

Guinn v New York Methodist Hosp.
2019 NY Slip Op 31940(U)
June 27, 2019
Supreme Court, Kings County
Docket Number: 501725/2015
Judge: Marsha L. Steinhardt
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At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of June 2019.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice

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DIJON GUINN, individually and as mother and natural Guardian of A.G-V, an infant,

Plaintiff,

DECISION AND ORDER
Index No. 501725/2015

-against-

NEW YORK METHODIST HOSPITAL; AMIR H. FAZELI, SANFORD M. LEDERMAN, THOMAS LUKE PAONE, KATARZYNA PERLMAN and BORO PARK OBSTETRICS AND GYNECOLOGY PC.,

Defendants.

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The following papers numbered 1 to 3 read herein:

Papers Numbered

Notice of Motion _____

1

Opposition _____

2

Reply _____

3

Defendants, New York Methodist Hospital, Amir H. Fazeli and Sanford M. Lederman, move this Court for an Order directing that summary judgment be entered in their favor and to dismiss the above-captioned action, in its entirety, as no triable issue of fact exists between the parties. Plaintiff opposes.

This is an action sounding in medical malpractice, commenced by the service of a Summons and Complaint upon the moving Defendants on or about February 13, 2015. Issue was joined some time thereafter. In March of 2018, a second action commenced against Drs.

Swenson, Qadri and Bush, which was ultimately discontinued by Order dated June 7, 2018.

Co-Defendants Pearlman and Boro Park Obstetrics and Gynecology were dismissed from the action on the same date.

Plaintiff discovered she was pregnant in August of 2012. Her date of delivery was estimated to be April 17, 2013 and she began pre-natal care at Boro Park Obstetrics in September of 2012. In October of 2012, Plaintiff presented to Methodist Hospital where she tested positive for Chlamydia, having tested positive for streptococcus agalactae the month before. On January 9, 2013, Plaintiff returned to Methodist Hospital with a history of her water having broke at approximately 10:00 a.m. At the time, she was 26 weeks pregnant. Dr. Fazeli performed a sterile speculum examination by which the diagnosis of preterm premature ruptured membranes was derived. Additionally, he undertook a vaginal exam to check for dilation. Plaintiff was admitted to the antepartum unit for a course of expectant management. She received two shots of Celestone, a steroid for fetal lung maturity, 24 hours apart. Plaintiff's blood work revealed an elevated white blood count (WBC) which was attributed to the steroid injections. The labs were repeated and during her pre-delivery hospitalization, Plaintiff's WBC varied. She was given magnesium sulfate for the fetus' neuroprotection. By January 11th, doctors rendering care to Plaintiff determined that with the decrease in amniotic fluid, delivery would be imminent – within 7 days. On January 15th, Plaintiff was advised that delivery would be induced. Infant-Plaintiff was born the next day.

Induction was ordered secondary to an elevated WBC and suspicion of chorioamnionitis. At some point, it was ascertained that the fetus was experiencing late decelerations and the decision was made to proceed with a Cesarean section. Infant-Plaintiff had good APGAR scores for a 27-week premature baby and was not septic at birth. He suffered major setbacks,

including necrotizing enterocolitis and intravascular hemorrhage at about three weeks of age. The pathology report, post-delivery, confirmed that there was evidence of intraamniotic infection and it was noted that Plaintiff had chorioamnionitis in the peripheral placental membranes and placental plate. It is Plaintiff's position that Defendants' departed from acceptable medical practice by the induction of labor, when there were no clinical signs of infection, no fever, no contractions and the medical personnel merely suspected chorioamnionitis and that the infant would have had a greater chance had gestation been permitted to continue.

In support of their application for summary judgment, Defendants submit the Affirmation of Dr. Victor R. Klein, a physician Board Certified in the fields of Obstetrics and Gynecology, Maternal-Fetal Medicine and Medical Genetics. It is his opinion that once there is a diagnosis of presumptive chorioamnionitis there is an indication for delivery and labor will be induced. He further opines that Plaintiff was experiencing some signs of labor and was having episodes of tachycardia. In addition, the fetal heart rate was trending upwards, and that the signs of infection were sufficient enough to warrant the induction of labor. Dr. Klein states that due to the pooling of fluid preventing visualization of the cervix, Dr. Fazeli acted appropriately in undertaking a manual vaginal exam to check the cervix for dilation, and that said examination did not cause infection. That the manual examination was necessary to create a plan of care for the patient. The fetus did not tolerate the induction and a decision was made to perform an emergency Cesarean section. Dr. Kline opines that at all times in question, Defendants acted within appropriate medical standards.

In further support of their application, the moving parties submit the Affirmation of David Hirschwerk, M.D., a physician Board Certified in Internal Medicine Infectious Disease. The expert states that with preterm rupture of membranes, the placental barrier that protects the

fetus is broken and allows bacteria to ascend, potentially leading to chorioamnionitis. Dr.

Hirshwerk opines that neither the speculum nor vaginal examination of Plaintiff by Dr. Fazeli caused the infection that was ultimately discovered in the placental pathology post-delivery.

In opposition to Defendants' motion, Plaintiff submits documentation from two medical practitioners. The first, delineated as a "physician's affidavit," is "unnamed" and unsigned. The original of this document was exhibited to the undersigned at the time of argument and it is the Court's intention to treat same as a physician's affirmation, as permitted in CPLR § 2106. This doctor is Board Certified in Obstetrics and Gynecology. It is the expert's opinion that the Defendants violated the NY Methodist Hospital Policy and Procedure for PPRM (preterm premature rupture of membranes) which make no mention of a digital examination when this condition is suspected. He opines that the manual examination conducted by Dr. Fazeli when Plaintiff presented to the hospital increased the risk of infection. At some point, the plan of treatment was changed from expectant management to immediate delivery. It is the expert's opinion that the only sign of infection was Plaintiff's rising WBC. That none of the clinical signs that would have necessitated an immediate delivery at that time were present. No standard of care is set forth as to the procedure that should have been adhered to during the management of Plaintiff's pre-term rupture of membranes. Further, the expert discusses, at length, the fact that Plaintiff did not give an informed consent to the induction of labor or to the Cesarean section.

In addition, Plaintiff submits an Affirmation from Cynthia Kaplan, M.D., a doctor Board Certified in Anatomic and Clinical Pathology, with a special qualification in Pediatric Pathology. Her report confirms the findings of Dr. Carolyn Salafia, the pathologist whose report is contained in the Methodist Hospital Record. At the time of the delivery, the placenta contained evidence of acute intraamniotic infection and an infection of a more long-standing nature. Although sure

that the chorioamnionitis is of recent origin, the expert cannot determine for how long a duration it may have existed. Nor can she state which organism is responsible for it. Although offering no opinion, *per se*, Dr. Kaplan does state that the “mother had no fever or other symptoms, evidence that this infection was not life threatening. The process seen in [the] pathology slides are not likely to cause imminent fetal sepsis or fetal demise.” No information is provided by the doctor as to the issue of causation nor as to any departure that took place.

On a motion for summary judgment, the moving party has the initial burden to provide sufficient proof, in admissible form, to enable a court to determine that it is entitled to judgment as a matter of law. If this burden is not met, the court must deny the relief sought (CPLR § 3212; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). However, once the movant on a summary judgment motion has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman*, 49 NY2d at 562).

The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury (*see Holbrook v. United Hosp. Med. Ctr.*, 248 AD2d 358, 359 [2d Dept 1998]). Therefore, on a medical malpractice motion for summary judgment, a moving physician must establish, *prima facie*, either that there was no departure from accepted standards of medical care or that any departure was not a proximate cause of the plaintiff's injuries (*Uchitel v. Fleischer*, 137 AD3d 1111, 1112 [2d Dept 2016]; *Senatore v. Epstein*, 128 AD3d 794, 795 [2d Dept 2015]).

To sustain this burden, the defendant must address and rebut any specific allegations of

malpractice set forth in the plaintiff's bill of particulars (*Wall v. Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1044–1045 [2d Dept 2010]; *Grant v. Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 874 [2d Dept 2008]). Once this showing has been made, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the defendant's prima facie showing, but only “as to those elements on which the defendant met the prima facie burden” (*Harris v. Saint Joseph's Med. Ctr.*, 128 AD3d 1010, 1012 [2d Dept 2015]; see *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment” (*DiMitri v. Monsouri*, 302 AD2d 420, 421 [2003] [citations omitted]; *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]).

Defendants have made a *prima facie* showing that there are no material issues of fact to be resolved at trial. Plaintiff's arguments are conclusory, unsupported, and speculative. Plaintiff's experts do not set forth a standard of care, nor the violation of same, and, in this Court's opinion, do not offer an alternative to the inducement of labor and delivery by Cesarean section.

For all the foregoing reasons, Defendants' motion is granted in its entirety and Plaintiff's complaint is dismissed as to New York Methodist Hospital, Amir H. Fazeli and Sanford M. Lederman.

This constitutes the opinion, decision and order of this Court.

ENTER,



HON. MARSHA L. STEINHARDT

J.S.C.