Michalowski v Greenstein
2019 NY Slip Op 32217(U)
July 26, 2019
Supreme Court, Suffolk County
Docket Number: 13-15309
Judge: David T. Reilly

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 13-15309
CAL. No. 16-01277MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 10-11-18
ADJ. DATE 12-12-18
Mot. Seq. # 009 - MotD

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KIMMY MICHALOWSKI, As Mother and Natural Guardian of J.S., an Infant,

Plaintiff,

- against -

MARC GREENSTEIN, HUNTINGTON HOSPITAL, DEBORAH ZITNER, SYED TUSNEEM-AHMED SHIBLI & NATALIE MEIROWITZ, M.D.,

Defendants.

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Upon the following papers numbered 1 to 46 read on this motion to renew : Notice of Motion/ Order to Show Cause and supporting papers 1-29 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 30- 35; 36-38; 39-40 ; Replying Affidavits and supporting papers 41-46 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Kimmy Michalowski for leave to renew the prior motion for summary judgment dismissing the complaint made by defendants Marc Greenstein, Huntington Hospital, and Natalie Meirowitz is granted; and it is

ORDERED that the Court's prior order, dated July 24, 2018, is modified and amended to include receipt and consideration of the unredacted copy of plaintiff's obstetrics and gynecology and neuroradiologist experts' affirmations, and plaintiff's pediatric and neonatal-perinatal medicine expert's affidavit in its determination; and it is further

ORDERED that upon renewal the motions by defendants Marc Greenstein, M.D., and Natalie Meirowitz, M.D., for summary judgment dismissing the complaint against them are denied, and the motion by defendant Huntington Hospital for summary judgment dismissing the complaint against it is granted.

The plaintiff, Kimmy Michalowski, commenced this action on behalf of her son, J.S., against defendants Dr. Marc Greenstein, Huntington Hospital, Dr. Deborah Zitner[1], Dr. Syed Tusneem-Ahemd Shibli, and Dr. Natalie Meirowitz to recover damages for injuries he allegedly sustained as a result of medical malpractice. By Order dated July 24, 2018 (Mayer, J. [Ret.]), this court granted defendants' motions for summary judgment on the grounds that the plaintiff was unable to establish that the defendants' alleged deviation from the applicable standard of good and acceptable medical care during the plaintiff's pregnancy proximately caused the injuries allegedly sustained by the infant. However, in its determination, the court stated that it did not consider the expert affirmations of plaintiff's obstetrician and gynecologist, neuroradiologist, or pediatric and neonatal-perinatal medicine specialist because it was not in receipt of an unredacted copy of any of the plaintiff's experts' reports for its *in camera* review.

The plaintiff now moves for leave to renew the prior motion on the basis that the court failed to consider the reports of her obstetrics and gynecology, neuroradiologist, or pediatric and neonatal-perinatal medicine experts in rendering its decision. The plaintiff contends that due to an inadvertent oversight, the unredacted copies of her expert reports were not mailed to the Court with her opposition papers for its *in camera* review. The defendants oppose the motion on the ground that the plaintiff's experts' reports failed to establish that they deviated from the applicable medical standard of care in rendering treatment to the plaintiff while she was pregnant or that their treatment proximately caused the infant plaintiff's alleged injuries.

A motion for leave to renew must be based upon new facts that were unavailable at the time of the original motion, and that would change the prior determination (*see* CPLR 2221[e][2]; ***Yunatanov v Stein***, 69 AD3d 708, 893 NYS2d 569 [2d Dept 2010]; ***Ramirez v Khan***, 60 AD3d 748, 874 NYS2d 257 [2d Dept 2009]; ***Lardo v Rivlab Transp. Corp.***, 46 AD3d 759, 848 NYS2d 337 [2d Dept 2007]; ***Boreanaz v Facer-Kreidler***, 2 AD3d 1481, 770 NYS2d 516 [4th Dept 2003]). Although a court has

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[1] By stipulation, dated October 13, 2015, the action was discontinued only as against defendant Dr. Deborah Zitner.

discretion to grant renewal, in the interest of justice, upon facts that were known to the movant at the time the original motion was made, it may not exercise that discretion unless the movant establishes a reasonable justification for the failure to present such facts on the prior motion (*see* CPLR 2221[e][3]; ***Williams v Nassau County Med. Ctr.***, 37 AD3d 594, 829 NYS2d 645 [2d Dept 2007]; ***Lattimore v Port Auth. of N.Y. & N.J.***, 305 AD2d 639, 760 NYS2d 224 [2d Dept 2003]; ***Sherman v Piccione***, 304 AD2d 552, 757 NYS2d 112 [2d Dept 2003]). Moreover, a motion for leave to renew "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation," or who failed to assert a legal theory due to a mistaken assumption that what was submitted was adequate (***Matter of Weinberg***, 132 AD2d 190, 210, 522 NYS2d 511 [1st Dept 1987], *lv dismissed* 71 NY2d 994, 529 NYS2d 277 [1988]; *see* ***Branca v Department of Educ. of City of N.Y.***, 25 AD3d 485, 808 NYS2d 77 [1st Dept 2006], *lv dismissed* 7 NY3d 899, 826 NYS2d 607 [2006]; ***Renna v Gullo***, 19 AD3d 472, 797 NYS2d 115 [2d Dept 2005]).

Pursuant to CPLR 2221, the Court grants the plaintiff leave to renew. Upon renewal, the Court modifies its determination in its prior order to include receipt of the unredacted copies of the plaintiff's experts' affirmations and affidavit in obstetrics and gynecology, neuroradiology, and pediatric and neonatal-perinatal medicine for its in camera review (*see e.g.* ***Darwick v Paternoster***, 56 AD3d 714, 868 NYS2d 698 [2d Dept 2008]). "CPLR 2221 (e) has not been construed so narrowly as to disqualify, as new facts not offered on the prior motion, facts contained in a document originally rejected for consideration because the document was not in admissible form" (***Schwelnus v Urological Assoc. of L.I., P.C.***, 94 AD3d 971, 972, 943 NYS2d 141 [2d Dept 2012]; *see* ***Simpson v Tommy Hilfiger USA, Inc.***, 48 AD3d 389, 850 NYS2d 629 [2d Dept 2008]).

Upon renewal, the Court finds that the plaintiff has raised a triable issue of fact as to whether Dr. Greenstein and Dr. Meirowitz deviated from the applicable standard of medical care and whether such deviation was a substantial factor in the injuries allegedly sustained by the infant plaintiff (*see* ***Hackney v Monge***, 103 AD3d 844, 960 NYS2d 176 [2d Dept 2013]; ***Schwelnus v Urological Assoc. of L.I., P.C.***, 94 AD3d 971, 943 NYS2d 141 [2d Dept 2012]; ***Del Bene v Frank C. Perry, DDS, P.C.***, 83 AD3d 771, 921 NYS2d 150 [2d Dept 2011]; ***Behar v Coren***, 21 AD3d 1045, 803 NYS2d 629 [2d Dept 2005]). The expert affirmation of Dr. Martin Gubernick, who is board certified in obstetrics and gynecology, states that, within a reasonable degree of medical certainty, it is his opinion that Dr. Greenstein and Dr. Meirowitz deviated from acceptable standards of medical care in by performing an unnecessary premature delivery of the infant, that the recommendation of a C-section delivery of the infant when the plaintiff was 34 weeks gestation deviated from accepted standards of medical care, and that the diagnosis of intrauterine growth restriction (IUGR), based upon the plaintiff's clinical presentation and testing, was a deviation that proximately caused or contributed to the infant suffering a brain injury (*see* ***Swezey v Montague Rehab & Pain Mgt., P.C.***, 59 AD3d 431, 872 NYS2d 199 [2d Dept 2009]; ***Vera v Soohoo***, 41 AD3d 586, 838 NYS2d 154 [2d Dept 2007]). Dr. Gubernick states that the plaintiff's prior sonograms did not show any evidence of IUGR, that lapses in fetal growth are common and can lead to recovery and a normal weight and growth at term, and that the two-week time span that was used to determine that the infant's growth was restricted was too short a period of time for a 34-week pregnancy, especially given the previous record of normal growth by the fetus demonstrated clinically and by sonography. Dr. Gubernick further states that 34 weeks is too early to deliver a fetus without additional confirmation that delivery is appropriate, and, thus, Dr. Greenstein and Dr. Meirowitz's concern about

IUGR should have been followed by the performance of an amniocentesis, which would indicate whether delivery of the baby is appropriate, and not by the actual delivery of the baby. In addition, Dr. Gubernick states that the proper course of prenatal treatment for the plaintiff, following the performance of the amniocentesis, was to allow the fetus to continue to gestate, repeat the amniocentesis at the end of the 37th week, which is the earliest date at which the risk of prematurity diminishes relative to the risk of restricted growth, and then determine whether delivery is the only viable option at that stage. Dr. Grubernick states that during this time period sonography can be performed weekly or even more frequently to see whether there is continued drops in fetal growth or whether there has been any associated abnormality involving the amniotic fluid or the fetal heart rate.

Furthermore, Dr. Grubernick states that the plaintiff's medical condition was not an indication to deliver the infant, because her complaints of headaches, visual disturbances, and elevated blood pressure had resolved by the time the June 26th sonogram was performed. Instead, Dr. Grubernick states, Dr. Greenstein and Dr. Meirowitz should have maintained the plaintiff on bed rest, which probably would have kept her symptoms under control. Dr. Grubernick states that the plaintiff's clinical presentation is not uncommon in a pregnancy, and that the presentation did not meet the requirements of a preeclampsia diagnosis symptoms. He explains that the plaintiff did not have a documented history of persistent severe headaches; that only isolated visual abnormality was noted on a few occasions; that there was an absence of upper abdominal or epigastric pain and altered mental status or chest pain; that her systolic blood pressure did not exceed 160 mmHG and the diastolic blood pressure did not exceed 10mmHG; that there was an absence of significant and repeated findings of urinary protein; that the blood tests did not reveal any evidence of abnormalities associated with hypertension; that the ultrasound indicated a normal fluid volume; and that there were no abnormalities found during the non-stress testing and biophysical profile.

Additionally, Dr. Grubernick states that it was a departure from accepted standards of obstetrical care to have delivered the infant prematurely at 34-weeks gestation based on the record, since prematurity, which is defined as a birth that occurs before 37 completed weeks of gestation, and its associated complications present a significant increased rate of long term neurological impairments, such as cerebral palsy, as well as premature vasculature of the baby's brain and the increased risk of bleed and hemorrhage in a premature newborn.

Lastly, the affirmation of Dr. James Abrahams, who is board certified in diagnostic radiology with a sub-certification in neuroradiology, states that it is his opinion, within a reasonable degree of medical certainty, based upon radiographic images and studies of the infant, that the hemorrhage in the infant's brain occurred during the first apneic episode that he had in the neonatal nursery, and that there is no right infarct to the right temporal lobe, but that the hemorrhage is in the right temporoparietal region with extension into the adjacent subdural space with resultant compression, edema and ischemia of the adjacent brain parenchyma. Dr. Abrahams states that the radiological images, as well as the clinical history, of the infant are inconsistent with him having suffered an hemorrhage in utero or prior to his first oxygen desaturation on June 29, 2006. Dr. Abrahams states that the infant's Apgar scores of 9 and 9, the reported normal blood gases tests, the normal fetal heart tracings, and the normal neonatal examination reveal a complete absence of any signs or symptoms of a preexisting infract of the infant's brain before birth. Dr. Abrahams explains that, if the event had occurred before birth, the effects of the

mass effect would have been shown very shortly after birth, not after hours of stability and normalcy in the NICU, and that the anterior fontanel would have been bulging at the of the newborn examination in the delivery room or upon arrival in the NICU. Dr. Abrahams further states that the blood shown on the June 30th CT scan of the infant's brain indicates an acute bleed that occurred around 5:50 p.m. on June 29, 2006, and that the infarct observed on the July 2nd MRI scan was the result of an ischemia due to compression from the acute bleed that occurred after birth in the NICU. Finally, Dr. Abrahams states that the bleed into the infant's right temporoparietal region of his brain was the direct result of his prematurity, since the vasculature of his brain was immature and vulnerable to injury from the normal pressures of a C-section delivery.

Conversely, the affidavit by the plaintiff's pediatric and neonatal-perinatal medicine specialist is speculative and without probative value, since the conclusion that the infant was deprived of the chance to avoid a brain hemorrhage and obtain a better outcome when Dr. Greenstein and Dr. Meirowitz delivered him at 34 weeks gestation is based upon the opinion of another doctor (*see* ***Diaz v New York Downtown Hosp.***, 99 NY2d 542, 754 NYS2d 195 [2002]; ***Nahigian v Kaplitt***, 165 AD3d 418, 82 NYS3d 715 [2d Dept 2018]).

However, plaintiff failed to raise a triable issue of fact as to whether the staff at Huntington Hospital deviated or departed from acceptable standards of medical care in their treatment of the infant, or whether their treatment was a proximate cause of the infant's injuries (*see* ***DeLaurentis v Orange Regional Med. Ctr.-Horton Campus***, 117 AD3d 774, 985 NYS2d 709 [2d Dept 2014]; ***Arkin v Resnick***, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]). The plaintiff's experts failed to link the infant's alleged injuries to any deviations or departures from accepted practice by the nursing staff at Huntington Hospital in its treatment of the infant, and, therefore, failed to raise a triable issue of fact on the issue of proximate cause sufficient to defeat Huntington Hospital's motion for summary judgment (*see* ***Heller v Weinberg***, 77 AD3d 622, 909 NYS2d 477 [2d Dept 2010]; ***Flanagan v Catskill Regional Med. Ctr.***, 65 AD3d 563, 884 NYS2d 131[2d Dept 2009]; ***Murray v Hirsch***, 58 AD3d 701, 871 NYS2d 673 [2d Dept 2009]). Thus, the evidence submitted by the plaintiff is insufficient to defeat Huntington Hospital's motion for summary judgment (*see* ***Myers v Ferrara***, 56 AD3d 78, 864 NYS2d 517 [2d Dept 2008]). Accordingly, upon renewal, the motions by defendants Dr. Greenstein and Dr. Meirowitz for summary judgment dismissing the complaint against them are denied, and that the motion by defendant Huntington Hospital for summary judgment dismissing the complaint against it is granted.

Dated: July 26, 2019
Riverhead, NY

J.S.C.
HON. DAVID T. REILLY

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION