Bastone v Garan
2019 NY Slip Op 34180(U)
December 12, 2019
Supreme Court, Westchester County
Docket Number: 63342/2017
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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LAURA BASTONE,

Plaintiff,

-against-

ARED GARAN and ARED GARAN, INC.

Defendants.

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DECISION & ORDER
On Motion for
Summary Judgment
Index No.: 63342/2017
Sequence No. 1

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 27-59, were read in connection with the motion for summary judgment by defendants. In this action, patient sues obstetrician, asserting medical malpractice, lack of informed consent, and negligence in Dr. Ared Garan's alleged failure to diagnose and treat patient for placental abruption, causing the loss of the fetus.

NOW, based on the foregoing, the motion is decided as follows:

In 2016, plaintiff received her prenatal treatment and care from defendant Dr. Ared Garan. Plaintiff, then 34 years of age went to Dr. Garan's office on January 16, 2016, status post intrauterine insemination. Her treating orthopedic surgeon, Dr. Graziosa had recommended that she should deliver by Cesarean section due to her past medical history significant for hip dyplasia, hip dislocation, hip surgery and knee arthroscopy. During her pregnancy, plaintiff returned to Dr. Garan's office for routine prenatal appointments. At her February 20, 2016

appointment, she was 16 weeks, 4 days gestation, Dr. Garan noted that the fundal height was 16 and plaintiff's blood pressure was 132/72 and her weight was 196 pounds. Dr. Garan testified that 132/72 is not high blood pressure, and is not indicative of chronic hypertension. No abnormalities were identified. On April 26, 2016, plaintiff presented to Dr. Garan with complaints. It was noted that plaintiff's blood pressure was 130/80 and her weight was 206 pounds. At this appointment, Dr. Garan recognized that there was a question as to whether plaintiff was leaking fluid. Upon examination of the pelvis, there was no fluid upon coughing. Dr. Garan testified that he performed an ultrasound in order to measure the amniotic fluid index, and confirmed that plaintiff was not ruptured upon examination. On May 23, 2016, at 29 weeks, 5 days gestation, Dr. Garan noted the fundal height was 30, her blood pressure was 124/72 and her weight was 209 pounds. Fetal heart rate and fetal movement were noted. A urine dipstick test was negative for glucose and revealed trace albumin. At the June 6, 2016 appointment at 31 weeks, 6 day gestation, Dr. Garan noted that the fundal height was 31, plaintiffs' blood pressure was 124/75 and her weight was 209 pounds. Plaintiff complained of irregular cramping pain. A urine dipstick test was negative for glucose and albumin. Dr. Garan believed that plaintiff's contractions were irregular, and explained that approximately 32 weeks, it is not uncommon for pregnant women to experience Braxton Hicks contractions, but that it his custom and practice, to advise a patient presenting with similar complaints as plaintiff at approximately 32 weeks gestation to go to the hospital if the pain became regular, meaning persisting for more than two hours.

On the morning of June 14th, plaintiff testified that she contacted Dr. Garan's office due to pain in her back and abdomen, and was told to come to the office, which she did. Upon arrival at Dr. Garan's office, plaintiff testified that she waited in the waiting room for 2 to 3

hours. While in the waiting room, she described the pain in her lower back and abdomen as intense, and that her hands and feet were swollen and possibly she had a headache, which plaintiff does not remember if she related her headache to the receptionist. Dr. Garan saw plaintiff, and performed various tests which were unremarkable, including an ultrasound which revealed that the placenta was in place and there was no clots or dark space noted, a positive heartbeat was noted and the amniotic fluid was normal. Her cervix remained long, closed and posterior, and there was no bleeding. From his examination of plaintiff, Dr. Garan believed that plaintiff was suffering from a pinched nerve. Dr. Garan's plan was for her to take Tylenol; go for her ultrasound appointment scheduled the next day; and for her to stay home from work for a few days.

After the June 14th appointment, plaintiff's father picked her up from Dr. Garan's office, and drove her to pick up her car at her job, and plaintiff then drove home from her job. She believes approximately 30 minutes elapsed from the time she left Dr. Garan's office until she arrived home. Her pain and complaints remained the same. Shortly after she arrived home, her husband left for work and she went to her bedroom to lay down. About 30 minutes later, she got up and out of bed, she thought that her water broke, but she observed blood all over the bed and floor. She called 911 and was taken to Jacobi Medical Center by EMS.

Plaintiff arrived at Jacobi Medical Center by ambulance at 9:19 PM, the evening of June 14. She was admitted to the Labor and Deliver Unit at 9:40 PM. At 10:15 PM, labs were collected and sent to laboratory. At 11:20PM , a bedside ultrasound was performed which confirmed the intrauterine fetal demise. Plaintiff had suffered a placental abruption.

These circumstances lead to this action, and this court's consideration of defendants' motion for summary judgment.

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v. Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Moreover, issue finding, as opposed to issue determination, is the key to summary judgment (Krupp v Aetna Life & Cas. Co., 103 AD2d 252, 261 [2d Dept 1984]). Summary judgment is a drastic remedy and should not

be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320,324 [1986]).

To establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (Stukas v Streiter, 83 AD3d 18,23 [2d Dept 2011]). If a defendant demonstrates only that he or she did not depart from good and accepted medical practice, plaintiff need only raise a triable issue of fact as to whether such a departure occurred. The plaintiff is required to raise a triable issue of fact as to causation only in the event that the defendant makes an independent prima facie showing that any claimed departure was not a proximate cause of the plaintiff's injuries" (Stukas v Streiter, 83 AD3d 18 . To establish proximate cause in a medical malpractice action, "a plaintiff needs do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant" (Johnson v Jamaica Hospital Medical Center, 21 AD3d 881, 883 [2d Dept 2005] citing Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [2d Dept 1998]; *see* Clarke v Limone, 40 AD3d 571, 571-572 [2d Dept 2007]). Since the burden of proof does not ask the plaintiff to eliminate every possible cause of her injury, "the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances [of a cure or increased her injury], as long as the jury can infer that it was probable that some diminution" in the plaintiff's chance of a better outcome (Jump v Facelle, 275 AD2d 345, 346 [2d Dept 2000]; see Flaherty v Fromberg, 46 AD3d 743, 745 [2d Dept 2007]; Calvin v New York Medical Group, P.C., 286 AD2d 469, 470 [2d Dept 2001]).

To successfully oppose a motion for summary judgment dismissing a cause of action for medical malpractice, a plaintiff must submit a physician's affidavit of merit attesting to (depending on the defendant's prima facie showing) a departure from accepted practice and/or containing the attesting doctor's opinion that the omissions or departures were a competent producing cause of the injury (Domaradzki v Glen Cove Ob/Gyn Associates, 242 AD2d 282 [2d Dept 1997]). Conclusory or general allegations of medical malpractice, "unsupported by competent evidence tending to establish the essential elements are insufficient to defeat a motion for summary judgment" (Mendez v City of New York, 295 AD2d 487 [2d Dept 2002]).

In support of his motion for summary judgment, Dr. Garan offers the affirmation of Adiel Fleischer, M.D., who affirms that he is licensed to practice medicine in New York State, and is board certified in obstetrics and gynecology, and maternal fetal medicine. He set forth the records and materials which he reviewed in rendering his opinion. Dr. Fleischer stated that it is his opinion within a reasonable degree of medical certainty that Dr. Garan treated plaintiff appropriately and did not deviate from the standard of medical practice in any of the care and treatment provided; there were no departures form good and accepted standards of medical care by Dr. Garan, which were a proximate cause of plaintiff's alleged injuries; and that the care and treatment rendered to the plaintiff did not cause or contribute to any of the injuries alleged. In addition, Dr. Garan appropriately examined plaintiff and assessed her condition during each of her prenatal appointments; properly documented all of plaintiff's significant clinical findings during each appointment; the size of the fetus was always consistent with gestational age; Dr. Garan appropriately began urine samples after 20 weeks of gestations and admitted that he performs a urine dipstick for numerous reasons, including the detection of proteinuria, which is common during pregnancy, but a abnormal amount of protein in the urine can be indicative of

preeclampsia. That all of plaintiff's urine samples during the pregnancy were negative except for May 23, where it revealed trace albumin, which in Dr Fleisher's opinion is not significant, nor does it require further testing. It is also Fleisher's opinion, that blood pressure was properly monitored; examination of the cervix remained closed, and that Dr. Garan believed that plaintiff was experiencing irregular contractions or Braxton contractions. Fleisher believes that Dr. Garan advising plaintiff to go to the hospital if her pain became regular was sound medical advice. In his opinion, Dr. Garan performed all necessary testing on June 14 in light of plaintiff's prenatal complaints and her clinical presentation, including an examination of the cervix, and ultra sound and testing to evaluate the amniotic fluid index. It was also his opinion that on June 14th, Dr. Garan appropriately appreciated plaintiff's blood pressure and took it twice.

The expert explains that preeclampsia is a serious blood pressure disorder that is more likely to occur in women with chronic high blood pressure. Symptoms of preeclampsia can include high blood pressure ad proteinuria. It is the expert's opinion, that the standard of care for a patient with preeclampsia includes monitoring the patient regarding blood pressure and observing fetal through, which was done here. In addition, its his opinion that plaintiff's symptoms and complaints on June 14, 2016, were not consistent with preeclampsia and did not require a change in the treatment plan, insofar as plaintiff failed to make complaints of edema, nausea, changes in vision or severe pain in her stomach. Also the expert believes that plaintiff was not in active labor on June 14th , as evidenced by Dr. Garan's examination of her cervix, which remained closed, and that she did not have any severe features of preeclampsia at the time of her June 14, 2016 presentation including blood pressure of 160/110, seizures or severe headaches. She did not possess any increased risk factor of preeclampsia notwithstanding obesity. Jacobi records document that plaintiff had previously delivered a full term baby, was not

diagnosed with preeclampsia during her prior pregnancy, and did not have a history of hypertension and was of advanced maternal age. As plaintiff was not demonstrating any symptoms consistent with preeclampsia and did not present a greater risk, the decision to discharge plaintiff from his office and have her follow up in the morning was well within the standard of care.

As to causation, there was no evidence that an abruption was imminent at the time that plaintiff left Dr. Garan's office in the afternoon of June 14th. It is Dr. Fleisher's opinion, that the placental abruption that plaintiff suffered after leaving Dr. Garan's office on June 14, 2016, was a sudden event that was completely unforeseeable and could not have been prevented. Even if the fetus was delivered earlier on June 14, 2016, after plaintiff's bleeding episode would have resulted in a stillborn baby or infant suffering from hypoxia.

However, while Dr. Fleischer identifies facts supporting his conclusion that the abruption was a sudden event which occurred on June 14, 2016, which could not have been avoided, plaintiff's expert [1] concludes that plaintiff's symptoms required intervention on June 14th, at the time of her final prenatal examination.

Plaintiff's expert, a physician licensed to practice medicine in New York and New Jersey, board certified in Obstetrics and Gynecology, opines that Dr. Garan departed from the standard of care when he failed to appreciate and timely act upon plaintiff's complaint in light of her elevated blood pressure on June 14, 2016, and failing to diagnose preeclampsia based upon

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[1]Contrary to defendants' contentions that plaintiff's expert's affirmation is not in proper form, and should be submitted to the court, plaintiff has submitted the Expert Affidavit for the court's review, and upon this court's review, the court shall consider plaintiff's expert's affidavit for the purposes of the instant motion.

complaints and clinical signs and symptoms. It is his further opinion that Dr. Garan's departures were competent producing caused of plaintiff's injuries, including the loss of her baby.

Plaintiff's expert points out that the records from Jacobi Hospital indicate that plaintiff's blood pressure upon arrival was 154/77. It is plaintiff's expert's opinion that Dr. Garan deviated from the standard of care and his deviations were the proximate cause of plaintiff's injuries, including the loss of her baby; and Dr Garan failed to timely act upon plaintiff's complaints of severe back pain and abdominal pain and edema in her hands and feet in light of her high blood pressure on June 14, 2016. These complaints and symptoms warranted further investigation as they were suggestive of preeclampsia which can be a potentially dangerous complication during pregnancy that can affect the mother and fetus. One of the complications of preeclampsia is placental abruption and fetal demise. If a doctor suspects preeclampsia, there are several tests that can be performed to rule out or diagnose preeclampsia such as blood test to measure liver or kidney function, a 24 hour urine analysis. It is plaintiff's expert opinion that plaintiff had signs and symptoms of severe preeclampsia at the time she presented to Dr. Garan's office on June 14, 2016 that warranted immediate intervention by sending her to the hospital following his evaluation for further work up and/or immediate delivery of the baby. On June 14, 2016, she presented to Dr. Garan's office with complaints of severe abdominal and back pain which radiated to her right groin, swelling in her hands and feet, and headache. Plaintiff had high blood pressure at the time she presented to his office on June 14th as it was noted to be 139/84 which fall under Stage 1 hypertension. Dr. Garan's failure to send plaintiff to the hospital immediately following his evaluation on June 14, 2016, was a departure from the standard of care. Based on her complaints and her high blood pressure, she had signs and symptoms of severe preeclampsia which warranted urgent intervention. Dr. Garan's failure to send plaintiff to

the hospital immediately following his evaluation on June 14, 2016, deprived plaintiff of the chance for timely treatment of her preeclampsia had Dr. Garan done so, plaintiff would have received timely intervention and treatment for preeclampsia either by being placed under close observation or immediately delivering the baby. If plaintiff had received timely intervention and treatment, either a placental abruption could have been avoided or if placental abruption did occur at the hospital, providers there would have been able to promptly address same thus increasing her chances of safely delivering her baby. Plaintiff's expert finds Dr. Garan's office record on June 14th, noting that plaintiff's urine was negative for protein, is suspect in light that Jacobi records indicate that she had proteinuria at the time she was tested in Dr. Garan's office on that day. Proteinuria is one of the cardinal features of preeclampsia, especially if the onset is after 20 weeks gestation. Had a urine analysis or dipstick been performed at Dr. Garan's office on June 14th, it would have revealed the presence of proteinurea.

In this record, primarily based on Dr. Fleisher's affirmation, defendants' evidence, consisting of medical records, deposition testimony and expert medical affirmation, and all other proof, Dr. Garan failed to eliminate all triable issues of fact concerning the treatment and care that he provided plaintiff, including for plaintiff's blood pressure on June 14th , and her other conditions, leading to the fetus demise. Dr. Garan's failure to tender evidence sufficient to eliminate any material issues of fact requires denial of the motion for summary judgment, regardless of sufficiency of opposing papers (Rentz v Modell, 262 AD2d 545 [2d Dept 1999]).

In any event, as is the case here, summary judgment is not appropriate "where the parties adduce conflicting medical expert opinions, as such issues of credibility can only be resolved by a jury" (Contreras v Adeyemi 102 AD3d 720, 721 [2d Dept 2013]).

To establish a cause of action to recover damages for malpractice based on informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment and the alternatives that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury (Public Health Law §2805-d(l) ; see also Magel v John T. Mather Memorial Hospital, 95 AD3d 1081 [2d Dept 2012]).

Plaintff alleges that Dr. Garan failed to disclose to plaintiff the risks, benefit and alternatives of the courses of treatment undertaken by Dr. Garan and those facts that a reasonable physician would under similar circumstances, including failing to advise plaintiff of the risks; signs and symptoms of preeclampsia; failing to advise the plaintiff of the consequences of ignoring signs and symptoms of preeclampsia; failing to disclose to plaintiff the risk of not performing an immediate C-section; failing to disclose to plaintiff the risk of not immediately presenting to the emergency room; failing to disclose to the patient the signs of placental abruption and the risks of same and failing to disclose how placental abruption; and preeclampsia would impact the well-being of the fetus.

Dr. Fleisher opines plaintiff's lack of informed consent claim is meritless, insofar as plaintiff has failed to identify any procedures that plaintiff underwent while under the care of Dr. Garan and has failed to specify what risks, hazards, complications and alternatives plaintiff was allegedly not advised of by defendant. Upon his review of the relevant medical records ad deposition testimony, plaintiff was advised of the risks, hazards and alternatives of the ordinary course of treatment being rendered during the pregnancy.

In addition, plaintiff's counsel claims that Dr. Garan was negligent from November 2015 through July 2016. Yet, plaintiff did not begin treatments with Dr. Garan until January 2016. In any event, since plaintiff does not oppose summary judgment as to the informed consent claim, summary judgment is granted dismissing plaintiff's informed consent cause of action.

Likewise, defendant is entitled to dismissal of all claims of negligence which plaintiff has not addressed in opposition.

The court has considered the remainder of the factual and legal contentions of the parties, and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this Decision and Order. This constitutes the Decision and Order of the Court.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment of defendants is **granted** to the extent that causes of action relative to informed consent and negligence are dismissed, and denied otherwise; and it is further

ORDERED, that the parties are directed to appear on Jan. 21, 2020, at 9:15AM, in Courtroom 1600, the Settlement Conference Part, at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

The Clerk shall mark his records accordingly.

Dated: December 12, 2019
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF