Lewis-Wade v Haratz-Rubenstein
2020 NY Slip Op 31755(U)
June 5, 2020
Supreme Court, Kings County
Docket Number: 515074/2018
Judge: Ellen M. Spodek

At an IAS Term, Part MMESP-6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of June 2020

P R E S E N T:

HON. ELLEN M. SPODEK, Justice

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KAREN LEWIS-WADE,

Plaintiffs,

DECISION AND ORDER

-against-

Index No: 515074/2018

NATAN HARATZ-RUBENSTEIN, M.D., ADVANCED WOMAN'S IMAGINING AND PRENATAL TESTING CENTER and NEW YORK PRESBYTERIAN – BROOKLYN METHODIST HOSPITAL,

Defendants.

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Papers	**Numbered**
Notice of Motion.....	___4_____
Affirmation in Opposition.....	__4-5____
Replying Affirmation	___5_____

Defendants NATAN HARATZ-RUBINSTEIN, M.D. ("Dr. Haratz-Rubinstein") and NEW YORK-PRESBYTERIAN BROOKLYN METHODIST HOSPITAL s/h/a ADVANCED WOMEN'S IMAGING AND PRENATAL TESTING and NEW YORK-PRESBYTERIAN BROKLYN METHODIST HOSPITAL ("NYPBMH," collectively with Dr. Haratz-Rubinstein, "defendants"), move for an order pursuant to CPLR 3212 for partial summary judgment dismissing plaintiff's claim for damages relating to emotional distress from the alleged misplacement of fetal remains.

Plaintiff's claim centers around an ultrasound evaluation of her cervix by Dr. Haratz-Rubenstein at NYPBMH on June 19, 2017. Plaintiff was approximately 18 weeks, 5 days gestation at the time. She went to NYPBMH the day before with complaints of vaginal bleeding. Following the ultrasound evaluation on June 19, 2017, a report was issued by Dr. Haratz-Rubenstein which documented, among other findings, that the cervix measured 3.5 centimeters which was normal for the gestational age. The plaintiff was discharged with instructions for pelvic rest and no intercourse.

Plaintiff had another episode of vaginal bleeding on June 23, 2017 and was admitted to NYPBMH through June 24, 2017. On evaluation, plaintiff's cervix was noted to be 3 centimeters dilated. A consult was obtained with a Maternal Fetal Medicine physician who discussed the risks of a dilated cervix in a 19-week gestation, treatment options, and advised that a cerclage was not recommended in the presence of vaginal bleeding. The plaintiff and her husband chose expectant management. Plaintiff was discharged home on June 24, 2017 on pelvic rest and modified bed rest.

On June 27, 2017, at approximately 20 weeks gestation, plaintiff went to another hospital, nonparty Kings County Hospital (“KCH”). Plaintiff delivered a female fetus weighing 270 grams, with Apgar scores of 0/0. Plaintiff brings this action against the defendants alleging that they were negligent in failing to diagnose an incompetent cervix and failing to perform a cerclage procedure prior to the plaintiff's discharge from NYPBMH on June 19, 2017, resulting in the preterm labor and delivery, and fetal demise.

At plaintiff’s examination before trial, she claimed that the nonparty KCH could not locate the fetal remains for approximately 6 weeks. Plaintiff thereafter served a supplemental Bill of Particulars seeking to add as an injury, emotional distress from the

misplacement of the fetal remains, for which she seeks damages, There is no note or entry contained in the record of KCH for the delivery admission on June 27, 2017, to document that the fetal remains were ever lost, misplaced or unavailable.

DISCUSSION

On a motion for summary judgment to dismiss a medical malpractice cause of action, a defendant has the prima facie burden of establishing that there was no departure from good and accepted medical practice, or, if there was a departure, the departure was not the proximate cause of the alleged injuries. *Brinkley v. Nassau Health Care Corp*., 120 AD3d 1287 (2d Dept. 2014); *Stukas v. Streiter*, 83 AD3d 18, 24-26 (2d Dept. 2011). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp*., 68 NY2d 320, 324 (1986); *Brinkley v. Nassau Health Care Corp.*, supra; *Fritz v. Burman*, 107 A.D.3d 936, 940 (2d Dept. 2013); *Lingfei Sun v. City of New York*, 99 AD3d 673, 675 (2d Dept. 2012); *Bezerman v. Bailine*, 95 AD3d 1153, 1154 (2d Dept. 2012); *Stukas v. Streiter*, at 24. A plaintiff succeeds in a medical malpractice action by showing that a defendant deviated from accepted standards of medical practice and that this deviation proximately caused plaintiff injury. *Contreras v Adeyemi*, 102 AD3d 720, 721 (2d Dept. 2013); *Gillespie v New York Hosp. Queens*, 96 A.D.3d 901, 902 (2d Dept. 2012); *Semel v Guzman*, 84 AD3d 1054, 1055-56 (2d Dept. 2011). The plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing. *Stukas*, at 24.

Defendants claim entitlement to judgment as a matter of law arguing there has been insufficient evidentiary proof that the fetal remains were in fact misplaced or mishandled. Defendants note that throughout the course of this litigation plaintiff has only offered testimonial evidence, as well as two documents, the Authorization for City Burial of Fetus form from KCH and the Certificate of Spontaneous Termination of Pregnancy from the City of New York Department of Health, in support of this claim. Defendants argue the testimony is self-serving and the documents lack probative value.

Next, defendants argue that the alleged negligent act, the misplacement of fetal remains, was unforeseeable, and that there were intervening and superseding acts. They note that defendants only managed the ultrasound evaluations and that the nonparty hospital, KCH, managed all aspects of the delivery as well as the fetal remains post-delivery. Defendants argue that it was not foreseeable that a subsequent treating hospital would lose or misplace the fetal remains. Defendants further note that this claim is tantamount to a cause of action for a loss of right to sepulcher, which could not be interposed against them.

In opposition, plaintiff asserts that sworn testimony by those with knowledge is admissible evidence which precludes summary judgment and requires the issue to go to trial for jury determination. Plaintiff also contends that the documentary evidence provided to defendants raises issues of fact which also preclude dismissal. Plaintiff further asserts defendants' arguments with respect to foreseeability and proximate cause fail. To this point, plaintiff argues when an individual is injured, aggravation of that injury is always foreseeable as a matter of law. As such, plaintiff concludes that because defendants

alleged negligence necessitated plaintiff to be treated by KCH, defendants are liable for any negligent act by KCH during their treatment of plaintiff.

In reply, defendants argue plaintiff failed to rebut defendants' prima facie entitlement to summary judgment on the issue of proximate cause. Defendants contend plaintiff's argument that a tortfeasor must always be held responsible for any subsequent act to a plaintiff ignores the principle of proximate causation. Defendants highlight that the case at bar does not pertain to an aggravation of a preexisting injury, as plaintiff argues, but rather a wholly unforeseeable act by a third party, which constituted a separate and independent act without proximate causation to the alleged negligence of defendants.

Defendants' initial argument challenging the probative value of the evidence proffered by plaintiff is insufficient to meet a prima facie burden. It is well established that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment"). *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 314-315 (2004). However, the Court finds that defendants have established their prima facie entitlement to summary judgment by submitting evidentiary facts that defendants did not proximately cause the injury. It is well established that where proximate cause involves an intervening act "liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence." *Derdiarian v. Felix Contractor Corp.*, 51 NY2d 308, 315 (1980); *see also Mazzella v. Beals*, 27 NY3d 694 (2016). The burden then shifted to plaintiff to provide evidence to the Court that the subsequent injury was a foreseeable consequence of defendants' negligence, thus raising a triable issue of fact. The Court finds that plaintiff has not sustained their burden.

Plaintiff's efforts to impute liability upon defendants are supported by conclusory statements, which come in conflict with the applicable law. Mere "conclusions, expressions of hope or unsubstantiated allegations or assertions" are insufficient to defeat summary judgment. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Plaintiff states defendants must be held liable for any negligent act by the nonparty KCH in managing the fetal remains, asserting "but for the malpractice on the part of defendant, there would be no fetal body." This is an inaccurate recitation of the law regarding liability and causation. Next, using emotional distress as an overarching injury, plaintiff asserts "the question is whether the original injury was aggravated or exacerbated by a subsequent tortfeasor. If the answer is yes, the original tortfeasor is responsible." There is no absolute right, as plaintiff would suggest, to establish a tortfeasor be held responsible for any subsequent act to the plaintiff regardless of the circumstances or foreseeability of the subsequent act. Here, the question is whether the facts presented allow the court to determine proximate causation as a matter of law, or if that question must be reserved for the jury.

Cases holding that intervening acts break the chain of causation, as a matter of law, have one of two distinctive features. In some, the risk created by the original negligence was not the risk that materialized into harm. *Campbell v. Cent. N. Y. Regional Transp. Auth.*, 7 NY3d 819, 820 (2006) (defendant bus driver who hit wheelchair-bound plaintiff did not cause the plaintiff's injuries that subsequently resulted from his use of a defective replacement wheelchair); *Martinez v. Lazaroff*, 48 NY2d 819, 820 (1979) (risk created by landlord's failure to supply hot water did not correspond to the injuries suffered). In other cases, even if there was some similarity between the risk created and

the actual harm, the defendant's acts of negligence had ceased, and merely fortuitously placed the plaintiff in a location or position in which a secondary and separate instance of negligence acted independently upon the plaintiff to produce harm; the defendant's actions did not put in motion or significantly contribute to the agency by which the injuries were inflicted. *Gerrity v. Muthana*, 7 NY3d 834 (2006).

In this case, the injury plaintiff's claim derives from, emotional distress resulting from the misplacement of fetal remains, is not the harm which would result from the defendants alleged negligence; that harm being preterm labor, delivery and fetal demise. Even if the Court concluded these separate injuries were sufficiently similar to raise an inference of causality, nothing in the record suggests any action or inaction by defendants put in motion or significantly contributed to the agency of the subsequent negligent act by non-party KCH. At most, plaintiff argues defendants furnished the occasion for the separate and independent negligence by the nonparty KCH. This, alone, is not a showing of proximate cause and is insufficient to defeat summary judgment. Given plaintiff's failure to raise an issue of fact, proximate cause "can be determined as a matter of law because 'only one conclusion may be drawn from the established facts.'" *Haim v. Jamison*, 28 NY3d 524, 529 (2016), citing *Derdiarian v. Felix Contractor Corp.*, *Supra*. Moreover, defendants are correct that this claim would fail as a separate cause of action for a loss of right of sepulcher, which similarly requires a showing that the injuries are ""the natural and proximate consequence of some wrongful act or neglect on the part of the one sought to be charged." *Mack v. Brown*, 82 AD3d 133, 138 (2d Dept. 2011), quoting *Stahl v. William Necker, Inc.*, 184 AD 85, 92 (1st Dept. 1913). As explained above, such a showing has not been demonstrated against these defendants.

The motion by defendants Dr. Haratz-Rubinstein and NYPBMH is granted in its entirety, and plaintiff's claim for damages being sought for emotional distress resulting from the misplacement of fetal remains is dismissed.

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

ENTER,

J.S.C.