

Santiago v Murray Hill OB/GYN, LLP

2022 NY Slip Op 33232(U)

September 26, 2022

Supreme Court, New York County

Docket Number: Index No. 105869/2005

Judge: Erika M. Edwards

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA EDWARDS PART 10M

Justice

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JENNIFER SANTIAGO,

Plaintiff,

- v -

MURRAY HILL OB/GYN, LLP, NEW YORK UNIVERSITY
MEDICAL CENTER, DR. MARIA BETANCOURT, DR.
GARY GUARNACCIA and THE PARKWAY HOSPITAL,

Defendants.

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INDEX NO. 105869/2005

MOTION DATE 11/03/2021,
11/08/2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 36, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 88, 90, 91, 93

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 84, 86, 87, 89, 92, 94, 95, 96

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents and oral argument held before this court on July 14, 2022, the court grants in part Defendants Murray Hill OB/GYN, LLP’s (“Murray Hill”) and Dr. Maria Betancourt’s (“Dr. Betancourt”) motion for summary judgment, filed under motion sequence 001, to the extent that the court grants the portions of the motion seeking dismissal of Plaintiff Jennifer Santiago’s (“Plaintiff”) claims for lack of informed consent, res ipsa loquitur, recklessness and her vicarious liability claims against Murray Hill for vicarious liability as to any employee or staff member other than Dr. Betancourt and Dr. Betancourt’s vicarious liability for the acts or omissions of others, but denies dismissal of Plaintiff’s medical malpractice claims against Dr. Betancourt and Murray Hill regarding Dr. Betancourt’s alleged improper delivery of the placenta, including, but not necessarily limited to, her failure to diagnose that Plaintiff had

retained products of conception and/or placenta in her uterus, failure to recognize that the placenta was incomplete and failure to properly care for and treat Plaintiff based on her condition and other portions of the motion not expressly granted herein.

The court grants in part Defendant NYU Langone Hospitals s/h/a New York University Medical Center's ("NYULH") motion for summary judgment, filed under motion sequence 002, to the extent that the court grants the portion of the motion seeking dismissal of Plaintiff's claims of lack of informed consent, res ipsa loquitur, recklessness and vicarious liability for any alleged actions or inactions by Dr. Betancourt and any other employee or staff member other than its pathologists who were involved in the macroscopic examination and interpretation of the placenta, but denies dismissal of NYULH's vicarious liability for Plaintiff's claims alleging malpractice of its pathologists who conducted the macroscopic examination and interpretation of the placenta and other portions of the motion not expressly granted herein.

Plaintiff brings this medical malpractice action against Defendants Murray Hill, NYULH, Dr. Betancourt (collectively "Defendants"), Dr. Gary Guarnaccia ("Dr. Guarnaccia") and The Parkway Hospital ("Parkway") involving her care and treatment beginning on December 9, 2002. Plaintiff subsequently voluntarily discontinued the action against Dr. Guarnaccia and Parkway filed bankruptcy and subsequently dissolved and shut down. Plaintiff, who was 32-weeks pregnant, learned that her fetus had no heartbeat. Dr. Betancourt performed a procedure to induce labor to deliver the stillborn fetus and remove the placenta on December 10, 2022, at Defendant NYU's facility. Plaintiff alleges in substance that Dr. Betancourt improperly performed the procedure, which resulted in a retained placenta and/or products of conception.

Defendants Murray Hill and Dr. Betancourt now move, under motion sequence 001, for summary judgment dismissal of Plaintiff's complaint against them, amendment of the caption to

delete their names, severance of the action and entry of judgment in their favor as against Plaintiff, or alternatively, for an order granting partial summary judgment in their favor on any claim the court deems just and proper.

Defendants Murray Hill and Dr. Betancourt rely on the expert affirmation of Michael F. Cabbad, M.D. and argue in substance that Dr. Betancourt and no one from Murray Hill departed from the standard of care in Plaintiff's treatment or proximately caused Plaintiff's alleged injuries. Murray Hill and Dr. Betancourt further argue that there is no evidence in the record of retained products of conception or placenta. They argue in substance that after delivery, Dr. Betancourt found Plaintiff's placenta to be intact, pathology confirmed that it was complete and based on Plaintiff's examination prior to her discharge, there were no retained products of conception and no excessive or abnormal vaginal bleeding to indicate that there were any retained products of conception.

Defendants Murray Hill and Dr. Betancourt further argue in substance that Plaintiff developed a hypervascular endometrial placental polyp after the induction of labor and evacuation of the stillborn fetus, which is a common risk of pregnancy, but Dr. Guarnaccia mistakenly believed the polyp to be retained products of conception. They further argue in substance that although a hypervascular endometrial placental polyp consists of placental tissue, it is separate and distinct from retained products of conception and should have been treated conservatively. Instead of monitoring the condition, he performed a dilation and curettage, removed the endometrial polyp, scraped more uterine tissue and removed Plaintiff's myometrium, which caused Plaintiff to suffer heavy vaginal bleeding and to develop Asherman's syndrome. Defendants Murray Hill and Dr. Betancourt further argue that Dr. Guarnaccia's procedure was seventeen days after Dr. Betancourt's procedure and it was the first time Plaintiff

experienced heavy vaginal bleeding. Therefore, they argue that there was no malpractice or causation on the part of Defendants Murray Hill and Dr. Betancourt.

Defendants Murray Hill and Dr. Betancourt also argue in substance that Plaintiff's res ipsa loquitur claims must be dismissed as Plaintiff failed to establish that the cause of Plaintiff's alleged injuries is unknown or unexplainable and for dismissal of Plaintiff's claims for vicarious liability. Additionally, they argue that Plaintiff's claims of lack of informed consent must be dismissed because Plaintiff failed to include such claim in her complaint and Defendants were not required to provide such consent.

Defendant NYULH now moves, under motion sequence 002, for summary judgment dismissal of Plaintiff's complaint as against it, or in the alternative, for an order granting NYULH leave to re-file and renew the motion following the completion of disclosure and discovery relating to newly located pathology studies. Defendant NYULH relies on the expert affirmations of Alex Kent Williamson, M.D. and Adiel Fleischer, M.D.

NYULH argues in substance that Plaintiff was treated at its facility from December 9, 2002 to December 11, 2002, and that there was subsequent pathology conducted on December 12, 2002. NYULH argues that since Plaintiff's only claims against it involve its surgical pathology examination of the placenta performed on December 12, 2002, Plaintiff's remaining claims against it and reckless claims should be dismissed. NYULH argues that it did not depart from accepted standards of medical care or proximately cause Plaintiff's alleged injuries. It argues that Dr. Betancourt was employed by Murray Hill, but that she had privileges at NYULH, so there can be no vicarious liability on the part of NYULH as to Dr. Betancourt's alleged actions or inactions. NYULH further argues in substance that at all times it met the standard of care and acted within good and accepted medical practice because the macroscopic examination,

interpretation and diagnosis involving the surgical examination of the placenta were reasonable and that the placenta appeared to have been removed intact.

NYULH further argues in substance that after delivery of the stillborn and placenta, Dr. Betancourt appropriately visually inspected, examined and touched the placenta and confirmed that it lacked any gaps or missing tissue to give her any reason to believe that there were any retained products of conception. Additionally, Dr. Betancourt performed a vaginal examination which was negative, showed no excessive or abnormal bleeding and confirmed that there were no signs of possible retained products of conception, including trailing membranes or other tissue. NYULH further argues that there is nothing in the medical records or the surgical pathology consultation report to indicate that there were any missing products of conception or an incomplete placenta.

Furthermore, NYULH argues that the material that Dr. Guarnaccia claimed to be retained product of conception was a small succenturiate lobe, or a growth separate from the placental body, which would cause Dr. Betancourt and NYULH pathologists to determine that the placenta was complete and which are typically treated conservatively with a trial of medication that stimulates expulsion and antibiotics. Additionally, there was no proximate causation as there was no documented trauma and the retained product ultimately found was minute.

Plaintiff opposes both motions and relies on the expert affirmations of Dr. Daryl K. Boffard and Dr. Paul J. Cohen. Plaintiff argues that NYULH failed to meet its burden of demonstrating its entitlement to summary judgment. Plaintiff also argues that there are genuine triable issues of fact as to Defendants' departures from accepted standards of care which were a substantial cause of Plaintiff's injuries. Plaintiff argues in substance that the disputed issues include the following: (1) Defendants failed to appreciate Plaintiff's risk for retained placenta or

products of conception; (2) Defendants failed to comport to the standard of care which required the administration of medication to encourage contractions in the uterus, Cord Control Traction and ultrasound examination to confirm that the uterus is clear of any products of conception; (3) Dr. Betancourt failed to perform an adequate examination of the placenta; (4) Dr. Betancourt and Murray Hill failed to make an appropriate differential diagnosis which should have included retained products of conception; (5) Dr. Betancourt and Murray Hill misdiagnosed Plaintiff's urinary tract infection and otherwise delayed proper diagnosis; (6) Defendants failed to obtain Plaintiff's informed consent and failed to advise Plaintiff of the risks of the procedure, induction and retained products of conception; (7) the macroscopic examination of the placenta was improper and incomplete as a substantial portion of the placenta, 35 grams or 10%, was missing and retained within Plaintiff's uterus; (8) Defendants misdiagnosed Plaintiff's condition by failing to raise or consider the possibility of retained products of conception based on the pathology sample; and (9) the pathologist who performed the macroscopic examination indicated uncertainty by noting that the cotyledons are "disrupted but appear to be complete," which should have been highlighted in the final report and followed up on by Dr. Betancourt to rule out or confirm retained products of conception.

Plaintiff also argues in substance that genuine triable issues of fact remain as to whether Plaintiff gave and whether Defendants obtained Plaintiff's informed consent to the treatment provided, including whether Defendants discussed the risks of the procedure, including the risks of infection and alternatives to the extraction.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New*

York, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical or dental malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical and dental malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's

ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment” (*id.*).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

For a plaintiff to prevail on a lack of informed consent claim, “a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff’s circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of (plaintiff’s) injuries” (*see* Public Health Law § 2805-d; *Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1st Dept 1995]).

Under the doctrine of *res ipsa loquitur*, “[w]here the actual or specific cause of an accident is unknown . . . a jury may in certain circumstances infer negligence merely from the happening of an event and the defendants relation to it” *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]; *see also Dermatosian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]). To prevail on the theory of *res ipsa loquitur*, a plaintiff must establish the following three elements: “(1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (internal citation and quotations omitted)” (*Kambat*, 89 NY2d at 494).

Summary judgment is warranted “only in the rarest of res ipsa loquitur cases” and “[t]hat would only happen when the plaintiff’s circumstantial proof is so convincing and the defendant’s response so weak that the inference of defendant’s negligence is inescapable” (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]).

Here, the court finds that Defendants met their initial burden of establishing their entitlement to summary judgment in their favor as a matter of law, but Plaintiff raised disputed material issues of fact as to her malpractice claims against Dr. Betancourt regarding her delivery of the placenta, whether she failed to diagnose that Plaintiff had retained products of conception and placenta in her uterus, failed to recognize that the placenta was incomplete and failed to properly care for and treat Plaintiff based on her alleged condition. Additionally, the court finds that Plaintiff raised disputed material factual issues regarding her claims of vicarious liability against Murray Hill as to Dr. Betancourt’s alleged malpractice claims and vicarious liability claims against NYULH as to Plaintiff’s malpractice claims against its pathologists.

The disputed issues regarding the placenta include, but are not necessarily limited to, whether Defendants Dr. Betancourt and Murray Hill departed from the accepted standard of medical practice in 2002 regarding Dr. Betancourt’s delivery of the placenta and Plaintiff’s subsequent care and treatment; whether NYULH’s pathologists conducted a proper, correct and complete macroscopic examination of the placenta; whether Dr. Betancourt and NYULH’s pathologists failed to diagnose, identify or recognize that Plaintiff had retained products of conception and/or retained placenta in her uterus and that the placenta was not complete; whether the material removed by Dr. Guarnaccia was a separate polyp or growth which was attached to the placenta or retained products of conception or placental tissue; and whether Defendants

proximately caused Plaintiff's alleged injuries, including the procedure performed by Dr. Guarnaccia and development of Asherman's syndrome.

The court grants dismissal of Plaintiff's claims regarding Murray Hill's vicarious liability premised on acts of its employees and staff members other than Dr. Betancourt and Dr. Betancourt's vicarious liability as to these individuals. The court finds that Plaintiff failed to demonstrate an issue of fact as to whether other doctors and staff members exercised any independent medical judgment, any independent acts of negligence or malpractice or whether any of Dr. Betancourt's orders greatly deviated from normal practice as to hold them liable for failing to intervene. Additionally, the court grants dismissal of Plaintiff's claims for NYULH's vicarious liability as to anyone other than its pathologists who were involved in the macroscopic examination and interpretation of the placenta.

Additionally, the court grants dismissal of Plaintiff's claims for lack of informed consent as such claims were not alleged in Plaintiff's complaint. Additionally, the court agrees with Defendants that the delivery of the still born fetus was medically necessary, that Defendants were not required to obtain Plaintiff's informed consent and that Plaintiff failed to sufficiently raise an issue of material fact based on admissible evidence to support her lack of informed consent claim.

The court also dismisses Plaintiff's claims regarding *res ipsa loquitur* as Plaintiff failed to raise an issue of fact to establish each element of this claim, including that the injuries alleged were of the kind which ordinarily do not occur in the absence of someone's negligence, that the injuries occurred at a site remote from the treatment site, and that they were unexplained based on Plaintiff's allegations.

The court also dismisses Plaintiff's allegations of recklessness.

Therefore, the court grants in part both motions as set forth herein.

The court has considered any additional arguments raised by the parties, which were not specifically addressed herein and the court denies all additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants in part Defendants Murray Hill OB/GYN, LLP's and Dr. Maria Betancourt's motion for summary judgment, filed under motion sequence 001, to the extent that the court grants the portions of the motion seeking dismissal of Plaintiff Jennifer Santiago's claims for lack of informed consent, *res ipsa loquitur*, recklessness and her vicarious liability claims against Murray Hill for vicarious liability as to any employee or staff member other than Dr. Betancourt and Dr. Betancourt's vicarious liability for the acts or omissions of others, but denies dismissal of Plaintiff's medical malpractice claims against Dr. Betancourt and Murray Hill regarding Dr. Betancourt's alleged improper delivery of the placenta, including, but not necessarily limited to, her failure to diagnose that Plaintiff had retained products of conception and/or placenta in her uterus, failure to recognize that the placenta was incomplete and failure to properly care for and treat Plaintiff based on her alleged condition and the court denies other portions of the motion not expressly granted herein; and it is further

ORDERED that the court grants in part Defendant NYU Langone Hospitals s/h/a New York University Medical Center's motion for summary judgment, filed under motion sequence 002, to the extent that the court grants the portion of the motion seeking dismissal of Plaintiff's claims of lack of informed consent, *res ipsa loquitur*, recklessness and vicarious liability for any alleged actions or inactions by Dr. Betancourt and any other employee or staff member other than its pathologists who were involved in the macroscopic examination and interpretation of the

