

Reilly v Ninia

2007 NY Slip Op 30057(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0017904

Judge: Robert W. Doyle

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plaintiff's injury.

A proponent of a motion for summary judgment has the burden of proving with admissible evidence that he or she did not deviate or depart from accepted practice in the medical community and that his or her treatment was not a proximate cause of the injury or damage (*Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375, *lv denied* 92 NY2d 814 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [1994]). A defendant meets this burden by establishing, as a matter of law, that he or she breached no professional duty of care owed to the plaintiff (*Kleinert v Begum*, 144 AD2d 645, 535 NYS2d 43 [1988]).

Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (*Fileccia v Massapequa General Hospital*, 63 NY2d 639, 479 NYS2d 520 [1984]; *Neuman v Greenstein*, 99 AD2d 1018, 473 NYS2d 806 [1984]; *Buonagurio v Drago*, 65 AD2d 830, 409 NYS2d 835 [1978], *lv. denied* 46 NY2d 708 [1979]). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat the summary judgment motion made by the defendant physician (*Fileccia v Massapequa Gen. Hosp.*, *supra*; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Bustamonte v Koval*, 98 AD2d 739, 469 NYS2d 441 [1983]).

In support of the motion, defendant Erhart submits, *inter alia*, the pleadings, plaintiffs' bill of particulars, portions of plaintiffs' medical records, the transcripts of the deposition testimony given by defendants Ninia and Erhart and an affirmation by Dr. Erhart's expert, Denise Guidetti, M.D.

At their examinations before trial, both defendants Ninia and Erhart testified to the effect that Dr. Erhart's treatment of plaintiffs was limited to assisting Dr. Ninia in the performance of an emergency caesarian section upon Ms. Reilly. Dr. Erhart's assistance in surgery involved only the holding of retractors and the cutting of sutures.

Defendant also submits the affirmation of his expert, Denise Guidetti, M.D. who is a board certified obstetrician/gynecologist. Dr. Guidetti's opinion is based upon her review of the plaintiffs' bill of particulars, plaintiffs' medical records and the deposition testimony given in this action. Dr. Guidetti opines with a reasonable degree of medical certainty that there was no departure or deviation from accepted standards of care on the part of Dr. Erhart which were a

proximate cause of any injury to the plaintiffs. She states that the medical records and the deposition testimony reveals that plaintiff Dani Ann Reilly was admitted to defendant St. Charles Hospital on November 1, 2002, as the private patient of defendant Jerry Ninia, M.D. for a planned induction of labor. Mrs. Reilly, whose pregnancy was at full term, was attached to a fetal monitor and administered the drug, Pitocin, intravenously at approximately 2:20 p.m. to induce labor. Mrs. Reilly's labor continued until about 8:45 p.m. when an episode of maternal hypotension associated with fetal bradycardia (decrease in fetal heartbeat) occurred and Dr. Ninia made the decision to perform an emergency C-section (caesarian section).

Dr. Guidetti continues that Dr. Erhart was a private attending obstetrician/gynecologist on staff at St. Charles Hospital on the date of the infant plaintiff's birth and happened to be present on the Labor and Delivery Unit at the hospital caring for one of his own patients when Dr. Ninia requested Dr. Erhart's assistance with the C-section. Dr. Guidetti states that the medical records note that in the course of surgery it was evident that Ms. Reilly's uterus had ruptured and there was a placental abruption. The infant plaintiff was delivered at 9:24 p.m. in poor condition with Apgar scores of 1 and 3 and was intubated and resuscitated and then later transferred to the Neonatal Intensive Care Unit at another hospital.

Dr. Guidetti opines that the management of Ms. Reilly's labor and delivery was at all times under the direction and sole control of her private attending physician, Dr. Ninia, and that Dr. Erhart's involvement with the care and treatment provided to Ms. Reilly was limited to his role as an assistant during an emergency C-section performing only such functions as the holding of retractors, keeping the operative site clear of blood and cutting sutures. There is no allegation that injury to the plaintiffs resulted from the manner in which the procedure was performed or by any act or omission on the part of Dr. Erhart in his role as an assistant. She also opines that the performance of the C-section was indicated in view of the fetal bradycardia and that there was no delay in the performance of the C-section which was attributable to Dr. Erhart. Dr. Guidetti concludes that Dr. Erhart had no role or involvement in the prenatal care rendered to plaintiff or with the management of labor or with the decision to perform a C-section or with the timing of the surgery. Nor is there any evidence that Dr. Erhart was in any way involved in the care provided to the infant plaintiff at or after her delivery. Thus, Dr. Erhart made a prima facie showing of entitlement to summary judgment on plaintiffs' first cause of action for medical malpractice based on negligence (*see, Banks v Barkoukis*, 231 AD2d 598, 647 NYS2d 814 [1996]).

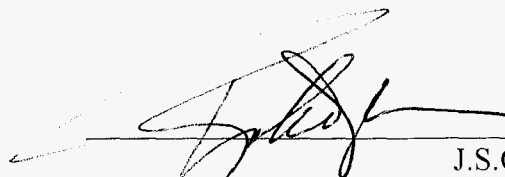
Defendant Erhart also sufficiently established his prima facie entitlement to summary judgment dismissing plaintiffs' cause of action for medical malpractice based on lack of informed consent by demonstrating that his sole involvement in plaintiffs' care was that of a surgical assistant to Dr. Ninia who was the primary surgeon for the surgical procedure performed in this case. As the assisting surgeon Dr. Erhart had no duty to obtain Ms. Reilly's consent for the procedure (Public Health Law § 2805-d; *Beard v Brunswick Hospital Center*, 220 AD2d

550, 632 NYS2d 805 [2002]; *Spinosa v Weinstein*, 168 AD2d 32, 571 NYS2d 747 [1991]).

Inasmuch as plaintiffs have not addressed the merits of Dr. Erhart's motion for summary judgment, they have failed to raise any triable issue of fact, and the motion for summary judgment dismissing the complaint as against Dr. Erhart is granted (*see, Fernandez v Elemam*, 25 AD3d 752, 809 NYS2d 513 [2006]; *Ericson v Palleschi*, 23 AD3d 608, 806 NYS2d 667 [2005]). The action is severed and continued as against the remaining defendants.

Finally, the Court notes that plaintiffs' affirmative request for relief, to wit, that the Court dismiss any claims which the remaining defendants may assert pursuant to CPLR article 16 at the trial of this action and preclude those defendants from attempting to blame or otherwise find fault with or apportion any liability to Dr. Erhart is not properly before the Court and has not been considered (CPLR 2215). Plaintiffs may, however, renew their request for such relief before the justice presiding at the trial of this action.

Dated: MAR 05 2007



J.S.C.

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