SHORT FORM ORDER

INDEX No. 02-10986
CAL. No. 05-01598-MM

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon ROBERT W. DOYLE

MOTION DATE 9/6/06
ADJ. DATE 9/20/06
Mot. Seq. # 013 - MG
014 - XMD
015 - XMD

ALEX ROMAN, by his mother and natural guardian, ROSEALIE CONTE, and ROSEALIE CONTE, individually,	SILBERSTEIN, AWAD & MIKLOS, P.C. Attorneys for Plaintiffs 600 Old Country Road Garden City, New York 11530
Plaintiffs,	
- against -	BROWN & TARANTINO, LLC Attorneys for Defts. Mauro, Kocis, Arnold, Quirk, Baranek & University Assocs. 14 Lafayette Square, 1500 Rand Bldg. Buffalo, New York 14203
CAREEN MAURO, C.N.M., "JANE DOE," C.N.M. (i.e., certified nurse midwife having Identification No. 032821), CHRISTINA KOCIS, C.N.M., JANE ARNOLD, C.N.M., ANTONIA PINNEY, M.D., KAREN CHU, M.D., BRUCE MEYER, M.D., "JOHN/JANE" QUIRK, M.D., "JOHN/JANE DOE," M.D. (i.e., physician who signed "Op Note" dated June 19, 2000 and who has I.D. #03236), D. BARANEK, N.N.P., "JOHN/JANE" BURDJALOV, M.D., DOREEN DEMEGLIO, R.N., "JOHN/JANE DOE," N.N.P. (i.e., who has I.D. #552000), UNIVERSITY ASSOCIATES IN OBSTETRICS AND GYNECOLOGY, P.C. (a/k/a Stony Brook Primary Care),	ELIOT SPITZER, Attorney General By: Bridget E. Farrell, Esq. Atty. for Defts. Pinney, Chu & Burdjalov 120 Broadway New York, New York 10271
	KELLY, RODE & KELLY, LLP Attorneys for Deft. Meyer 330 Old Country Road, Suite 305 Mineola, New York 11501
Defendants.	

Upon the following papers numbered 1 to 26 read on this motion and cross motions for reargument; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12-13; 14-15; Answering Affidavits and supporting papers 16 - 26; Replying Affidavits and supporting papers _____; Other _____: (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#013) by the plaintiff for leave to reargue the prior motion (#012) that resulted in an order of this court, dated May 25, 2006 (R. Doyle, J.) which denied summary judgment is granted: and it is further

ORDERED that the motion (#014) by defendant Antonia Pinney, M.D. for leave to reargue the prior motion (#009) for summary judgment dismissing the complaint as to this defendant is denied; and it is further

ORDERED that the motion (#015) by defendant Bruce Meyer, M.D. for leave to reargue the prior motion (#010) for summary judgment dismissing the complaint as to this defendant is denied.

A motion for reargument addressed to the discretion of the court is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts or misapplied a controlling principle of law (CPLR 2221[d]). The purpose is not to permit the unsuccessful party to reargue the very questions previously decided (***Fosdick v Hempstead,*** 126 NY 651, 1891 NY LEXIS 1714 [1891]; ***Foley v Roche,*** 68 AD2d 558, 418 NYS2d 588 [1979]). Plaintiffs contend that this court misapprehended facts contained in the prior order concerning whether defendants Drs. Pinney and Meyer rendered any care and/or treatment to plaintiff prenatally prior to their initial evaluation on June 19, 2000 at 8:20 p.m. and that the initial evaluation was done at the request of Nurse Kocis.

Plaintiffs' motion for reargument is granted solely on this issue and for the purpose of amending the prior order of this court. This court's initial review of the evidence presented on the prior motions clearly established that there was a question of fact concerning whether the defendants Drs. Pinney and Meyer had any contact with the plaintiff prior to the evaluation on June 19, 2000 at 8:20 p.m. and when they were first contacted by Nurse Kocis to do an evaluation. This court also recognized that there is a question of fact concerning the extent of any contact either directly with the plaintiff or through Nurse Kocis. While the court did not overlook or misapprehend the relevant facts, the court did inadvertently state that this issue was "undisputed," which it clearly is not. Therefore, the prior order is amended to reflect that a triable issue of fact exists on this issue.

Addressing the renewal motions by both defendants Dr. Pinney and Dr. Meyer, CPLR 2221 provides, among other things, that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e][2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e][3]; *see, **Lattimore v Port Authority of New York and New Jersey,*** 305 AD2d 639, 760 NYS2d 224 [2003]; ***Sherman v Piccione,*** 304 AD2d 552, 757 NYS2d 112 [2003]). On the present motions, the "new facts" which apparently provide the basis of defendants Dr. Pinney's and Dr. Meyer's renewal motions are contained within the affirmations of their respective counsel, and each primarily consist of a rehashing of the same arguments made by the respective counsel on the prior motions. Their current arguments concerning the accuracy of the medical record note by Nurse Kocis raises a triable issue of fact. This court notes, as it did in the prior order, that defendants Drs. Pinney and Meyer argued on the prior motions that there was a question of fact concerning when they were first contacted by Nurse Kocis and informed of the patient's condition. Thus, their current change in position arguing that the medical record note and the testimony of Nurse Kocis is not credible is not persuasive and in fact, requires resolution by the trier of fact.

Inasmuch as the instant motion alleges no new or additional facts which were not before the court on the prior motion, the instant motion is appropriately treated solely as one for leave to reargue (*see, **Long Island Lighting Co. v American Employers Ins. Co.,*** 131 AD2d 733, 517 NYSA2d 44 [1987]; *see also, **EMC Mortg. Corp. v Stewart,*** 2 AD3d 772, 769 NYS2d 408 [2003]; ***Congregation Gates of Prayer v Peninsula Improvement Corp.,*** 157 AD2d 765, 551 NYS2d 7693 [1990]; *app dism* 75 NY2d 1005, 557 NYS2d 371). Reargument is denied as the moving papers fail to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied any controlling principles of law in reaching its determination (*see*, ***Mooney v Vecchio,*** 305 AD2d 415, 758 NYS2d 506 [2003]; ***Foley v Roche***, 68 AD2d 558, 418 NYS2d 588 [1979]).

Dated: MAR 0 5 2007

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**