

Atienza v Taubman

2007 NY Slip Op 30701(U)

March 27, 2007

Supreme Court, Queens County

Docket Number: 0004384/2004

Judge: James P. Dollard

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cross motion are determined as follows:

This is an action to recover damages for personal and emotional injuries allegedly sustained due to the defendants' medical malpractice between November 2002 and March 2003. The plaintiffs allege that the defendants negligently and improperly placed a cervical cerclage, failed to timely remove the cervical cerclage and failed to perform a timely cesarean section delivery. As a result of the alleged negligence the plaintiffs claim to suffer from emotional trauma due to the death of their fetus. The plaintiff Kathelyn Atienza further alleges that as a result of the negligence she needed surgery and is unable to safely carry a pregnancy.

On December 12, 2002 the plaintiff, Kathelyn Atienza first saw the defendant Dr. Linkie, who is part of the Taubman, Korn and Linkie, P.C. medical group. Her last menstrual period was reported to be October 8, 2002. A pregnancy test was positive. Mrs. Atienza's history was taken and it was noted that she had two separate uterine horns. Mrs. Atienza's had three prior pregnancies when she lived in the Philippines. The first pregnancy resulted in a premature rupture of the membranes and a spontaneous vaginal delivery at 28 weeks gestation. The second pregnancy resulted in a fetal demise at four months after preterm labor with the fetus delivered by a classical cesarean section. The third pregnancy resulted in fetal demise at 26 weeks gestation after a repeat classical cesarean section. Dr. Linkie took a sonogram confirming that Mrs. Atienza had an intrauterine pregnancy in the right uterine horn.

On January 7, 2003, Mrs. Atienza was seen by the defendant Dr. Taubman for a prenatal office visit. Dr. Taubman referred Mrs. Atienza to the Antepartum Testing Unit (ATU) at the defendant Hospital for consideration of a cervical cerclage. The next day, Mrs. Atienza was seen by Dr. Adiel Fleischer at the ATU at the Hospital. Dr. Fleischer performed a sonogram and detected the double uterus. Dr. Fleischer found that Mrs. Atienza had uterus didelphys and documented that her history was suggestive of cervical incompetence. In light of her obstetrical history, Dr. Fleischer recommended the placement of a cervical cerclage at 14-15 weeks of gestation followed by serial cervical measurements.

Mrs. Atienza presented to the Hospital on January 13, 2003 for placement of a McDonald's cerclage. A consent form was executed by Mrs. Atienza allowing Dr. Linkie and her assistants

to place the cerclage for cervical incompetence. Drs. Linkie and Fleischer were the surgeons performing the procedure.

On January 22, 2003, Mrs. Atienza was seen by Dr. Linkie at her office. She complained of low discomfort when urinating and occasional spotting. Mrs. Atienza returned to the Taubman, Korn and Linkie, P.C. medical group for prenatal visits on February 4 and 11, 2003. There were no complaints at the February 4 visit, but on the February 11 visit Mrs. Atienza complained of one spot of blood with cramps the prior evening but none at the time of the visit. Mrs. Atienza also went for ultrasounds at the ATU on February 4 and 18, which showed the fetus was growing normally and the cervical length was normal. On March 3, 2003, Mrs. Atienza returned to the medical group and all was normal without any complaints.

On March 13, 2003, Mr. Atienza called the group office to say that Mrs. Atienza was in severe pain. Mrs. Atienza was directed to go to Labor and Delivery at the defendant Hospital and arrived at 3 p.m. Mrs. Atienza was 22 weeks gestation. While being observed at the Hospital it was suspected that Mrs. Atienza suffered from a uterine dehiscence. A cesarean section and an exploratory laparotomy were performed and it was discovered that Mrs. Atienza had suffered a uterine dehiscence in the right uterine horn, which occurred at the location of the prior classical cesarean. The non-viable fetus was removed.

In support of their motion, defendants Dr. Leggett, the Hospital and North Shore Long Island Jewish Health System submitted the expert affirmation of Henry Prince, M.D., a licensed physician who is board certified in Obstetrics and Gynecology. Dr. Prince opined to a reasonable degree of medical certainty that the treatment of Mrs. Atienza conformed to good and accepted standards of medical practice. Dr. Prince opined that Mrs. Atienza's injuries and the fetal death were caused when her uterus ruptured at a time when her fetus was not viable. Dr. Prince opines that the defendants could not have delivered the fetus prior to the uterine rupture as it was not viable at that time. Dr. Prince further opines that the defendants did not cause or contribute to the uterine rupture and that Mrs. Atienza sustained a spontaneous rupture as a consequence of having undergone two prior classical cesarean sections. Dr. Prince states that the placement of the cervical cerclage was within the good and accepted standards of medical practice and the cerclage did not cause or contribute to the uterine rupture.

In support of their motion, defendants Drs. Linkie and Taubman submitted the expert affirmation of Pedro R. Segarra, M.D., a licensed physician who is board certified in Obstetrics and Gynecology. Dr. Segarra opined to a reasonable degree of medical certainty that Drs. Linkie and Taubman's treatment of Mrs. Atienza conformed to good and accepted standards of medical practice. Dr. Segarra opined that in light of the risks associated with cervical incompetence and a double uterus it was appropriate for Drs. Linkie and Taubman to seek the opinion of Dr. Fleischer and, furthermore, it was appropriate to utilize a cervical cerclage in an attempt to prolong the gestation. Dr. Segarra opined that the cerclage did not contribute to the uterine dehiscence suffered by Mrs. Atienza. Dr. Segarra further stated if performed at the 22 weeks gestation a cesarean section would not have been successful as the fetus would not have survived if delivered.

As a result of the affirmations that the defendants acted within good and accepted standards of medical practice in their care and treatment of the plaintiff, the defendants met their burden of establishing, prima facie, their entitlement to summary judgment as a matter of law on the issue of medical malpractice (Reyz v Khelemsky, 10 AD3d 714 [2004]; Fhima v Maimonides Med. Ctr., 269 AD2d 559 [2000]). Additionally, defendants demonstrated, prima facie, that they obtained Mrs. Atienza's informed consent prior to the placement of the cervical cerclage (Stancavage v Mirman, 309 AD2d 918 [2003]; Dunlop v Sivaraman, 272 AD2d 570 [2000]).

Plaintiffs, in opposition to the motion, are required to submit evidentiary facts or materials to rebut the prima facie showing by the defendants so as to demonstrate the existence of a triable issue of fact (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). In response to a defendant who has come forward with expert medical evidence that it did not depart from good and accepted medical practice, a plaintiff is required to submit an expert medical opinion to demonstrate the merit of the action (Simms v N. Shore Univ. Hosp., 192 AD2d 700 [1993]). In opposition, the plaintiffs submitted an affidavit of a medical expert redacted pursuant to CPLR 3101(d) and offered to provide an unredacted copy to the court for in camera review. Even though the expert opined that the defendants departed from good and accepted standards of medical practice by using a McDonald cerclage and by failing to perform a level three sonogram when the plaintiff was admitted to the Hospital, the affirmation failed to raise an issue of fact as "it was devoid of any

expression or opinion that the alleged departure was a competent producing cause of any injury or damage to the plaintiff (Domaradzlo v Glen Cove OB/GYN Assoc., 242 AD2d 282 [1997]; see Chance v Felder, 33 AD3d 645 [2006]; Wicksman v Nassau County Health Care Corp., 27 AD3d 644 [2006]; Dellacona v Dorf, 5 AD3d 625 [2004]). Additionally, the plaintiffs' expert claim that the failure to perform a cesarean section was the proximate cause of the fetal demise is conclusory and unsupported by the evidence. While the expert opines that prior to the complete rupture of the plaintiff's uterus a cesarean section could have been performed, the expert concedes that the uterine dehiscence began before the plaintiff arrived at the hospital and admits that he cannot state that a cesarean section would have saved the life of the fetus and in fact states that "the fetal prognosis at 22 weeks gestation would not be good in any event."

Finally, plaintiffs did not submit any evidence to rebut defendants showing that they obtained the plaintiff's informed consent for the placement of the cervical cerclage, and, therefore, failed to raise an issue of fact sufficient to defeat summary judgment as to that claim (Alvarez, 68 NY2d at 327). While the plaintiffs' expert stated that the plaintiff was at a high risk for a uterine rupture he does not state that the cerclage created such a risk. Therefore, it was not necessary to inform the plaintiff that there was risk of a uterine rupture from the placement of the cervical cerclage.

Since summary judgment dismissing the complaint is appropriate, it is not necessary to separately reach the merits of the argument to dismiss the cause of action of the plaintiff Arnhel Atienza.

Accordingly, the motions for summary judgment are granted. The cross motion by defendants Dr. Leggett, the Hospital and North Shore Long Island Jewish Health System is denied as moot.

Dated: March 27, 2007
