

**Boutin v Bay Shore Family Health Ctr.**

2007 NY Slip Op 30718(U)

March 29, 2007

Supreme Court, Suffolk County

Docket Number: 0015635/2002

Judge: Robert W. Doyle

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SUPREME COURT-STATE OF NEW YORK

TRIAL SPECIAL TERM, PART 5 SUFFOLK COUNTY

P R E S E N T:

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE: 12-1-06  
MOT. Seq. #002 – DISM – MD  
#003 – SJ – MD  
#004X – SJ – MD  
#005X – AP – MG

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JEAN BOUTIN, JR., an infant under the  
age of 14 years, by his other and natural  
guardian, LORRAINE, BOUTIN,

Plaintiff,

-against-

BAY SHORE FAMILY HEALTH  
CENTER, SOUTHSIDE HOSPITAL,  
ROBERT J. LIPARI, M.D., COUNTY OF  
SUFFOLK, BERNADITA LAZO, M.D.,  
CHARLES ROSENBLUM, M.D., BAY  
SHORE OB/GYN GROUP P.C. A/K/A  
BAY SHORE OB/GYN GROUP, P.C.,

Defendants.

X

X

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Upon the following papers numbered 1 to 12 read on these motions for dismissal and summary judgment: Notice of Motion/~~Order to Show Cause~~ and supporting papers 1-2; Notice of Cross Motions and supporting papers for summary judgment and to amend pleadings 3-4; Answering Affidavits and supporting papers 5-8; Replying Affidavits and supporting papers 9-12; Other     ; (~~and after hearing counsel in support and opposed to the motion~~); it is,

**ORDERED** that this motion by defendants Southside Hospital, Robert J. Lipari, M.D. and Bay Shore Ob/Gyn Group, P.C. for an order granting them summary judgment dismissing plaintiff's complaint, this motion by defendant Bernadita Lazo, M.D. for summary judgment dismissing the complaint, this cross motion by defendants Bay Shore Family Health Center and County of Suffolk for summary judgment and this cross motion by plaintiff for leave to serve an amended bill of particulars as to defendants Bay Shore Family Health Center and the County of Suffolk and a supplemental bill of particulars as to defendant Bernadita Lazo, M.D. are considered by the Court and are determined as follows:

This is an action commenced by plaintiff as mother and natural guardian of the infant, Jean Boutin, Jr., seeking to recover for personal injuries sustained by the infant plaintiff allegedly as the result of medical malpractice. Plaintiff contends that defendants failed to diagnose fetal distress in the yet-unborn infant and to perform a timely caesarian section. As a result, plaintiff alleges that the infant sustained a cerebral infarction and extensive neurological deficits.

Defendant Southside Hospital (hereinafter the Hospital) moves for summary judgment dismissing the complaint upon the ground that it cannot be held liable for the alleged negligence of the private attending physician at its hospital. While defendant acknowledges that it may be held liable for the negligence of its employees, it will not be liable when the treatment is rendered by an independent physician who is retained by the patient herself. According to defendant, plaintiff was a patient of the Bay Shore Family Health Center and the Bay Shore Ob/Gyn Group, P.C. and that one of its doctors, defendant Robert J. Lipari managed and directed plaintiff's labor and delivery. Under no view of the circumstances, according to defendant, could defendant Hospital be held liable for injuries resulting from the conduct of this individual, who was a privately retained physician.

Defendants Southside Hospital, Robert J. Lipari, M.D. and Bay Shore Ob/Gyn Group, P.C. also move for summary judgment dismissing the complaint against them upon the ground that the care and treatment rendered by these defendants was not the proximate cause of the injuries to the infant plaintiff. To support this argument, defendants submit to the Court an affidavit from a medical doctor in which he opines that the injuries to the plaintiff were consistent with an in-utero insult that occurred prior to the plaintiff's presentation to the defendant Hospital and that the care and treatment rendered by defendants Hospital and Lipari did not, in any way, contribute the injuries suffered by the plaintiff.

In opposition to both of these motions, plaintiff raises several arguments and submits to the Court a redacted affidavit from a medical doctor. In that affidavit, the expert offers that both Dr. Lipari and the Hospital departed from the acceptable standard of care and committed medical malpractice in their treatment of plaintiff and his mother. With regard to Dr. Lipari, it is the expert's opinion, *inter alia*, that he failed to recognize certain symptoms as necessitating the need for a C-section earlier than one was actually ordered. As to the hospital, the expert concludes that it should have been aware of the need for additional physicians on duty in order to permit the earlier performance of a C-section. He further opines that this medical malpractice was a proximate cause of the injuries to plaintiff.

The law is well-settled that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see, Andre v. Pomeroy*, 35 NY2d 361, 362 NYS2d 131; *Benincasa v. Garrubo*, 141 AD2d 636, 529 NYS2d 797). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v. Schefman*, 121 AD2d 295, 503 NYS2d 58). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court's directing judgment in its favor as a matter of law (*Gilbert Frank Corp. v. Federal Insurance Co.*, 70 NY2d 966, 525 NYS 2d 793 *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790). The party opposing the motion, on the other hand, must produce

evidentiary proof in admissible form sufficient to require a trial of material questions of fact upon which the opposing claim rests (Gilbert Frank Corp. v. Federal Insurance Co., *supra*). Furthermore, the evidence submitted in connection with a motion for summary judgment should be reviewed in the light most favorable to the party opposing the motion (Robinson v. Strong Memorial Hospital, 98 AD2d 976, 470 NYS2d 239).

Here, there are significant factual issues, as raised by the medical affidavit submitted by the plaintiff, regarding the alleged negligence of each of the movants which are sufficient to preclude the granting of summary judgment.

Defendants Bay Shore Family Health Center and the County of Suffolk also move for summary judgment. According to these defendants, plaintiff alleges in her bills of particulars that the only negligence by any of the defendants occurred on June 8, 1993. These defendants assert that according to their records, the last time plaintiff was seen at Bay Shore Family Health Center was June 3, 1993 some six days prior to the alleged negligence and therefore, they cannot be found liable for the injuries suffered by plaintiff.

In response to this application, plaintiff has cross moved for an order granting her leave to amend the bill of particulars as to defendants Bay Shore Family Health Center and County of Suffolk and to supplement her bill of particulars as to defendant Bernadita Lazo, M.D.


With respect to the motion by defendants Bay Shore Family Health Center and County of Suffolk, the Court finds that these defendants were adequately apprised initially as to the nature of the claim by plaintiff against them and that any deficiency in the bill of particulars, with regard to the specific dates of the alleged malpractice, has been eliminated by plaintiff's present motion. In so ruling the Court notes that both of the original bills of particular as to each of these defendants, lists prenatal care and treatment of the infant plaintiff's mother as part of their claim. It must also be noted that the infant plaintiff's mother was questioned extensively during her deposition about her prenatal care at the Bay Shore Family Health Center. Thus, as to the underlying basis of the claim against these defendants, the prenatal care of the infant and his mother, that allegation has always been in the bill of particulars. The fact that the date of the alleged malpractice incorrectly limits the time frame to the day of her presentation to the hospital does not prejudice defendants in any real way. They were given the opportunity to and in fact did question plaintiff's mother at her deposition regarding the nature of the prenatal care. Had they not do so and had the bills of particular not alleged "prenatal care", defendants' arguments would be more compelling.

Thus, in allowing the amendment, the Court does not view this as an instance where plaintiff is being permitted to allege new injuries or a new theory of recovery. On the contrary, plaintiff is merely seeking to amend the dates of the alleged negligence to comport with the theory under which the original complaint and bill of particulars were filed. In this regard, it should be noted that it is well settled that leave to amend or supplement a bill of particulars should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law or unless prejudice and surprise directly resulting from the delay is shown (*see*, Adams v. Jamaica Hopsital, 258 AD2d 604, 685 NYS2d 752; Thomas v. Mat Power, Inc., 129 AD2d 697, 514 NYS2d 460). In this case, the proposed amendment is neither palpably improper nor insufficient and does not result in prejudice or surprise to defendants. Accordingly, the motion for leave to serve the amended bill of

particulars is granted. The amended bill will be deemed served upon all parties upon service on them of a copy of this order together with notice of entry.

For these same reasons, the application by plaintiff for leave to supplement the bill of particulars as to defendant Bernadita Lazo, M.D. is also granted. The bill of particulars as to defendant Lazo, dated February 11, 2003, clearly sets forth the dates of the alleged negligence as from January 12, 1993 to June 8, 1993, the period of prenatal care as well as delivery. Under the circumstances and given that defendant was aware of the time period for which the negligence was claimed, plaintiff's application is granted. Once again, the supplemental bill will be deemed served upon all parties upon service on them of a copy of this order together with notice of entry.

Dated: MARCH 29, 2007

  
J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION

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