

Ballard v Henry

2007 NY Slip Op 30721(U)

March 26, 2007

Supreme Court, Kings County

Docket Number: 0005569/2004

Judge: Gerard H. Rosenberg

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At an I.A.S. Term, Part MMTRP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of March, 2007.

P R E S E N T:

HON. GERARD H. ROSENBERG,

Justice.

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JIL BALLARD, as Mother and Natural Guardian of DIONTAE BALLARD-POPE, an Infant, and JIL BALLARD, Individually,

Plaintiff(s).

-against-

NIGEL HENRY, M.D., BYRON MYERS, M.D., LONG ISLAND COLLEGE HOSPITAL and EMPIRE CENTER, P.C.,

Defendant(s).

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DECISION & ORDER

Index No. 5569/04

Cal. No. 2005-018607T

Motion Seq. No. 004, 005

The following papers numbered 1 to 9 read on this motion.

	Papers Numbered
Notice of Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed _____	1 - 2
Notice of Cross-Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed _____	3 - 4
Affirmation(s) in Opposition and Exhibits Annexed _____	5, 6
Reply Affirmation(s) and Exhibits Annexed _____	7, 8
Supplemental Affirmation(s) in Opposition and Exhibits Annexed _____	9

[Motions Sequence Nos. 004 and 005 are consolidated for the purpose of disposition].

Upon the foregoing papers, and upon oral argument, plaintiff moves pursuant to CPLR 3126 for an order striking the answer of defendant Long Island College Hospital (LICH) based on its spoliation of evidence, specifically fetal monitoring strips.

Defendants Nigel Henry, M.D. (Dr. Henry) and Central Brooklyn Medical Group, P.C. d/b/a and s/h/a Empire Center, P.C. (Empire Center) cross-move for an order dismissing plaintiff's complaint as to them should plaintiff's motion be granted; or, alternatively, granting leave to file a late motion for summary judgment and thereafter granting summary judgment. These defendants take no position with respect to plaintiff's motion.

This is an action alleging medical malpractice. Plaintiff claims that the defendants failed to appreciate the high-risk nature of the labor and delivery involving the infant plaintiff on August 20, 2001, including the fact that this was a pre-term delivery and a repeat cesarean section, and failed to schedule a timely cesarean section, resulting in the deprivation of oxygen to the fetus for a significant period prior to delivery.

The Spoliation Motion

Plaintiff states that she requested that LICH provide the fetal monitoring strips as early as April of 2003. It is clear at this stage of the proceedings that the fetal monitoring strips from this labor and delivery can not be located (see affidavit dated June 1, 2005, of Dawn Maynard, Director of Medical Records at LICH, annexed to the moving papers as Exhibit I). Based on the absence, due to loss or destruction, of the fetal monitoring strips of plaintiff taken at LICH from the time the plaintiff presented to LICH to the time of delivery by emergency c-section, plaintiff moves to strike the answer of the defendant LICH.

In support of the motion plaintiff has submitted an affirmation from a physician board-certified in the field of Obstetrics and Gynecology. Plaintiff's expert states that fetal monitoring strips, which are utilized to continually assess the fetal heart rate and the

relationship of the heart rate to maternal contractions, are analyzed by physicians and nurses to determine fetal well being, and to see whether there is fetal distress or stress upon the fetus caused by a lack of oxygen. The records and deposition testimony confirm that an external fetal monitor was utilized upon the maternal plaintiff's arrival at LICH through the infant plaintiff's delivery by cesarean section. Despite defendants' denial of any fetal distress, plaintiff's expert points to LICH's own medical record, titled "Labor & Delivery Operating Room Log, Cesarean Section Tally Sheet." On that record the word "Emergent" is checked off and under "Pre-Op Diagnosis" is stated "Repeat c/s nonreassuring fet[al] tracings."

Plaintiffs' expert opines that without the strips it is not possible to determine the onset, extent and duration of the non-reassuring fetal tracings prior to the performance of the emergency c-section, as the strips are necessary to evaluate the actions and conduct of the defendants with regard to determining whether there were any departures from accepted medical practice at the time care was rendered to the maternal plaintiff. Plaintiffs' expert states, in fact, "that the fetal monitoring strips are the most critical evidence to determine the fetal well being or fetal distress at the critical time prior to delivery. The fetal monitoring strips would provide evidence as to the nature, extent and duration of fetal distress documented in the defendant's hospital records."

In opposing the motion LICH submits affidavits from Regina DeCarlo, M.D., board certified in both the fields of Pediatrics and Neurology and Psychiatry with Special Qualifications in Child Neurology, and Denise Guidetti, M.D., board certified in Obstetrics and Gynecology, with a sub-certification in the field of Maternal Fetal Medicine. Drs.

DeCarlo and Guidetti opine that based on review of the medical records and the deposition testimony of several witnesses, the monitoring of the maternal plaintiff did not indicate any abnormalities in the fetal heart tracings which would lead to intervention. They cite, for example, the infant's normal initial blood gas values as evidence that there was no pathological disruption of oxygen to the fetus immediately prior to delivery. Dr. DeCarlo additionally opines that the fact that the infant plaintiff had two discrete infarctions, one frontal and one in the basal ganglia unilateral in nature, is inconsistent with hypoxia which would lead to diffuse and bilateral damage. Drs. DeCarlo and Guidetti thus conclude that the absence of the fetal monitoring strips are not necessary to prove plaintiff's case since the records and testimony provide proof to a reasonable degree of medical certainty that there was no oxygen deprivation during the labor which caused injury to the infant plaintiff.

Analysis

“It is well settled that when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading” (*Baglio v St. John's Queens Hosp.*, 303 AD2d 341, 342 [2003]). That being said, striking a pleading is an extreme sanction and unless the party that lost or destroyed the evidence acted willfully, contumaciously, or in bad faith, a lesser sanction is usually appropriate although “courts will consider the extent of prejudice to a [non-responsible] party and whether dismissal is necessary as ‘a matter of elemental fairness’” (*Favish v Tepler*, 294 AD2d 396, 397 [2002], quoting *Puccia v Farley*, 261 AD2d 83, 85 [1999]).

While the strips are clearly relevant, the court is not convinced that their absence will prevent plaintiff from making a case against the defendant, and the extreme sanction of striking defendant's answer is not warranted in this case. Plaintiff has access to the written hospital records and progress notes, including the aforementioned "Labor & Delivery Operating Room Log, Cesarean Section Tally Sheet" which contains the entries "Emergent" and "Repeat c/s nonreassuring fet[al] tracings." In addition, plaintiff has been able to conduct adequate depositions of multiple witnesses who were involved in the plaintiff's treatment.

However, while plaintiff's motion to strike the answer of the defendant LICH is accordingly denied, the Court finds that under the circumstances presented in this case plaintiff will be entitled to a spoliation/negative inference instruction at trial (see, *De Los Santos v Polanco*, 21 AD3d 397 [2005]).

The Cross-Motion for Dismissal or Summary Judgment

As noted, Dr. Henry and Empire Center cross-move for an order dismissing plaintiffs' complaint as to them should plaintiff's motion be granted; or, alternatively, granting leave to file a late motion for summary judgment and thereafter granting summary judgment.

Initially, in light of the court's ruling on the spoliation motion, in which the court is declining to find that the plaintiff cannot proceed in the absence of the fetal monitoring strips, the factual and legal predicate upon which the cross-motion is based has not been established. Therefore, that portion of the cross-motion which seeks dismissal of the plaintiff's complaint based on the anticipated granting of the spoliation motion and striking of LICH's answer is denied.

With respect to that portion of the motion which seeks leave to file a late motion for summary judgment, the Note of Issue was filed on December 30, 2005. The cross-motion is dated December 7, 2006, and was served by personal delivery on December 8, 2006, which is 342 days after the filing of the Note of Issue.

Part 13 of the Uniform Rules of the Civil Term, Supreme Court, Second Judicial District, Kings County, provides that motions for summary judgment shall be made within sixty days of the filing of the note of issue. The Court of Appeals has held that courts may only entertain an untimely summary judgment motion when the movant demonstrates “good cause” for his or her delay, which the Court of Appeals has deemed to entail “a satisfactory explanation for the untimeliness” (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *see also Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725 [2004]), “rather than simply permitting meritorious, non-prejudicial filings, however tardy” (*Brill*, *id.*, at 652). Stated otherwise, “[w]hether there is merit to the late motion for summary judgment is not a relevant consideration” (*Czernicki v Lawniczak*, 25 AD3d 581 [2006]).

In addressing the issue of timeliness, the movants acknowledge that at the time the Note of Issue was filed a search had been conducted for the fetal monitoring strips without success. (The affidavit of Dawn Maynard, the Director of Medical Records at LICH, referred to above, is dated June 1, 2005, which is six months prior to the filing of the Note of Issue). Movants concede that they could have moved within 60 days of the Note of Issue for summary judgment based upon the medical affirmation of Dr. Nimaroff, defendants’ expert, which they now submit, and state that it is anticipated that the plaintiff would have then

opposed their motion and submitted her own expert's medical affirmation to support plaintiff's claims of a prima facie claim of medical malpractice. Yet movants state that "[i]t was not until [movants] received plaintiff's motion, that it became apparent that [the plaintiffs] were conceding that they could not make such a showing, based on the absence of the fetal monitoring strips. Defendants respectfully request that the Court, in its discretion, hear the following argument for summary judgment based upon these newly served statements."

As the Court of Appeals noted in *Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects [Habiterra Assoc.]* (5 NY3d 514, 521[2005]): "Litigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated (*see Miceli v State Farm Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Kihl v Pfeffer*, 94 NY2d 118 [1999])." Defendant's motion was admittedly made more than 60 days after the plaintiff filed a note of issue, in violation of Rule 13, and the court finds that the defendant has failed to establish good cause for the delay (*see CPLR 3212[a]*; *Giordano v. CSC Holdings, Inc.*, 29 AD3d 948 [2006]; *Bevilacqua v City of New York*, 21 AD3d 340 [2005]; *First Union Auto Fin. v Donat*, 16 AD3d 372 [2005]). Movant's decision to not move within the designated 60 day period, and to instead wait for plaintiff's spoliation motion, which would necessarily include a statement that plaintiff could not establish a prima facie case without the fetal monitoring strips, was a tactical strategic choice, made in disregard of Rule 13, and at movant's peril.

Were the court to address the merits of the motion by Dr. Henry and Empire Center, it would in any event be denied.

Analysis

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact (*Colely v Michelin Tire Corp.*, 99 AD2d 795 [1984]). A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant the court in directing judgment in favor of any party as a matter of law (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]). Upon a showing by the movant of entitlement to judgment as a matter of law, the opposing party must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts. When that occurs, a credibility question is presented requiring a jury's resolution (*Feinberg v Feit*, 23 AD3d 517 [2005]; *Shields v Baktidy*, 11 AD3d 671, 672 [2004]).

Here, upon the properly supported papers of both sides (*Marano v Mercy Hospital*, 241 AD2d 48 [1998]), the court finds that issues of fact exist which would preclude the granting of summary judgment. These factual issues are set forth in the affirmations of the parties' respective experts, which are summarized as follows.

In support of the motion for summary judgment, Dr. Henry and Empire Center submit the affirmation Dr. Michael Nimaroff, board-certified in Obstetrics and Gynecology. After

review of the pleadings, relevant records and deposition testimony, Dr. Nimaroff states the following with a reasonable degree of medical certainty.

The medical records of the maternal plaintiff reveal that she was seen for prenatal care at Empire Center from February 12 through August 16, 2001. The plaintiff was appropriately managed throughout her pregnancy and diagnostic examinations revealed an unremarkable pregnancy. Due to the evidence of maternal obesity, and abnormal test results, she was sent for additional testing, which ruled out gestation diabetes. Three sonograms confirmed the fetal size was consistent with dates and revealed no abnormalities. A physical examination revealed that there was no reason to believe that there was any problem with the pregnancy at that point. The plaintiff's prenatal care was well within the accepted standards of medical practice, and her admission to LICH on August 20, 2001 due to preterm contractions was not proximally related to any act and/or omission on the part of Empire Center during the prenatal care provided.

The maternal plaintiff presented to LICH in the early morning hours of August 20, 2001 and was formally admitted. The analysis upon admission was a 36-week pregnancy with preterm contractions and probable chorioamnionitis. According to the records the fetal heart rate was reported in the 170's at 4:15 a.m. Upon Dr. Henry's initial examination and contact with the plaintiff, the plan was to perform a cesarean section. By 5:00 a.m. the nurse's note reported a fetal heart rate in the 150-160's, following the administration of IV hydration, antibiotics and antipyretics. Dr. Nimaroff states that despite the absence of the fetal heart monitoring strips, the well-being of the fetus during labor is evidenced by the progress notes,

and it is shown that the fetal heart rate responded accordingly to the administration of medication and hydration.

The delivery of the infant-plaintiff by cesarean section was performed by Dr. Henry at 7:10 a.m. The infant weighed 7 pounds, 2 ounces and had Apgar scores of 6 and 8 at 1 and 5 minutes, respectively. The infant initially did well but was admitted to the NICU with respiratory distress. Pathology of the placenta revealed no evidence of chorioamnionitis but rather some intervillous thrombosis, indicating that the fetal tachycardia was likely a result of the maternal temperature.

Dr. Nimaroff opines that the plaintiff's prenatal course progressed without difficulty and was appropriately monitored and managed. Despite plaintiff's claim that this was an emergent cesarean section, there is only one note from an unidentified nurse in the medical records indicating as such. This unidentified nurse would not have had the ability to determine whether such a procedure was warranted, as the treating physician would make such a determination. Nevertheless, the plaintiff underwent a cesarean section within 2½ hours of admission of Dr. Henry's assessment.

The progress notes record the initial fetal tachycardia and that the fetal heart rate responded accordingly to the management initiated. Dr. Nimaroff has read the supporting affidavit of plaintiff's physician and agrees with it to the extent that the only evidence of any fetal distress is on a singular Tally Sheet. The remainder of the hospital records wholly support that there was no departure from good and accepted standards of medical care. Dr. Nimaroff believes that the fetal strips would support the finding of fetal well-being and be

evidence against any allegation of fetal distress occurring while the maternal plaintiff was at LICH. Further, the infant plaintiff's subsequently diagnosed CNS infarct did not result from any delay in performing the cesarean section but rather from an antepartum ischemic event.

In opposition, plaintiff submits the redacted affirmation of its expert, a board certified Obstetrician-Gynecologist, who states the following with a reasonable degree of medical certainty.

On August 20, 2001, the maternal plaintiff arrived at LICH at 1:00 a.m. with complaints of abdominal pain and irregular contractions. She was seen by a Triage Nurse and Dr. Runic, a Second Year Resident, placed in a triage room and set up with an electronic fetal monitor. According to the LICH medical chart, Dr. Henry was promptly notified of his private practice patient's arrival at 1:00 a.m. by Dr. Runic. At 1:40 a.m. Dr. Runic conveyed her findings of a maternal fever, fetal tachycardia and contractions every 2 to 4 minutes to Dr. Henry, and in response Dr. Henry issued orders, including that the patient be admitted to Labor and Delivery. For entirely unexplained reasons, the maternal plaintiff remained in Triage until 4:45 a.m., when she was finally admitted, which was almost four hours after presenting to LICH.

At 4:45 a.m. the decision was made to perform a cesarean section. It was not until 4:50 a.m. that the maternal plaintiff was first seen and examined by Dr. Henry, her doctor in charge of her care and treatment. Again for reasons unexplained, she was not taken to the operating room until 6:32 a.m., even though the decision to perform a cesarean section was made almost two hours earlier.

According to deposition testimony, the “Labor & Delivery Operating Room Log Cesarean Section Tally Sheet” (Operating Room Log) was primarily completed by LICH’s scrub and/or circulating nurses, including Nurse Elaine A. Vaughan (Nurse Vaughan). This Operating Room Log states that the maternal plaintiff underwent an “Emergent” C-Section and her Pre-Op Diagnosis was “Repeat C/S Non-reassuring Fetal Heart Tracings.”

At her deposition Nurse Vaughan admitted that she checked off “emergent” on the Operating Room Log for the reason that the cesarean section was performed, but she denied documenting on the Operating Room Log that she wrote the Pre-Op Diagnosis of “Non-reassuring Fetal Heart Tracings.”

Plaintiff’s expert states that it is his/her opinion that without the complete fetal monitoring strips defendant’s expert’s statements that there were no departures in the care and treatment rendered by Dr. Henry and his medical group are wholly unsupported. There is absolutely no documentation at all provided in the chart regarding fetal condition from 5:00 a.m. to 7:10 a.m. other than that the plaintiff underwent an emergent cesarean section because of non-reassuring fetal heart tracings. In fact, the testimony taken of the witnesses from the hospital indicate that any writings concerning abnormalities present on the tracings would be documented upon the paper tracings, which have never been available for review. It would be impossible to state as does defendant’s expert that the claims against Dr. Henry and his medical group are without merit, particularly when a writing is made in the patient’s chart stating an “emergent cesarean section” because of “non-reassuring fetal heart tracings.”

Plaintiff’s expert further opines that despite the failure of the defendants to produce

the fetal monitoring tracings, Dr. Henry and his medical group departed from good and accepted medical practice in the care and treatment rendered during plaintiff's labor and delivery while at LICH. This is so because based upon the medical records indicating a finding of non-reassuring fetal heart tracings, in the presence of maternal fever and fetal tachycardia, an earlier cesarean section was indicated within two hours from the time the maternal plaintiff presented to LICH. It was incumbent upon the treating physician to take steps to lower the fever, which will lower the fetal heart rate to normal, if there is no fetal distress. Other than administering one medication, which did not show that it had any effect within two hours of the plaintiff's arrival at LICH, Dr. Henry did not take appropriate and necessary steps to bring the maternal plaintiff's fever down so that the fetal heart rate would return to normal, and it was a violation of the standard of care to allow the fetal heart rate to remain tachycardic for greater than two hours in the face of non-reassuring fetal heart tracings.

Plaintiff's expert states that a cesarean section should have been performed by 3:00 a.m. at the latest, and the failure to perform the cesarean section resulted in substantial harm to the infant plaintiff in that he was caused to remain in a poor intrauterine environment for over six hours. As a result the fetal condition deteriorated. Plaintiff's expert opines that the plaintiff's labor and delivery was complicated by the maternal fever and fetal tachycardia and was not appropriately monitored or managed, and states that defendant's expert willfully ignores that the chart states that this was an "emergent" cesarean section and that the pre-op diagnosis was "non-reassuring fetal heart tracings." In addition, plaintiff's expert observes

that there are absolutely no writings at all in the chart between 5:00 a.m. and 6:32 a.m. concerning this patient.

Conclusion

Accordingly, plaintiff's motion for an order striking the answer of defendant LICH is granted only to the extent that plaintiff shall be entitled to a spoliation/negative inference charge at trial with respect to the missing fetal monitoring strips. The cross-motion by Dr. Henry and Empire Center to dismiss is denied, and that part of the cross-motion which seeks summary judgment is denied as untimely.

This constitutes the decision and order of the court.

ENTER,



HON. GERARD H. ROSENBERG

J. S. C.