[* 1]

4

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAKOWER Justice PART 5

Index Number : 117577/2005
GALLEGOS, WENDY
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4, 5
Replying Affidavits	6, 7, 8

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/5/08

EILEEN A. RAKOWER J.S.C.
lsc

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------X

WENDY GALLEGOS, an infant by her parents and natural Guardians RUBEN GALLEGOS and INES GALLEGOS, and RUBEN GALLEGOS and INES GALLEGOS, Individually,

Plaintiff,

Index No. 117577/05

Seq No.: 001

- against -

Decision and Order

THE CITY OF NEW YORK, and THE NEW YORK CITY DEPARTMENT OF EDUCATION, WESTSIDE WOMEN'S MEDICAL and DAVID GLUCK, M.D.,

Defendants.

----------X

HON. EILEEN A. RAKOWER

Plaintiffs bring this action for personal injuries allegedly sustained as a result of infant plaintiff, Wendy Gallegos ("Ms. Gallegos"), having undergone "a termination of pregnancy without proper counseling and parental notification" at the Westside Women's Medical Pavilion located at 1841 Broadway in the County and State of New York on December 3, 2004. The procedure was performed by Dr. David Gluck at the Westside Women's Medical facility. Defendants Westside Women's Medical and David Gluck, M.D. ("Westside") move for summary judgment pursuant to CPLR 3212. City cross-moves for summary judgment. Plaintiffs oppose both the motion and the cross-motion and also cross-move to amend the complaint in order to substitute Ms. Gallegos as plaintiff, on her own behalf, since she has now reached the age of majority. The proposed amended complaint does not contain any cause of action on behalf of each of Ms. Gallegos' parents, individually. Westside opposes plaintiffs' cross-motion to amend, arguing that the amendment changes the cause of action from "lack of parental consent," to that of "lack of informed consent," which sounds in medical malpractice.

Ms. Gallegos relays the facts as follows: when Ms. Gallegos was fourteen years old and in the ninth grade at the George Washington High School of International Business and Finance ("GW Highschool"), she discovered she was pregnant by her then eighteen year old boyfriend. She reports that "a doctor" from the "school clinic" named "Rosemarie" gave her a pregnancy test and that it came out positive. When Rosemarie asked Ms. Gallegos what she wanted to do, Ms. Gallegos told her that she "wasn't ready to have a kid." Aside from Rosemarie, she also told "Michelle," the "guidance counselor at the clinic" that she was pregnant. Michelle scheduled an appointment for her to have an abortion at Westside's facility. Ms. Gallegos testified that she did not want to tell her parents about the pregnancy because "they wouldn't accept the decision that I made to have an abortion." After the procedure, plaintiff reported to Michelle that she was fine. About six months later, Ms. Gallegos' parents found the clinic paperwork. Her mother arranged for Ms. Gallagos to see a family counselor. Ms. Gallagos stopped seeing the counselor sometime in 2006. It is undisputed that Ms. Gallagos did not suffer physical harm as a result of the abortion.

As a threshold matter, plaintiffs' cross-motion to amend is granted (*see* 3025[b]). Despite Westside's contention that plaintiff cannot now assert a new cause of action for lack of informed consent, there is no prejudice where no new facts have been asserted and "any legal, as opposed to factual, objections defendant might have against the new causes of action have already been made in opposition to the motion to amend." (*England v. Sanford*, 167 AD2d 147[1st Dept. 1990]). While plaintiff failed to provide notice of a medical malpractice action pursuant to CPLR 3406(a), the appropriate remedy is to issue a conditional order, granting plaintiff permission to promptly file a late notice. Finally, plaintiff shall be permitted to amend in order to substitute Wendy Gallegos in place of infant plaintiff as she has reached the age of majority. (*Ramirez ex rel. Medina v. City of New York*, 2003 WL 21295289, *aff'd Ramirez v. City of New York*, 13 AD3d 248[1st Dept. 2004]). The balance of the motions will be considered with the proposed amended pleadings.

City, in support of its cross-motion, submits the following: plaintiffs' notice of claim; its answer; plaintiffs' bill of particulars; plaintiff's deposition testimony; the deposition testimony of Juan Alvarez, principal of GW Highschool at the time of the incident; a "Memorandum of Understanding" between New York Presbyterian ACNC /Colombia University School of Public Health ("MOU"); and the New York City Department of Education's "Regulation of the Chancellor, Section A-740, Pregnant and Parenting Students and Reproductive Health Privacy," ("A-740"), issued January 9, 2004. City asserts that, despite the plaintiffs' and co-defendants' use of terms

including "high school clinic" and "school counselor,"the employees that plaintiffs refer to as Michelle and Rosemarie are actually employees of a private clinic run by Columbia Presbyterian ("Columbia") which served the high school population as a support resource, including support for pregnant students.

Plaintiffs, in opposition, submit: their Note of Issue; the deposition transcript of Mr. Alvarez; a copy of A-740 and a Regulation of the Chancellor, School Based Centers and Other School Health Service Projects, Section A-705 ("A-705"). Plaintiffs first argue that City filed its motion more than 120 days from the date that the note of issue was filed. Thus, the motion is untimely and should be disregarded. Next, plaintiffs argue that it is undisputed that Mr. Alvarez was aware of Ms. Gallegos' pregnancy before the abortion and that City's failure to appoint a faculty member to assist both Ms. Gallegos and her parents, was a violation of A-740. Plaintiffs also point to A-705 to show that Columbia was an agent of City, and was under City's control.

The note of issue in the instant matter was filed on March 24, 2008. Defendant may file a motion for summary judgment within 120 days. Thus, the motion for summary judgment is timely if filed by July 22, 2008. The instant motion was filed and received by motion support on July 22, 2008. Thus, it is timely. It is noted that the court has discretion to allow a party to file a summary judgment motion after the statutory time 'on good cause shown." (*see*, CPLR 3212[a]). Here, City asserts that any delay in filing was justified since plaintiffs filed their note of issue before all discovery was complete, including depositions of key witnesses. Indeed, the deposition of Juan Alvarez on behalf of the Department of Education, submitted within plaintiffs' affirmation in opposition to City's cross motion, was held on June 25, 2008.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249,

251-252 [1st Dept. 1989]).

City first argues that "Rosemarie" and "Michelle" were not City employees, but were employees of a private clinic servicing the students. In any event, City owed no duty to Ms. Gallegos to obtain the consent of her parents before she underwent the abortion. Nor is there any parental notification requirement, even if City knew of Gallegos's pregnancy.

Plaintiff seeks to hold City liable for its complicity in keeping knowledge of the pregnancy and abortion from Ms. Gallegos's parents, and failing to follow its own rules regarding "setting out the importance of parental involvement regarding student choices regarding pregnant students, and requiring written informed parental consent prior to referring a student to medical providers outside the school." However, in plaintiff's bill of particulars, she does not cite to such rules. Indeed, City provides Regulation of the Chancellor A-740, updated September 6, 2002, which states, in relevant part:

> 2.2 School officials shall not demand or require any student to undergo tests for pregnancy, sexually transmitted diseases or HIV/AIDS.
>
> 2.3 School officials shall not demand or require any student or his/her health care provider to disclose the results of tests for pregnancy, sexually transmitted diseases or HIV/AIDS, nor shall any student or his/her health care provider be required to disclose the student's status or condition with regard to pregnancy, HIV/AIDS, sexually transmitted diseases or sexual activity.

In *Planned Parenthood of Central Missouri v. Danforth*, 428 US 52[1976], the court found that "the State may not impose a blanket provision . . . requiring the consent of a parent . . . as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." (*Id.* at 74). (*See Bellotti v. Baird*, 443 US 622[1979], where the Court examined parental consent statutes further and found unconstitutional a statute which required minors to attempt to obtain parental consent before seeking a judicial alternative, concluding that "every minor must have the opportunity . . . to go directly to court without first consulting or notifying her parents.")

While many states have enacted laws which require parental consent or its judicial alternative, New York is not among them. The New York Legislature has

declined on two occasions to add a parental notification requirement to its abortion statute, Penal Law Section §125.5.[1] New York Public Health Law §2504(3) also contains no parental notification requirement. It states: "[a]ny person who is pregnant may give effective consent for medical, dental, health and hospital services relating to prenatal care."

Westside argues it obtained the proper consent before performing the medical procedure on December 3, 2004. Westside, in support of its motion, submits the following: the un-amended summons and complaint; its answer; plaintiffs' bill of particulars; Ms. Gallegos' deposition transcript; and the "Consent for Termination of Pregnancy" form signed by Ms. Gallegos. Westside argues that Ms. Gallegos was informed of all the risks and complications associated with the procedure, and that the Consent for Termination of Pregnancy form, signed by Ms. Gallagos in the presence of a witness, was sufficient evidence that Wendy Gallegos was fully apprised of the risks and potential complications of an abortion. Further, Westside points out that plaintiff does not allege that any of the complications associated with the procedure proximately caused injury to Ms. Gallagos.

Public Health Law §2805-d states, in relevant part:

> Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation . . .

Further, the statute states:

> for a cause of action therefor it must also be established that a reasonably prudent person in the patients position would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought.

---

[1]See S.B. 3277, 2001-2002 Reg. Sess. (N.Y. 2001). The bill was reintroduced in 2005, but died in committee. See Assemb. B. 6439, 2005-2006 Reg. Sess (N.Y. 2005).

Specific to abortions, Public Health Law §2805-d does not require physicians to refer patients to counseling on abortion alternatives or to provide such counseling themselves to patients. (*Rodriguez v. Epstein*, 244 AD2d 202[1st Dept. 1997]). In any event, Ms. Gallegos' testified that at the time of her unplanned pregnancy, she "wasn't really interested in knowing" about any alternatives to abortion. (*See Perez v. Park Madison Prof. Laboratories, Inc.*, 212 AD2d 27, where the Court found that: "[t]his state has no statute singling out abortion from other medical procedures as requiring specific methods to assure that a women's consent is informed." [*Id.* at 274].)

Westside submits a form dated December 3, 2004, and signed by Ms. Gallegos in the presence of a witness, Susan Israel LMSW, titled "Consent for Termination of Pregnancy" which states, in relevant portion:

> I acknowledge that I have met with a patient educator and I have considered my alternatives regarding this pregnancy and I voluntarily and of my own free will consent to the termination of pregnancy procedure. . . .
>
> I understand that the complications associated with pregnancy's terminations are generally less severe than those associated with childbirth. Nonetheless, I realize that there are risks of minor and major complications which may occur in this procedure. I understand that possibility of the following complications, and that I may need to be hospitalized for their treatment and/or investigation:
>
> > PERFORATION OF THE UTERUS/INCOMPLETE TERMINATION OF THE PREGNANCY ABSENCE OF MENSTRUATION (ALSO KNOWN AS ASHERMAN'S SYNDROME) ADVERSE REACTIONS TO MEDICINES OR ANESTHESIA/PAINANDCRAMPS EXCESSIVE BLEEDING/INFECTION
>
> The above-named patient is firm in her decision to terminate her pregnancy. The procedure has been explained and she is aware of the risks . . .

Westside has made a prima facie showing of informed consent by establishing that it informed plaintiff of the risks associated with the abortion and that Ms.

Gallegos signed the written consent form indicating her understanding of those risks. (see generally *Lynn G. v. Hugo*, 96 NY2d 306[2001]). Plaintiff does not dispute having understood and signed the forms.

Plaintiff alleges she suffered "severe and serious psychological damages" as result of having the abortion. However, plaintiff is unable to demonstrate that a lack of informed consent as to the abortion procedure performed, proximately caused such damages.

Ms. Gallagos testified in her deposition:

> Q: After December 3rd, 2004, did you speak with Michelle . . .?
> . . .
> A: She asked me how I was doing , how did it go, if I was really okay, were there any side effects?
> Q: What did you tell Michelle at that time?
> A: I told her everything was great . . .

Ms. Gallegos' mother arranged for her to see a counselor because "she thought there was something wrong with [her]." Ms. Gallagos states that she told her mother that she was "fine." Ms. Gallagos stopped seeing the counselor because "she was like sort of doing a diagnostic of how I was doing, and she - - well, she said that I was okay, I didn't need further counseling."

Finally, Ms. Gallagos' own deposition testimony establishes that she willingly consented to the abortion, did not wish to hear about any alternatives and did not suffer any physical injury from the procedure.

In opposition to Westside's motion, Ms. Gallegos provides an affidavit, dated September 7, 2008. Specifically, it states:

> At no time were any alternatives to the abortion offered to me, by either Michelle the guidance counselor, or anyone at Westside Women's Medical. At no time did I speak to a counselor or doctor at Westside concerning alternatives to an abortion, or risks of the procedure.

A self-serving affidavit of this nature "can only be considered to have been tailored to avoid the consequences of her earlier testimony." (*Phillips v. Bronx Lebanon Hosp.*,

268 AD2d 318[1st Dept. 2000]).

Wherefore it is hereby

ORDERED that plaintiffs' cross-motion to amend their complaint is granted; and it is further

ORDERED that defendants Westside Women's Medical and David Gluck, M.D.'s motion is granted and the complaint is dismissed as against them; and it is further

ORDERED that defendant the City of New York's cross-motion is granted and the complaint is dismissed as against it; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of said defendants.

DATED: December 5, 2008

EILEEN A. RAKOWER, J.S.C