

Bustos v Lenox Hill Hosp.
2009 NY Slip Op 31083(U)
May 8, 2009
Supreme Court, New York County
Docket Number: 107925/04
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

BUSTOS, MARIA PILAR, ETAL.

INDEX NO. 107925/04

MOTION DATE 3/31/09

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

- v -
LENOX HILL HOSPITAL,
ETAL.

The following papers, numbered 1 to 24 were read on this motion to/for summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-11

Answering Affidavits — Exhibits _____

XMT 12-14

Replying Affidavits _____

15-24

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDERS

FILED

MAY 14 2009

COUNTY CLERK

Dated: 5/8/09

Jh

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

-----X
MARIA PILAR BUSTOS and CESAR BUSTOS,

Plaintiff,

-against-

LENOX HILL HOSPITAL, PEDRO SEGARRA, M.D.
and DR. "JOHN" CHAN (first name being fictitious
and unknown),

Defendants.
-----X

JOAN B. LOBIS, J.S.C.:

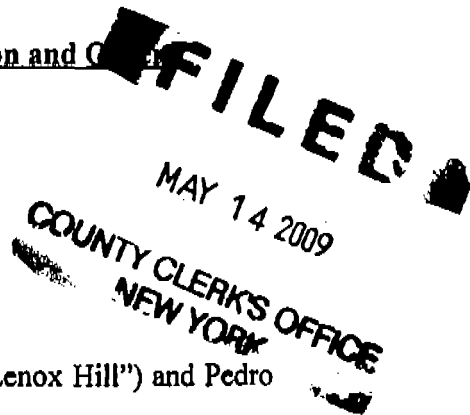
In Motion Sequence Number 003, Lenox Hill Hospital ("Lenox Hill") and Pedro Segarra, M.D. ("Dr. Segarra") (together "defendants")¹ move for an order, pursuant to C.P.L.R. Rule 3212, granting them summary judgment, with prejudice, and amending the caption by deleting the names of the moving defendants. Plaintiffs cross-move for an order, pursuant to C.P.L.R. Rule 3212(f), denying defendants' motion as premature.

This is an action in which plaintiffs allege medical malpractice and lack of informed consent on behalf of Maria Pilar Bustos, and loss of consortium on behalf of Cesar Bustos. Plaintiffs commenced this action by serving a summons and complaint on or about May 25, 2004. Issue was joined by defendants' service of answers on or about June 14, 2004 and June 28, 2004. Plaintiffs served a verified bill of particulars on or about September 28, 2004. Ms. and Mr. Bustos were deposed over the course of four days in March 2005. On October 11, 2005, this case was stayed pending an appeal of the June 14, 2005 decision of the Hon. Eileen Bransten, to whom this case was

¹ A review of the court file indicates that Dr. "John" Chan (first name being fictitious and unknown) was never served.

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Decision and Order



originally assigned. The Appellate Division rendered a decision on May 18, 2006, and the stay was lifted by a stipulation that I so-ordered on March 27, 2008. Thereafter, on July 18, 2008, Dr. Segarra was deposed. The note of issue was due by December 31, 2008, but it has not yet been filed.

This action arises out of the labor and delivery of Ms. Bustos' son on April 1, 2003. Plaintiffs claim that defendants departed from good and accepted standards of medical practice by failing to properly evaluate the size of the fetus and failing to recommend a cesarean section, thereby causing Ms. Bustos to sustain symphysis pubis diastasis—a separation and/or fracture of the lower pelvic bone—following the vaginal delivery of her son, requiring surgical intervention and pinning. At the heart of these allegations is plaintiffs' claim that defendants improperly applied excessive force during the performance of a McRobert's maneuver in the delivery room. A McRobert's maneuver is a procedure that "is performed [during labor] to facilitate delivery by forcefully pushing the patient's thighs onto the abdomen and simultaneously spreading the patient's legs outward." Bustos v. Lenox Hill Hosp., 29 A.D.3d 424, n.1 (1st Dep't 2006), citing Welsh v. Scheinfeld, 21 A.D.3d 802 (1st Dep't 2005).

On October 17, 2002, Ms. Bustos came under the care of Dr. Segarra for her second pregnancy.² She presented for follow-up appointments on November 21, 2002; December 19, 2002; February 10, 2003; February 24, 2003; March 13, 2003; March 27, 2003; and March 31, 2003. On the morning of April 1, 2003, Ms. Bustos was admitted to Lenox Hill to deliver her child. At approximately 9:42 a.m., she delivered a healthy 10-pound baby boy via vaginal delivery. Following

² Plaintiff had previously delivered a healthy 9-pound baby girl via vaginal delivery in 1997, without incident.

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the delivery, Ms. Bustos complained of bilateral back and leg pain. On April 2, 2003, an x-ray showed that she had separation of the symphysis pubis and widening of the sacroiliac joints. On April 3, Ms. Bustos was transferred to the Hospital for Special Surgery ("HSS") for surgery to repair her pelvis.

With respect to the positioning of Ms. Bustos' legs during the delivery, Ms. Bustos testified that at the time of delivery, her right leg was positioned out to the right side of her body and a resident supported her left ankle. Mr. Bustos testified that the resident was holding his wife's left ankle, and that her right leg was in a stirrup during delivery. Dr. Segarra testified that Ms. Bustos' baby was delivered spontaneously, and that neither the resident, a physician named Dr. Chen, nor a nurse moved Ms. Bustos' leg or legs while the baby was being delivered. Dr. Segarra testified that a McRobert's maneuver was not performed during Ms. Bustos' delivery.

The party moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant was negligent. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). "[B]are allegations which do not refute the specific factual allegations of medical malpractice in the bill of particulars are insufficient to establish entitlement to judgment as a matter of law." Grant v. Hudson Val. Hosp. Ctr., 55 A.D.3d 874 (2d Dep't 2008). Once the movant makes a *prima facie* showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, supra at 324 (citation omitted). Specifically, this requires, in a medical malpractice action, that a plaintiff opposing a summary judgment motion

must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact. . . . General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion.

Id. at 324-25 (citations omitted).

Defendants argue that the deposition testimony and medical records establish that no force, let alone excessive force, was applied to Ms. Bustos' legs during the delivery. In support of their motion for summary judgment, defendants annex the affirmation of their expert, Henry K. Prince, M.D., who sets forth that he is a physician duly licensed to practice medicine in the State of New York and board certified in obstetrics and gynecology. Dr. Prince sets forth that he reviewed plaintiffs' bill of particulars, the parties' deposition transcripts, and the medical records from Dr. Segarra, Lenox Hill, and HSS. He explains that

the symphysis pubis is a joint that connects the two halves of the pelvis at the front. This joint is strengthened by a dense network of ligaments to ensure that very little movement ordinarily occurs. During pregnancy, the female body produces hormones called progesterone and relaxin, which soften these ligaments. As a result, the symphysis pubis loosens and moves during and just after pregnancy in order to allow passage of the infant. Symphysis pubis diastasis is a condition in which the joint loosens and leaves an abnormally wide gap between the two pelvic bones.

Dr. Prince sets forth that symphysis pubis diastasis is a known, but rare, complication of delivery.

With respect to the McRobert's maneuver, defendants' expert Dr. Prince asserts that the procedure is a labor and delivery maneuver generally used to resolve actual or suspected shoulder

dystocia, a childbirth complication in which the anterior shoulder of the infant cannot—or requires significant manipulation to—pass below the symphysis (i.e., the shoulders fail to deliver shortly after the head). Dr. Prince explains that the McRobert's maneuver involves sharply hyperflexing the mother's legs upon her abdomen, thereby rotating the symphysis pubis towards the anterior and straightening the sacrum. The maneuver is normally performed by having two assistants grab the back of the mothers' thighs and push them onto the abdomen, and is often followed by the application of suprapubic pressure.

Dr. Prince opines that there was no indication for a caesarian section, either prenatally or during the labor and delivery. Ms. Bustos had a "proven pelvis," having previously delivered a healthy nine pound child by vaginal delivery in 1997. Dr. Prince contends that based on the progress of the pregnancy and the findings during labor and delivery, the standard of care warranted a trial of labor and delivery, and that a caesarian section was not indicated. Furthermore, Dr. Prince opines that Ms. Bustos' clinical pelvimetry was adequately assessed; that Dr. Segarra's decision to proceed with a vaginal delivery satisfied the standard of care; and, that the delivery was not the proximate cause of any injury to plaintiff.

Dr. Prince avers that a McRobert's maneuver was never performed. Ms. Bustos' records do not document a McRobert's maneuver. Dr. Prince contends that both Ms. and Mr. Bustos' descriptions of the positioning of Ms. Bustos' legs during delivery indicate that the McRobert's maneuver was not used. Their testimony reveals no evidence that her legs were hyperflexed onto her abdomen during delivery. Dr. Prince opines that the positioning and movement of Ms. Bustos' legs during the delivery was appropriate, and that based on plaintiffs' descriptions, no

force, let alone excessive force, was applied during the delivery. Accordingly, Dr. Prince claims that the mother's positioning during the delivery satisfied the standard of care, and was not the proximate cause of any condition of which plaintiffs complain. Finally, Dr. Prince sets forth that Ms. Bustos received adequate postnatal care; that her complaints of pain were followed closely after delivery; and, that her postnatal care satisfied the standard of care and did not proximately cause any condition of which plaintiffs complain. Therefore, Dr. Prince concludes that neither Dr. Segarra nor any Lenox Hill staff members departed from good and accepted standards of medical care in connection with assessing the mother's pelvimetry; deciding to proceed with a vaginal delivery as opposed to a cesarean section; performing the labor and delivery; positioning Ms. Bustos; or, caring for and treating Ms. Bustos prior to her discharge.

Defendants have demonstrated their *prima facie* entitlement to summary judgment as a matter of law. They have provided an affirmation by which their expert opines that the departure that plaintiffs allege—that defendants improperly applied excessive force during the performance of a McRobert's maneuver in the delivery room—did not occur, based on the parties' deposition testimony and Ms. Bustos' medical records. Defendants have demonstrated that no triable issue of fact exists as to plaintiffs' contention. Accordingly, the burden shifts to plaintiffs to demonstrate "the existence of material issues of fact which require a trial of the action." Alvarez, supra at 324 (citation omitted).

In response to defendants' *prima facie* showing, plaintiffs cross-move for an order denying defendants' motion pursuant to C.P.L.R. Rule 3212(f); directing defendants to provide Lenox Hill's rules and regulations; and, granting plaintiffs "a reasonable time" to oppose the

summary judgment motion after defendants provide this discovery. By plaintiffs' attorney's affirmation, plaintiffs state that they requested a copy of the table of contents from the rules and regulations of Lenox Hill, which defendants provided on February 19, 2009. Plaintiffs' attorney states that during a conference call with my court attorney, defense counsel agreed to provide copies of the rules and regulations. Plaintiffs now assert that defendants have refused to provide these rules and regulations, despite "several conferences with the court and correspondence requesting same." Plaintiffs' attorney states that their expert has requested to see a copy of Lenox Hill's rules and regulations prior to submitting his affidavit in opposition to defendants' motion for summary judgment. Plaintiffs also argue that the hospital has the burden of proof to establish that it and Dr. Segarra complied with its own pertinent rules and regulations, and ask this court to deny defendants' motion on the basis that it is premature. Plaintiffs do not make any attempt to substantively oppose defendants' motion.

In opposition to plaintiffs' cross motion and in support of their motion, defendants point out that plaintiffs' cross motion is one for discovery, and as such, must include an affirmation of good faith as required by 22 N.Y.C.R.R. § 202.7(a), which it does not. Defendants contend that the only discovery plaintiffs sought between May 18, 2006 (the date the appeal was decided) and November 18, 2008 (the date this motion was served) was the deposition of Dr. Segarra and a statement from defendants as to whether there were any rules regarding the performance of caesarian sections at Lenox Hill, both of which defendants timely provided. Defendants further argue that plaintiffs' counsel's statements regarding the telephone conversation with my court attorney are mischaracterizations of what actually took place during that conference; that, in fact, what was discussed during that conference was the *table of contents* for the rules and regulations, not the rules

and regulations themselves; and, that defendants quickly provided the table of contents to plaintiffs, despite the fact that the table of contents had been provided previously to plaintiffs' former counsel in May 2005. Defendants also argue that plaintiffs failed to set forth any explanation as to why the rules and regulations are necessary to form an expert opinion or how any such rules and regulations will assist in determining whether excessive force was used in the delivery. Defendants cite to the lengthy adjournments already granted plaintiffs during the pendency of this motion; that this order to show cause was first made returnable by the court on December 16, 2008, but was adjourned at plaintiffs' request to January 27, 2009, to obtain an affidavit from their expert; that when plaintiffs requested the adjournment, they made no mention of any outstanding discovery required for their expert's opinion; that plaintiffs brought a discovery motion on or about January 7, 2009, which was subsequently withdrawn; and, that plaintiffs had an additional adjournment to March 31, 2009, allowing plaintiffs over four months to properly oppose the instant motion.

A review of the county clerk's file shows two instances where this court ordered defendants to produce certain hospital rules and regulations. First, on October 12, 2005, in the preliminary conference order signed by Justice Bransten, defendants agreed to furnish Lenox Hill's rules and regulations regarding obstetrics and gynecology, and labor and delivery, to the extent such rules and regulations existed for the year 2003. Then, by stipulation that I so-ordered on October 28, 2008 (the "October 2008 Order"), defendants were ordered to produce "any and all hospital rules and regulations in effect on [April 1, 2003] regarding cesarean section[s] in Lenox Hill Hospital within 20 days." As to the October 2008 Order, defendants annex their letter response to plaintiffs, dated November 25, 2008, by which they inform plaintiffs that Lenox Hill "did not maintain any written

rules, regulations, protocols or procedures regarding the performance of cesarean sections in April 2003.”

Uniform Rule § 202.7 mandates that before a discovery motion is brought, counsel must submit an affirmation that he or she has “conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” 22 N.Y.C.R.R. § 202.7. Plaintiffs’ counsel fails to submit a separate affirmation of good faith, and his affirmation in support of the cross motion contains only a vague statement that “defendants’ counsel has refused to provide [the] Rules and Regulations even though [the attorneys] have had several conferences with the court and correspondence requesting same.” Only one letter, dated January 28, 2009, is annexed to plaintiffs’ papers. To confer in good faith necessitates a discussion, and § 202.7(c) requires that the details of such consultation be set forth. Eaton v. Chahal, 146 Misc. 2d 977, 983 (Sup. Ct. Rensselaer Co. 1990) (noting that good faith means that “[s]ignificant, intelligent and expansive contact and negotiations must be held between counsel to resolve any dispute and such efforts must be adequately detailed in an affirmation.”). Plaintiffs’ vague affirmation does not demonstrate good faith. See Estate of Jacques Montrevil, N.Y.L.J., July 15, 2008, at 41, col. 4 (Surr. Ct. Kings Co. 2008), citing Eaton, supra. For this reason alone, plaintiffs’ cross motion must be denied.

Assuming, *arguendo*, that plaintiffs had annexed a proper affirmation of good faith, their motion would be denied nevertheless. Under C.P.L.R. Rule 3212(f), in order to deny or hold in abeyance this motion as premature due to outstanding discovery, plaintiffs must demonstrate that “facts essential to justify opposition may exist but cannot then be stated.” Plaintiffs have failed to offer anything of an evidentiary nature supporting their theory that excessive force was applied

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during the performance of a McRobert's maneuver during Ms. Bustos' labor and delivery of her child. See Noonan v. New York Blood Center, Inc., 269 A.D.2d 323, 323-24 (1st Dep't 2000). Given defendants' assertions that a McRobert's maneuver was never performed, plaintiffs have not pointed to any basis on which it may be concluded that the injuries to Ms. Bustos' pelvis were due to excessive force applied during a McRobert's maneuver. Id. at 324. Plaintiffs failed to make any proffer as to how the discovery sought might add to their case, nor have they explained why they delayed in seeking this allegedly "relevant" discovery for almost one year after the stay was lifted. See Ingalsbe v. Chicago Ins. Co., 287 A.D.2d 939, 940 (3d Dep't 2001).

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed as against all defendants; and it is further

ORDERED that plaintiffs' cross motion is denied in its entirety.

This constitutes the decision and order of the court. The Clerk is directed to enter judgment accordingly.

Dated: May 8, 2009

FILED


JOAN B. LOBIS, J.S.C.

MAY 14 2009

COUNTY CLERK'S OFFICE
NEW YORK
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