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

PRESENT: JOAN B. LOBIS Justice

PART 6

Index Number : 107925/2004
BUSTOS, MARIA DEL PILAR
VS.
LENOX HILL HOSPITAL
SEQUENCE NUMBER : 005
REARGUMENT/RECONSIDERATION

INDEX NO.

MOTION DATE 9/9/09

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-9, 91-98
Answering Affidavits — Exhibits	10-13
Replying Affidavits	14

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED
OCT 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/19/09

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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

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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.

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Index No. 107925/04

Decision and Order

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

In Motion Sequence Number 005, plaintiffs seek renewal and reargument of Motion Sequence Number 003, by which Lenox Hill Hospital ("Lenox Hill") and Pedro Segarra, M.D. ("Dr. Segarra") (together, "defendants") moved for an order, pursuant to C.P.L.R. Rule 3212, granting them summary judgment. The court granted defendants' motion for summary judgment in a decision and order dated May 8, 2009 (the "May 2009 Decision") and dismissed plaintiffs' complaint in its entirety. For the reasons stated below, plaintiffs' motion for renewal is granted and, upon the granting of renewal, the motion for summary judgment is denied. The parties shall appear for a status conference on November 10, 2009.

A full recitation of the history of this case is set forth in the May 2009 Decision, familiarity with which is presumed. Briefly, plaintiff Maria Pilar Bustos seeks to recover damages for injuries that she alleges occurred during the delivery of her son, Cedric, on April 1, 2003, and plaintiff Cesar Bustos seeks to recover for the loss of consortium that resulted from Ms. Bustos' injuries. Plaintiffs assert that the birth was mismanaged and that defendants departed from good and accepted medical practice by failing to properly evaluate the size of the fetus and failing to

recommend a cesarean section. Plaintiffs allege that Ms. Bustos suffered a symphysis pubis diastasis separation and fracture as a result of the improper "hyper flexion-abduction maneuver" during the late stage of labor. This maneuver was performed after an epidural had been administered. Ms. Bustos was transferred to the Hospital for Special Surgery on April 4, 2003. She underwent surgical intervention and fixation with plates and screws to repair the fracture and stabilize both sacroiliac joints. She asserts that she continues to experience pain.

The course of this lawsuit has not been a model of efficient litigation. The complaint was filed on May 25, 2004. Approximately one year later, defendants moved for a protective order prohibiting plaintiffs from photographing and videotaping the delivery area at Lenox Hill Hospital. By written decision entered on June 28, 2005, the Hon. Eileen Bransten denied defendants' request and permitted plaintiffs to photograph and videotape the delivery area; in the same decision and order, the matter was scheduled for a pretrial conference for the middle of July 2005. Defendants appealed the decision, and on October 11, 2005, the matter was stayed by the Appellate Division pending the appeal. The Appellate Division reversed Justice Bransten in a decision dated May 18, 2006. Effective, January 1, 2008, Justice Bransten was reassigned to the Commercial Division and the undersigned took over her inventory.

This matter came to this court's attention when plaintiffs moved to lift the stay and compel discovery. The parties stipulated to remove the stay, which this court so-ordered on March 27, 2008, and the matter was set down for a status conference on April 22, 2008. In the interim between Justice Bransten's decision and this case being restored to the active calendar, plaintiffs changed attorneys. Plaintiffs filed their consent to change attorneys on or about June 24, 2008.

Between March 2008, when the stay was lifted, and March 31, 2009, when the parties appeared for oral argument on Motion Sequence Number 003, the parties had several status conferences at which this court addressed ongoing discovery disputes. At a conference on October 28, 2008, in addition to ordering defendant hospital to produce certain rules and regulations, the note of issue date was extended until December 31, 2008, and a further conference was set for January 20, 2009. Defendants filed their motion for summary judgment by order to show cause on or about November 20, 2008, and the return date was set for December 16, 2008. Subsequently, the return date of Motion Sequence Number 003 was adjourned three times: to January 27, 2009; to February 24, 2009; and, finally to March 31, 2009. Before Motion Sequence Number 003 was fully submitted, on or about January 7, 2009, plaintiffs filed a motion for an order to compel discovery, stay defendants' motion for summary judgment, and extend their time to file the note of issue (Motion Sequence Number 004). On or about March 20, 2009, in response to Motion Sequence Number 003, plaintiffs served a cross motion for an order, pursuant to C.P.L.R. Rule 3212(f), denying defendants' motion as premature and granting plaintiffs a "reasonable time" to oppose defendants' summary judgment motion. On March 31, 2009, Motion Sequence Number 004 was deemed withdrawn, and Motion Sequence Number 003 was fully submitted. The May 2009 Decision granting defendants' motion and denying plaintiffs' cross motion was entered on May 14, 2009.

In opposing defendants' motion for summary judgment, plaintiffs—relying on their cross motion for relief pursuant to C.P.L.R Rule 3212(f)—offered no expert affidavit or affirmation in response to defendants' expert's opinion that no malpractice occurred during the delivery of

Cedric. Only now have plaintiffs come forward with an expert affidavit from Michael Plotnick, M.D., a board-certified orthopedist, which sets forth deviations from the standards of accepted obstetric practice. Plaintiffs argue that this affidavit should be considered new facts not offered on the prior motion and, if considered, would change the prior determination. See C.P.L.R. Rule 2221(d)(2). Defendants oppose renewal, arguing that plaintiffs' failure to submit the expert's affidavit should not be considered since plaintiffs offered no reasonable justification for the failure to submit an expert affidavit on the prior motion. They argue further that in the event renewal is granted, the court should adhere to its original determination and grant summary judgment to defendants.

Plaintiffs claim that their expert, Dr. Plotnick, was not initially forthcoming with his affidavit. He had been retained by plaintiffs' prior counsel, moved out of New York State, and was uncooperative with plaintiffs' current counsel. Plaintiffs argue that this explanation satisfies the requirement of C.P.L.R. Rule 2221(e)(3) for reasonable justification for the failure to present the facts on the prior motion. But, even if they offered no justification, plaintiffs argue that renewal should be granted in the interest of justice and substantial fairness, citing to, inter alia, Trinidad v. Lantigua, 2 A.D.3d 163 (1st Dep't 2003); Mejia v. Nanni, 307 A.D.2d 870 (1st Dep't 2003); and, Tishman Constr. Corp. v. City of New York, 280 A.D.2d 374 (1st Dep't 2001).

In response to plaintiffs' motion, defendants urge to this court to follow a line of cases which hold that renewal should not be used to give a party a second chance to argue facts that were known at the time the motion was submitted, but not presented. Healthworld Corp. v. Gottlieb, 12

A.D.3d 278 (1st Dep't 2004); Chelsea Piers Mgmt. v. Forest Elec. Corp., 281 A.D.2d 252 (1st Dep't 2001). Defendants also rely on cases that recite the longstanding principles of the importance of finality and the prohibition against relitigating issues that have been determined previously. Buechel v. Bain, 97 N.Y.2d 295 (2001); D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659 (1990).

There is no question that the information contained in Dr. Plotkin's affidavit was known or should have been known at the time of the return date of the summary judgment motion, and that plaintiffs' attorney's reasons for not including it or an affidavit of a different expert were less than overwhelming. Plaintiffs' counsel had a calculated strategy to cross-move for a stay pursuant to C.P.L.R. Rule 3212(f) but did not prevail. The failure to address the merits of the claim of medical malpractice, however, must be evaluated by the more flexible standard enunciated in the cases cited by plaintiffs. Plaintiffs should be allowed their day in court. There is a strong tradition of having a judicial determination after hearing from all sides in a controversy. The issues here are more akin to opening a default than evaluating the availability of facts on the date of the motion. See Goldman v. Cotter, 10 A.D.3d 289 (1st Dep't 2004). The cases which defendants cite for the importance of finality of court decisions are consistent with this principle; those cases all involve situations where the merits were fully explored. For these reasons, the motion for renewal is granted. In view of the foregoing, this court need not reach the issue of whether there are also grounds to reargue.

Having granted the first prong of plaintiffs' motion, I must now examine whether plaintiffs' expert's affidavit is sufficient to rebut defendants' prima facie showing of entitlement to

summary judgment. Defendants' expert, Henry K. Prince, M.D., a physician board certified in obstetrics and gynecology, opined that the deposition testimony and medical records establish that the delivery management was proper, that no force was applied, and that there was no indication for a caesarean section. He maintains that the injury that resulted to Ms. Bustos—a symphysis pubis diastasis—is a known but rare complication of delivery. Dr. Prince describes the McRobert's maneuver in detail and concludes that all the descriptions of the positioning of Ms. Bustos' legs during the delivery are inconsistent with a McRobert's maneuver. He describes how the symphysis pubis—the joint that connects both halves of the pelvis—is loosened by naturally-produced hormones in order to allow passage of the infant during a vaginal birth. He asserts that Ms. Bustos had a "proven pelvis," having vaginally delivered a nine-pound-four-ounce infant in 1997. Dr. Prince concludes that the birth was normal, the child healthy, and Ms. Bustos' postnatal care adequate. In his opinion, neither Dr. Segarra or Lenox Hill Hospital departed from good and accepted medical care, and the care and treatment rendered was not a proximate cause of any conditions alleged by plaintiffs.

Dr. Plotnick's affidavit details several areas in which he opines that Ms. Bustos' care and treatment departed from good and accepted medical care. He opines that because of the mother's height, the high birth weight, and the presence of gestational diabetes, defendants' failure to estimate fetal weight or pelvic dimension was a departure from the standard of care. Dr. Plotnick asserts that the delivery resulted in a traumatic injury to Ms. Bustos' pelvis that would have been prevented if a cesarean section had been performed. He cites the failure to perform a "formal estimation of the fetal weight" near term as another departure. Dr. Plotnick references the "the

unusually dense epidural block" as a contributing factor to the injury, the effects of which allowed what Dr. Plotnick identifies as an "exaggerated hyper flexion-abduction maneuver," which in turn caused the symphyseal rupture. Finally, he opines that the lack of a episiotomy is further evidence that the difficult of the delivery and that the attending physician's decision to leave the performance of the procedures to the residents was also a departure.

In the opposition papers, defendants dispute that a cephalopelvic disproportion was present. They argue that Dr. Segarra's deposition testimony disproves the factual assumptions upon which Dr. Plotnick bases his opinions. While it appears that the estimates of fetal weight were documented, Dr. Segarra's testimony as to the measurements is more ambiguous than defendants argue. Dr. Segarra testified that there was an assessment of pelvic adequacy. It is unclear that this is the standard of care. The parties dispute the point during the delivery when force was used and the amount of time that plaintiff was pushing. Moreover, the injury to the pelvis (which included a fracture) is not adequately explained by the normal process of symphysis pubis softening during labor.

After considering the expert opinions of both sides, there are factual disputes as to whether there were departures from the standard of care, which must be resolved at trial. Plaintiffs' argument about defendants' delay, however, is disingenuous. Plaintiffs did nothing to restore the case to the calendar after the Appellate Division decision and repeatedly requested adjournments of the summary judgment motion. Plaintiffs allege that there is still a dispute regarding defendants' production of certain rules and regulations, but have not identified how the additional discovery is

relevant at this stage of the litigation. However, to the extent previously ordered by this court, any rules and regulations not already produced must be produced by the date of the pre-trial conference scheduled below. Any denial of the existence of a particular rule must be set forth in an affidavit or affirmation of a person with actual knowledge.

The decision and order of dismissal is vacated, and the matter is set down for a pre-trial conference on November 10, 2009, at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: October 19, 2009

JOAN B. LOBIS, J.S.C.