

Kubik v Erhart

2009 NY Slip Op 33433(U)

June 18, 2009

Supreme Court, Suffolk County

Docket Number: 18335/2001

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Diana Kubik and Kurt Kubik,

Plaintiffs,

-against-

Thomas P. Erhart, Thomas P. Erhart, P.C., St.
Charles Hospital Women's Center and Anthony
Royek, M.D.,

Defendants.

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Motion Sequence No.: 003; MD
Motion Date: 7/15/08
Submitted: 2/11/09

Motion Sequence No.: 004; XMD
Motion Date: 7/15/08
Submitted: 2/11/09

Motion Sequence No.: 005; XMD
Motion Date: 7/15/08
Submitted: 2/11/09

Attorneys [See Rider Annexed]

Upon the following papers numbered 1 to 67 read on these motions to dismiss pursuant to CPLR §3211 and CPLR §3212; Notice of Motion/ Order to Show Cause and supporting papers, 1 - 10; Notice of Cross Motion and supporting papers, 11 - 17; 18 - 31; 32 - 34 ; Answering Affidavits and supporting papers, 35 - 46 ; Replying Affidavits and supporting papers, 47 - 50; 51 - 53; 54 - 55; 56 - 57; Other, 58 - 67.

The instant action seeks to recover damages for medical malpractice arising from the tragic tort of "wrongful life." The plaintiffs Diana and Kurt Kubik sought treatment from the defendants with respect to Diana's pregnancy with their son Justyn. They allege that the defendants were negligent in rendering treatment in that they failed to advise them that Justyn would be born with serious and irreversible medical problems as a result of arthrogyrosis. Specifically, they contend that the defendants were negligent in failing to accurately read the plaintiff Diana's sonograms, in failing to inform the plaintiffs of the results of said sonograms and in failing to advise the plaintiffs of the options available to them with respect to continuing

the pregnancy. The plaintiffs allege that had they been told the child would be born with arthrogryposis they would have chosen to abort him rather than carrying the pregnancy to term. The complaint alleges that as a result of the defendants' negligence Justyn was born on June 5, 1999, with severe health problems, disabilities, handicaps and injuries requiring extraordinary medical care and expenses. It further alleges that the plaintiffs have incurred and will continue to incur pecuniary losses on behalf of the child until such time as he is twenty-one years of age.

The defendant St. Charles Hospital Women's Center now moves for dismissal of the plaintiffs' complaint and all cross-claims asserted against them on the grounds that the plaintiffs have not and will not incur extraordinary expenses in raising the child. By separate cross motions, the defendants Thomas P. Erhart and Anthony Royek, M.D., cross-move for dismissal of the complaint and all cross-claims asserted against them on the same grounds. Dr. Royek also seeks dismissal of the complaint and all cross-claims asserted against him on the asserted ground that the plaintiffs cannot establish that he departed from good and accepted peri-natal practice.

The defendants failed to establish their entitlement to dismissal of the complaint. To be sure, a cause of action may not be maintained on behalf of an infant plaintiff based on a claim of "wrongful life" or the assertion that, but for the negligence of the healthcare provider, the parent would have aborted the fetus rather than giving birth to a child with abnormalities (see Sheppard-Mobley v. King, 4 NY3d 627 [2005]; Sample v. Levada, 8 AD3d 465 [2nd Dept., 2004]). However, it is now well established that a cause of action which seeks to recover for the extraordinary costs incurred in raising a child with a disability is valid (see, Spano v. Bertocci, 299 AD2d 335 [2nd Dept., 2002]; Ciceron v. Jamaica Hosp., 264 AD2d 497 [2nd Dept., 1999]; Bani-Esraili v. Lerman, 69 NY2d 807 [1987]; cf. Alquijay v. St. Luke's-Roosevelt Hospital Center, 63 NY2d 978 [1984]). Thus, here, the plaintiffs have stated a valid cause of action to recover pecuniary loss for extraordinary expenses for their son's care (see, Sample v. Levada, 8 AD3d 465 [2nd Dept., 2004]).

The defendants have failed to establish their entitlement to summary judgment dismissing the complaint on the grounds that the plaintiffs cannot establish that they have incurred, or will incur, extraordinary expenses in raising Justyn. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]).

In support of their respective motion and cross motions for summary judgment, the defendants rely upon, *inter alia*, the complaint, the bill of particulars, the supplemental bill of particulars and the affidavit of a purported expert in third-party payer analysis for individuals

living with special needs. This evidence fails to demonstrate, as a matter of law, that the plaintiffs have not, and will not, incur extraordinary expenses in raising Justyn to the age of twenty-one years. Significantly, the defendants do not dispute that, as a result of Justyn's arthrogryposis, he has and will continue to require substantial assistance at a substantial cost over the general costs of rearing a child. Indeed, the defendants' purported expert acknowledges that Justyn has and will continue to require maximum assistance for all activities of daily living, 24/7 supervision, 24/7 skilled nursing care and extensive medical care (compare DePeigne v. Medical Ctr., 251 AD2d 47 [1st Dept., 1998]). Rather, the defendants contend that the plaintiffs have not and will not incur extraordinary expenses because such expenses have been and will continue to be born entirely by either medical insurance or Medicaid (compare Sobie v. Katz Constr. Corp., 189 AD2d 49 [1st Dept., 1993]). Thus, defendants essentially argue not that extraordinary expenses have not and will not be incurred but, rather, that such expenses will be covered entirely by payments from a "collateral source" (compare Mickens v. LaSala, 8 AD3d 453 [2nd Dept., 2004]).

CPLR §4545(a) dictates the "admissibility of collateral source of payment" in an action for medical malpractice. It provides "[i]n any action for medical ... malpractice where the plaintiff seeks to recover for the cost of medical care, dental care, podiatric care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source such as insurance (except for life insurance), social security (except those benefits provided under title XVIII of the social security act), workers' compensation or employee benefit programs (except such collateral sources entitled by law to liens against any recovery of the plaintiff)" (see, Bryant v. New York City Health & Hosps. Corp., 93 NY2d 592 [1999]). Thus, CPLR §4545 (a) authorizes the court in a medical malpractice action to reduce the amount of the plaintiff's award if it finds "with reasonable certainty" that any element of the economic loss encompassed in the award was or will be replaced, in whole or in part, from a collateral source (see, Kihl v. Pfeffer, 47 AD3d 154 [2nd Dept., 2007]; Caruso v. Russell P. Le Frois Builders, 217 AD2d 256 [4th Dept., 1995]; Ventura v. Fisher, 5 Misc3d 1001A [2004]; Schmidt v. Buffalo Gen. Hosp., 183 Misc2d 32 [1999]). The statute further directs that in order "to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement." The burden is on the party claiming the offset to prove its entitlement to such offset by clear and convincing evidence (see, Firmes v. Chase Manhattan Automotive Fin. Corp., 50 AD3d 18 [2nd Dept., 2008]; Terranova v. New York City Tr. Auth., 49 AD3d 10 [2nd Dept., 2007]; Schmidt v. Buffalo Gen. Hosp., 183 Misc2d 32 [1999]).

Contrary to the defendants' contentions, they did not establish by clear and convincing evidence that the extraordinary costs incurred by the plaintiffs in raising Justyn have been, and

will continue to be, born entirely by a collateral source (see, Pryce v. Gilchrist, 51 AD3d 425 [1st Dept., 2008]; cf. Staats v. Wegmans Food Mkts., AD3d, 2009 NY Slip Op 4505 [4th Dept June 5, 2009]; Kihl v. Pfeffer, 47 AD3d 154 [2nd Dept., 2007]). The assertion in the plaintiffs' bill of particulars that "medical expenses" have been reimbursed by Aetna US Healthcare and New York State Benefit Fund does not suffice to establish, as a matter of law, that all of the extraordinary expenses of raising Justyn have been reimbursed. Likewise, the conclusory and unsubstantiated assertions contained in the affidavit of Ann Koerner were insufficient to demonstrate that the extraordinary costs associated with raising Justyn have not been and would continue not to be incurred by the plaintiffs. In this regard, Koerner's affidavit impermissibly relies upon unsworn reports and/or unauthenticated medical records from outside sources (see, Astrel v. Yarborough, 31 AD3d 356 [2nd Dept., 2006]; Kivlan v. Acevedo, 17 AD3d 321 [2nd Dept., 2005]). Moreover, none of the records purportedly relied upon by Koerner have been submitted with the motion (see, Farmer v. City of New York, 25 AD3d 649 [2nd Dept., 2006]; cf. Wagman v. Bradshaw, 292 AD2d 84 [2nd Dept., 2002]). In any event, Koerner offers only conclusory and unsubstantiated opinions as to the extraordinary expenses attributable to Justyn's condition and that such expenses have been and will continue to be covered by either insurance or Medicaid (see, Gonzalez v. 98 Mag Leasing Corp., 95 NY2d 124 [2000]; Exime v. Williams, 45 AD3d 633 [2nd Dept., 2007]; Youthkins v. Cascio, 298 AD2d 386 [2nd Dept., 2002]).

The defendant Anthony Royek, M.D., has also failed to establish a prima facie entitlement to summary judgment on the grounds that he did not depart from the requisite standard of care. The elements of proof in a medical malpractice action are a deviation or departure from accepted standards of practice and evidence that such departure was a proximate cause of the plaintiff's injury (see, Cohen v. Kalman, 54 AD3d 307 [2nd Dept., 2008]; Terranova v. Finklea, 45 AD3d 572 [2nd Dept., 2007]; Biggs v. Mary Immaculate Hosp., 303 AD2d 702 [2nd Dept., 2003]; Roseingrave v. Massapequa Gen. Hosp., 298 AD2d 377 [2002]; Holbrook v. United Hosp. Med. Ctr., 248 AD2d 358 [2nd Dept., 1998]). On a motion for summary judgment dismissing the complaint, a defendant physician or dentist has the burden of establishing the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (see, Shahid v. New York City Health & Hosps. Corp., 47 AD3d 800 [2nd Dept., 2008]; Terranova v. Finklea, 45 AD3d 572 [2nd Dept., 2007]; Rebozo v. Wilen, 41 AD3d 457 [2nd Dept., 2007]; Williams v. Sahay, 12 AD3d 366 [2nd Dept., 2004]). "To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" (Terranova v. Finklea, 45 AD3d 572 [2nd Dept., 2007]).

In support of this portion of his cross motion for summary judgment, Dr. Royek submitted, *inter alia*, the affidavit of Dr. Adiel Fleischer. Contrary to Dr. Royek's contentions, this affidavit was insufficient to demonstrate, as a matter of law, that he did not deviate from the accepted standard of medical care in his treatment of the plaintiffs. Dr. Fleischer impermissibly relies upon unsworn reports and/or unauthenticated sonographic records as well as undisclosed medical records from outside sources in forming his conclusions (see, Astrel v. Yarborough, 31 AD3d 356 [2nd Dept., 2006]; Kivlan v. Acevedo, 17 AD3d 321 [2nd Dept., 2005]). In fact, Dr.

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Fleischer does not rely upon any admissible evidence with respect to Dr. Royek's actual treatment of the plaintiff. In this regard, notably absent from Dr. Royek's papers is any evidence with respect to the treatment he rendered to the plaintiff, his performance of the sonograph and evidence that such treatment conformed with the requisite standard of care. Thus, Dr. Fleischer offers only conclusory and unsubstantiated opinions that Dr. Royek's treatment of the plaintiff conformed with the requisite standard of care (see, Terranova v. Finklea, 45 AD3d 572 [2nd Dept., 2007]). While Dr. Fleischer does offer the substantiated medical opinion that the plaintiffs will be unable to establish a departure of the standard of medical care based on the sonographic copies corresponding to the February 25, 1999 study, such opinion is insufficient to meet Dr. Royek's prima facie burden on this summary judgment motion of establishing that his conduct conformed with the requisite standard of care.

The defendants' failure to make a prima facie showing of entitlement to judgment as a matter of law requires denial of their respective motion and cross motions, regardless of the sufficiency of the opposition papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]).

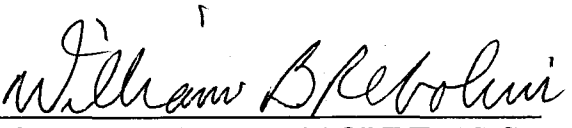
Accordingly, it is

ORDERED that the motion by the defendant St. Charles Hospital Women's Center for dismissal of the plaintiffs' complaint pursuant to CPLR §3211 and for summary judgment dismissing the plaintiffs' complaint pursuant to CPLR §3212 (#003) is denied; and it is further

ORDERED that the cross motion by the defendant Thomas P. Erhart for dismissal of the plaintiffs' complaint pursuant to CPLR §3211 and for summary judgment dismissing the plaintiffs' complaint pursuant to CPLR §3212 (#004) is denied; and it is further

ORDERED that the cross motion by the defendant Anthony Royek, M.D. for dismissal of the plaintiffs' complaint pursuant to CPLR §3211 and for summary judgment dismissing the plaintiffs' complaint pursuant to CPLR §3212 (#005) is denied.

Dated: June 18, 2009


HON. WILLIAM B. REBOLINI, J.S.C.