

Assenza v Horowitz

2010 NY Slip Op 30254(U)

February 2, 2010

Supreme Court, Richmond County

Docket Number: 100502/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index. 100502/09
Motion No.:006**

**AMANDA ASSENZA, An Infant under the age of 14
years, by her father and natural guardian,
DAVID ASSENZA, and
DAVID ASSENZA, Individually,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**MARK HOROWITZ, M.D.,
STATEN ISLAND UNIVERSITY HOSPITAL, and
ARTHUR BOUNASPINA, M.D.**

Defendants

The following items were considered in the review of the following motion for renewal and reargument.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2,3
Amended Answering Affidavit	4
Replying Affidavits	5, 6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant, Mark Horowitz, M.D. (“Dr. Horowitz”), moves for renewal and reargument of the decision and order of this court dated October 9, 2009 that denied his cross-motion for summary judgment. The defendant’s motion is granted to the extent that this court reconsidered its prior decision and order; however the court maintains its prior disposition denying summary judgment in Dr. Horowitz’s favor.

Facts

The infant plaintiff presented to Staten Island University Hospital, (“SIUH”) on October

11, 2005 for a scheduled open left ureteral re-implantation surgery with Dr. Horowitz. The infant plaintiff was taken to the recovery room in stable condition after Dr. Horowitz completed the surgical procedure.

On October 12, 2005, a note by the night nurse placed in the chart at approximately 2:00 A.M. indicated that the infant had not urinated since her operation. A later note in the chart indicates that a course of treatment was discussed with Dr. Horowitz wherein the infant plaintiff would both ambulate and be placed in a bathtub to facilitate urination. At approximately 11:35 A.M. after it became apparent the infant plaintiff would not urinate by these means, the chief resident under the supervision of Dr. Bounaspina, the attending doctor and also the infant plaintiff's private pediatrician, catheterized the infant plaintiff and approximately 90 cc's of urine was returned. Dr. Bounaspina then ordered three doses of IV Gentamicin.

According to the rendition of the facts given by all defendants, the infant plaintiff's condition did not improve. The child complained of abdominal pain, the urology resident's plan was to have the infant out of bed ambulating and to be given a Tylenol suppository. During his deposition, Dr. Horowitz testified that during the night of October 12, 2005 he spoke by telephone with both the infant plaintiff's mother, and the nurse assigned to the patient's unit, at which time he gave instructions for the infant plaintiff to be catheterized. Dr. Bounaspina's attorney highlights that no such order appears in the records kept by SIUH.

While the medical chart does not reflect Dr. Horowitz's order to catheterize the infant plaintiff, the defendants essentially agree that when Dr. Chang, the pediatric resident attempted to catheterize the infant plaintiff's mother came forward with urine from her child and repeatedly asked if catheterization could be avoided. Dr. Chang testified that she assumed the plan requiring catheterization would change in light of the fact that the infant plaintiff had urinated and was no longer in pain. She communicated this change of circumstances to Dr. Bounaspina who, advised that the catheterization could be postponed.

On October 13, 2005, the infant plaintiff's mother testified that early that morning she awoke to find her child with wet clothes. But the medical records and the testimony of Dr. Bounaspina during his deposition indicate that the infant plaintiff was found to have perforated on the morning of October 14, 2005. According to a note placed in the chart by resident Carlos Barahona the infant plaintiff's mother reported that the child had urinated 2-3 times during the night, but was now complaining of abdominal pain. Dr. Chang testified that before she left the hospital at 9:00 A.M. that one of the interns had paged Dr. Horowitz and made him aware that the infant plaintiff had not been catheterized. A note placed in the medical chart by a urology fellow, Ferendino, indicates that the infant plaintiff's abdomen was mildly distended and she had just vomited. Ferendino's assessment/plan was for the infant plaintiff to receive a Tylenol suppository, to get out of bed and ambulate. Further notations accompanying this plan indicate that it was discussed with Dr. Horowitz. After this course of treatment failed to work a notation in the file indicated that "peds and also Dr. Ferendino" ordered the catheterization of the infant plaintiff. At 12:30 P.M. Dr. Giunta inserted a Foley catheter and drained urine. The catheter was left in the patient.

On October 14, 2005 at approximately 3:00 A.M. a surgical "green" team was called to see the infant plaintiff after it was determined that the surgical dressings were soaked. The team changed the dressings, only to require them to be changed again at approximately 6:10 A.M. Later that morning Dr. Bounaspina observed the patient at approximately 9:30 A.M. and noted that the abdominal suture line was leaking urine. A perforation of the bladder was diagnosed shortly thereafter.

The defendant, Dr. Horowitz, initially cross-moved for summary judgment dismissing the plaintiff's case. Annexed to his cross-motion was his own expert affidavit in support of his motion. Dr. Horowitz avers the following facts in his expert affidavit:

Following surgery, Amanda Assenza was having some difficulty urinating. On October 12, 2005, during the evening, I had a telephone conversation with a nurse at Staten Island

University Hospital. I instructed the nurse to catheterize Amanda and leave the catheter in overnight. I also spoke with Mrs. Assenza and advised her of the plan. She did not express hesitancy at that time with regard to having Amanda catheterized.

My instruction to the nurse was an appropriate order that I reasonably expected would be carried out by the hospital staff. The order was given appropriately in accordance with good and accepted medical practice.

My care and treatment of Amanda Assenza was entirely appropriate and rendered in accordance with good and accepted medical practice and did not cause the urinary bladder perforation.

The bladder perforation occurred when the bladder became too full and leaked through the suture line. It resulted from the failure to catheterize Amanda during the evening of October 12, 2005, in direct contravention of my order.

Dr. Horowitz now moves to renew and reargue his cross motion for summary judgment which was denied by a decision and order of this court dated October 9, 2009.

Discussion

“On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. . . In opposition, the plaintiff must submit a physician’s affidavit attesting to the defendant’s departure from accepted practice, which departure was a competent producing cause of the injury . . . General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment . . .”¹

As this court noted in its previous October 9, 2009 decision and order while a defendant

¹*Rebozo v. Wilen*, 41 AD3d 457, [2d Dept 2007].

doctor may submit his or her own affidavit as an expert in support of motion for summary judgment it is done at his or her peril. In determining whether summary judgment is appropriate, a court must draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.²

In this case, Dr. Horowitz is correct that in evaluating his initial motion this court mistakenly failed to consider the medical reports and exhibits annexed to his co-defendant's motion. However, his motion must still be denied. In light of the facts at issue in this case this court finds that Dr. Horowitz's affidavit is conclusory in nature. In *Canosa v. Abadir*, the Appellate Division, Second Department found the statements made by the defendant that "[t]he [dermabrasion] procedure was performed fully in accord with good and accepted practice' and "[a]ll of my medical treatment rendered to Ms. Canosa was in accord with good an accepted standards of medical care'" were conclusory and insufficient to establish a prima facie entitlement to summary judgment.³ As is evident, Dr. Horowitz's statements in his expert affidavit equally lack substance.

Additionally, Dr. Horowitz's expert affidavit presents issues of fact on its face for resolution at trial. His statement that the infant plaintiff's mother did not express hesitancy with respect to the catheterization of her daughter is in direct contravention to the her deposition testimony. Accordingly, Dr. Horowitz failed to demonstrate the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby.

Conclusion

Accordingly after allowing the reargument of the defendant's cross motion for summary judgment and having reconsidered this court's decision and order of October 9, 2009, it is

² *Torres v. Jeremias*, 283 AD2d 484, [2d Dept 2001].

³ *Canosa v. Abadir*, 165 AD2d 823, [2d Dept 1990].

hereby:

ORDERED, that renewal and reargument is granted; and it is further

ORDERED, that after reconsideration, Mark Horowitz, M.D.'s cross-motion for summary judgment is denied; and it is further

ORDERED, that the parties report to **JCP 8 on Monday, March 1, 2010 at 9:30 A.M.**

ENTER,

DATED: February 2, 2010

Joseph J. Maltese
Justice of the Supreme Court