

Irving v Gabriels

2010 NY Slip Op 30662(U)

March 30, 2010

Supreme Court, Albany County

Docket Number: 51552/08

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

KERELL IRVING, an infant by his Mother
and Natural Guardian, CHRISTINA CONNERS,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 5155-08
RJI NO. 01-08-94769

JOSEPH GABRIELS, M.D., ST. PETER'S
HOSPITAL and MARIO GUILLEN, M.D.,

Defendants.

Supreme Court Albany County All Purpose Term, March 12, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Kerell Irving (hereinafter "Plaintiff") was born on June 26, 1998 at St. Peter's Hospital (hereinafter "St. Peter's"). At that time, Dr. Mario Guillen (hereinafter "Guillen") was a first year resident on rotation at St. Peter's and Dr. Joseph Gabriels (hereinafter "Gabriels") was Plaintiff's mother's obstetrician. Plaintiff alleges that during the course of his delivery he suffered a brachial plexus injury resulting in a permanent condition of Erb's Palsy.

Plaintiff commenced this medical malpractice action seeking to recover damages for the injuries he sustained at birth. Issue was joined by each defendant, discovery is complete and a trial date certain has been set. Defendants St. Peter's and Guillen¹ now move for summary judgment, which is opposed by Plaintiff. Because Defendants failed to demonstrate their entitlement to judgment as a matter of law, their motion is denied.

“[S]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869 [3d Dept. 1996]).

On a motion for summary judgment, the movant must “make a prima facie showing of entitlement to judgment as a matter of law.” (Ferluckaj v. Goldman Sachs & Co., 12 NY3d 316 [2009] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). “A motion for summary judgment should be entertained only after the moving party has established, by competent admissible evidence, that it is entitled to judgment as a matter of law.” (Ware v. Baxter Health Care Corp., 25 AD3d 863, 864 [3d Dept. 2006]). A movant fails to meet their burden by “pointing to gaps in... proof”, rather the movant’s obligation on the motion is an affirmative one. (Antonucci v. Emeco Industries, Inc., 223 A.D.2d 913, 914 [3d Dept. 1996]).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce “evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (Id. at 562).

¹ St. Peter's and Guillen will hereinafter be referred to collectively as Defendants.

As relied on by Defendants in support of their motion, “[i]t is well established that a hospital is not vicariously liable for the acts of a private attending physician.” (Walter v. Betancourt, 283 AD2d 223, 224 [1st Dept. 2001]). Moreover, “[a] resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene” (Boston v. Weissbart, 62 AD3d 517, 518-19 [1st Dept. 2009], quoting Soto v Andaz, 8 AD3d 470, 471 [2d Dept. 2004]).

While the above limitations of liability are not in dispute, on this record Defendants offered insufficient proof of their applicability. Specifically, Defendants failed to demonstrate that Gabriels performed or controlled Plaintiff's delivery, thereby sheltering the hospital (St. Peter's) and resident (Guillen) from liability. Defendants demonstrated that three doctors were involved in Plaintiff's delivery, Guillen, Dr. Dorn (a resident) and Gabriels . All three were deposed, with their deposition testimonies properly attached to Defendants' moving papers. Each doctor denied any recollection of Plaintiff's delivery, either before or after reviewing the medical records created at the time of Plaintiff's birth. Not one of the doctors involved testified that Gabriels delivered Plaintiff or established Gabriels' control over the delivery. Nor did any of them testify that Guillen did not exercise independent medical judgment in delivering Plaintiff. Although all three doctors recalled general procedures engaged in at the time, not one of them established what occurred during Plaintiff's delivery. Nor do the medical records, alone or as interpreted by the doctors, establish the actions of Gabriels' and Guillen. Moreover, as the record upon which Defendants' expert testimony is based is inconclusive about Gabriels' control and

supervision, his opinion on Defendants' liability is of no probative value.

Similarly inconclusive are the excerpts, attached to Defendants' motion, of Plaintiff's mother and Plaintiff's grandmother's (who was present for the delivery) depositions. While both establish that Gabriels was present for the delivery, neither state who performed Plaintiff's delivery. Nor do either establish what actions Gabriels and Guillen took during the delivery, or the instructions and supervision Gabriels gave to Guillen during the delivery. As such, on this record, Defendants failed to demonstrate with competent evidence their prima facie entitlement to judgment as a matter of law.

Accordingly, Defendants' motion is denied and the sufficiency of Plaintiff's late filed opposition is not at issue. (Kropp v. Corning, Inc., 69 AD3d 1211 [3d Dept. 2010]).

This Decision and Order is being returned to the attorneys for Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 30, 2010
Albany, New York


Joseph C. Teresi, J.S.C.

PA PERS CONSIDERED:

1. Notice of Motion, dated February 17, 2010, Affidavit of Mandy McFarland, dated February 17, 2010, with attached Exhibits "A" - "L".
2. Affirmation in Opposition of Thomas Valet, dated March 8, 2010, with attached Exhibits "A" - "K".
3. Reply of Mandy McFarland, dated March 11, 2010.