

<b>Margulies v Gardner</b>
2010 NY Slip Op 31514(U)
May 28, 2010
Supreme Court, New York County
Docket Number: 100648/06
Judge: Joan B. Lobis
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6-2-10

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

PRESENT: Joan B. Lobis  
Justice

PART 6

Joshua Mangolies

INDEX NO. 100648/06

MOTION DATE 3/17/10

MOTION SEQ. NO. 007

- v -  
Andrew Gardner

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 28 were read on this motion to/for summary judgment

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
	<u>1-4</u>
	<u>15-25</u>
	<u>26-28</u>

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):

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

**FILED**  
JUN 02 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: May 28, 2010

JBL

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**

-----X  
JOSHUA MARGULIES and ELIZABETH MARGULIES,  
individually and as parents and natural guardians of  
BENJAMIN MARGULIES, an infant,

Plaintiffs,

Index No. 100648/06

-against-

**Decision and Order**

ANDREW GARDNER, JOEL MOSKOWITZ,  
CORINTHIAN OB/GYN, P.C., CECILIA  
SCHMIDT-SAROSI, OFFICES FOR FERTILITY AND  
REPRODUCTIVE MEDICINE, P.C., NYU HOSPITALS  
CENTER, GENZYME GENETIC and SHARON COHEN,

Defendants.

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

Motion Sequence Numbers 007, 008, 009, 010, and 011 are hereby consolidated for disposition. In their respective motions, defendants Andrew Gardner, M.D., Joel Moskowitz, M.D., Corinthian OB/GYN, P.C., Cecilia Schmidt-Sarosi, M.D., Offices for Fertility and Reproductive Medicine, P.C., NYU Hospitals Center, and Sharona Cohen move, by orders to show cause, for summary judgment dismissing the claims against them pursuant to C.P.L.R. Rule 3212. Plaintiffs oppose the motions.

This action sounds in medical malpractice and negligence. Plaintiffs claim that defendants are liable for their pecuniary damages arising out of the wrongful birth of their son, Benjamin. They allege that defendants failed to perform, order and/or recommend proper and adequate genetic testing on the plaintiffs to test for Tay-Sachs Disease from the pre-conception and prenatal periods (in or about June 2003) until and including Benjamin's birth on January 26, 2004. He was diagnosed with Tay-Sachs Disease, a genetic disease, approximately fourteen (14) months

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later. On November 27, 2006, ten months after this action was commenced, Benjamin died from Tay-Sachs Disease, at age two years and ten months.

Plaintiffs commenced this action on January 17, 2006, by the filing of a summons with notice. The complaint was served on or about February 2, 2006. Issue was joined on or about March 7, 2006. On or about May 5, 2006, plaintiffs filed and served an amended complaint without leave of court, pursuant to C.P.L.R. Rule 3025(a), adding a second cause of action for negligence against defendant Sharona Cohen, a genetics counselor who was not named in the original complaint. The first cause of action against the other defendants remained the same as previously pled.

In a prior motion (Motion Sequence Number 006), plaintiffs sought to add Benjamin's Estate as a party to the action and to add a cause of action on behalf of Benjamin for his pain and suffering and his lost opportunity to treat or cure his Tay-Sachs Disease. In determining whether to grant plaintiffs' motion and allow their proposed amendments, the court noted that plaintiffs' statements supporting their motion to amend appeared to fundamentally conflict with their claim for wrongful birth, setting forth:

The only current claim that plaintiffs have before this court is a claim for wrongful birth. The premise for a claim for wrongful birth is that, but for the negligence of the physicians, the infant never would have been born; the damages are the pecuniary losses the parent or parents have for the "extraordinary care and treatment . . . required." Becker v. Schwartz, 46 N.Y.2d 401, 410 (1978). The court notes that there is no claim in these papers that, had Mr. and Ms. Margulies known as a result of genetic testing that the fetus had Tay-Sachs Disease, they would have chosen to terminate the pregnancy. In his affidavit, Mr. Margulies asserts that he and his wife had been alerted to the fact that Benjamin had Tay-Sachs, they could

have initiated an umbilical cord blood transplant much earlier than they did, thereby either giving Benjamin a better chance at survival, or lessening or averting his “unnecessary and excessive conscious pain and suffering.” Defendants Dr. Gardner and NYU point out that this statement is a tacit acknowledgment that Mr. and Ms. Margulies would not have chosen to terminate the pregnancy even had they known that Benjamin had Tay-Sachs. Given that it appears that plaintiffs are not seeking the only measure of damages that this state has recognized to date for a wrongful birth claim—the costs for the extraordinary care and treatment that they expended as a result of Benjamin being born—the court must look at the proposed amendment even more closely before it is allowed.

See Decision and Order dated December 4, 2009 (the “December Decision”). In the December Decision, the court denied plaintiffs’ motion to amend their complaint on the grounds that their proposed amendments lacked merit. Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc., 27 A.D.3d 323 (1st Dep’t 2006); Thompson v. Cooper, 24 A.D.3d 203, 205 (1st Dep’t 2005); Davis & Davis, P.C. v. Morson, 286 A.D.2d 584 (1st Dep’t 2001). The instant motions for summary judgment followed shortly thereafter.

Defendants now contend that plaintiffs cannot satisfy the necessary elements of a claim for damages resulting from the wrongful birth of their son Benjamin. They argue that Mr. Margulies’ statement in support of the prior motion—that plaintiffs could have sought treatment for Benjamin earlier had they known he was positive for Tay-Sachs—is an admission by plaintiffs that they would not have chosen an abortion over continuing the pregnancy to delivery. They further maintain that plaintiffs should be estopped from claiming that they would have terminated the pregnancy had they been informed that Benjamin had Tay-Sachs Disease.

Plaintiffs maintain that the statements that Mr. Margulies made in support of the motion to add Benjamin's Estate as a party and to add a claim for Benjamin's pain and suffering were made in Mr. Margulies' capacity as the Administrator of the Estate, and not in his individual capacity. Plaintiffs maintain that it is proper for Mr. Margulies to assume a position that is seemingly contradictory to his individual claim, if he does so in his capacity of representing the Estate, and that they in their individual capacities are not bound by those statements made by Mr. Margulies in his capacity as Administrator of the Estate. Plaintiffs further argue that the doctrine of estoppel does not operate to bar them from making a claim for wrongful birth. They contend that estoppel only applies to prevent a party from taking a position inconsistent with a prior position when that party has first secured a judgment in his or her favor based on the prior position. Since plaintiffs did not prevail on the prior motion, they argue that estoppel does not apply to them.

In a claim for wrongful birth, "the parents complain essentially of a negligent failure to give adequate genetic counseling, causing them to forego the opportunity to avoid conception or to terminate the pregnancy in order to prevent having a child suffering from genetic birth defects." Miller v. Rivard, 180 A.D.2d 331, n.1 (3d Dep't 1992), citing Philips v. United States, 508 F. Supp. 544, 545 n.1 (S.C. 1981). To succeed on a claim for wrongful birth, the parents

must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party. . . . Specifically, the plaintiff must establish that malpractice by a physician deprived the parent of the opportunity to terminate the pregnancy within the legally permissible time period or that the child would not have been conceived but for the defendants' malpractice.

DeChico v. Northern Westchester Hosp. Ctr., 2010 N.Y. Slip Op. 4133, \_\_\_ A.D.3d \_\_\_ (2d Dep't May 11, 2010) (internal citations and quotations omitted).

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Here, Benjamin's claim for pain and suffering, which was rejected by this court, is seemingly at odds with his parents' claim for wrongful birth. Since, as administrators of his Estate, Benjamin's parents must bring the suit on his behalf, they had to essentially claim in one breath, in their representative capacity, that he could have been treated for Tay-Sachs Disease, and in another breath, in their individual capacities, that they lost the opportunity to have an abortion. Nevertheless, plaintiffs' attempt to plead inconsistent causes of action is not enough to warrant summary judgment, since it is well settled that inconsistent pleading is allowed. Mitchell v. New York Hosp., 61 N.Y.2d 208 (1984), citing Cohn v. Lionel Corp., 21 N.Y.2d 559, 563 (1968); C.P.L.R. Rule 3014. "Good practice, in fact, usually mandates that the pleader set forth everything on which there is a reasonable chance to succeed." David D. Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C.P.L.R. C3014:6 (1991).

Not only are inconsistent pleadings allowed, but the statements from Mr. Margulies' affidavit that are the linchpin of defendants' argument for the application of judicial estoppel are not so unequivocal as to merit the application of the estoppel doctrine. Paragraph 7 from the affidavit states:

That the defendants failed to test my wife's amniotic fluids, and my son' [*sic*] Benjamin in utero, for Tay-Sachs disease. If, during my wife's pregnancy with Benjy, or anytime soon thereafter, we had been alerted to the fact that Benjy was positive for Tay-Sachs, we could have initiated an umbilical cord blood transplant much earlier than we did, and thereby (a) give him a better chance at survival and/or (b) lessen or avert what became his unnecessary and excessive conscious pain and suffering.

This statement does not directly comment on the alternative to terminate the pregnancy, which was

only available until the twenty-fourth week of gestation according to New York State's abortion laws. N.Y. Penal Law § 125.05; see also DeChico v Northern Westchester Hosp. Ctr., 2010 NY Slip Op 04133 (2d Dep't May 11, 2010). Nor would it have been necessary for the parents to make such a statement about aborting the child in support of their application to amend the complaint to include the pain and suffering claim on behalf of the Estate. They have presently submitted a detailed affidavit that asserts that had they known of Benjamin's illness while he was *in utero* they would have terminated the pregnancy if they could have legally done so. At the time the complaint was filed, this issue (termination) would have been a threshold to maintaining the initial cause of action. The question of whether these statements are tailored to the needs of the litigation or a recent fabrication are left to a jury to consider.

Furthermore, cases with similar seemingly inconsistent claims have survived summary judgment in New York. In Nieves v. Montefiore Med. Ctr., 305 A.D.2d 161 (1st Dep't 2003), the estate of the mother (who died in childbirth) had a claim against the defendant physicians for failure to recommend an abortion, while the child (who survived with brain damage) had a claim against the defendant physicians for injuries resulting from the physicians' failure to properly monitor the mother during pregnancy. In Sheppard-Mobley v. King, 4 N.Y.3d 627 (2005), the mother had a claim for a negligently administered abortion drug, while the infant had a claim for injuries he sustained while *in utero* from the abortion drug. In both cases, the infant's claims existed only because the fetus was not, indeed, aborted, which would be a necessary element of the parents' claims that but for the negligence of the defendants, the fetus would have been aborted.

At first glance, the necessary elements of plaintiffs' claim for wrongful birth are inconsistent with the necessary elements of the claim they unsuccessfully sought to add to the complaint. However, upon closer examination as set forth above, the court finds that the positions taken by plaintiffs are not so impermissibly inconsistent in the context of this case as to warrant dismissal. Nor, under the same reasoning, will the court hold that plaintiffs waived or are estopped from asserting the elements of their cause of action for wrongful birth. Any inconsistencies go to plaintiffs' credibility, and will almost certainly be explored throughout the remainder of this case, but are not grounds for summary judgment dismissal.

Accordingly, the motions for summary judgment are denied. The parties shall appear for a status conference on June 15, 2010, at 9:30 a.m. This constitutes the decision and order of the court.

Dated: May 28, 2010

  
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 JOAN B. LOBIS, J.S.C.

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