

LeMaire v Kuncham

2011 NY Slip Op 31539(U)

May 24, 2011

Sup Ct, Nassau County

Docket Number: 17379/06

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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BRIAN LeMAIRE and CHRISTINE LeMAIRE, as Co-Administrators of the Estate of BRANDON LeMAIRE, deceased, and BRIAN LeMAIRE and CHRISTINE LeMAIRE, Individually,

Plaintiffs,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 17379/06
Motion Seq. No.: 05, 06, 07 & 08**

SUDHA KUNCHAM, WANTAGH OB/GYN, P.C., DIANE LUCKS, LEWIS ROSENBERG, IRWIN GOLDSTEIN, PETER HOLDEN and NORTH SHORE UNIVERSITY HOSPITAL AT PLAINVIEW,

Defendants.

DECISION AND ORDER

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In this action to recover damages for medical malpractice, defendants Sudha Kuncham, M.D., Wantagh OB/GYN, P.C., Diane Lucks, C.N.M., Lewis Rosenberg, M.D., Irwin Goldstein, M.D., Peter Holden, M.D., and North Shore University Hospital at Plainview ("NSUH-P") move for an order granting summary judgment and dismissal of the complaint of plaintiffs Brian and Christine LeMaire, as

Co-Administrators of the Estate of Brandon LeMaire and Individually. The motions of Peter Holden, M.D., (Sequence No. 5), Sudha Kuncham, M.D., and Wantagh OB/GYN, P. C., (Sequence No. 6), Diane Lucks and NSUH-P, (Sequence No. 7), and Lewis Rosenberg, M.D., (Sequence No. 8) are all unopposed by the plaintiffs, who only oppose the motion of Lewis Rosenberg, M.D.

This medical malpractice action arises out of the medical care and treatment during the labor and delivery on February 19, 2006, of the infant-plaintiff, Brandon LeMaire, now deceased. The plaintiffs allege that Dr. Rosenberg and the other defendants failed to timely diagnose a breech presentation and umbilical cord prolapse, and unreasonably delayed the performance of a Cesarean Section ("c-section") delivery. It is further alleged that the defendants negligently failed to resuscitate the infant-plaintiff timely and properly, with the result that the infant-plaintiff suffered hypoxic ischemic encephalopathy, severe neurological problems and ischemic brain injury. The infant-plaintiff died on October 1, 2007, when he was approximately one year and seven months old.

In his motion papers, Dr. Rosenberg alleges that he had a coverage arrangement with co-defendant Dr. Sudha Kuncham, under which he agreed to provide obstetrical and gynecological care to her patients when she was not available and this arrangement covered Saturday February 18, 2006 through Sunday February 19, 2006, the days in question. He states that he became involved in the care and treatment of plaintiff Christine LeMaire when, on Sunday February 19, 2006 at about 3:30 a.m., he received a telephone call from Mrs. LeMaire's husband, plaintiff Brian LeMaire, indicating that his wife was a patient of Dr. Kuncham and was at 37 weeks' gestation, the fetus was in a breech presentation and his wife was scheduled for a c-section delivery on Tuesday February 22, 2006.

According to Dr. Rosenberg, Mr. LeMaire told him Mrs. LeMaire was not having contractions but there was fluid coming from her vagina. He asked Mr. LeMaire a series of questions to determine whether Mrs. LeMaire's membranes had ruptured and directed Mr. LeMaire to bring his wife immediately to North Shore University at Plainview. Dr. Rosenberg stated that he then called the hospital and told one of the nurses in Labor and Delivery that Mrs. LeMaire would be coming in and needed to be evaluated. He stated that he told the nurse to call him at home as soon as Mrs. LeMaire arrived and had been evaluated.

Mrs. LeMaire arrived at NSUH-P at 4:50 a.m., and reported that her water broke at 4:00 a.m. and she began to experience contractions at 4:25 a.m. She was shown to the bathroom and at 4:53 a.m., she

called from the bathroom that “there’s something coming out.” Co-defendant Diane Lucks, C.N.M., was notified and Mrs. LeMaire was placed on a stretcher in the Trendelenburg position. Dr. Rosenberg stated that Lucks got onto the stretcher with Mrs. LeMaire and maintained her hand within Mrs. LeMaire’s vagina to support the presenting part of the fetus in an attempt to alleviate the pressure that one of the fetal feet was placing on the umbilical cord.

At 4:58 a.m., one of the nurses in the Delivery Room called Dr. Rosenberg to tell him that Mrs. LeMaire had arrived and had a prolapsed cord. Dr. Rosenberg stated that he told the nurse that the fetus needed to be delivered by c-section as soon as possible, asked her to open up the Operating Room for the surgery and told her that he was leaving immediately for the hospital. He also told the nurse to call Dr. Goldstein and request him to go to the hospital as soon as possible to assist with the c-section delivery. Dr. Rosenberg then left his home for the hospital and, while on the way, he received a telephone call from one of the nurses that Dr. Goldstein wanted Dr. Rosenberg to pick him up at his house. Dr. Rosenberg then called Dr. Goldstein and told him to go directly to the hospital.

Both doctors arrived at the hospital at approximately 5:20 a.m., ran upstairs to the Doctors’ Lounge to change into scrubs and then went into the Delivery Room where Mrs. LeMaire had already been intubated and was under general anesthesia. The first incision was made at 5:29 a.m. and the infant-plaintiff was delivered by c-section at 5:31 a.m. without any difficulties. Dr. Rosenberg stated that it was at the time of delivery that he learned, for the first time, that the infant plaintiff was a double footling breech presentation. The infant plaintiff did not cry immediately upon delivery and the umbilical cord was wrapped around his leg. He was handed to a Neonatologist. Approximately, one hour after the delivery, Dr. Rosenberg stated, he prepared a handwritten chronology of events on the back of a paper placemat from a diner and a few days later, prepared a two-page, typewritten note regarding the events of the labor and delivery as part of his office chart.

At 8:00 a.m., the infant plaintiff was transferred to Schneider Children’s Hospital at Long Island Jewish Medical Center where he was diagnosed with hypoxic ischemic encephalopathy, cerebral palsy, respiratory depression and spastic quadriparesis. On October 1, 2007, the infant plaintiff died.

The plaintiffs commenced the action against the defendants on October 23, 2006, seeking damages for medical malpractice, failure to inform the parent plaintiffs as to the risks, complications, consequences and dangers of the care, treatment and procedures undertaken, and recklessness. On

October 30, 2008, after the death of the infant plaintiff, the complaint was amended to add a cause of action for wrongful death.

In support of his summary judgment motion, Dr. Rosenberg submits an affirmation of Dr. Michael Moretti, who opines that Rosenberg acted in accordance with accepted standards of medical care and practice, and that none of his acts were a substantial factor in causing the infant plaintiff's injuries or subsequent demise. He indicates that Mrs. LeMaire had an umbilical cord prolapse when she was at 37 weeks gestation, which is a complication where the umbilical cord drops through the open cervix and into the vagina ahead of the baby prior to or during delivery. He describes the occurrence as rare but notes that the chances of it occurring increases when there is a breach presentation (feet first) as occurred in this case. Nonetheless, he states that the risk of an umbilical cord prolapse is still very low. Dr. Moretti stated that a prolapsed cord is an obstetrical emergency which warrants an emergency c-section delivery which Dr. Rosenberg timely and appropriately performed once he was notified that Mrs. LeMaire had a prolapsed cord. He opines that the infant plaintiff's injuries and demise were not proximately caused or contributed to by any acts or omissions of Dr. Rosenberg.

In opposition, the plaintiff's counsel submits an affirmation which quotes from an affidavit, redacted pursuant to CPLR §3101 (d), of an unidentified "board certified expert", claiming that the original, unredacted version will be made available to the court for *in-camera* inspection. The plaintiffs' expert states that defendant Rosenberg "departed from the standards of good and accepted obstetrical practice by failing to immediately proceed to the hospital when he received the first phone call from Brian LeMaire at 3:30 a.m." He or she further states that had Rosenberg been at the hospital, a c-section could have been performed within minutes of the prolapsed cord being observed at 4:53 a.m. and a c-section would have avoided prolonged fetal distress and prevented the resulting encephalopathy.

The plaintiffs' "expert" relies on the allegations that, on Mrs. LeMaire's last visit to Dr. Kuncham on February 15, 2006, Dr. Kuncham had diagnosed a footling breech and scheduled a c-section for February 22, 2006. She had advised Mrs. LeMaire to go to the hospital if her water broke prior to scheduled c-section date. Dr. Kuncham then went on vacation and Dr. Rosenberg was covering for her. Dr. Rosenberg had testified in his deposition that he had received the call from Mr. LeMaire at approximately 3:30 a.m. on February 19, 2006, telling him that his wife was a patient of Dr. Kuncham, that the baby was in breech presentation, that they had just gotten back from a party and that Mrs.

LeMaire was leaking some fluid from her vagina. Rosenberg had testified that he was unable to tell whether the fluid was amniotic fluid and had directed Mr. LeMaire to take his wife to the hospital. However, Dr. Rosenberg remained at home and in bed until approximately 4:58 a.m. when he received a call from the nursing staff that a prolapsed umbilical cord of six inches had been observed at 4:53 a.m.

In a reply affirmation, counsel for Dr. Rosenberg assert that the plaintiffs' expert's affidavit in response is without merit and he asks that the affidavit not be considered by this Court because it had not been served in accordance with pre-trial disclosure rules in CPLR §3101 (d). He notes that there has never been a response to his demands dated December 12, 2006 and June 1, 2009 for Expert Witness Disclosure and the redacted expert's affidavit is insufficient since it provides no information about the expert's education, background or pedigree. Dr. Rosenberg states that he served expert disclosure on December 21, 2010 and so the opinions of Dr. Moretti are not a surprise, but he only received the plaintiffs expert's affidavit in response to his summary judgment motion. He further notes that there is no indication that the plaintiffs' expert has any expertise in the area and states that the plaintiffs' expert's position that Rosenberg was obligated to be at the hospital was without foundation in the record since he was covering for Dr. Kuncham, Dr. Goldstein and his own practice.

Initially, it is noted that the affidavit of the plaintiffs' expert is rejected as violative of the disclosure of expert rules in CPLR §3101 (d). Dr. Rosenberg properly points out that there is no indication of any education, expertise or other qualifications whatsoever of the alleged expert to warrant the opinions coming from him or her. While CPLR §3101 (d) provides that "a party, in responding to a request *may* omit the names of medical, dental or podiatric experts," the section continues that the party "*shall be required to disclose all other information concerning such expert*" (emphasis added). There has been neither an excuse nor an explanation offered for this lapse (*see, Yax v Development Team, Inc.*, 67 AD3d 1003, 1004 [2nd Dept. 2009]; *King v Greguss Mgmt Corp*, 57 AD3d 851, 852 [2nd Dept. 2008]). For these reasons, the expert affidavit is rejected.

Even assuming that the affidavit was accepted, however, there is no basis for denying defendant Rosenberg's motion. It is settled that the movant for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form which demonstrates that absence of any material issues of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York University Medical Center*, 64 NY 2d

851 [1985]). Once such showing is made, the opponent of the summary judgment motion must demonstrate by admissible evidence that factual issues exist requiring a trial of the action (*Zuckerman, supra; Winegrad, supra*).

It should be noted, parenthetically, that the fact that the plaintiffs only oppose the summary judgment motion of defendant Rosenberg, does not entail the conclusion that the unopposed motions of the other defendants should be granted, without more. The Supreme Court, on a summary judgment motion, is empowered to search the record, and grant summary judgment to a nonmoving party (*see, CPLR §3212 (b); JMD Holding Corp v Congress Financial Corp.*, 4 NY3d 373, 385 [2005]; *Navillus Tile Inc., v George A. Fuller Co., Inc.*, ____ AD3d ____, [2nd Dept., decided 4/19/11]; *Montefiore Medical Center v Crest Plaza, LLC.*, ____AD3d ____, [2nd Dept., decided 4/26/11]; *Nachum v Ezagui*, ____AD3d____, [2nd Dept, decided 4/26/11]). However, it is clear that none of the other defendants, apart from defendant Lucks, was directly involved in the incident which occurred on February 19, 2006, and it is equally clear on the record that Lucks reacted appropriately to the observation of the prolapsed umbilical cord until the arrival of Dr. Rosenberg. For these reasons, upon searching the entire record submitted in support of the various parties' positions, the unopposed motions, sequence numbers five, six, and seven of the other defendants are **granted**.

“In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries . . . A defendant physician seeking summary judgment in a medical malpractice action must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby . . . If the defendant physician satisfies this prima facie burden, a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact” (*Alvarez, et al v Gerberg, et al*, ____AD3d____, [2nd Dept, decided 4/26/11], citations omitted; *see, also, Stukas v Streiter*, ____AD3d____, [2nd Dept., decided 3/8/11]).

On this record, the Court concludes that the plaintiffs have not made a sufficient showing of their entitlement to summary judgment as a matter of law. The facts as contained in the motion papers indicate that, while Dr. Rosenberg had been informed that the infant plaintiff was in breech presentation, the information received by him from Mr. LeMaire did not indicate whether his wife's waters had

broken and Dr. Rosenberg properly directed him to take her to the hospital. There is no indication in the rejected affidavit of the plaintiffs' expert nor anywhere else in the record that, had Dr. Rosenberg arrived at the hospital any sooner, the infant plaintiff would not have suffered the hypoxic ischemic encephalopathy, severe neurological problems and ischemic brain injury, or that his death was the result of anything other than blameless inadvertence.

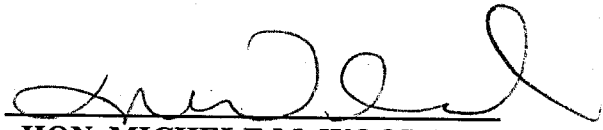
For the above reasons, the Court concludes that, while Dr. Rosenberg has made a showing that he did not depart from accepted medical practices and, therefore, no issue of fact to be tried, there has been no responsive showing by the plaintiffs. Accordingly, the summary judgment motion of Dr. Lewis Rosenberg should be and is hereby *granted*. It is hereby

ORDERED, that the plaintiff's complaint is *dismissed*.

This constitutes the Decision and Order of the Court.

DATED: May 24, 2011
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD

J.S.C.

XXX

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**