

Garcia v New York Presbyt. Hosp.

2011 NY Slip Op 31896(U)

July 6, 2011

Sup Ct, NY County

Docket Number: 110447/08

Judge: Alice Schlesinger

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

ALICE SCHLESINGER

PART **IA** PART 16

Index Number : 110447/2008

GARCIA, IARA NAOMI

VS.

NEW YORK PRESBYTERIAN HOSPITAL

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *by defendant*

New York Presbyterian Hospital is granted and the Clerk is directed to enter judgment in favor of defendant dismissing this action with prejudice in accordance with the accompanying memorandum decision.

FILED

JUL 12 2011

JUL 06 2011

Dated: July 6, 2011

NEW YORK COUNTY CLERK'S OFFICE

Alice Schlesinger

ALICE SCHLESINGER S.C.

- Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
- Check if appropriate: DO NOT POST REFERENCE
- SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X
IARA NAOMI GARCIA, an infant, by her mother and
natural guardian, MELISSA LOPEZ,

Plaintiff,

Index No. 110447/08
Motion Seq. No. 002

-against-

THE NEW YORK PRESBYTERIAN HOSPITAL,

Defendant.

FILED

JUL 12 2011

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SCHLESINGER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Before this Court is a motion by defendant, New York Presbyterian Hospital ("NYPH") for summary judgment dismissing the complaint, pursuant to §3212 of the CPLR. The action concerns the premature birth of Iara Naomi Garcia on December 13, 2002. The infant was delivered at 31 weeks gestational age.

This is a timely motion, despite the fact that the plaintiff had filed a Note of Issue on October 5, 2010, and this motion was not made until early January 2011. I had extended the hospital's time to make its dispositive motion to sixty days from the time counsel received the deposition transcript of Dr. Akita.

The motion is supported by the Affidavit/Affirmations of three medical doctors. The first is from Dr. Michael Socol who is board certified in Maternal Fetal Medicine and in Obstetrics and Gynecology. The second is from Dr. Sergio G. Golombek who is board certified in Neonatology. Both of these physicians discuss in detailed statements the applicable standards of care and give opinions that NYPH's actions in all ways met that standard.

The third affirmation is from Dr. Joseph Maytal who is board certified in Neurology with special qualifications in Child Neurology as well as Neurophysiology. Dr. Maytal provides an opinion as to the causation of the child's physical condition based primarily on his examination of her on January 15, 2010. He prepared a report dated January 31, 2010, that contained his findings and conclusions. He opines that all of Lara Garcia's conditions were caused by her severe prematurity.

As stated above, both doctors, Socol and Golombek, who are well-credentialed in their respective fields, show in great detail how they arrived at their conclusions that Lara's mother Melissa Lopez received care, both prenatally and during labor and delivery, that was in all respects proper and that the infant also received treatment during her admission in the neonatal nursery until her discharge on January 17, 2003, that was similarly proper.

In fact, what the moving papers attempt to do and in fact do quite successfully, is to tackle each of the myriad, scatter shot claims that counsel for the plaintiff makes in its Bill of Particulars' five-page response to defense counsel's question #7: "If plaintiff charges this defendant with any other negligence, identify said negligence."

Counsel for the moving defendant characterizes the sheer vastness of the claims as a "laundry list of allegations against NYPH for both obstetrical care as well as neonatal care" with close to 100 allegations against the hospital. She then previews what her experts will address, first general claims addressed by both and then specific claims by the expert who practices in that specialty.

Dr. Socol, the Obstetrician, then discusses in a detailed 21-page affidavit the care Ms. Lopez received when she first presented to the hospital on August 5, 2002, for prenatal care, where she was estimated to be 11-12 weeks pregnant, and when and why

she was transferred to the hospital's high risk clinic on September 18, 2002. This was because of her history of a premature delivery where that infant died shortly after birth. He goes over every visit and discusses precisely what was done at each. He opines that all of her care was proper and that each claim against the hospital is baseless. Specifically, with regard to the allegation that NYPH failed in having a plan to prevent prematurity or prolong gestation, he says that an appropriate plan was in place which included serial sonograms and other treatment.

As to the events of December 13, when Ms. Lopez presented to NYPH, she was already 6 cm dilated with bulging membranes. Dr. Socol says that the team at the hospital "did its best to avoid a premature delivery that was inevitable" (page 21). Finally, as to the claims plaintiff makes as to NYPH's failure to recognize or manage signs of fetal distress, he opines "these claims are belied by the record." (page 15). Also, he says that the mother's contractions during labor as well as the fetal heart rate were well documented

Dr. Golombek, the Neonatologist, then discusses in detail the events that ensued from the time Ms. Lopez presented to the hospital at 8:30 a.m. on December 13, 2002 to 10:35 a.m. when the tracings on the fetal monitor strips became non-reassuring and it was decided to rupture the membranes and proceed with delivery. The baby was delivered at 10:49 a.m. by Dr. Alvarado with Maternal Fetal Medicine Specialist Dr. Devine present, along with a pediatrician.

Dr. Golombek then details the baby's daily course in the hospital where at first she was given a seven-day course of antibiotics because of the mother's history of GBST and foul-smelling amniotic fluid, although blood cultures showed no growth of bacteria or fungi. The infant was discharged from the hospital on January 17, when she was 37 days old.

This expert then deals with each of the plaintiff's general claims and specific neonatal ones. He says that many of the claims are just factually wrong, such as the allegation of failure to maintain or preserve records or the failure to administer vitamin K to the infant at birth. Records were kept and preserved and this injection was given.

I could now take the time to set down each response and opinion by this doctor as to the myriad departures claimed. However, suffice it to say, he either refutes plaintiff's depiction of what a particular standard of care is or makes it clear that the hospital met that standard in every way by its constant monitoring and treatment of the baby.

There is no question in my mind after reading the voluminous moving papers, which include the extensive opinions by Doctors Socol and Golombek as to the alleged departure and the opinion by the examining Child Neurologist Dr. Maytal as to causation, that NYPH has made out a prima facie case as to the absence of any negligence in its care and treatment of Ms. Lopez and her infant daughter.

What the plaintiff does in opposition is quite astounding, or rather it would be more accurate to say what the plaintiff's counsel does not do. That is, not only does he offer no opposition to the second and third causes of action dealing with preservation of records and spoliation of evidence, but more significantly, in the opposition affirmation by Dr. Bruce Halbridge, a board certified Obstetrician/Gynecologist, he reduces plaintiff's claims of departures to just one, from the 100 or so made in the Bill of Particulars, and that one was not even included in that Bill.

The departure is that the hospital's prenatal clinic staff failed to recognize and respond to Ms. Lopez' symptoms of an urinary tract infection on December 12, 2002, the day before she went into premature labor.

Dr. Halbridge refers to several notations in Ms. Lopez's chart. First, he points to an entry made on December 12th by Dr. Christian Pettker who saw her at that visit.

Dr. Halbridge refers to what he wrote:

History of premature rupture of membranes with a D&C for retained placenta...symptoms of urinary tract infection (UTI), urine analysis and culture and sensitivity... Metrogel - RTC 2 wks.

Also, Ms. Lopez says in an affidavit that on December 12, she went to the clinic complaining of pain. She was examined at the clinic by a doctor who inserted his finger with a gel into her vagina. She was discharged then and told she could go home. In other words, she received no medication.

Dr. Halbridge then opines that oral antibiotics are the treatment for UTI, not Metrogel, a cream used to treat bacterial vaginosis. He states that the standard of care required that Ms. Lopez "be covered by broad spectrum antibiotics until the culture results were obtained" (¶ 36).

He further opines that if she had been given such a broad spectrum antibiotic on December 12, 2002, this:

would have substantially reduced or eliminated entirely the patient's Group B strep UTI and avoided the onset of pre-term labor the following day and resultant pre-term delivery of this severely premature infant on December 13, 2002. (¶ 39).

Earlier on in his affirmation, this doctor states in paragraphs 21 and 22 that an UTI is defined as the presence of at least 100,000 organisms per milliliter of urine and that the results for the urine collected on December 12, 2002 for a culture and sensitivity test were entered on the plaintiff's chart on December 15, 2002. "The patient was positive for a

Group Beta Strep UTI.”

The affirmation is concluded first with a summary of the child's injuries soon after birth and at the present. Then Dr. Halbridge states that he agrees with Dr. Maytal's opinion that “all of the child's conditions are caused by her severe prematurity” (¶ 41), but that this severe prematurity

was the direct result of the failure of the staff at the NYPH prenatal clinic and in particular Dr. Pettker, to recognize the significance of Ms. Lopez' UTI symptoms and her history of a prior pre-term labor and delivery. As a result of the failure immediately to treat Ms. Lopez with a broad spectrum antibiotic on December 12, 2002, her urinary tract infection was permitted to develop into an acute chorioammonitiss as confirmed by the NYPH pathology report. The infection was the cause of the pre-term labor and the delivery of her severely premature infant on December 15, 2002 (¶ 42).

In Reply, defense counsel acknowledges her “surprise” at the preceding turn of events. She points out, as the Court has already noted, that the alleged departures had been drastically reduced to one, a claim never really mentioned before.¹

More significantly, however, is the substance of the Reply, which is contained in a supplemental affidavit from Dr. Socol and a new affidavit from Dr. Jonathan Vapnek, a board certified Urologist. I have accepted and considered these additional papers in Reply because to do otherwise would have been unfair to NYPH. They were not on notice, until the opposition, that the one claimed departure would center around an untreated UTI.

¹Counsel does acknowledge that the “kitchen sink” enumeration of departures in the Bill of Particular did have a reference to failure to prescribe and administer antimicrobial and antiviral but maintains there was nothing that stated that an untreated UTI was the cause of the premature labor and the infant's injuries.

Therefore, none of the experts commented on this. But now, emphatically they do. See *Anderson v. Beth Israel Medical Center*, 31 AD3d 284 (1st Dept, 2006).

Dr. Vapneck's affirmation, supported by the mother's chart, makes the following points: 1) Dr. Halbridge's opinion is based on an error of fact; 2) Melissa Lopez never had an urinary tract infection; 3) This is proved by a negative urinalysis and negative urine culture; 4) The urinalysis, whose results were immediately available on December 12, was negative for leukocyte esterase and nitrate; 5) The urine culture, whose results were back on December 15, grew 10K-100K colonies of Group B Streptococcus which is an organism commonly found in the vagina. That count is not indicative of an urinary tract infection because the count has to be in excess of 100,000K to indicate the presence of an UTI and finally; 6) Ms. Lopez was never diagnosed with or treated for an UTI. She was given one dose of ampicillin right before delivery as a vaginal swab showed Group B Strep present. This would not have cured an UTI, if there had been one because it required much more in the way of antibiotic therapy. And significantly an UTI will not resolve on its own.

Dr. Socol is in agreement with Dr. Vapnek as to this important fact, whether the plaintiff had an UTI on December 12, 2002. He says she did not. Because she did not and because her urinalysis was negative, it was the standard of care not to prescribe antibiotics, contrary to Dr. Halbridge's opinion. Rather, the proper course was to await the results of the urine culture. This is what NYPH did and it was appropriate.

Dr. Socol also has found, what he believes, is the source of Dr. Halbridge's opinions, though Dr. Halbridge includes no attribution. The words used in part by Dr. Halbridge seem to have been taken verbatim from a 2009 article "Urinary Tract Infections in Pregnancy", by Dr. Leticia Jones. Counsel includes this article as an exhibit

in her Reply. Significantly, under "urine culture" in the article, it says that " a colony count of 100,000 colony - forming units per milliliter has historically been used to define a positive culture result."

Dr. Socol points out that the article is dated seven years after the events in issue and was published in a non-peer review journal on the web. Dr. Socol concludes by opining that the decision not to give Ms. Lopez antibiotics on December 12 was right and most important since she never had an UTI, this had nothing to do with her going into premature labor the following day.

Discussion

The motion by the hospital is in all respects granted. I cannot find a legitimate issue of fact under these circumstances. A board certified Urologist has stated unequivocally that Ms. Lopez never had an UTI. This opinion is supported by her records and her course in the hospital.

In Dr. Halbridge's affirmation, he agrees with the Jones' article that an UTI is "defined as the presence of at least 100,000 organisms per milliliter of urine". He also must have seen the culture results since he refers to them. Yet he omits the actual findings of the culture, which are "10-100 K col/ml streptococcus Group B" (exhibit A in the Reply). This is less than 100, 000 milliliters and thus does not meet the definition in the article for an UTI or the information provided by either Dr. Halbridge or Dr. Vapneck.

Also, significantly, Dr. Halbridge omits any mention of the urinalysis, which was available to Dr. Pettker on December 12 and showed a negative result. It goes directly to the appropriate standard of care. Dr. Socol says you do not prescribe antibiotics for a pregnant woman with a negative analysis. Dr. Halbridge conveniently ignores this

compelling evidence that there was little likelihood of an UTI under these circumstances.

Dr. Halbridge also fails to comment on the hospital records which show that a diagnosis of an UTI was never made for Ms. Lopez, that she was never treated for one, and that she left the hospital without any UTI.

Based on all of the above, omissions and failures by Dr. Halbridge, as well as his conclusory opinions as to causation, I find that his affirmation is entitled to no weight. Most important here is that the records of Ms. Lopez together with the convincing facts and opinions proffered by the defense experts, mandate the conclusion that Ms. Lopez never had an UTI. Therefore, there was no departure to diagnose one. Finally, since all the probative evidence and opinions presented by the defendant conclusively show that the premature labor and delivery on December 13 was unavoidable, the defendant is entitled to judgment in its favor.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

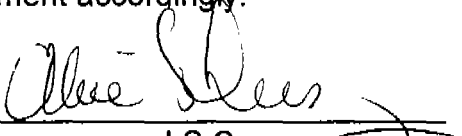
Dated: July 6, 2011

JUL 06 2011

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JUL 12 2011

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