

<b>Marmoejos v Bronx-Lebanon Hosp. Ctr.</b>
2011 NY Slip Op 33955(U)
April 6, 2011
Supreme Court, Bronx County
Docket Number: 23037/2006
Judge: Norma Ruiz
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NEW YORK SUPREME COURT ---- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

Index No. 23037/2006

JAILENE MARMOLEJOS, an infant, by her Mother  
and Natural Guardian, LUCIA ABREU

DECISION/ ORDER  
HON. NORMA RUIZ

Plaintiffs,

-against-

BRONX-LEBANON HOSPITAL CENTER and  
ELIDA MARQUEZ, M.D.

Defendants.

RECEIVED  
BRONX COUNTY CLERK'S OFFICE  
APR 13 2011

The following papers numbered 1 to 7 Read on this motion, SUMMARY JUDGMENT  
Noticed on 12/29/09 and duly submitted as No. 12 on the Motion Calendar of 9/27/10

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion

to:	Papers	Numbered
	Notice of Motions and Affidavits Annexed.....	1-2
	Notice of Cross Motions and Answering Affidavits.....	3-5
	Replying Affidavits .....	6-7
	Memorandum of Law .....	

Other:

*Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:*

Defendants move for summary judgment. Plaintiff cross moves to strike the defendant's Answer for failing to provide court ordered discovery and other related relief. Upon a review of the moving papers and opposition submitted thereto, the motion is granted in part and denied in part. Similiarly, the plaintiff's cross motion is also granted in part and denied in part as set forth below.

This medical malpractice action involves the prenatal care of Lucia Abreu ("Abreu") and labor and delivery of her daughter the infant plaintiff Jailene Marmolejos on May 29, 1999 at defendant Bronx Lebanon Hospital Center ("Bronx Lebanon"). Specifically, the plaintiff alleges that the defendants were negligent in failing to: diagnose intrauterine growth restriction ("IUGR"), diagnose and treat fetal distress and timely deliver the infant plaintiff; resulting in severe developmental delays, bilateral club feet, truncal

hypotonicity, mildly dysmorphic facial features, choreoathetosis and poor head control.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment on the grounds that the infant plaintiff's injuries were caused by a genetic/hereditary/chromosomal developmental abnormality and not by the treatment rendered by the defendant doctors.

Movant submits the affirmation of Dr. Barry Brown, an OB/GYN who opines that the plaintiff did not manifest any clinical evidence of IUGR and that the labor and delivery was within accepted standards at all times. Dr. Brown explained that a pregnancy involving IUGR will be marked by diminished weight gain. He noted that here the plaintiff gained 20lbs during this pregnancy which was within normal limits. The expert also noted that plaintiff's first pregnancy was normal and she did not have a history of smoking, drinking or drug use which would put her at risk for IUGR. He further noted that the fetal weight assessment taken by the medical personnel at Bronx Lebanon was 7.5lbs. Based on the above facts, Dr. Brown concluded that there were no indications of IUGR. Therefore, there was no medical basis for defendants to perform any further testing.

However, the expert's affidavit fail's to mention that the plaintiff informed the defendant doctors, when she began her prenatal care, that she was diagnosed with genital herpes. The affirmation is silent regarding the relationship between genital herpes and IUGR.

Also absent in Dr. Brown's affirmation is the questionable weight loss of eight pounds. On the prenatal visit of May 19, 1999, the medical records note the plaintiff's weight as 150 lbs, eight pounds less than her last prenatal visit on May 11, 1999. The bald assertion of Jeanne Murphy, CNM, made ten years following her entry in the medical chart, that the notation reflects that the patient weighted 158 lbs and not 150 lbs, is insufficient to conclusively establish that this plaintiff did not lose eight pounds.

With respect to the labor and delivery, Dr. Brown opined that the infant plaintiff did not suffer any intrapartum fetal distress or hypoxia in this case. The doctor noted that the placental pathology study did not offer any evidence of "acute placental insufficiency." In addition, this expert stated that the infant's APGAR scores of "8" and "9" refute the suggestion of intrapartum fetal hypoxia. Dr. Brown further opined that the fetal heart tracings were reassuring and there was no reason to deliver the infant plaintiff earlier in labor. Dr. Brown offered no opinion as to the significance of the diagnosis of oligohydramnios

(low amniotic fluid) at the bedside sonogram performed early in labor. Nor did the doctor comment on the fact that cyanosis (blueish discoloration of the skin) was present at birth which required resuscitation with free flow oxygen. (See *Discharge Summary Part B* for the infant plaintiff annexed to the plaintiff's Affirmation in Opposition as *Exhibit "1"* at page 113). Dr. Brown also failed to comment on the findings of the Neonatal Attending doctor who noted in the "*Doctors Bedside Notes Continued*" on June 3, 1999 "There was a history of oligohydramnios which is most likely a or one of the contributing factors for IUGR and club feet." *Id.* at page 123. In contrast to this expert's opinion, an attending doctor from the defendant hospital Bronx Lebanon opined that the plaintiff did have IUGR secondary to oligohydramnios which was a contributing factor for the infant plaintiff's club feet.

Moreover, the report from the Center for Congenital Disorders ("Center") also contradicts Dr. Brown's opinion. The report states that the infant plaintiff was referred to the Center by "Ann Marie Molloy CNP of Bronx Lebanon Hospital." In the section of the report titled "*Assessment and Plan*" the following was noted:

Jailene is a six month old with some hypotonia, failure to thrive and bilateral club feet. We feel that the club feet was a result of hypotonia in utero. Her low birth weight was a result of poor nutrition in the womb. We feel that this is not due to a genetic problem but due to an environmental problem resulting in poor blood flow to the fetus during its development.

The report was signed by Dr. Robert W. Marion and counter signed by Ellen Hantman, M.S. Gen Couns. (See Center's report annexed to plaintiff's Affirmation in opposition as Exhibit "4" pages 155-116). This report was not addressed by Dr. Brown.

Movant also annexed the affidavit of Dr. Andrew M. Steele a pediatrician who specializes in Neonatal-Perinatal Medicine. Dr. Steele opined that the infant plaintiff's developmental delays and alleged injury stem from a genetic/hereditary developmental abnormality and not uteroplacental insufficiency secondary to IUGR. Despite said finding, Dr. Steele conceded that IUGR and SGA (a diagnosis made following birth of an infant who is below the tenth percentile for weight given gestation age - here the infant plaintiff weighed 4lbs 9ozs) may be associated with learning disabilities, poor motor coordination and other developmental delays.

Dr. Steele made reference in his affirmation to the infant plaintiff's Board of Education school records, specifically a notation which indicates that she manifests repetitive and obsessive behavior that is consistent with autism. He goes on to opine that autism is a neurodevelopmental

disorder that is unrelated to the medical care rendered by the defendants because, in the absence of cerebral palsy, autism can not be scientifically attributed to fetal hypoxia. However, the infant plaintiff's medical records, specifically the report of Vicki Sudhalter, Ph.D, ruled out a diagnosis of autism. It is unclear if Dr. Steele reviewed Dr. Sudhalter's report prior to forming this opinion.

Similarly, Dr. Steele's affirmation is silent with respect to the following: the plaintiff's history of genital herpes, questionable weight loss of eight pounds, the diagnosis of oligohydramnios when the plaintiff presented for labor and delivery, the presence of cyanosis at birth, the opinion of Bronx Lebanon's attending doctor regarding the plaintiff having IUGR secondary to oligohydramnios (a contributing factor for the infant plaintiff's club feet) and the report from the Center.

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. *See Rebozo v. Wilen* 41 AD3d 457 (2d Dept 2007). "Bare conclusory denials of negligence without any factual relationship to the alleged injuries, and the submission of an affidavit of a medical expert which fails to address the essential factual allegations set forth in the complaint are insufficient to establish that defendant is entitled to summary judgment." *Wasserman v. A.V. Carella, M.D.*, 307 AD2d 225, 226 (1st Dept 2003).

The alternative relief of setting this matter down for a *Frye* Hearing is denied. The only evidence submitted on this issue is the expert's bare opinion that the plaintiff will not be able to produce any medically valid evidence suggesting that the infant plaintiff's injuries can be attributable to anything else other than genetics. As noted above, Dr. Steele conceded that IUGR and SGA may be associated with learning disabilities, poor motor coordination and other developmental delays.

Moreover, the opinions of the Bronx Lebanon attending doctor and the report of the Center, lend credence to the plaintiff's contention that their theory on causation is not novel. In addition, the plaintiff correctly points out, the defendants' medical experts offer no medical authority such as a treatise, scientific or medical report/article/publication or peer-reviewed study, to support the allegation that the infant plaintiff's developmental delays are attributable solely to a genetic, chromosomal or hereditary abnormality. The Court did not consider the article inappropriately submitted for the first time in the defendants Reply Affirmation. Thus, the defendants failed to establish the lack of general acceptance of the plaintiff's theory of causation.

That portion of the motion which seeks to dismiss the plaintiff's claim for lack of informed consent is granted without any opposition submitted thereto.

Accordingly, the defendants' motion is granted ONLY to the extent that the plaintiff's claim for the lack of informed consent is dismissed.

PLAINTIFF'S CROSS MOTION

That branch of plaintiff's cross motion which seeks to strike the defendants' Answer for failure to provide the emergency room record and sonogram record for March 31, 1999, or in the alternative, directing Bronx Lebanon to produce the aforementioned records within twenty (20) calendar days is denied. Plaintiff certified this case ready for trial when it filed its note of issue. Said certification included a statement that all discovery was completed. This Court will not entertain a discovery motion at this juncture. See 22 NYCRR 202.21; *Schroeder v Iesi NY Corp.*, 24 AD3d 180 (1st Dept 2005).

The Court does find, however, that the recent production of the current address for defendant's former employee Jeanne Murphy, CNM, does constitute an unanticipated circumstance thus allowing her deposition post note of issue. *Id.* This Court will entertain a motion for an open commission to depose Jeanne Murphy if said motion is made within thirty days from the entry of this decision and order.

That branch of the motion which seeks a missing documents charge is premature and denied without prejudice with leave to renew before the trial judge.

This constitutes the decision and order of the Court.

Dated: 4/06/11  
Bronx, New York

  
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NORMA RUIZ, J.S.C.