

**Rojas v St. Luke's Roosevelt Hosp. Ctr.**

2013 NY Slip Op 30310(U)

February 6, 2013

Sup Ct, New York County

Docket Number: 118307/06

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS  
*Justice*

PART 6

Dorothy Rojas, et al.,

- v -

St. Luke's Roosevelt Hosp. Ctr., et al.,

INDEX NO. 118307/06

MOTION DATE 1/17/13

MOTION SEQ. NO. 005

The following papers, numbered 1 to 22, were read on this motion to for restore.

Notice of Motion / Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

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

No(s) 1-6  
No(s) 7-16  
No(s) 17-21  
x-mut reply 22

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION

**FILED**  
FEB 11 2013  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 2/6/13

Joan B. Lobis J.S.C.  
**JOAN B. LOBIS**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:.....MOTION IS  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
DOROTHY ROJAS, an Infant by her Mother and  
Natural Guardian, YENNY ROJAS, and YENNY  
ROJAS, Individually,

Plaintiffs,

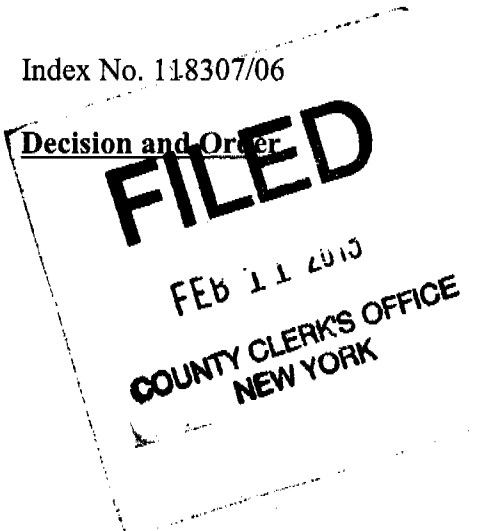
Index No. 118307/06

-against-

ST. LUKE'S ROOSEVELT HOSPITAL CENTER,  
SHONDA CORBETT, M.D., and KUSUM  
KHANNA, M.D., STEPHANIE POLLITZ, M.D.,  
and FELICIA HAMILTON, M.D.,

Defendants.

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



Dorothy Rojas, an infant by her mother and natural guardian, Yenny Rojas, and Yenny Rojas, individually, move to restore the above-captioned matter to the Court's calendar and to set the matter down for a pre-trial conference. Defendants St. Luke's Roosevelt Hospital Center ("St. Luke's"), Shonda Corbett, M.D., Stephanie Pollitz, M.D., and Felicia Hamilton, M.D., oppose the motion and cross-move to dismiss the action on the grounds that Plaintiffs failed to properly restore the action in accordance with the Court's directives.

This medical malpractice action arises out of the delivery of infant-Plaintiff Dorothy Rojas at St. Luke's on September 27, 2005. Plaintiffs allege three causes of action: medical malpractice on behalf of infant-Plaintiff, Dorothy, and Plaintiff-mother, Yenny Rojas; lack of informed consent on behalf of Yenny Rojas; and loss of services on behalf of Yenny Rojas. Plaintiffs allege that Dorothy suffered shoulder dystocia and that Yenny Rojas suffered perineal laceration and separation of the pubic symphysis as a result of Defendants' negligence.

Plaintiffs commenced the case on December 11, 2006, against St. Lukes and Dr. Corbett. Dr. Pollitz, as the attending obstetrician, was added as a defendant on September 17, 2007, and Dr. Hamilton, as the author of the notes in Yenny Rojas' medical charts, was added as a defendant on February 4, 2008. Discovery was completed and note of issue was filed on or about July 28, 2011. The matter was scheduled for trial on December 6, 2011, February 23, 2012, June 6, 2012, and June 11, 2012. On June 11, 2012, Plaintiffs were not ready to proceed with jury selection and requested an adjournment. This Court, instead, marked the case off the calendar and directed Plaintiffs to move to restore the action to the trial calendar within 90 days. The Court instructed that Plaintiffs' motion to restore should be supported by an expert affirmation setting forth Defendants' departures from good and accepted medical practice. Defendants were permitted to move to dismiss the action if Plaintiffs failed to move to restore the action in accordance with its directives.

Plaintiffs now seek to restore the action and has attached an affirmation of merit by Martin Gubernick, M.D., and a medical examination report from R.C. Krishna, M.D. In his affirmation, Dr. Gubernick states that he is a physician licensed to practice medicine in New York. In forming his opinion, Dr. Gubernick reviewed the relevant medical records, deposition transcripts, defendant's expert disclosures, and the examination report of Ingrid P. Taff, M.D. He opines with a reasonable degree of medical certainty that St. Luke's and Dr. Corbett departed from good and accepted medical standards in their treatment of Dorothy Rojas during her delivery on September 27, 2005, and that these Defendants' departures contributed to Dorothy sustaining a left brachial plexopathy. He states that these Defendants "failed to properly perform the obstetrical maneuvers used to facilitate delivery during births complicated by shoulder dystocia," which resorted to the use

of excessive traction on Dorothy's head during the delivery. He further opines that brachial plexopathies usually result from the use of excessive traction on the head during delivery. He states that this is especially so given that Dorothy does not have a condition predisposing her to a brachial plexopathy. The use of excessive traction on an infant's head during delivery is only indicated when there is a concern for neonatal encephalopathy. Here, there was no indication that there was a concern for neonatal encephalopathy. Without that, time was not of essence and there was no reason to rush the delivery by employing the use of excessive traction on the fetal head. As indicated in Dr. Corbett's Attending Delivery Note, Dorothy's delivery was delayed by one minute, and during that minute Dr. Corbett employed the McRobert's maneuver, suprapubic pressure, and the Woods corkscrew maneuver to reduce the infant's left shoulder dystocia. He states that Dr. Corbett should have changed the angle of the delivery and the left shoulder prior to proceeding with the delivery.

Dr. Krishna submits an examination report, stating that she saw Dorothy on September 7, 2012, for a neurological examination appointment. Her examination revealed "focal persistent deficits in the upper extremity from Dorothy's birth trauma of a left upper extremity Erb's Palsy," including an asymmetry of the left masseter region of the face.

Defendants oppose the motion and cross-move to dismiss the action in its entirety. Defendants argue that Dr. Gubernick's affirmation is conclusory and fails to establish that the matter is meritorious and that Dr. Krishna's neurological note does not rise to the level of an expert affirmation. Additionally, Defendants argue that because Plaintiffs failed to move to restore the action against Defendants Stephanie Pollitz, M.D., and Felicia Hamilton, M.D., the matter should

be dismissed against these Defendants. They state that Dr. Gubernick's affirmation does not mention these Defendants and their alleged departures. They point out that the caption on Plaintiffs' moving papers do not bear the names of these Defendants, nor do Plaintiffs attach any supporting documents referencing Drs. Pollitz and Hamilton. Further, Defendants aver that because Plaintiffs failed to reference the causes of action alleged on behalf of Yenny Rojas, all causes of action alleged by her should be dismissed.

In opposition to Defendants' motion to dismiss and in further support of their motion to restore, Plaintiffs argue that they complied with the Court's directive. Plaintiffs state that the incorrect caption was an error and does not indicate their refusal to restore the matter as against Drs. Pollitz and Hamilton. They aver that the Court's directives did not require them to submit an exhaustive and all-inclusive expert affirmation as to all alleged theories of liability and causation, and that the Court did not indicate that the restoration would be limited to the theories of liability and injuries referenced in the motion to restore. Plaintiffs further argue that their expert affirmation is sufficient and non-conclusory, as it was properly based upon the records in the case and opines to departures and proximate cause. Plaintiffs also posit that Defendants' motion to dismiss should be denied because the Court's directive only permitted Defendants to move to dismiss only if Plaintiffs had failed to move to restore, irrespective of the motion's sufficiency. They further state that Defendants' dispositive motion is untimely as the deadline for any such motion has elapsed.

In further support of the cross motion to dismiss, Defendants reiterate their argument that Plaintiffs' expert's affirmation is deficient because it is conclusory. They state that it fails to address alleged departures as to Yenny Rojas and does not mention the alleged departures

attributable to Drs. Pollitz and Hamilton. They also state that Plaintiffs failed to cure their deficiency in their reply.

“[A]n affidavit of merit by a medical expert is required to demonstrate a meritorious action” in a medical malpractice action. Kaufman v. Bauer, 36 A.D.3d 481, 482 (1st Dep’t 2007). The showing of merit necessary to restore a case is less than that required to defend a summary judgment motion. Id. In considering the sufficiency of an affidavit of merit, the Court should evaluate whether the expert attributed specific acts of Plaintiff’s alleged negligence to the Defendants. See, e.g., id.; Nolan v. Lechner, 60 A.D.3d 473 (1st Dep’t 2009); Yousian v. N.Y. Med. Ctr. Hosp., 277 A.D.2d 449 (2d Dep’t 2000); Miller v. City of N.Y., 242 A.D.2d 370 (2d Dep’t 1997); Elliot v. Nyack Hosp., 204 A.D.2d 958 (3d Dep’t 1994).

The Court finds that Plaintiffs successfully restored the case as to the first cause of action alleging medical malpractice by Defendants Dr. Corbett and St. Luke’s on behalf of infant-Plaintiff, Dorothy Rojas. Plaintiffs’ expert, Dr. Gubernick, opines that there were deviations from the standard of care in the manner in which Dr. Corbett delivered Dorothy, which proximately caused Dorothy’s injury of Erb’s Palsy. Based on his experience, and after reviewing the relevant medical records and the deposition transcripts in this matter, Dr. Gubernick rendered his opinion within a reasonable degree of medical certainty. Dr. Gubernick specifically stated that Dr. Corbett rushed the delivery, failed to reassess and alter the angle of the infant during delivery, and failed to properly perform the obstetrical maneuvers to reduce the risk of shoulder dystocia. Because Dr. Gubernick’s affirmation is sufficient, whether Dr. Krishna’s neurological note suffices as an expert

affirmation is inconsequential. As a derivative claim, the third cause of action for loss of services on behalf of Plaintiff-mother Yenny Rojas is also restored.

Plaintiffs, however, failed to restore the case against Drs. Pollitz and Hamilton, and Plaintiff-mother Yenny Rojas' causes of action sounding in medical malpractice and lack of informed consent. As Defendants point out, Plaintiffs' attorney affirmation and expert affirmation do not mention alleged departures by these Defendants that caused injury to either Dorothy or Yenny Rojas. Plaintiffs' attorney's affirmation, Dr. Gubernick's expert affirmation, or Dr. Krishna's note do not mention Yenny Rojas' injuries of perineal laceration or separation of pubic symphysis. Nor does Yenny Rojas submit her own affidavit on the lack of informed consent cause of action. Plaintiffs additionally failed to cure this deficiency in their reply papers. Due to Plaintiffs' failure to move to restore these matters, those portions of Defendants' cross-motion seeking to dismiss the matter against Drs. Pollitz and Hamilton, and seeking to dismiss the first cause of action on behalf of Yenny Rojas and the second cause of action for lack of informed consent are granted. Accordingly, it is

ORDERED that Plaintiffs' motion to restore the case is granted in part, and the first cause of action alleging medical malpractice on behalf of infant-Plaintiff Dorothy Rojas and the third cause of action are restored; it is further

ORDERED that Defendants' motion to dismiss is granted in part, and the first cause of action for medical malpractice on behalf of Yenny Rojas and the second cause of action for lack

of informed consent are dismissed; it is further

ORDERED that the case is dismissed in its entirety against Stephanie Pollitz, M.D., and Felicia Hamilton, M.D., and the Clerk is directed to enter judgment in favor of these Defendants; it is further

ORDERED that the action is continued against the remaining Defendants; it is further

ORDERED that the caption shall be amended to reflect the dismissal of Drs. Pollitz and Hamilton and that all future papers filed with the Court shall bear the amended caption; it is further

ORDERED that the counsel for Drs. Pollitz and Hamilton shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the Court's records to reflect the change in caption; and it is further

ORDERED that the remaining parties shall appear for a pre-trial conference on Tuesday, March 5, 2013, at 9:30 a.m.

Dated: February 6, 2013

ENTER:

**FILED**  
FEB 11 2013  
COUNTY CLERKS OFFICE  
NEW YORK

**FILED**  
FEB 11 2013  
COUNTY CLERKS OFFICE  
NEW YORK

  
JOAN B. LOBIS, J.S.C.