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SHORT FORM ORDER

INDEX No. 09-32657

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 4-24-12
ADJ. DATE 5-14-12
Mot. Seq. # 002 - MD
003 - MD

---X

KEIBY OCHOA,

Plaintiff,

- against -

RANDI TURKEWITZ, CHANDRA REESE, JENNIFER SCHWAB, LAN NA LEE, KINNARI DESAI, J. GERALD QUIRK, JR., ADAM P. BUCKLEY, and UNIVERSITY ASSOCIATES IN OBSTETRICS & GYNECOLOGY, P.C.,

Defendants.

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Upon the following papers numbered 1 to 45 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-21 no affidavit of service; (003) 22-33; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 34-38; Replying Affidavits and supporting papers 39-43; 44-45; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendants, Kinnari Desai, Gerald Quirk, Jr., Adam Buckley, and University Associates in Obstetrics & Gynecology, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint, is denied; and it is further

ORDERED that motion (003) by defendants, Randi Turkewitz, Chandra Reese, Jennifer Schwab, and Lan Na Lee, pursuant to CPLR 3212 for summary judgment dismissing the complaint, is denied as untimely.

In this medical malpractice action, the plaintiff, Keiby Ochoa, who was twenty-three years old at the time the cause of action arose, seeks damages for personal injuries she sustained due to the alleged negligent departures from good and accepted standards of medical care and treatment rendered to her while she was under the care and treatment of the defendants during labor and delivery of her nine pound, twelve

ounce infant. The plaintiff alleges that during labor, she experienced uterine atony and hemorrhage which necessitated a hysterectomy. The plaintiff was admitted to Stony Brook University Hospital on December 14, 2008, to the service of the attending on duty, Adam P. Buckley, M.D. On December 16, 2008, a cesarean section was performed by defendant Kinnari Desai, M.D., an attending physician, who then sought consultation with defendant J. Gerald Quirk, Jr., due to the plaintiff experiencing uterine bleeding after the surgery. Thereafter, a hysterectomy was performed. It is alleged that the defendants departed from good and accepted standards of care and treatment in that they, inter alia, failed to ascertain fetal dimensions, fetal weight, and pelvimetry; failed to monitor the progress, or lack thereof, of labor and fetal descent; permitted the plaintiff to push prior to reaching full dilation; improperly increased doses of Pitocin; failed to timely perform a cesarean section; improperly performed a cesarean section; failed to perform uterine massage; caused and permitted uterine exhaustion, atony, atony of the myometrium, chorioamnionitis, acute funisitis, post-partum vaginal bleeding and hemorrhage which required a hysterectomy; failed to perform alternative procedures for stopping blood loss, including but not limited to uterine artery ligation and/or internal iliac artery ligation; and permitted unqualified individuals to provide care and treatment to the plaintiff. Co-defendants, Lan Na Lee and Randi Turkewitz were third year residents; Chandra Reese was a second year resident; and Jennifer Schwab was first year resident, at Stony Brook University Hospital.

In motion (002), defendant physicians, Desai, Quirk, Buckley, and University Associates in Obstetrics & Gynecology, P.C., seek summary judgment dismissing the complaint as asserted against them on the basis that they did not depart from the accepted standards of care and treatment, and did not proximately cause the plaintiff's claimed injuries.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of application (002), the moving defendants have submitted, inter alia, an attorney's affirmation; the expert affirmation of James T. Howard, Jr., M.D.; an unauthenticated, uncertified, and undated, partial excerpt from the ACOG Practice Bulletin which is not in admissible form; copies of the summons and complaint, answers served by these moving defendants, and plaintiff's bills of particulars; copies of the unsigned transcripts of the examinations before trial of defendants Kinnari, Desai, Quirk, and Buckley which are considered as adopted as accurate by them (***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); various expert exchange and disclosure and discovery; partial, uncertified copies of plaintiff's hospital record which are not in admissible form to be considered on a motion for

summary judgment pursuant to CPLR 3212 and 4518 (***Friends of Animals v Associated Fur Mfrs.,*** *supra*). Expert testimony is limited to facts in evidence (*see also* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious***, 224 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; ***Bloom v City of New York***, 202 AD2d 465, 609 NYS2d 45 [2d Dept 1994]).

Even if the moving defendants had submitted a certified and complete copy of the plaintiff's hospital record, it is determined that they have not demonstrated prima facie entitlement to summary judgment dismissing the complaint asserted against them. "The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (***Toomey v Adirondack Surgical Assoc.,*** 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001][citations omitted]; ***Winegrad v New York Univ. Med. Ctr.,*** 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Machac v Anderson,*** 261 AD2d 811, 690 NYS2d 762 [3d Dept 1999]). It is determined that the affidavit by the moving defendants' expert, Dr. Howard, is cursory, conclusory and unsupported with the standards of care, and how such standards were complied with by the various defendants. It is further determined that the plaintiff has submitted an expert affirmation which raises triable issues of fact which preclude summary judgment from being granted to the defendants.

The moving defendants' expert, James T. Howard, Jr., M.D. affirms that he is a physician licensed to practice medicine in New York State and is board certified in obstetrics and gynecology. He set forth his education and training, work experience, and basis for his qualification as an expert. He opined that Dr. Buckley, Dr. Desai, Dr. Quirk, and University Associates in Obstetrics and Gynecology did not deviate from accepted standards of obstetrical care, and that their care and treatment was not the proximate cause of any injury to the plaintiff.

Dr. Howard stated that the ultimate outcome, the performance of the hysterectomy to treat the uterine atony and hemorrhage, was not the result of any malpractice by any of the movants. When Dr. Desai and Dr. Quirk arrived at the scene, they attempted to use a variety of uterotonic agents, such as Hemabate, Methergine, and Cytotec, to no avail. B-lynch sutures were used and the uterine artery and vein on both sides was cross clamped in an attempt to make the uterus contract. Because all the attempts to force the

uterus to contract failed, Dr. Desai and Dr. Quirk decided that a hysterectomy should be performed, a decision which was within the standard of care.

Dr. Howard opined that Dr. Quirk was called in for a consultation by Dr. Desai, and that Dr. Quirk evaluated Dr. Desai's attempts to treat the uterine atony. Thereafter, Dr. Quirk made the determination that the plaintiff required a hysterectomy, which was performed by Dr. Desai, an attending, and Dr. Lee, a third year resident. Dr. Howard has not set forth the standard of care in opining that a hysterectomy was the proper treatment, as determined by Dr. Desai and Dr. Quirk. Dr. Howard continued that it was not the "slow progress" in the performance of the cesarean section which resulted in maternal blood loss, but rather the uterine atony. Dr. Howard stated that there is no proof in the hospital record that uterine massage was not properly performed, however, he has not set forth the standard of care for uterine massage, nor does he describe how or when it was performed. He continued that while the plaintiff alleged that the uterine artery ligation was not performed, uterotonics were administered along with the use of B-lynch sutures and cross clamping the uterine artery and vein. Dr. Howard, however, failed to address the standard of care and whether or not uterine artery ligation was an option, as alleged by the plaintiff, and, if so, why it was not employed.

Dr. Howard opined that Dr. Buckley's involvement in the case was limited in that he was the attending on duty when the plaintiff was first admitted, and was in charge of her care when the Cervidil was used to ripen the cervix for labor. Dr. Howard stated that since this was the plaintiff's first pregnancy, her capability to deliver vaginally was unknown. However, Dr. Howard fails to support this conclusory statement with the standard of care to determine whether or not the plaintiff would likely be able to deliver the fetus vaginally. He stated that the plaintiff was 4' 11" tall and that the baby weighed 9 lbs. 12 ozs., despite the estimated fetal weight of the infant being documented at 8 lbs. This, he stated, is not an indication of malpractice. Dr. Howard stated that although the plaintiff alleges she exhibited signs of cephalopelvic disproportion, such claim is without merit, however, he does not set forth the basis for such conclusion. Dr. Howard continued that because Dr. Buckley went off duty at 7 a.m. on December 15, 2008, and the cesarean section was not performed until the early morning hours of December 16, 2008, there is no proximate cause between Dr. Buckley's care and treatment, and the performance of the hysterectomy due to uterine atony.

With regard to Dr. Desai, Dr. Howard opined that although the progress of the plaintiff's labor may have been slow at times, there was nothing to indicate the need to perform a cesarean section prior to the time it was ordered by Dr. Desai, however, he does not state the basis for such unsupported conclusion. He continued that although Dr. Schwab, a first year resident, examined the plaintiff and determined that she was fully dilated, and after two hours of pushing, Dr. Lee determined that the plaintiff was actually only 7 cm dilated with a swollen cervix, Dr. Desai's decision to let the plaintiff rest for two hours before deciding to perform the cesarean section was within the standard of care, which standard of care has not been set forth. He added that there was nothing to indicate that at 5 p.m. on December 15, 2008, that a cesarean section was warranted, however, he has not set forth the plaintiff's status, and the basis for such opinion. Dr. Howard continued that while there are documented risk factors for uterine atony and Pitocin use in the literature, there is no way to be certain when post-partum hemorrhage will occur, be it after a vaginal delivery or cesarean section.

Defendants' motion for summary judgment dismissing the complaint is also precluded as the plaintiff has submitted an affirmation from her expert which raises material factual issues.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.***, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

The plaintiff has submitted the redacted affirmation of her expert with the moving papers, as well as an unredacted copy under separate cover to this court for *in camera* inspection (*see* ***Marano v Mercy Hospital,*** 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]). Such unredacted copy has been inspected by this court and returned to the plaintiff's counsel.

Plaintiff's expert has affirmed that he/she is licensed to practice medicine in New York and New Jersey and is board certified in obstetrics and gynecology. Plaintiff's expert set forth his/her education and training, as well as work experience to qualify as an expert on behalf of the plaintiff. The plaintiff's expert has opined within a reasonable degree of medical certainty that the defendants departed from good and accepted standards of care and treatment of the plaintiff; failed to appreciate the plaintiff's risk factors for pelvic-cephalic disproportion; failed to appreciate the arrest of labor; administered Pitocin in a contraindicated manner; permitted the plaintiff to push for a period of two and a half hours when she was not fully dilated; failed to perform a cesarean section in a timely and proper manner, which resulted in uterine exhaustion, uterine atony, hemorrhage, and the need for an emergent hysterectomy.

Plaintiff's expert stated that the plaintiff presented to Stony Brook University Hospital on December 14, 2008 complaining of uterine contractions at 40 weeks and 5 days, with the presenting part high at a -3 station, which made cephalopelvic disproportion likely. She was found to be in prodromal labor and remained so during the day. Repeated observations indicating that the presenting part remained at -3 station was strongly suggestive evidence of cephalopelvic disproportion, particularly in light of the plaintiff's small stature. However, no attempt was made during the plaintiff's hospitalization to evaluate the fetal size utilizing ultrasound. Instead, the fetal size was assessed clinically, a less accurate means of estimating fetal weight. Cervidil had been started to stimulate labor on the morning of December 15, 2008. At 8:15 a.m., the plaintiff was 4 to 5 cm dilated and Pitocin was begun at a rate which was incrementally increased from 1 to 9 milliunits per minute. However, by 4:36 p.m., the plaintiff only progressed one centimeter in dilation to 5 centimeters. Thus, opined plaintiff's expert, the physicians treating the plaintiff had reason to conclude that the plaintiff's labor had a secondary arrest as there was cessation of a previously normal active phase of cervical dilation for a period of two hours or more, which required further evaluation, including exclusion of cephalopelvic disproportion. The plaintiff's expert opined that it was a deviation from the accepted standard of practice for the defendants not to investigate and attempt to exclude cephalopelvic disproportion; that the defendants failed to assess the fetal weight with ultrasound; and further departed from the standard of care by the continued administration of Pitocin after 4:36 p.m. without evaluation of for cephalopelvic disproportion and assessment of the fetal weight. The plaintiff's expert stated that the continued administration of Pitocin at high doses, to a patient with cephalopelvic disproportion, is highly conducive to uterine exhaustion and atony.

The plaintiff's expert continued that at 8:32 p.m. on December 15, 2008, first year resident Dr. Schwab performed a vaginal examination wherein she found the plaintiff was ten centimeters dilated, 100%

effaced, and at 0 station, and instructed the plaintiff to push, which plaintiff continued to do until 11:15 p.m. when she was examined by senior resident, Dr. Lee, who found the plaintiff was only seven centimeters dilated. The plaintiff was then instructed to stop pushing. The plan of treatment was to only affect delivery by cesarean section in the absence of progress in the course of an additional two hours. The plaintiff's expert opined that permitting a patient to push when the cervix is not completely dilated is conductive to uterine exhaustion; the cesarean section was indicated at 11:15 p.m.; and it was a deviation from the standard of care to procrastinate further for two hours and to continue administering Pitocin during the intervening time period as prolonged labor and excessive stimulation of the uterus with Pitocin exhausts the myometrium and is conducive to post-partum hemorrhage. Additionally, encouraging the plaintiff to push when the cervix is not fully dilated also contributed to the uterine exhaustion manifested by uterine atony. Performance of a cesarean section at this appropriate time would have unlikely involved the degree of bleeding that was eventually encountered when the operation was performed on December 16, 2008. These factors, opined plaintiff's expert, were a substantial factor in causing the severe intraoperative bleeding and uterine atony which occurred on December 16, 2008; and that the defendants mismanaged the care of the plaintiff when the uterine atony became apparent, further exacerbating the bleeding, and causing the need for a hysterectomy.

The plaintiff's expert opined that Dr. Buckley deviated from the standard of care in failing to appreciate the substantial risk factors for pelvic-cephalic disproportion evident from the clinical examination, history, and medical records available at the time, especially evidenced by the -3 station which was strongly suggestive of cephalopelvic disproportion; in failing to evaluate the fetal size utilizing ultrasound; in failing to assess and evaluate the adequacy of the plaintiff's pelvis upon admission; in permitting Dr. Schwab, a first year resident who was not trained to evaluate the plaintiff for pelvic-cephalic disproportion, to perform the initial evaluation and assessment of the plaintiff; in augmenting protocol and administering drugs to augment labor without properly evaluating the plaintiff for pelvic-cephalic disproportion; and in prolonging the plaintiff's progress of labor and permitting it to progress to uterine atony and hemorrhage that eventually necessitated hysterectomy.

The plaintiff's expert stated that Dr. Desai, as an attending, had responsibility for devising the treatment plan for the plaintiff on the evening of December 15, 2008, and in light of the arrest of the plaintiff's labor, procrastination and continued use of Pitocin stimulation was not an acceptable management plan as delivery was already indicated at 6:00 p.m. due to the then four-hour arrest of labor. The plaintiff's expert continued that the uterine activity pattern served as a contraindication to continued administration of Pitocin. Thus, opined plaintiff's expert, Dr. Desai deviated from the standard of care by failing to affect surgical delivery of the infant at that time; in continuing the administration of Pitocin after the arrest of labor; in permitting the plaintiff to push in the absence of full cervical dilation, a serious deviation; failing to double check the findings of the first year resident; continuing Pitocin at 11:15 p.m. when the cervix was seven centimeters dilated with an anterior swollen lip; in failing to perform the cesarean section at 11:15 p.m. on December 15, 2008; in failing to timely perform the uterine artery ligation which was a significant factor to the loss of plaintiff's uterus; performing an ineffective B-Lynch suture; and in causing a loss of time leading to uterine atony and hysterectomy.

As to Dr. Quirk, plaintiff's expert opined that if Dr. Quirk made the decision to place the second B-Lynch suture, it was a deviation from the standard of care as it resulted in the loss of precious time and limited the possibility for other more effective interventions; thus, Dr. Quirk negligently managed the plaintiff's uterine atony and hemorrhage, a substantial factor in causing the consequences derived therefrom, including the performance of an emergent hysterectomy.

Based upon the foregoing, it is determined that the plaintiff's expert has raised multiple factual issues as set forth regarding each of the moving defendants, which factual issues preclude summary judgment dismissing the complaint from being granted.

Accordingly, motion (002) is denied.

In turning to motion (003) by defendants Randi Turkewitz, Chandra Reese, Jennifer Schwab, and Lan Na Lee, for summary judgment dismissing the complaint as asserted against them, it is determined that the motion has been untimely submitted. The note of issue was filed in this action on October 29, 2012. The last date to serve a motion for summary judgment was on February 25, 2013. However, motion (003) was not served until March 19, 2013, well beyond the 120 days in which to file such motion. Counsel for these defendants argues that there is no prejudice to determining such motion. However, the standard requires the tardy movant to demonstrate good cause for failing to timely submit the motion. "Good cause" under CPLR 3212 (a) requires a showing of good cause for the delay in making the motion-a satisfactory explanation for the untimeliness-rather than simply permitting meritorious, non-prejudical filings, however tardy. No excuse at all, or a perfunctory excuse, cannot be "good cause" (*see* ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; ***First Union Auto Finance, Inc.***, 16 AD3d 372, 791 NYS2d 596 [2d Dept 2005; ***Tucci v Colella,*** 26 Misc 3d 1234A, 907 NYS2d 441 [Sup Ct, Kings County 2010]). Based upon the failure to proffer an excuse, good cause has not been demonstrated. The standard to be applied in extending the time for making a summary judgment motion is that there are identical issues as those raised in a timely motion for summary judgment properly before the court. Herein, each defendant physician rendered his own care and treatment to the plaintiff with separate allegations of departures from the standards of care asserted against each. Thus, this application (003) is not identical to motion (002) as the defendants are different, and the care and treatment provided by each are separate and apart from that of their co-defendants, precluding summary judgment (***Teitelbaum v Crown Heights Association for the Betterment***, 84 AD3d 935, 922 NYS2d 544 [2d Dept 2011).

Accordingly, motion (003) is denied.

Dated: 6/10/13

A.J.S.C.

___ **FINAL DISPOSITION** _X_ **NON-FINAL DISPOSITION**