

<b>Beras v Bronx Lebanon Hosp.</b>
2013 NY Slip Op 33871(U)
October 3, 2013
Supreme Court, Bronx County
Docket Number: 301989/09
Judge: Stanley B. Green
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IA-6

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ANYIE BERAS,

Plaintiff(s),

INDEX No. 301989/09

- against-

DECISION

BRONX LEBANON HOSPITAL, MORRIS  
HEIGHTS HEALTH CLINIC, DR. JEAN  
TURINGAN, DR. KOHOTER AND DR.  
SPENCE,

Defendant(s).

-----X  
BRONX LEBANON HOSPITAL CENTER,  
Defendant/Third- Party Plaintiff,

INDEX: 85962/07

- against-

MORRIS HEIGHTS HEALTH CENTER, TRIX CANLAS,  
AS Administratrix of the Estate of JEAN TURINGAN, also  
known as JEAN TURINGAN, M.D., Deceased, and BLAIR  
KOKOTEK, M.D.,

----- X  
**HON. STANLEY GREEN,**

The motion by defendant Bronx Lebanon Hospital Center for summary judgment dismissing the complaint against it is granted.

Plaintiff commenced this action to recover damages for brain injuries allegedly sustained by the infant plaintiff during her birth at Bronx Lebanon Hospital Center. Plaintiff alleges that defendant failed to timely diagnose, manage and /or treat fetal hypoxia and failed to timely perform a C-section.

Plaintiff claims that the fetal heart tracings show multiple and prolonged periods of non-readability, multiple and prolonged periods of decreased variability or areas that are generally flat and many instances of late and prolonged late decelerations and that, as a result of defendant's failure to do a timely C-section, the plaintiff suffered severe brain injuries which were diagnosed many years later.

The hospital record reflects, and the parties agree, that the infant weighed 8lbs 11ozs at birth and was assigned Apgar scores of 8 and 10 at 1 and 5 minutes and was transferred to the

nursery. She was noted to be pink with good tone and some jaundice. She had good reflexes, her lungs were clear and she had a "lusty" cry. She had no respiratory distress and vitals were stable. She was monitored for hypoglycemia and hypocalcemia but studies were unremarkable. She was sent home two days after birth.

An MRI performed on April 19, 2007, at 11 years of age, did not reveal any neurological infarcts that could be linked to the prenatal, intrapartum or neonatal period. Genetic testing on behalf of the defendant in 2008 did not reveal a genetic basis for the infant's condition.

In support of its motion, defendant submits the affirmation of Adiel Fleischer, M.D., who is Board Certified in Obstetrics & Gynecology and Maternal-Fetal Medicine. He gives a detailed recital of the history of plaintiff's prenatal course and delivery and opines that there is no indication that the infant plaintiff was exposed to an infection and no evidence that the infant sustained a hypoxic ischemic insult during the intrapartum period. He further opines that the fact that the infant had good Apgar scores and did not develop hypoxic ischemic encephalopathy, a seizure disorder or any organ problems following delivery indicated that she did not sustain an intrapartum anoxic ischemic injury.

Defendant also submits the affirmation of Michelle Lasker, M.D., who is Board Certified in Pediatrics with a Sub-Certification in Neonatal and Perinatal Medicine. She opines that the infant did not sustain or encounter hypoxia during delivery that was significant enough to cause permanent neurological injuries, including Cerebral Palsy, because she never exhibited any signs or symptoms of any such injuries in the neonatal period and she transitioned well to extra uterine life. She says that if the infant had suffered significant intrapartum hypoxia, she would have had:

- (A) "an umbilical cord arterial blood pH pf less than 7.00 with a base deficit equal to or greater than 12;
- (B) neonatal encephalopathy; (C) quadriplegic or dyskinetic Cerebral Palsy; and/or (D) associated Cerebral Palsy pathology."

She thus opines that the absence of any neo-natal symptoms establishes that there is no indication that the infant-plaintiff sustained an intrapartum hypoxic event that could have caused any permanent neurological injuries.

She also opines that there is no evidence of infection.

Defendant has made a prima facie showing of entitlement to judgment as a matter of law. The burden now shifts to the plaintiff to establish questions of fact sufficient to defeat the motion.

In opposition to defendant's motion, plaintiff submits the affidavits of an unnamed doctor who says he is board certified obstetrics and gynecology and Daniel Adler, M.D, board certified in pediatrics and psychiatry and neurology with a special qualification in child neurology.

Neither make any claim regarding an infection and that claim is dismissed.

The unnamed ob/gyn gives a detailed recital of the plaintiff's pre-natal course and delivery and opines that defendant departed from good and accepted standards of care by failing to perform a C-section, which resulted in brain damage. His lengthy affirmation does create a question of fact as to whether the infant-plaintiff suffered hypoxia in utero. Dr. Adler adopts the opinion of this doctor regarding hypoxia and opines that the injuries he diagnosed in 2012 resulted from that hypoxia.

Neither of plaintiff's experts address the opinion of defendant's experts, that, in the absence of any signs or symptoms of neurological abnormalities in the neo-natal period there can be no causal relation between any possible hypoxia and the infant's alleged injuries, diagnosed years after birth.

In a medical malpractice case, the plaintiff must establish both a departure by the defendant and a causal relationship to the injuries. Here the plaintiff may have established a question of fact regarding the existence of hypoxia, but has failed to do so with respect to causation. The failure to address the opinion of defendant's experts regarding the significance of the absence of neo-natal problems is fatal to plaintiff's case and entitles defendant Bronx Lebanon Hospital Center to judgment dismissing the complaint against it (Abalola v. Flower Hospital, 44 AD3d 522; Ramirez v. Columbia- Presbyterian Medical Center, 16 AD3d 238).

Accordingly, the complaint against defendant Bronx Lebanon Hospital Center is dismissed and the Clerk is directed to enter judgment dismissing the complaint against defendant Bronx Lebanon Hospital Center.

This constitutes the decision and order of the Court.

Dated: October 3, 2013

  
STANLEY GREEN, J.S.C.