

Francis v Blumberg

2014 NY Slip Op 32073(U)

June 26, 2014

Supreme Court, New York County

Docket Number: 400760/11

Judge: Douglas E. McKeon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. DOUGLAS E. McKEON

PRESENT: _____ J.S.C.
Justice

PART 38

Lamar Francis

- v -

Dr. Isabel Blumberg et al.

INDEX NO. 400760/11

MOTION DATE _____

MOTION SEQ. NO. (003)

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read 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

Motion and cross-motion are decided as per the annexed Memorandum Decision.

FILED

AUG 08 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/29/14

de
HON. DOUGLAS E. McKEON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

LAMAR FRANCIS, an infant by his mother and
natural guardian, SABRINA FRANCIS,

Plaintiff,

-against-

DR. ISABEL BLUMBERG, DR. LISSETTE
MACHIN, DR. HELEN ROUVELAS, DR.
OFELIA MARTINEZ, CORAZONE DELVIN,
R.N., and MOUNT SINAI MEDICAL CENTER,

Defendants.

-----X
HON. DOUGLAS E. MCKEON:

MEMORANDUM DECISION

Index No.: 400760/11

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NEW YORK

Motion, by defendants Dr. Lissette Machin, Dr. Helen Rouvelas, Dr. Ofelia Martinez, Corazone Delfin s/h/a Corazone Delvin, R.N. and Mount Sinai Hospital s/h/a Mout Sinai Medical Center for an order pursuant to CPLR 3212 granting summary judgment to the defendants and defendant Dr. Blumberg's cross-motion for the same relief are decided as follows:

This action involves medical malpractice relating to the labor, delivery (on September 4, 2004) and neonatal course of the infant plaintiff, resulting in alleged injuries. It is claimed that the infant plaintiff should have been delivered earlier in that foul smelling fluid at rupture of membranes, presumptive of chorioamionitis, coupled with periods of purportedly non-reassuring tracings required an earlier cesarean section. With respect to the neonatal management, plaintiff claims a failure by defendants to administer antibiotics after delivery, a failure to diagnose a fetal metabolic imbalance with low pH causing hypoxia, and a failure to intubate, administer oxygen and call for appropriate consultations.

Initially, this court grants summary judgment to Dr. Machin, Dr. Rouvelas, Dr. Martinez and Nurse Delfin. Plaintiff has indicated intent to discontinue her claims against these defendants and there is no opposition to the underlying summary judgment motion on their behalf. Thus, this court will address the summary judgment motion by Mt. Sinai, to the extent the hospital is vicariously liable for Dr. Blumberg's management of the subject labor and delivery and the cross-motion by Dr. Blumberg for summary judgment.

Defendants' position is supported by the affirmations of Gary Mucciolo, M.D., a Board Certified obstetrician/gynecologist, and Andrew Steele, M.D., a Board Certified neonatologist/perinatologist. Both physicians opine, to a reasonable degree of medical certainty, that the decision to induce labor was appropriately undertaken. Regarding fetal heart tracings through the time when the tracings started to demonstrate fetal tachycardia, earlier intervention by cesarian section was not warranted. As for the decelerations in the tracings, Dr. Mucciolo opined that the decelerations commonly occur due simply to the stress of labor contractions and that even late decelerations are not highly predictive of fetal distress. Dr. Mucciolo further adds that the periods of diminished variability seen on the tracings reflect periods of wakefulness and sleep of the infant. He opined that the tracings were appreciated and that a presumptive diagnosis of chorioamnionitis was considered by Dr. Blumberg and that the decision was appropriately made that a cesarian delivery was warranted. According to defendant's expert, the factors involved here were timely appreciated and accomplished, all within good and accepted standards of obstetrical practice. Dr. Steele opined that the neonatal course here was appropriate. The infant was administered blow-by oxygen and then a CPAP, weaned the following day to room air, administered antibiotic therapy until the negative cultures were returned, had normal

neurological examinations, tolerated oral feedings, underwent phototherapy for jaundice and was appropriately discharged.

In opposition, plaintiff submits the affirmations of a Board Certified obstetrician and gynecologist and Dr. Daniel Adler, a Board Certified pediatric neurologist. In sum, plaintiff's experts opine that as a result of the presumptive chorioamnionitis and the fetal heart rate changes indicative of hypoxia, good and accepted care required that the infant be delivered via cesarean section at an earlier time. As a result of the failure to be delivered earlier, the infant suffered from intrapartum hypoxia during labor and that as a result of the hypoxia, the infant developed hypoxic ischemic encephalopathy, respiratory distress, motor and language delay, cognitive impairment, and low muscle tone with fine and gross motor incoordination.

Upon a full review of the submitted papers, this Court determines that the plaintiff has demonstrated that material issues of fact exist, such that defendant Mt. Sinai and Dr. Blumberg's motion and cross-motion for summary judgment are denied.

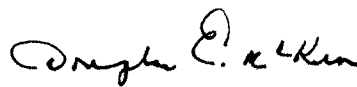
A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged. *See Roques v. Nobel*, 73 AD3d 204, 206 (1st Dep't 2010). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. *Id.* If the movant makes a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require trial of the action. *Id.*

It cannot be determined, as a matter of law, that the defendants did not depart from accepted medical standards based upon the facts in this case. Furthermore, this court determines that the plaintiff has demonstrated that material issues of fact exist, such that defendants Mount Sinai Hospital and Dr. Blumberg's motion and cross-motion for summary judgment are denied.

Accordingly, defendants Dr. Machin, Dr. Rouvelas, Dr. Martinez and Nurse Delfin are granted summary judgment and the complaint is dismissed against them. The motion and cross-motion by defendants Mount Sinai and Dr. Blumberg are denied.

This constitutes the decision and order of the court.

DATED: New York, New York
June 26, 2014



Douglas E. McKeon, J.S.C.

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