

Johnson v Bronx-Lebanon Hosp. Ctr.

2014 NY Slip Op 32715(U)

July 31, 2014

Sup Ct, Bronx County

Docket Number: 301202/10

Judge: Stanley B. Green

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NEW YORK SUPREME COURT - COUNTY OF BRONX

IA-6

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6

-----X

FELICIA JOHNSON,

Plaintiff,

INDEX № 301202/10

-against-

THE BRONX-LEBANON HOSPITAL CENTER,
ANDRZEJ RIESS, WOODLAND MEDICAL
ASSOCIATES, P.C., MONICA J. SIMONS and
PHABILLIA AFFLACK,

Present:
HON. STANLEY GREEN
J.S.C.

Defendant.

-----X

THE BRONX-LEBANON HOSPITAL CENTER,
Third-Party Plaintiff,

-against-

CHRISTINA FLORES, M.D.,
Third-Party Defendant.

-----X

The following papers numbered 1 to 4 read on this motion
No. on the Calendar of May 12, 2014

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1
Answering Affidavit and Exhibits.....	2,3
Replying Affidavit and Exhibits.....	4

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision.

Dated: July 31, 2014



STANLEY GREEN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

-----X
FELICIA JOHNSON,

Plaintiff,

INDEX No. 301202/10

-against-

THE BRONX-LEBANON HOSPITAL CENTER,
ANDRZEJ RIESS, WOODLAND MEDICAL
ASSOCIATES, P.C., MONICA J. SIMONS, and
PHABILLIA AFFLACK,

Defendant,

DECISION

-----X
THE BRONX-LEBANON HOSPITAL CENTER,

Third-Part Plaintiff,

Third-Party
INDEX No. 84123/12

-against-

CHRISTINA FLORES, M.D.,

Third-Party Defendant,

DECISION

-----X
HON. STANLEY GREEN:

The motions made by defendants Andrezej Riess, Monic J. Simons, Phabillia Afflack, and the cross-motion made by Bronx-Lebanon Hospital Center for an order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint is granted only to the extent that all claims against Dr. Phabillia Afflack, and claims for lack of informed consent are dismissed.

Plaintiff Felicia Johnson commenced this action on February 17, 2010 to recover damages for medical malpractice, negligence and a lack of informed consent in connection with the treatment rendered by defendants.

On November 18, 2009, plaintiff presented to Bronx-Lebanon Hospital complaining of contraction pains and requesting a cesarean section. Her past surgical history included a cesarean section in February 2008. She was admitted to the service of attending Dr. Andrzej Riess for obstetrics/gynecological care. The defendants stated that, prior to the procedure, the risks and benefits of a cesarean section versus vaginal birth were explained to the plaintiff. They further assert that the plaintiff verbalized that she understood and signed her consent for the cesarean section. On November 18 at 23:24, plaintiff's infant son was delivered by co-defendant Dr. Christina Flores via elective, non-emergent cesarean section.

Plaintiff's intraoperative blood loss from the delivery was estimated to be 900 cc. Following the operation, on November 19, 2009, first-year resident Dr. Omar Duenas was called to evaluate Ms. Johnson for oliguria (decreased urine output). Dr. Duenas went on to assessed plaintiff through a bedside sonogram, which revealed plaintiff had some abdominal free fluid that looked clear and was not heterogeneous. Dr. Duenas further noted that plaintiff's hemoglobin and hematocrit had dropped. Dr. Duenas reviewed the case with Dr. Simons and the plan was to start the plaintiff on PRBC (packed red blood cells), to perform repeat CBC (complete blood count) and to consider a CT scan of the abdomen and pelvis. Dr. Simons never personally reviewed the sonogram and its images were not preserved. On November 20, 2009, Dr. Simons requested the present management be continued, a CBC be repeated, and a CT scan be performed as occasion requires.

On November 20, 2009, Dr. Nalgona noted a drop in plaintiff's HGB after two PRBC had been given. He also noted persistent tachycardia (a heart rate which exceeds the normal range) due to anemia. On November 21, 2009, plaintiff was noted as being anemic but asymptomatic. Plaintiff was discharged from the hospital on November 22, 2009.

On November 26, 2009, at 13:18, plaintiff presented to the Bronx-Lebanon Medical Center complaining of abdominal pain and vaginal bleeding. Plaintiff was examined by the Emergency Department and then later discharged at 16:30 with instructions to follow-up with the GYN clinic and to return if worsening pain, high fever, blood in stool or persistent vomiting occurred. Her discharge diagnosis was acute diarrhea.

On December 1, 2009, plaintiff presented to the Bronx-Lebanon Hospital clinic with complaints of abdominal pain and was transferred to the Bronx-Lebanon Hospital Center Emergency OB service for a fluid collection. An abdominal CT scan with IV contrast and a pelvic CT scan with IV contrast (wherein a radiopaque substance is used to illuminate vessels and organs inside the abdominal cavity) revealed an intra-abdominal abscess or abscesses.

Dr. Afflack cared for the plaintiff on December 1, 2009. Dr. Afflack noted that plaintiff was admitted for treatment of a hematoma versus abscess. On December 2, 2009, an abdominal drain was placed. On December 3, 2009 a pigtail catheter was draining fluid and plaintiff was on antibiotics.

On December 4, 2009, plaintiff was readmitted with a likely infected hematoma. On December 9, 2009, a PICC line was placed for long-term intravenous antibiotic treatment (wherein a catheter is inserted into a peripheral vein and guided to a central vein). On December 7, 2009, a CT scan with IV contrast of the pelvis and abdomen revealed post drainage of a pelvic

abscess, with residual hemorrhagic locule in the cul-de-sac and some residual fluid in both adnexal regions.

Defendants claim that following placement of the PICC line, plaintiff was told to stay at the hospital, but she refused. They also claim she refused to arrange for a repeat CT scan within two weeks. However, plaintiff points out that within Dr. Mehdizadeh's deposition he stated that he made a mistake when entering this note in plaintiff's records.

On December 14, 2009, plaintiff presented to the Jacobi Medical Center Emergency Department complaining of a fever and lower abdominal pain. A CT scan of the abdomen and pelvis showed abscesses anterior and posterior to the uterus. On December 15, 2009, plaintiff underwent a supracervical hysterectomy, bilateral salpingectomy, removal of necrotic tissue, lysis of adhesions, wound debridement and repair of deserosalization of the bowel. She continued antibiotic treatment until December 22, 2009. The PICC line was removed on December 23, 2009 with discharge instructions to follow-up with GYN Surgery for wound checks weekly.

In support of the motion for summary judgment, the defendant submitted the expert affirmation of Henry K. Prince, M.D., a duly licensed physician, board-certified in obstetrics and gynecology. Dr. Prince opined that the defendants Andrzej Riess, M.D., Monica J. Simons, M.D., and Phabillia Afflack, M.D. did not deviate from the good and accepted standards of medical practice in their treatment and care of the plaintiff.

In regard to the claims against Dr. Simons, Dr. Prince opined that it was within Dr. Simons' medical judgment to allow Dr. Duenas to interpret plaintiff's bedside sonogram. He opined that abdominal free fluid following a cesarean section is not abnormal for a patient such as the plaintiff, who was afebrile and hemodynamically stable. He further opined that the

appropriate treatment was observation and Dr. Simons' plan for plaintiff to start PRBC, undergo a repeat CBC and to consider a CT scan of the abdomen and pelvis was therefore appropriate.

In regard to the claims against Dr. Riess, Dr. Prince opined that Dr. Riess's involvement with the plaintiff was limited to November 18, 2009. Dr. Prince opined that Dr. Riess did not deviate from the good and accepted standard of care during this short treatment. Dr. Prince references a deposition provided in defendant's reply affirmation, where Dr. Riess stated that he was not involved in plaintiff's discharge or writing her discharge prescriptions.

In regard to the claims against Dr. Afflack, Dr. Prince opined that Dr. Afflack appropriately admitted the plaintiff for treatment of a hematoma versus abscess.

Dr. Prince further noted that plaintiff verbalized an understanding and signed her consent for the risks of undergoing a cesarean section.

Dr. Prince further opined that Dr. Riess, Dr. Simons, and Dr. Afflack did not proximately cause or contribute to the plaintiff's injuries.

Defendant, The Bronx-Lebanon Hospital Center submitted an affirmation in support, contending that Dr. Riess, Dr. Simons, and Dr. Afflack sufficiently showed *prima facie* entitlement to summary judgment, and thus all complaints against them should be dismissed. The Bronx-Lebanon Hospital Center contends that it cannot be held vicariously liable for its co-defendant employee physicians who have been dismissed from an action. The Bronx-Lebanon Medical Center contends it should be dismissed from this action along with Dr. Riess, Dr. Simons, and Dr. Afflack.

In opposition to the motion for summary judgment, plaintiff submitted the expert affirmation of Karen Weiss, M.D., a duly licensed physician, board-certified by the American Board of Obstetrics and Gynecology Obstetrics. Dr. Weiss opined that to a reasonable degree of

medical certainty, Dr. Riess, Dr. Simons, and Bronx-Lebanon Hospital deviated from the good and accepted standards of medical practice at various times between November 19, 2009, and December 9, 2009. She further opined that these departures were substantial factors in the plaintiff's need for a hysterectomy.

Dr. Weiss opined that although 900 cc of blood loss during a cesarean section delivery is not excessive, because plaintiff had an adhesion from her prior cesarean section, it was foreseeable that excessive bleeding could occur intraoperatively or postoperatively. She pointed out that the Bronx-Lebanon Hospital Center's records show a note acknowledging such adhesion. She contended that with the knowledge of this adhesion and plaintiff's loss of 900 cc of blood, good and accepted medical practice required identification of the cause of bleeding through serial laboratory data, serial examinations and radiologic studies before discharge from the hospital. She explained that this must be done in order to avoid potential complications, like the development of an infection from the pelvic collections of blood.

Upon review of the hospital records, Dr. Weiss opined that the PBRC treatment the plaintiff was being administered should have been sufficient to raise her HGB, yet it was not successful. She further opined that the only explanations for this was either that plaintiff had bled more than 900 cc or that she began to have an occult bleed related to the surgery, which was not properly investigated before her discharge. Dr. Weiss pointed to plaintiff's HGB levels on November 19, 2009 dropping from 9.4 to 6.7 and opined that this was an "ominous sign." She contended that, because plaintiff's HGB only minimally increased after receiving four units of blood, radiological studies should have been performed.

Dr. Weiss also opined that plaintiff's infection started after bleeding occurred during and after the cesarean section delivery on November 18, 2009, which led to pelvic and abdominal

collections of blood. Dr. Weiss opined that plaintiff required a prompt diagnosis and treatment, such as antibiotics, during her admission on November 18, 2009 and her ER presentation on November 26, 2009. She further opined that plaintiff should have received a complete drainage of the pelvic collections before discharge on December 9, 2009. She further opined that because the plaintiff had tachycardia, the defendants should have foreseen an infection occurring and taken preemptive steps to diagnose the cause of plaintiff's intraoperative and postoperative bleeding.

Dr. Weiss further contended that the defendants failed to promptly admit the plaintiff to the emergency room on November 26, 2009. She also contended they failed to provide appropriate instructions and time frames for follow up monitoring of the plaintiff after discharge on December 9, 2009.

Dr. Weiss contended that Dr. Simons departed from the good and accepted standards of medical practice by failing to personally evaluate the bedside sonogram that was conducted by Dr. Duenas. Dr. Weiss opined that because Dr. Duenas was a first-year resident, only four months out of medical school, Dr. Simons should not have relied on his interpretation of such a crucial sonogram. Dr. Weiss also opined that the good and accepted standards of medical practice required Dr. Simons to order a CT scan due to plaintiff's postoperative bleeding and her becoming increasingly anemic with HGB counts precipitously dropping.

Dr. Weiss also opined that Dr. Riess departed from the good and accepted standards of medical practice by failing to supervise the medical and obstetrical care of the plaintiff at discharge without diagnosing and treating the cause of persistent tachycardia and abnormally low HGB counts despite four units of blood having been administered. She contended that Dr. Riess was negligent in writing a discharge prescription for the plaintiff without diagnosing her

condition. Dr. Weiss points to a log by the V.V. Pharmacy (plaintiff's Exhibit C), which shows 5 prescriptions for the plaintiff with a fill-date of November 27, written by Dr. Riess. She contended that this is evidence that Dr. Riess authored plaintiff's discharge prescriptions himself.

Dr. Weiss concluded that, both collectively and individually, these departures substantially contributed to plaintiff's extension of bleeding leading to infection, the development of pelvic infection, abscesses, tissue necrosis, the need for extensive surgery including hysterectomy and salpingectomy, the need for further surgery, cosmetic deformity, infertility, depression, and pain and suffering. She further opined that if the plaintiff had received medical care in accord with the good and accepted standards of medical practice, these damages would have been avoided.

Dr. Weiss opined that Dr. Afflack did not depart from the good and accepted standards of medical practice in her treatment and care for the plaintiff.

In medical malpractice actions, "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 demonstrate the absence of any material issues of fact." (Alvarez v. Prospect Hosp., 68 N.Y.2d 320; Winegrad v. New York Univ. Med. Center, 64 NY2d 851; Zuckerman v. City of New York, 49 NY2d 557; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395). In order to successfully oppose a defendant's motion for summary judgment, a plaintiff must submit evidentiary facts or materials to rebut defendant's *prima facie* showing, thus demonstrating a triable issue of fact exists. (Shahid v. NYCHHC, 47 A.D.3d 800, 801; Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324). "A physician's affidavit in opposition to a motion for summary judgment must attest to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury." (Shahid v. NYCHHC, 47 A.D.3d 800, 801) When a party fails to

rebut assertions made in a summary judgment motion, those assertions are deemed admitted by the party. (Kuehne & Nagel, Inc. V. F. W. Baiden, 36 NY2d 539.)

Successful claims for lack of informed consent require the plaintiff to prove “the defendant failed to disclose to her the material risks, benefits, and alternatives to the surgery which a reasonable medical practitioner under similar circumstances would have disclosed, in a manner permitting [the plaintiff] to make a knowledgeable evaluation, and that a reasonably prudent person in the plaintiff’s position would not have undergone the surgery if he or she had been fully informed.” (Romano v. Colen, 305 A.D.2d 575; Public Health Law § 2805-d [1], [3]; Davis v. Nassau Ophthalmic Servs., 232 A.D. 2d 358).

It is noted that plaintiff raised the issue of timeliness of defendant’s motion. However, the note of issue was filed on October 24, 2014 and defendant’s motion for summary judgment was filed on February 21, 2014. Thus, the motion was made within the 120-day period and is therefore timely according to CPLR 1212(a), and this part’s (IA6) rules.

The defendant sufficiently showed *prima facie* entitlement to summary judgment through the affirmation of Dr. Price. The burden then shifted to the plaintiffs to identify triable issues of fact. Plaintiffs’ medical experts failed to address the assertions made by Dr. Price regarding the plaintiff giving her informed consent. Because Dr. Weiss did not refute these assertions, they are deemed admitted. Therefore plaintiff’s claims of a lack of informed consent are hereby dismissed.

Dr. Weiss addressed the assertions made by Dr. Prince regarding the claims against Dr. Afflack without refuting them. Because Dr. Weiss did not raise any triable issue of fact regarding Dr. Afflack, all claims against her are hereby dismissed.

Plaintiff's medical expert sufficiently raised issues of fact as to whether defendants deviated from accepted medical practice based on: (1) whether radiology studies should have been performed due to plaintiff's HGB levels, (2) whether plaintiff was placed on antibiotics early enough, (3) whether defendants should have taken more steps to diagnose plaintiff's bleeding, (4) whether plaintiff should have received complete drainage before her discharge, and (5) whether plaintiff received the proper treatment for her condition and (6) whether any of these issues proximately caused plaintiff's injuries.

The defendants argued that Dr. Riess was not involved in plaintiff's discharge prescriptions and that his care for the plaintiff was limited to November 18, 2009. However, plaintiff pointed to Exhibit C in her motion in opposition, which showed a log by the V.V. Pharmacy, which showed 5 prescriptions for plaintiff, written by Dr. Riess, with a fill-date of November 27, 2009. Therefore, claims against Dr. Riess are precluded from summary judgment, and issues of fact still remain as to: (1) whether Dr. Riess filled out discharge prescriptions for plaintiff, (2) whether his involvement with the plaintiff's care extended past November 18, 2009, and (3) whether Dr. Riess departed from the good and accepted standards of medical practice by failing to supervise the medical and obstetrical care of the plaintiff at discharge without diagnosing and treating the cause of persistent tachycardia due to anemia and abnormally low HGB counts after four units of blood had been administered.


Regarding the claims against Dr. Simons, issues of fact still remain as to: (1) whether she should have personally reviewed plaintiff's bedside sonogram herself, (2) whether she should have ordered a CT scan for the plaintiff.

Regarding the claims against The Bronx-Lebanon Hospital Center, issues of fact still remain as to whether the hospital and its agents deviated from the good and accepted standard of medical care in its treatment and care of the plaintiff.

Based upon the foregoing, it is determined that plaintiff failed to adequately refute defendant's *prima facie* entitlement to summary judgment for claims of lack of informed consent and claims against Phabillia Afflack. Plaintiffs have demonstrated triable issues of fact, sufficient to withstand summary judgment for the remainder of claims, and thus the defendant's motion is hereby denied on all other claims.

This constitutes the decision and order of the court.

Dated: July 31, 2014



STANLEY GREEN, J.S.C.