

Ward v Safajou

2014 NY Slip Op 33079(U)

August 6, 2014

Supreme Court, Putnam County

Docket Number: 1386/10

Judge: Lewis J. Lubell

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Dispo

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK COUNTY OF PUTNAM

-----X ANNEYA WARD,

Plaintiff,

-against -

CHRISTA SAFAJOU, M.D., HUDSON VALLEY WOMEN'S MEDICAL GROUP, P.C., NHAN TAI, M.D., WATERSIDE WOMEN'S MEDICAL CARE, P.C., GAIL McDONALD-PEARSON, M.D., and VASSAR BROTHERS HOSPITAL,

Defendants.

-----X LUBELL, J.

DECISION & ORDER

Index No. 1386/10

Sequence No. 7 & 8

Motion Date: 5/19/14

The following papers were considered in connection with Motion Sequence #7 by defendants Nhan Tai, M.D. and Gail McDonald-Pearson for an order pursuant to CPLR §§3211(a)(7) and 3212 dismissing plaintiff's complaint with prejudice and granting summary judgment in favor of defendants, deleting names from the caption; directing entry of judgment in favor of defendants; and Motion Sequence #8 by defendant Vassar Brothers Hospital for an Order (1) granting its motion for summary judgment dismissing the complaint; and (2) for such other and further relief as this Court deems just and proper:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT/EXHIBITS A-O	1
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-J	2
MEMORANDUM OF LAW	3
AFFIRMATION/EXHIBIT A	4
PHYSICIAN AFFIRMATION	5
UNREDACTED AFFIDAVITS OF PLAINTIFF'S EXPERTS	6
PHYSICIAN AFFIDAVIT/EXHIBIT A	7
REPLY AFFIRMATION	8
REPLY MEMORANDUM OF LAW	9

Plaintiff, Anneya Ward, brings this medical malpractice action to recover for emotional distress caused by the alleged negligent acts and omissions of defendants with respect to obstetrical labor and delivery care rendered to plaintiff by defendants to the extent that it allegedly resulted in the death of her infant daughter, Ahstarr Nugent.

Prior to the instant motion, defendants Nhan Tai, M.D., Gail McDonald-Pearson, M.D., Vassar Brothers Hospital, and Hudson Valley Women's Medical Group, P.C., moved for summary judgment on the ground that plaintiff cannot state a cause of action for emotional distress because Ahstarr's birth was a "live birth" within the meaning of Public Health Law §4130(1), for which there is no recovery to the parent/plaintiff (see Broadnax v. Gonzalez, 2 NY3d 148 [2004][even absent independent physical injury to her person, a mother may recover damages for emotional harm when medical malpractice causes a miscarriage or still birth]; Sheppard-Mobley v. King, 4 NY3d 627 [2005][an expectant mother may not recover damages for emotional harm where the alleged medical malpractice causes in utero injury to the fetus where there is a live birth]).

In its Decision & Order dated July 31, 2012, this Court denied defendants' prior motions for summary judgment, finding that plaintiff demonstrated the existence of triable issues of fact, to wit, whether Ahstarr's birth was a "live birth." Denial was without prejudice to re-application upon the close of discovery.

As discovery is now complete, defendants, Nhan Tai, M.D. and Gail McDonald-Pearson, M.D., move to dismiss plaintiff's complaint pursuant to CPLR §3211(a)(7), for failure to state a cause of action, and CPLR §3212, for summary judgment. In addition, defendant, Vassar Brothers Hospital, moves pursuant to CPLR §3212 for summary judgment. Said defendants rely upon the same ground for dismissal as they did in their prior motion.

As stated in Alvarez v. Prospect Hospital (68 NY2d 320 [1986]),

[T]he 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 (Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 853; Zuckerman v. City of New York, 49 NY2d 557, 562; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404). Failure to make such prima facie showing requires a denial of the

motion, regardless of the sufficiency of the opposing papers (Winegrad v. New York Univ. Med. Center, supra, at p 853). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v. City of New York, supra, at p 562).

(Alvarez, 68 NY2d at 324).

In support of their motion, defendants contend that Ahstarr was born alive, thereby precluding plaintiff from recovering emotional distress damages.

According to Public Health Law §4130(1), a "live birth" is:

The complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such separation, breaths, or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached; each product of such birth is considered live born.

Upon examination of the papers currently before the Court, the Court finds that defendants have, in the first instance, made a prima facie showing of entitlement to judgment in their favor as a matter of law. The record indicates that Ahstarr was born alive, as she was delivered with a heart rate of 60-70 beats per minute which rose to over 70 after suctioning. Besides the documentary evidence, defendants rely upon the affirmation of Jesus Jaile-Marti, M.D., a physician duly licensed to practice medicine in the State of New York.

Dr. Jaile-Marti notes, among other things, that the medical records reveal that Ahstarr was given Apgar scores of 1, 1, and 3 (at one, five, and ten minutes, respectively). The first two Apgar scores were given before Ahstarr was intubated. Dr. Jaile-Marti opines, "[i]n my experience, positive Apgar scores are not given when there is a stillbirth. If [Ahstarr] were born 'dead,' [she] would have received a '0' for heartrate on the Apgar score" (Jaile-

Marti aff, 3). In addition, Dr. Jaile-Marti states, "a certificate of live birth was issued coinciding with [Ahstarr's] birth. In 2007, certificates of live birth were not issued if the infant was stillborn. If the infant were in fact stillborn or 'born dead,' a death certificate would have been issued following the delivery" (Jaile-Marti aff, 3).

The burden now shifts to plaintiff to oppose the motion.

Neither the record nor plaintiff's experts' affidavits raise a material question of fact as to whether Ahstarr was born alive within the meaning of Public Health Law §4130(1). Furthermore, the Court rejects plaintiff's contention that she is entitled to emotional distress damages since Ahstarr never attained consciousness.

Upon refusing to follow Mendez v. Bhattacharya (15 Misc.3d 974 [Sup Ct 2007])["technical" sign of life, such as "lingering heartbeat", did not preclude recovery by mother for emotional distress damages where infant had "no respiration and efforts to resuscitate by mechanical ventilation and CPR were unsuccessful"], the Court in Levin v. New York City Health and Hospitals Corp. (2014 NY Slip Op 05492 [1st Dept July 24, 2014]) stated:

To accept plaintiff's contention that, where there is a live birth but the infant never attains consciousness, a mother should be permitted to maintain a cause of action for emotional distress would impermissibly expand the narrow holding in Broadnax and Sheppard-Mobley.

Furthermore, it is a misreading of Amin v. Soliman (67 AD3d 835 [2d Dept 2009]) to argue, as does plaintiff, that, "[t]he clear language of Amin permits the recovery of a claim for the plaintiff-mother's emotional anguish where the child was never conscious, even when born alive."

[In] Amin v. Soliman (67 AD3d 835 [2d Dept 2009]), . . . plaintiff successfully raised an issue of fact as to whether the deceased infant had been born alive . . . In Amin, defendants claimed there had been a live birth. However, there was no respiratory response, the Apgar score was zero at one, five and ten minutes after birth and the infant died within ten minutes after being removed from a ventilator upon which she had been placed (67 AD3d at 836).

(Levin v. New York City Health and Hospitals Corp., 2014 NY Slip Op 05492 [1st Dept July 24, 2014]). There is no indication in Amin that the infant's consciousness or lack thereof played any role in the court's determination and it cannot be fairly read to infer same.

Here, as in Levin, supra, the infant had a heartbeat and positive Apgar scores soon after delivery. Furthermore, Ahstarr showed other signs of life such as breathing independent of artificial means days after delivery (see Jaile-Marti aff, 4 ["[T]he consultation report of the attending neonatologist [dated November 29, 2007], specifically notes the patient 'does breathe on her own off of the respirator at the rate of 60 [bpm]', and goes on to note the EEG performed on day of life number 2 showed voltage suppressions, meaning there was in fact brain activity."]).

There having been a "live birth" within the meaning of Public Health Law §4130(1), it cannot be said that plaintiff-mother sustained an independent injury such as would allow her to maintain a cause of action for emotional distress (see, Levin, supra). That the infant's unconsciousness may have resulted from an alleged comatose state does not compel a different result.

Based upon the foregoing, it is hereby

ORDERED, that, the motions of defendants Tai, McDonald-Pearson, and Vassar Brothers Hospital for summary judgment are granted, and defendants Tai and McDonald-Pearson's motion for dismissal for failure to state a cause of action is denied as moot; and, it is further

ORDERED, that, the action be and is hereby dismissed in all respects, plaintiff having since discontinued the action as against any remaining defendants, or having failed to pursue same.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
August 6 , 2014

S/

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