

Lore v O'Keefe

2015 NY Slip Op 30779(U)

May 11, 2015

Supreme Court, Suffolk County

Docket Number: 08-17617

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 5-8-14
ADJ. DATE 11-20-14
Mot. Seq. # 004 - MD

COPY

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LUCILLE LORE, Individually and as
Administrator of the Estate of ALEXANDRIA
LORE, and STEPHEN LORE,

Plaintiffs,

- against -

ROBERT O'KEEFE, M.D., JULIE
WELISCHAR, M.D., Licensed physicians of the
State of New York, STONY BROOK GYN/OB,
P.C. and PATRICIA DRAMITINOS, M.D., each
of them jointly, severally, or in the alternative,

Defendants.
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Upon the following papers numbered 1 to 35 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 26 - 33; Replying Affidavits and supporting papers 34 - 35; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (004) by defendants Robert O'Keefe, M.D., Julie Welischar, M.D. and Stony Brook GYN/O.B., P.C. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them is denied.

This is a medical malpractice action to recover damages, personally and derivatively, for defendants' alleged negligence in their prenatal care of plaintiff Lucille Lore ("plaintiff") and delivery of her daughter Alexandria Lore ("infant plaintiff"). Plaintiffs allege that the negligence occurred between October 24, 2005 and November 7, 2005. The infant plaintiff was delivered by emergency cesarean section on November 8, 2005 and died on August 22, 2006 from pneumonia. In May 2005, plaintiff initially visited Stony Brook GYN/OB, P.C., the office of defendants Robert O'Keefe, M.D. ("Dr. O'Keefe") and Julie Welischar, M.D. ("Dr. Welischar"), (collectively "defendants") for her pregnancy. On October 24, 2005, plaintiff, at 32 weeks gestation, went to defendants' office with complaints of labile elevated blood pressure with abdominal pain, three episodes of vomiting, swelling of both lower legs, and elevated urine protein of 269. Defendants referred her to Stony Brook Hospital Labor and Delivery ("Stony Brook Hospital") for evaluation of pre-eclampsia. Plaintiff was discharged the same day and ordered to begin a 24 hour urine collection for protein.

On November 7, 2005, plaintiff, at 34 weeks gestation, again went to defendants' office. Her blood pressure was elevated to 160/100, she had gained four pounds in one week, and she had severe swelling in both legs as well as a headache. Plaintiffs claim that these were all signs of impending eclampsia. Plaintiff was scheduled for a cesarean section delivery on December 21, 2005. According to plaintiff, she asked Dr. Welischar why she could not have an early delivery to lessen her symptoms and was told "something has to happen first" and was again referred to Stony Brook Hospital.

At Stony Brook Hospital, plaintiff was evaluated by defendant Patricia Dramitinos, M.D. ("Dr. Dramitinos")¹, an OB/GYN resident, at approximately 2:15 p.m. on November 7, 2005. Plaintiff had a blood pressure of 160/100, protein in her urine and normal fetal heart tones. Plaintiffs claim that plaintiff was advised to lie on her left side to normalize her blood pressure and was not given anti-hypertensive medications despite her requests. Plaintiff's blood pressure decreased slightly with rest and the fetal heart beat remained normal. Dr. Dramitinos informed plaintiff that she was acting based on the advisement of Dr. O'Keefe by telephone. Dr. O'Keefe, who was on call, did not personally speak to plaintiff nor examine her on said date. At approximately 5:10 p.m., plaintiff was discharged as "stable." She was instructed to collect urine to evaluate for protein, to remain on strict bed rest and to call defendants' office for a follow-up visit the next day.

Plaintiffs further claim that less than eight hours after said discharge, at 2:50 a.m. on November 8, 2005, plaintiff reported to her husband, plaintiff Stephen Lore, that her lungs were filling with fluid and that she could not breathe and shortly thereafter she was in respiratory distress. When plaintiff arrived by ambulance at Stony Brook Hospital at approximately 3:40 a.m. the fetal heart rate was noted to be abnormal, an immediate endotracheal intubation was performed, and an emergency cesarean section delivery was performed by Dr. O'Keefe. Plaintiff remained in the Intensive Care Unit after the delivery. She was unable to breathe sufficiently after removal of the endotracheal tube. On November 10, 2005 she suffered an acute myocardial infarction and on November 18, 2005 she underwent open heart surgery. Plaintiff was discharged from Stony Brook Hospital on November 28, 2005. The infant plaintiff was born in respiratory distress, with repeated sub-normal Apgar readings, cerebral palsy and seizures. The infant plaintiff remained in the Neonatal Intensive Care Unit. She was unable to swallow and underwent several surgeries for the insertion of feeding tubes into her abdomen.

By their complaint and bill of particulars, plaintiffs claim that defendants knew plaintiff to be potentially pre-eclampsic inasmuch as 12 years earlier she had given birth to twins by emergency cesarean section at 32 weeks gestation under the care of a high risk OB/GYN physician. They also claim that defendants knew that plaintiff had chronic hypertension yet Dr. O'Keefe discontinued her medications at the beginning of her pregnancy. Plaintiffs allege that defendants were negligent in, among other things, ignoring plaintiff's known history of pre-eclampsia, failing to recognize, diagnose and conservatively treat the signs and symptoms of eclampsia and congestive heart failure, failing to treat plaintiff as a high-risk patient, discharging plaintiff from Stony Brook Hospital on November 7, 2005 after only three hours of observation and treatment, and failing to timely admit plaintiff to Stony Brook Hospital and to timely deliver the infant plaintiff. In addition, plaintiffs allege that as a result of said negligence, plaintiff sustained, among other things, respiratory arrest and cardiac arrest and the need for a coronary artery bypass graft and an

¹ The action was dismissed as against Dr. Dramitinos by order of this Court dated June 5, 2009 based on lack of personal jurisdiction and upon reargument by plaintiffs, the Court adhered to said determination in its order dated October 7, 2009.

introaortic balloon pump, and the infant plaintiff underwent a hypoxic insult resulting in, among other things, severe hypoxic ischemic encephalopathy, cerebral hemorrhage, acute renal failure, convulsions and respiratory distress syndrome.

Defendants now move for summary judgment dismissing plaintiffs' complaint on the grounds that there is no triable issue of fact as to whether defendants' treatment conformed to accepted standards of medical care or whether their treatment was proximately related to the injuries of plaintiff and the infant plaintiff. Their submissions in support of the motion include the affidavits of Dr. O'Keefe and Dr. Welischar, the pleadings and bill of particulars, and the certified medical records of Stony Brook GYN/O.B., P.C.

A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, prima facie, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries (*see DeLaurentis v Orange Regional Med. Ctr.–Horton Campus*, 117 AD3d 774, 775, 985 NYS2d 709 [2d Dept 2014]; *Rivers v Birnbaum*, 102 AD3d 26, 43, 953 NYS2d 232 [2d Dept 2012]; *see also Michel v Long Is. Jewish Med. Ctr.*, 125 AD3d 945, 5 NYS3d 162, 163 [2d Dept 2015]). In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars (*Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045, 912 NYS2d 77 [2d Dept 2010]). In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements with respect to which the defendant has met its initial burden (*see DeLaurentis v Orange Regional Med. Ctr.–Horton Campus, supra; Rivers v Birnbaum, supra; see also Michel v Long Is. Jewish Med. Ctr., supra*). General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment (*see Savage v Quinn*, 91 AD3d 748, 749, 937 NYS2d 265 [2d Dept 2012]; *Salvia v St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053, 1054, 923 NYS2d 856 [2d Dept 2011]; *Ahmed v New York City Health & Hosps. Corp.*, 84 AD3d 709, 711, 922 NYS2d 202 [2d Dept 2011]; *see also Bhim v Dourmashkin*, 123 AD3d 862, 999 NYS2d 471, 473 [2d Dept 2014]).

Dr. O'Keefe avers in his affidavit that he is board certified in Obstetrics and Gynecology, that he currently practices as part of Stony Brook GYN/OB, a private practice provider, and that based on his review of office medical records, plaintiff's first visit to Stony Brook GYN/OB was in May 2005. He states that he saw plaintiff on May 3, 2005, at which time she was pregnant, her history was taken, an examination was performed and viability was confirmed. In addition, Dr. O'Keefe states that he saw plaintiff during several visits scheduled between May 3, 2005 and July 12, 2005 and did not observe any complication signs for plaintiff or her baby requiring intervention. He also states that based on a review of office records, he did not see plaintiff between July 12, 2005 and October 24, 2005. He further states that on November 7, 2005 he was on call, but not present at Stony Brook Hospital, he was plaintiff's attending physician on said date, and that he was responsible for supervising Dr. Dramitinos. Dr. O'Keefe explains that "[a]fter discussing the patient with Dr. Dramitinos, I ordered the patient to be admitted to the hospital, so we could keep a close eye on her. Dr. Dramitinos then called me and advised me that the patient did not want to be admitted to the hospital and refused to stay. When I spoke with Dr. Dramitinos, Mrs. Lore's blood pressure had improved and the fetal heart tracing was reactive, which means that there is variability, which is a good sign." He continues that "[a]t that point, I could not force Mrs. Lore to stay at the hospital. I wanted her to stay, and it was my understanding that Dr. Dramitinos was going to talk to the patient and recommend she remain in the hospital. Despite my recommendation, my impression was that the patient refused to stay in

the hospital. I was aware that Mrs. Lore is a nurse who understood the implications of ignoring her physician's recommendation to remain at the hospital." Dr. O'Keefe indicates that he received a call on November 8, 2005 that plaintiff had returned to Stony Brook Hospital in an unstable condition, in respiratory distress, and "the fetal heart tracing was not reassuring." He explains that he saw plaintiff with Dr. Ravi Schanker, a specialist in maternal-fetal medicine, and that they delivered the baby as soon as plaintiff was medically stable.

Dr. O'Keefe addresses plaintiffs' allegations in his affidavit and asserts that on November 7, 2005 he appropriately relied on the resident to examine plaintiff and take a history and that there was nothing in said information related to him that suggested that his personal examination of the patient was required. In addition, he asserts that he and Dr. Welischar closely monitored plaintiff's blood pressure and looked for signs of pre-eclampsia, given her age and history, and that plaintiff did not have pre-eclampsia during any time that he saw her until November 7, 2005 at which time she had elevated blood pressure that can develop into pre-eclampsia and he recommended that plaintiff be admitted to the hospital. He also asserts that said recommendation and the risks of leaving the hospital, the life threatening complications of pre-eclampsia, were communicated to plaintiff, who as a nurse presumably understood said risks. Dr. O'Keefe notes that on November 7, 2005 he was not advised that plaintiff had any signs or symptoms of pulmonary edema or congestive heart failure or any need for oxygenation such that he does not believe that there was a need to consult specialists or deliver the baby on said date. He also believes that after plaintiff left Stony Brook Hospital on November 7, 2005 her condition deteriorated and she developed cardiac arrest and/or respiratory arrest and/or myocardial infarction as well as any hypoxic insult to the fetus. Therefore, Dr. O'Keefe does not believe that he caused or contributed to any of plaintiff's injuries. Dr. O'Keefe opines that he did not deviate in his care and treatment of plaintiff or the infant plaintiff and that his actions did not proximately cause any of the alleged injuries. He also opines within a reasonable degree of medical certainty that the care and treatment he rendered to plaintiff and the infant plaintiff was at all times within the applicable standard of care. Dr. O'Keefe further opines that none of the alleged injuries were caused by any actions or inactions by himself or anyone at Stony Brook GYN/OB.

In her affidavit, Dr. Welischar avers that she is board certified in Obstetrics and Gynecology, that she currently practices as part of Stony Brook GYN/OB, a private practice provider, and that she first saw plaintiff on August 1, 2005. She states that she saw plaintiff during several visits scheduled between August 1, 2005 and October 24, 2005, plaintiff was closely monitored because she was an older patient with a history of hypertension, and that during said visits she did not see any signs of complications for plaintiff or the baby. In addition, Dr. Welischar states that she saw plaintiff on October 24, 2005 at Stony Brook GYN/OB and that based on plaintiff's elevated blood pressure of 150/100 and later of 140/98 she advised plaintiff to go to the hospital. She did not see plaintiff in the hospital but consulted with the Stony Brook Hospital resident who saw plaintiff. According to Dr. Welischar, plaintiff expressed a strong desire to go home. Dr. Welischar and the resident decided that plaintiff was medically stable and could be sent home with instructions to monitor her symptoms and collect urine for testing primarily for protein. She also states that she saw plaintiff on November 1, 2005 at Stony Brook GYN/OB, plaintiff's blood pressure was slightly elevated at 142/90, and that she planned to have plaintiff return in one week for further evaluation of her blood pressure. Dr. Welischar further states that plaintiff came to Stony Brook GYN/OB on November 7, 2005, that a biophysical profile performed that day showed that the fetus was in good health, that plaintiff's blood pressure was increased and that Dr. Welischar advised plaintiff to go to Stony Brook Hospital to further evaluate her blood pressure. She avers that she specifically advised plaintiff that she may be developing pre-eclampsia and advised her to prepare for admission to the hospital. Dr. Welischar informs

that she did not treat plaintiff on November 7 after she left her office and that she next spoke to plaintiff on November 9, 2005 at Stony Brook Hospital. According to Dr. Welischar, plaintiff told her that she should have listened to her, "meaning that she should have stayed at the hospital for further evaluation on November 7, 2005."

Dr. Welischar opines that she did not deviate in her care and treatment of plaintiff or the infant plaintiff and that her actions did not proximately cause any of the alleged injuries. She addresses plaintiffs' allegations and asserts that she believes that she properly warned plaintiff on November 7, 2005 about the serious nature of potentially developing pre-eclampsia based on her elevated blood pressure and gave appropriate instructions to go to the hospital for further evaluation. Dr. Welischar notes that plaintiff did not demonstrate any signs of pulmonary edema or congestive heart failure or of cardiac arrest, respiratory arrest or myocardial infarction in her presence nor was there any indication that she needed to deliver the baby. She opines that the care and treatment that she rendered to plaintiff and the infant plaintiff was at all times within the applicable standard of care.

Here, Dr. O'Keefe and Dr. Welischar each made a prima facie showing of entitlement to judgment as a matter of law by proffering their own affidavits, in which they opined, to a reasonable degree of medical certainty, that the care and treatment each of them provided to plaintiff did not depart from good and accepted medical practice (*see Belak-Redl v Bollengier*, 74 AD3d 1110, 903 NYS2d 508 [2d Dept 2010]; *Swezey v Montague Rehab & Pain Mgt., P.C.*, 59 AD3d 433, 872 NYS2d 199 [2d Dept 2009]; *Videnovic v Goodman*, 54 AD3d 937, 864 NYS2d 496 [2d Dept 2008]).

Plaintiffs in opposition argue that there is no evidentiary support in the hospital records for defendants' assertions that plaintiff was ordered to be admitted to the hospital or recommended admission but that plaintiff refused to stay in the hospital and that plaintiff was advised of the risk of going home. In addition, they argue that the failure to admit plaintiff to the hospital on November 7, 2007 was a deviation of accepted medical practice and the proximate cause of the subsequent injuries. In support of their opposition to the motion, plaintiffs submit their affidavits, the Stony Brook Hospital Obstetrics Nursing Assessment Form, Physician's Assessment for November 7, 2005, the expert affidavits of Carl M. Desiderio, M.D. and Michael M. Molaei, M.D., and a portion of the deposition testimony of Dr. O'Keefe.

Plaintiff includes the following in her affidavit: "I emphatically state that I was never advised that Dr. O'Keefe or any other doctor recommended that I be admitted to the hospital. I was never advised of any of the risks of leaving the hospital and instead I was told that I was being discharged stable. I was never asked to sign any documentation acknowledging that I was being released against medical advice." She explains that "[a]lthough I am a nurse, my career has been almost entirely limited to emergency and trauma care. I do not have any expertise in the field of GYN/OB and in fact in every emergency room that I have worked the policy has always been that pregnant patients exceeding 5 months be immediately referred to the Labor and Delivery Unit ... When I was told that I was stable to go home, I followed my doctors orders and went home."

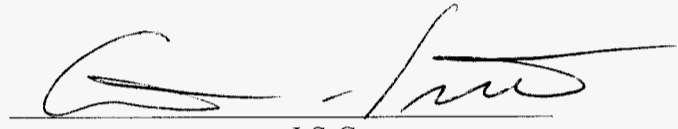
Dr. Molaei avers by affidavit that he is a licensed gynecologist/obstetrician, that his opinion is based on the review of defendants' office records and progress notes and Stony Brook Hospital records, and that said records are devoid of any doctor's order for admission to the hospital as well as any indication that plaintiff signed out or left the hospital against medical advice. He notes that plaintiff's discharge papers indicate that she was discharged home in stable condition. Dr. Molaei opines that plaintiff's symptoms on

October 24, 2005 and November 7, 2005 were indicative of pre-eclampsia and that plaintiff should have been admitted to the hospital for proper fetal and maternal monitoring, 24 hour urine, further liver function testing, biophysical profiles, and a high risk maternal fetal medicine consult. He adds that in the hospital, pulmonologists and other acute care specialists would have been available for immediate summoning to stabilize plaintiff's condition before she went into distress. Dr. Molaei opines in conclusion that "the failure to admit under the circumstances was a deviation of accepted medical practice and this deviation was the proximate cause of the subsequent injury."

In opposition, plaintiffs raised a triable issue of fact by submitting the affidavit of their obstetric medical expert, who opined that defendants deviated from accepted medical practice by failing to admit plaintiff to Stony Brook Hospital on November 7, 2005, and that such deviation was a proximate cause of plaintiff's injuries (*see Farrell v Herzog*, 123 AD3d 655, 998 NYS2d 202, 204 [2d Dept 2014]; *Trauring v Gendal*, 121 AD3d 1097, 995 NYS2d 182 [2d Dept 2014]). Although defendants contend in reply that Dr. Molaei's affidavit lacks probative value based on his failure to review plaintiff's bill of particulars and the parties' deposition transcripts and affidavits and his failure to delineate which defendant(s) failed to admit plaintiff, said arguments do not warrant disregard of said affidavit. Summary judgment is not appropriate where, as here, the parties adduce conflicting medical expert opinions based on conflicting facts; as such credibility issues can only be resolved by a jury (*see Iulo v Staten Is. Univ. Hosp.*, 106 AD3d 696, 697, 964 NYS2d 565 [2d Dept 2013]; *Hayden v Gordon*, 91 AD3d 819, 821, 937 NYS2d 299 [2d Dept 2012]; *Bengston v Wang*, 41 AD3d 625, 626, 839 NYS2d 159 [2d Dept 2007]).

Accordingly, the instant motion is denied.

Dated: May 11, 2015



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION