Dugan v Lazar
2015 NY Slip Op 31012(U)
June 11, 2015
Supreme Court, Suffolk County
Docket Number: 11-10360
Judge: Joseph C. Pastoressa

[* 1]

SHORT FORM ORDER

INDEX No. 11-10360
CAL. No. 14-00704MM

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Acting Justice of the Supreme Court

MOTION DATE 10-1-14 (#003)
MOTION DATE 11-19-14 (#004)
ADJ. DATE 12-3-14
Mot. Seq. # 003 - MD
004 - MD

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REBECCA DUGAN and JOHN DUGAN,

Plaintiffs,

- against -

SARAH J. LAZAR, M.D., VITO ALAMIA, JR., M.D., HAMPTONS GYNECOLOGY & OBSTETRICS, HAMPTONS GYNECOLOGY & OBSTETRICS, P.C. and SOUTHAMPTON HOSPITAL,

Defendants.

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Upon the following papers numbered 1 to 51 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-21 ; Notice of Cross Motion and supporting papers 22-24 ; Answering Affidavits and supporting papers 25-40 ; Replying Affidavits and supporting papers 50-51 ; Other __ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Southampton Hospital seeking summary judgment dismissing the complaint against it is denied, as moot; and it is further

ORDERED that the cross motion by defendant Vito Alamia, Jr., M.D., seeking summary judgment dismissing the complaint against him is denied.

From April 28, 2009 through August 26, 2010, plaintiff Rebecca Dugan was a patient of defendant Hamptons Gynecology & Obstetrics, P.C., where she received treatment in connection with

her pregnancy. During such time period, she was treated by defendant Dr. Vito Alamia, Jr., defendant Dr. Sarah Lazar, and Dr. Jennie Varhola at the practice.

On November 24, 2009, Dugan, who was 35 weeks gestation, presented to Dr. Vito Alamia, Jr. for a biophysical profile and examination. During the biophysical profile examination of Dugan, Dr. Alamia determined that the fetus weighed 2746 grams and that the amniotic fluid index was high at level 29. As a result, Dr. Alamia diagnosed Dugan with polyhydramnios, excess amniotic fluid in the amniotic sac, and ordered her to undergo weekly biophysical examinations to monitor the fluid around the baby and to check the fetus's overall well-being. Dr. Alamia also counseled Dugan regarding the risks of polyhydramnios upon rupture of the amniotic sac, including cord prolapse, placenta abruption, premature birth and perinatal death.

On December 8, 2009, when Dugan presented at the 37 ½-week prenatal visit, Dr. Alamia discovered, following an examination and biophysical profile, that the amniotic fluid around the baby was increasing, and he informed Dugan that there was an increased risk of complications with having extra fluid around the baby, including the rupture of membranes, but that the baby should arrive by the due date, and recommended that she continue undergoing her weekly biophysical examinations. Due to her concerns about the extra fluid around the baby, later the same day, Dugan phoned Dr. Alamia to request an induction of labor. During the conversation, Dr. Alamia explained to Dugan the risk of inducing labor at 37 ½ weeks, answered all of her questions and informed her that a repeat ultrasound would be performed the following week, as well as stated that he would discuss inducing her labor at the next prenatal appointment.

Thereafter, on December 21, 2009, Dugan was admitted into Southampton Hospital for an induction of labor. On December 22, 2009, Dugan gave birth to a viable female infant with an Apgar score of 9 on the one and five minute tests following the baby's birth. Dugan's daughter was delivered by Dr. Varhola, who also performed a manual extraction of the placenta, because a cord avulsion occurred during the birthing process. It was noted in Dugan's Southampton Hospital records that "there was minimal bleeding from the procedure and the placenta was removed intact," and that, following a repair of a second degree laceration, Dugan was transferred to the maternity floor to recover. On December 24, 2009, Dugan was discharged from Southampton Hospital with written instructions to follow-up with Dr. Varhola.

On January 25, 2010, Dugan presented to Dr. Varhola at the office of Hamptons Gynecology & Obstetrics, with complaints of vaginal bleeding and pelvic pain. Dr. Varhola performed a sonogram, which revealed thickened endometrium, but did not rule out retained products of conception ("RPOC"), such as placental and/or fetal tissue. As a result of the sonogram, Dr. Varhola contacted Dr. Alamia via telephone at Southampton Hospital and informed him that Dugan was being sent to the hospital for RPOC, and that she required a dilation and curettage ("D&C") procedure. Dr. Varhola also faxed this information to Southampton Hospital. Dr. Alamia met Dugan in ambulatory surgery and, according to the ambulatory history and physical prepared by Dr. Varhola, Dugan was "'status post vacuum assisted vaginal delivery and a manual extraction of the placenta on December 22, 2009, complaining of increased vaginal bleeding this past week with abdominal pain and odor,' 'an 'endo stripe' which equaled 17mm consistent with products of concepts, and 'upon examination, the patient's abdomen was soft and

with mild tenderness'."

Thereafter, Dr. Alamia performed an abdominal examination of Dugan and explained to her the D&C surgical procedure and the associated risks, including bleeding, infection and possible scarring of the uterine cavity. The D&C procedure was performed by Dr. Alamia without complications, and, according to his custom and practice, an image of the uterine cavity was taken, even though an examination of the hospital records did not contain such an image, and a 3 millimeter piece of placenta was sent out for a pathological diagnosis. It was noted in the hospital chart that, postoperatively, Dugan's peripad was "half soaked." Following the D&C procedure, Dr. Alamia authored an operative report, which noted that Dugan's preoperative and postoperative diagnosis was retained placenta fragments, that an abdominal ultrasound revealed a 3 centimeter white calcified area in the uterine fundus, that sharp curetting was performed until the placenta was dislodged, and that a suctioning cannula then was placed in the uterine cavity to remove the remaining clots and debris. The result of the pathological test revealed that Dugan had "RPOC with degenerated chorionic villi," and the report was provided to Dr. Alamia on February 3, 2010.

Later on that same day, Dugan was discharged from Southampton Hospital with instructions to follow-up with Dr. Alamia the next day. Prior to her discharge, Dugan, as was noted in her chart, passed a "moderate-size" blood clot onto the floor of the hospital. In addition, Dr. Alamia prescribed the broad spectrum oral antibiotic Mefoxin to treat what he suspected was mild endometritis, and he informed Dugan that the antibiotic was to be used for seven days and that if she developed any infection or fever to contact his office. Dr. Alamia did not have any additional contact with Dugan after the D&C procedure.

On February 5, 2010, Dugan presented to the emergency department at Southampton Hospital with the chief complaint of vaginal bleeding, which had begun prior to her arrival, and "cramping" pain in her pelvic area. After a physical examination of Dugan, the triage nurse noted in the hospital chart that Dugan had "moderate vaginal bleeding and bright red blood per her vagina," and that a pelvic examination was performed by Physician Assistant Robert Lemp. P.A. Lemp further noted that Dugan had "pelvic pain and vaginal bleeding that had been 'waxing and waning,'" that she had a complicated vaginal delivery six weeks prior with manual removal of the placenta and RPOC, that she had a D&C approximately two weeks before with some intermittent slight bleeding, and that she had an episode of a gush of bright red blood the day before and earlier the same day. Thereafter, a speculum and bimanual examination was performed by P.A. Lemp, and it was discovered that Dugan had slight vaginal bleeding with clots via the cervical os. As a result of Dugan's abnormal examination, a pelvic sonogram was ordered, which revealed a 2.5 centimeter fluid collection in the uterine cavity. The results of a Doppler flow study showed "active bleed" in the area.

Following a consultation with Dr. Sarah Lazar about Dugan's condition and the test results, which showed that Dugan was anemic and had an elevated white blood count, Dugan was admitted into the hospital for further evaluation and surgery by Dr. Lazar with a differential diagnosis of "postpartum with vaginal hemorrhage and evidence of intrauterine debris with blood flow." Dugan opted to undergo another D&C procedure following a physical examination and a discussion with Dr. Lazar about taking the oral prescription drug Methergine versus having another D&C surgery performed. Dugan was

prepped for surgery and underwent a D&C procedure for vaginal bleeding that same day. During the procedure, debris was removed from Dugan's endometrial surface, and multiple images were taken of Dugan's uterine cavity, which revealed that there was no evidence of any remaining debris by sonogram or currettage. Towards the end of the procedure, Dugan had "very heavy oozing." Therefore, Dr. Lazar touched the area of Dugan's cervix with a silver nitrate stick and cautery, massaged the uterus aggressively, bimanually, and performed a final sonogram, abdominally and vaginally, which revealed that the endometrial echo was clean and there was no evidence of an "oozing vessel." Methergine was administered to Dugan intraoperatively. A specimen of the uterine tissue that was removed during the surgery and sent to pathology for testing, revealed that there was "blood clots with scant decidualized tissue." Later that same day, Dugan, whose vital signs were stable, was discharged from the hospital, given prescriptions for Vicodin and Methergine, and advised to follow-up with Dr. Lazar in one to two weeks.

Following her discharge from the hospital, Dugan presented to Dr. Lazar at Hampton Gynecology & Obstetrics' office on February 19, July 20, and August 20, 2010, where she was evaluated and underwent testing for a diagnosis of amenorrhea and dyspareunia. On August 20, 2010, Dr. Lazar attempted to perform a hysteroscopy to determine why Dugan's menstruation had not returned. However, the procedure was terminated because the hysteroscope was unable to pass through the internal orifice of the uterus ("Internal os"). As a result, Dr. Lazar was concerned that Dugan was experiencing stenotic cervix or Asherman's syndrome, and referred her to Dr. James Stelling of Reproductive Specialists of New York for evaluation. On August 26, 2010, Dugan underwent a transvaginal sonogram, which revealed a normal uterus and ovaries. On September 1, 2010, the results of her test were reviewed with Dugan and a repeat consultation was scheduled for September 7, 2010. On September 8, 2010, Dugan presented to Dr. Stelling with a chief complaint of amenorrhea. Dr. Stelling diagnosed Dugan with Asherman syndrome and amenorrhea after she underwent an hysteroscopy under sonogram guidance to access the uterine cavity, which was concluded after Dugan loss 600 milliliters of blood. Dr. Stelling planned to perform a repeat saline sonogram post recovery to check the uterine cavity, because he was unable to determine whether the hysteroscopy entered the uterine cavity or created a false passage posterior to the endometrial lining when the procedure was performed on October 12, 2010.

Between October 2011 and April 2012, Dugan received treatment from Dr. Steven Palter, a fertility specialty, since her menstruation did not return after the birth of her first child and her ability to conceive again was unknown. During her treatment with Dr. Palter, Dugan was admitted on several occasions into North Shore University Hospital at Syosset for a diagnostic hysteroscopy, lysis of adhesions and an attempted endometrial biopsy under ultrasound guidance, where a uterine balloon was placed and revealed a poorly active endometrial stroma.

Subsequently, Dugan and her husband, John Dugan, commenced this action against Dr. Lazar, Dr. Alamia, Hamptons Gynecology & Obstetrics, Hamptons Gynecology & Obstetrics, P.C., and Southampton Hospital to recover damages for injuries allegedly sustained by Dugan as a result of medical malpractice and lack of informed consent. The gravamen of the complaint alleges that defendants' negligence during the delivery and birth of plaintiffs' daughter on December 22, 2009 resulted in Dugan's development of Asherman's syndrome. The complaint further alleges that Dugan

developed Asherman's syndrome as a result of the sustained heavy bleeding and trauma to her endometrial lining due to the multiple D&C procedures that she underwent immediately after giving birth.

Southampton Hospital now moves for summary judgment on the basis that its staff did not deviate from any standards of good and acceptable medical care when it rendered care to Dugan during her admissions in the hospital on December 22, 2009 through December 24, 2009, January 25, 2010, and February 5, 2010, and that the care provided by its staff did not, in any way, proximately cause the injuries allegedly sustained by plaintiff. Southampton Hospital also asserts that consent for the procedure was obtained from Dugan by her treating physicians prior to the surgeries. Southampton Hospital further asserts that it is not vicariously liable for the acts or omissions of Dugan's treating physicians or their private practice, since they are not employees of the hospital. In support of the motion, Southampton Hospital submits copies of the pleadings, certified copies of Dugan's medical records, and the sworn affirmation of its expert, Dr. Victor Klein.

Dr. Alamia cross-moves for summary judgment on the basis that he did not deviate or depart from the applicable standard of care during his prenatal treatment of Dugan or in his performance of the D&C procedure that plaintiff underwent on January 25, 2010. In support of the motion, Dr. Alamia submits copies of the pleadings and copies of Dugan's medical records. Plaintiffs oppose Dr. Alamia's cross motion on the grounds that it is untimely, and that Dr. Alamia failed to provide a good cause for his delay in submitting the cross motion. Alternatively, plaintiffs oppose the motion on the grounds that there are triable issues of fact as to whether Dr. Alamia deviated from the acceptable standards of medical practice while rendering prenatal treatment to Dugan and during his performance of the D&C procedure on January 25, 2010, and, if so, whether such departures were a proximate cause of Dugan's alleged injuries. In opposition to the motion, plaintiffs submit copies of the pleadings, certified copies of Dugan's medical records, the parties' deposition transcripts, and the redacted copy of their expert's affirmation. Plaintiffs also submit an unredacted copy of their expert's affirmation for in camera review.

Southampton Hospital's motion for summary judgment in its favor is denied. On November 11, 2014, after the submission of the instant motions, plaintiffs executed a stipulation discontinuing their claim against Southampton Hospital. Southampton Hospital's motion, therefore, is moot.

Dr. Alamia's motion, improperly denominated as a cross motion for summary judgment, also is denied. A cross motion can only be made for relief as against a moving party (CPLR 2215; Gaines v Shell-Mar Foods, Inc., 21 AD3d 986,987-988; Williams v Sahay, 12 AD3d 366). Since plaintiffs are not moving parties in the instant matter, Dr. Alamia's cross motion is an "improper vehicle for seeking affirmative relief from a nonmoving party" (Mango v Long Is. Jewish-Hillside Med. Ctr., 123 AD2d 843; see also Barrett v Watkins, 52 AD3d 1000; Terio v Spodek, 25 AD3d 781; Sheehan v Marshall, 9 AD3d 403).

Moreover, Dr. Alamia's cross motion for summary judgment dismissing plaintiffs' complaint is untimely, having been made almost three months after the expiration of the 120-day statutory filing period for summary judgment (see Micelli v State Farm Mut. Auto. Ins. Co., supra; Brill v City of New York, supra; Bressingham v Jamaica Hosp. Med. Ctr., 17 AD3d 496). CPLR 3212 (a) provides that

"any party may move for summary judgment in any action, after issue has been joined, provided however, that the court may set a date after which no motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of the court on good cause shown" (see Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725; Brill v City of New York, 2 NY3d 648; Lyebyedyev v Hoffman, 84 AD3d 751; State Farm Fire & Cas. v Parking Sys. Valet Serv., 48 AD3d 550).

Furthermore, the Court of Appeals has determined that "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion–a satisfactory explanation for the untimeliness–rather than simply permitting meritorious, nonprejudicial filings, however tardy . . . No excuse at all, or a perfunctory excuse, cannot be 'good cause.'" (Brill v City of New York, supra at 652; see Gonzalez v Zam Apt. Corp., 11 AD3d 657). Although, a court may consider an untimely cross motion for summary judgment where a timely motion for summary judgment was made on nearly identical grounds (see Alexander v Gordon, 95 AD3d 1245; Altschuler v Gramatan Mgt., Inc., 27AD3d 304; Osario v BRF Construction Corp., 23 AD3d 202), Dr. Alamia's cross motion does not seek summary judgment on the same grounds as asserted by Southampton Hospital's motion (see Bicounty Brokerage Corp. v Burlington Ins. Co., 101 AD3d 778; compare Das v Sun Wah Rest., 99 AD3d 752; Grande v Peteroy, 39 AD3d 590), and it does not set forth good cause for the delay in seeking summary judgment (see Thompson v Leben Home for Adults, 17 AD3d 347]; Colon v City of New York, 15 AD3d 173). In addition, at the time of the submission of Dr. Alamia's cross motion there was no timely motion for summary judgment pending, since the cause of action against Southampton Hospital had been discontinued.

In any event, even if the Court were to overlook such deficiencies, Dr. Alamia failed to demonstrate his prima facie entitlement to judgment as a matter of law based upon the evidence submitted in support of his cross motion (see Romano v Persky, 117 AD3d 814; Makinen v Torelli, 106 AD3d 782, Vera v Soohoo, 41 AD3d 586). To establish a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the patient and that defendant was not the proximate cause of plaintiff's injuries (see Castro v New York City Health & Hosps. Corp., 74 AD3d 1005; Deutsch v Chaglassian, 71 AD3d 718; Plato v Guneratne, 54 AD3d 741; Jones v Ricciardelli, 40 AD3d 935; Mendez v City of New York, 295 AD2d 487). A physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she conformed to the acceptable standard of care and practice (see Spensieri v Lasky, 94 NY2d 231; Barrett v Hudson Valley Cardiovascular Assoc., P.C., 91 AD3d 691; Geffner v North Shore Univ. Hosp., 57 AD3d 839). Although Dr. Alamia has submitted copies of Dugan's medical records regarding his treatment of her during her pregnancy and his performance of the D&C procedure on January 25, 2010, he has failed to submit an expert's affirmation attesting to the fact he did not deviate from the acceptable standard of medical care in his prenatal treatment and care of Dugan and in his performance of the emergent D&C surgery. Furthermore, Dr. Alamia's reliance on the affirmation of Dr. Klein, Southampton Hospital's expert, to meet his prima facie burden is misplaced. Despite stating that, "due to the patient's condition of retained placenta on January 25, 2010, the D&C was performed as a result

of an emergency that required immediate medical care," and that his affirmation is not intended to make any criticism of the care rendered by Dugan's physicians, Dr. Klein does not state in his affirmation what the acceptable standard of medical care is that Dr. Alamia owed Dugan during the time he provided medical treatment to her or whether such treatment met the required standard of care.

Accordingly, Dr. Alamia's cross motion for summary judgment dismissing the complaint against him is denied.

Dated: June 11, 2015

HON. JOSEPH C. PASTORESSA, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION