

Agosto v Matalon

2015 NY Slip Op 31833(U)

September 29, 2015

Supreme Court, Suffolk County

Docket Number: 11-24355

Judge: Arthur G. Pitts

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

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 3-20-14
ADJ. DATE 1-29-15
Mot. Seq. # 001 - MotD
002 - XMD

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JAYLEE AGOSTO, an Infant by her Mother and
Natural Guardian, MELISSA MORSE, and
MELISSA MORSE, Individually,

Plaintiffs,

- against -

MARTIN MATALON, M.D., MEDICAL ARTS
OB/GYN, P.C., and SOUTHSIDE HOSPITAL-
NORTH SHORE-LONG ISLAND JEWISH
HEALTH SYSTEM INC.,

Defendants.
-----X

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Upon the following papers numbered 1 to 34 read on this motion and cross motion for summary judgment:
Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; Notice of Cross Motion and supporting papers
23 - 34; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ;
(~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the unopposed motion by defendant Southside Hospital for summary judgment dismissing the complaint against it is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that the cross motion by defendants Martin Matalon, M.D., and Medical Arts Obstetrics and Gynecology, P.C., for, inter alia, leave to file a late motion for summary judgment is denied.

Agosto v Matalon
Index No. 11-24355
Page No. 2

On the evening of March 14, 2009, plaintiff Melissa Morse, who at the time was nearing the end of the third trimester of her pregnancy with infant plaintiff Jaylee Agosto, presented at defendant Southside Hospital complaining of back pain, increased urination, and leaking amniotic fluid. As part of plaintiff's treatment by the hospital's department of obstetrics and gynecology, fetal heart rate monitoring was conducted and an amniotic fluid swab test was performed to ascertain whether the membranes holding in the amniotic fluid had ruptured. The swab test was negative for the presence of amniotic fluid, and plaintiff was discharged with a prescription for Macrobid, an antibiotic used to treat urinary tract infections. Less than one week later, on March 19, plaintiff presented at Southside Hospital complaining of back pain. Plaintiff's treating obstetrician/gynecologist, defendant Martin Matalon, M.D., admitted plaintiff to the hospital for 23-hour observation services. During the observation admission, a urine culture was positive and an ultrasound revealed plaintiff was suffering from unilateral hydronephrosis (kidney swelling). Diagnosed by Dr. Matalon as suffering from pyelocystitis (inflammation of the renal pelvis and bladder), an intravenous antibiotic, Acef, was administered to plaintiff during her observation.

After her discharge from the hospital, Dr. Matalon conducted an internal and external examination of plaintiff during an office visit on March 25, 2009. At the time of this visit, plaintiff was 39 weeks pregnant, and had been receiving outpatient intravenous antibiotic treatment for a bladder infection. Based on the findings of his examination, Dr. Matalon discontinued the intravenous antibiotic treatment and ordered a stress test and a biophysical profile of the baby. On the night of March 28, plaintiff again presented at the hospital because she believed she was leaking amniotic fluid. Tests performed by the obstetric and gynecology department to assess whether amniotic fluid was leaking were negative, and plaintiff was discharged with instructions to follow-up with Dr. Matalon.

On March 30, 2009, plaintiff had another appointment with Dr. Matalon. At an examination before trial, Dr. Matalon testified that while the results of the biophysical profile of infant plaintiff were within the normal range, fetal movements were positive, and his physical examination showed plaintiff's cervix was closed with no effacement, he decided to induce labor. Dr. Matalon testified that his decision to induce labor was based on various factors, including that plaintiff was more than 40 weeks pregnant, that she smoked during the pregnancy, and that infant plaintiff was in the vertex position and small in size. Plaintiff was admitted to Southside Hospital later that same day. The next day, after contractions had been induced with an intravenous infusion of Pitocin, Dr. Matalon artificially ruptured plaintiff's membranes at 10:30 a.m. During the second stage of labor, Dr. Matalon performed a vacuum extraction procedure on plaintiff, and infant plaintiff was delivered vaginally at 12:22 p.m. Before the procedure was performed, an internal fetal monitor revealed "deep variable decelerations" in the fetal heart rate and increased recovery time, prompting Dr. Matalon to order that the Pitocin be stopped. According to Dr. Matalon's deposition testimony, variable decelerations in fetal heart rate usually are attributed to compression of the umbilical cord. Dr. Matalon testified that he decided to use a vacuum extraction because infant plaintiff was in

Agosto v Matalon
Index No. 11-24355
Page No. 3

position, plaintiff was “exhausted and couldn’t push anymore,” and he “didn’t want to wait” until the decelerations in fetal heart rate “became dangerous.” He also testified that he included on the hospital form completed in connection with the delivery a note “ruptured membrane questionable,” because plaintiff complained of ruptured membranes and, though testing was negative, “it’s always a questionable thing.”

Subsequently, plaintiff, individually and on behalf of infant plaintiff Jaylee Agosto, commenced this action against Southside Hospital, Dr. Matalon, and defendant Medical Arts Obstetrics and Gynecology, P.C., asserting causes of action for medical malpractice and lack of informed consent. Plaintiff also interposed a derivative claim for loss of services and medical expenses. The bills of particulars served on Southside Hospital and Dr. Matalon allege, in part, that defendants were negligent, among other things, in failing to monitor plaintiff’s prenatal care; in failing “to perform the proper tests and examinations to investigate and monitor plaintiff’s amniotic fluid levels”; in failing to properly assess for possible rupture of the fetal membranes; in failing to properly manage plaintiff’s oligohydramnios condition; in failing to perform an amniocentesis; in “allowing plaintiff to labor despite low amniotic fluid”; in failing “to call in specialists for consultation, review and diagnosis”; and in failing to obtain informed consent. The bills also allege that defendants were negligent in failing “to recognize and heed the small birth weight of infant plaintiff”; in failing to recognize that infant plaintiff could not be safely delivered vaginally; in “causing, permitting or contributing to the infant plaintiff suffering complications at birth”; in causing infant plaintiff to suffer prolonged ischemia, resulting in deafness; in failing “to quickly act upon the presentation of fetal compromise by performing a Cesarean section”; and in “permitting or contributing to infant plaintiff suffering fetal distress and neurological damage.” Additionally, the bills of particulars allege that infant plaintiff suffered a left parietal cephalhematoma and profound hearing loss in both ears due to defendants’ negligence, and that it is expected she will suffer delayed development and severe emotional distress.

Southside Hospital now moves for summary judgment dismissing the complaint against it, arguing it cannot be held vicariously liable for the alleged malpractice of Dr. Matalon, as he is not a staff member. The hospital further argues the care rendered by its employees did not deviate from accepted medical practice when plaintiff presented for emergency treatment on March 14, 19 and 28, 2009, or when she was admitted for observation on March 19 or for delivery of infant plaintiff on March 30, 2009. The hospital’s submissions in support of its motion include the transcripts of plaintiff’s and Dr. Matalon’s deposition testimony, certified copies of the March 2009 hospital records related to plaintiff’s treatment, and an affidavit of Dr. Michael Arato. Dr. Matalon and Medical Arts Obstetrics & Gynecology cross-move for an order granting then leave to make a late summary judgment motion and, upon leave being granted, awarding summary judgment in their favor on the ground Dr. Matalon did not deviate from accepted standards of medical care during the prenatal period or during infant plaintiff’s delivery. No papers were submitted in opposition to the motions.

Agosto v Matalon
Index No. 11-24355
Page No. 4

The cross motion for summary judgment in favor of Dr. Matalon and Medical Arts Obstetrics & Gynecology is denied. CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the court, such a motion “shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.” Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). As explained by the Court of Appeals in *Brill*, the “good cause” requirement set forth 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” (*Brill v City of New York*, *supra* at 652, 781 NYS2d 261). Here, the mere claim of law office failure, namely that defense counsel “miscalculated the 120 [day] deadline for making the summary judgment motion,” is insufficient to demonstrate good cause for the delay in making the instant cross motion (*see Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261; *Quinones v Joan & Sanford I. Weill Med. Coll. & Graduate Sch. of Med. Sciences of Cornell Univ.*, 114 AD3d 472, 980 NYS2d 88 [1st Dept 2014]).

As to the motion by Southside Hospital, the requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted standards of medical practice, and (2) evidence that such departure was a proximate cause of the plaintiff’s injury or damage (*see Duvidovich v George*, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; *Ahmed v Pannone*, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014], *lv dismissed* 25 NY3d 964, 8 NYS3d 261 [2015]; *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *DiMitre v Monsour*, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]). On a motion for summary judgment dismissing a medical malpractice action, the moving defendant has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Michel v Long Is. Jewish Med. Ctr.*, 125 AD3d 945, 5 NYS3d 162 [2d Dept 2015]; *Savage v Quinn*, 91 AD3d 748, 937 NYS2d 265 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). If the defendant makes such a showing, the burden shifts to the plaintiff to submit evidentiary proof rebutting the defendant’s prima facie showing (*see Gillespie v New York Hosp. Queens*, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 24, 918 NYS2d 176).

Although a hospital may be vicariously liable under the doctrine of respondent superior for malpractice committed by a physician or other professional employee provided by the hospital (*Fiorentino v Wenger*, 19 NY2d 407, 414, 280 NYS2d 373 [1967]), it generally may not be held liable for malpractice committed by a physician not in its employment (*see Hill v St. Clare’s Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]; *Doria v Benisch*, 130 AD3d 777, 14 NYS3d 95 [2d Dept 2015]; *Salvatore v Winthrop Univ. Med. Ctr.*, 36 AD3d 887, 829 NYS2d 183 [2d Dept 2007]).

However, an exception exists when a patient presents at a hospital seeking treatment from the hospital and not from a particular physician of the patient's own choosing (*see Sampson v Contillo*, 55 AD3d 588, 865 NYS2d 634 [2d Dept 2008]; *Salvatore v Winthrop Univ. Med. Ctr.*, 36 AD3d 887, 829 NYS2d 183; *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 800 NYS2d 609 [2d Dept 2005]; *Orgovan v Bloom*, 7 AD3d 770, 776 NYS2d 879 [2d Dept 2004]). Under this exception, liability is predicated on the hospital's apparent or ostensible agency over the independent physician (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904; *Hannon v Siegel-Cooper Co.*, 167 NY 244, 60 NE 597 [1901]; *Loaiza v Lam*, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2013]; *Sampson v Contillo*, 55 AD3d 588, 865 NYS2d 634; *Dragotta v Southampton Hosp.*, 39 AD3d 697, 833 NYS2d 638 [2d Dept 2007]). In the context of a medical malpractice case, an apparent or ostensible agency is established when a patient (1) reasonably relies on the appearance of authority of the agent based on words or conduct of the principal, (2) accepts the services of the agent in reliance of the apparent relationship between the principal and the agent, and (3) reasonably believed the agent treating him or her was provided by the hospital or acted on the hospital's behalf (*see Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 988 NYS2d 628 [2d Dept 2014]; *Loaiza v Lam*, 107 AD3d 951, 968 NYS2d 548; *Dragotta v Southampton Hosp.*, 39 AD3d 697, 833 NYS2d 638). Moreover, a hospital may be held concurrently liable with a private physician if its employees commit independent acts of negligence or fail to inquire about the correctness of a private physician's orders that are contrary to normal practice (*see Corletta v Fisher*, 101 AD3d 929, 956 NYS2d 163 [2d Dept 2012]; *Martinez v La Porta*, 50 AD3d 976, 857 NYS2d 194 [2d Dept 2008]; *Cerney v Williams*, 32 AD3d 881, 822 NYS2d 548 [2d Dept 2006]).

In addition, Public Health Law § 2805-d (1) defines lack of informed consent as "the failure of the person providing the professional treatment * * * to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make knowledgeable evaluation." To establish a medical malpractice claim based on lack of informed consent, a plaintiff must show (1) that the defendant failed to disclose alternatives to the proposed treatment and the foreseeable risks associated with such treatment, that a reasonable medical practitioner under similar circumstances would have disclosed, (2) that a reasonably prudent person in the patient's position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury (*see Public Health Law §2805-d [3]; Manning v Brookhaven Mem. Hosp. Med. Ctr.*, 11 AD3d 518, 782 NYS2d 833 [2d Dept 2004]; *Trabal v Queens Surgi-Center*, 8 AD3d 555, 779 NYS2d 504 [2d Dept 2004]; *Footte v Rajadhyax*, 268 AD2d 745, 702 NYS2d 153 [3d Dept 2000]). To establish the proximate cause element, a plaintiff must show that the operation, treatment or procedure for which there was no informed consent was a substantial cause of the injury (*see Trabal v Queens Surgi-Center*, 8 AD3d 555, 779 NYS2d 504; *Mondo v Ellstein*, 302 AD2d 437, 754 NYS2d 579 [2d Dept 2003]).

Agosto v Matalon
Index No. 11-24355
Page No. 6

The branch of Southside Hospital's motion seeking summary judgment in its favor on the cause of action for medical malpractice is denied. Here, while opining that the obstetric medical treatment provided by the hospital's employees when plaintiff presented for care on March 14, 19 and 28 was within accepted standards of medical practice, the conclusory affidavit of Dr. Arato fails to address many of the alleged departures with respect to plaintiff's care set forth in the bill of particulars served on the hospital, such as failing to perform a proper vaginal examination, failing to perform an ultrasound, and failing to assess plaintiff's amniotic fluid volume, or to explain the accepted medical practices when a pregnant patient presents at the hospital with complaints of premature spontaneous rupture of fetal membranes, back pain or a possible urinary tract infection (see *Cham v St. Mary's Hosp. of Brooklyn*, 72 AD3d 1003, 901 NYS2d 65 [2d Dept 2010]; *Savage v Franco*, 35 AD3d 581, 827 NYS2d 210 [2d Dept 2006]; *Johnson v Queens-Long Is. Med. Group, P.C.*, 23 AD3d 525, 806 NYS2d 614 [2d Dept 2005]). Rather, Dr. Arato's affidavit states in vague, conclusory terms that, "within a reasonable degree of medical certainty, there was never any evidence of oligohydraminos, amniotic fluid levels were properly monitored . . . and the records fail to reflect any evidence that [plaintiff] had rupture of membranes for any period of extended time, as there was no evidence of chorioamnionitis nor any evidence of infection" in plaintiff or infant plaintiff, and that, even if plaintiff suffered from oligohydraminos, such condition "would not have resulted in bilateral deafness [in infant plaintiff] with no other neurological or physical abnormalities." The Court notes that the affidavit does not address Dr. Matalon's deposition testimony that, despite negative test results, plaintiff may have had a spontaneous premature rupture of the fetal membranes. And, other than a conclusory statement that "the status of the fetus was evaluated" during the March 28 hospital visit, it does not discuss the medical testing performed by the hospital's medical staff to assess infant plaintiff's status during the three visits immediately preceding plaintiff's March 30, 2009 admission for the induction of labor or opine as to whether the staff departed from the applicable standards of care.

Moreover, Dr. Arato does not refute the allegations of negligence against the hospital staff relating to the delivery of infant plaintiff, such as that infant plaintiff experienced prolonged ischemia and suffered complications due to an improper delivery, nor does he explain what constitutes good medical practice for hospital staff during an induced vaginal delivery performed by a private physician, particularly one involving a vacuum extraction, other than to state that the hospital provided "proper nursing care during the course of labor and delivery," and that there was "no indication for amnioinfusion to prevent umbilical cord compression" (see *Lormel v Macura*, 113 AD3d 734, 979 NYS2d 345 [2d Dept 2014]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *Cerny v Williams*, 32 AD3d 881, 822 NYS2d 548; *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2d Dept 2001]; cf. *Fink v DeAngelis*, 117 AD3d 894, 986 NYS2d 212 [2d Dept 2014]; *Sela v Katz*, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]; *Martinez v La Porta*, 50 AD3d 976, 857 NYS2d 194). In fact, Dr. Arato's affidavit does not discuss any acts performed by hospital staff during infant plaintiff's delivery. Having denied the application for summary judgment on the cause of action for medical malpractice, summary judgment in favor of Southside Hospital on plaintiff's derivative cause of action also is denied.

Agosto v Matalon
Index No. 11-24355
Page No. 7

Finally, as to the cause of action for lack of informed consent, a private physician treating his or her patient in a hospital facility has the duty to obtain the patient's consent (*see Salandy v Bryk*, 55 AD3d 147, 864 NYS2d 46 [2d Dept 2008]). While plaintiff presented at Southside Hospital on three occasions in March 2009 before she was admitted by Dr. Matalon for delivery of infant plaintiff, there is no evidence or allegation that plaintiff or infant plaintiff suffered an injury due to any treatment or procedure performed during those three visits. The branch of the motion for summary judgment dismissing the claim for lack of informed consent as against Southside Hospital, therefore, is granted.

Dated: September 29, 2015



J.S.C.

_____ FINAL DISPOSITION XX NON-FINAL DISPOSITION

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