Bonds v New York City Health & Hosps. Corp.
2015 NY Slip Op 32185(U)
October 21, 2015
Supreme Court, Bronx County
Docket Number: 350367/11
Judge: Douglas E. McKeon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

--X

QASIM BONDS, an Infant, by his Mother and Natural Guardian, INDIA WALCOTT,

Plaintiff(s)

- against -

INDEX NO: 350367/11

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

DECISION/ORDER

Defendant(s)

--X

HON. DOUGLAS E. MCKEON

Defendant's motion to dismiss plaintiff's complaints for failure to comply with General Municipal Law § 50-e and cross-motion by plaintiff for an order deeming the previously served untimely Notice of Claim timely, *nunc pro tunc,* or granting plaintiff leave to file a Late Notice of Claim are consolidated for disposition and decided as follows.

India Walcott, the infant's mother, sought prenatal care at Morris Heights Health Center. On June 13, 2005 she was sent from Morris Heights Healthcare Center to North Central Bronx Hospital for evaluation of blood pressure and proteinuria. She was a 21 year old female at 27 weeks gestation complaining of swelling of her hands and feet. Upon examination in the emergency room her blood pressures were recorded as 125/66, 138/73, 115/62 and 107/61. Her cervix was

closed and her abdomen was noted to be soft and non-tender with no contractions. An external fetal heart rate monitor reflected a fetal heart rate in the 140's with average long term variability and no decelerations. After monitoring she was discharged with instructions to followup at Morris Heights and to return to the emergency room if she experienced a spontaneous rupture of membranes, bleeding, decreased fetal movement, contractions or signs of labor. On June 24th she called the Obstetrics Clinic for the results of the 24 hour urine test done at the hospital. Upon questioning she reported seeing white and black dots before her eyes, occasional contractions, no pain and positive fetal movement. She was told to come in for immediate evaluation. She returned to the emergency room where she complained of a headache and occasional visual changes. Her blood pressure was noted as 145/67 and 136/74 with proteinuria. She was having mild contractions and a fetal heart rate in the 120's - 130's with accelerations to the 160's and long term variability. She was 1-2 centimeters dilated, 75 percent effaced, and at negative two station. She was transferred to labor and delivery for a term intrauterine pregnancy with the intention of ruling out preeclampsia. OB attending Dr. Santoro noted a planned care for 24 hour urine fetal monitoring, labs, and induction of labor if there was evidence of preeclampsia or maternal/fetal compromise. On June 25, 2005 she was full term at 38 weeks and four days pregnant. Dr. Swaby noted that she complained of a headache and blurred vision, noted her blood pressure, that she was three to four centimeters dilated, that she had edema of the lower extremities

bilaterally. He noted his assessment and plan as intrauterine pregnancy, preeclampsia, start IV fluids and transfer to labor and delivery for induction with Pitocin. She was sent to labor and delivery and placed on a continuous fetal heart rate monitor. Pitocin was started at 11:55 a.m. At 1:50 p.m. she was started on Magnesium Sulphate for seizure prophylactic. It was continuously administered until 8:30 p.m. At 3:15 p.m. midwife Williams noted that Ms. Walcott continued to complain of headaches and blurry vision, that her blood pressure was 138/64, that the fetal heart rate was 120-130 with positive accelerations and no decelerations with contractions every five to six minutes. At 5:30 Ms. Walcott was uncomfortable with contractions but did not want pain medication or an epidural. She reported her headache was improving. At 7:20 p.m. Dr. Swaby saw the patient who reported that her headache was improved. Her blood pressure was 138/59, the base line fetal heart rate was 140-150 with good beat to beat variability and she was having contractions every 4-5 minutes. At 9:15 p.m. Dr. Swaby noted for the first time the fetal heart rate had a deceleration down to 80-90 beats per minute for two to three minutes without recovery. An artificial rupture of membranes by the midwife revealed blood. Dr. Swaby diagnosed a placental abruption and ordered a C-section. Dr. Swaby testified that the deceleration occurred at roughly 9:10 p.m. and that the observation of gross blood upon artificial rupture in conjunction with the deceleration led him to diagnose placental abruption and a STAT C-section. At 9:25 p.m. Ms. Walcott was transferred to the operating room. At 9:36 p.m. the initial

incision was made and large quantities of blood and clotting material were found in the uterus upon completion of a C-section at 9:37 p.m. when the infant Qasim Bonds was delivered. He was immediately transferred to the care of attending pediatrician Dr. Susan Chung. The infant was grunting and provided bag/mask ventilation. Cord blood gas results reflected a PH of 7.044 and venous cord blood gases reflected a PH of 7.11. Dr. Swaby entered a brief operative note in the chart which indicated, among other things, that there was a possibility that the infant has aspirated blood. The Apgar scores were 1 at one minute and 8 at five minutes. In regards to complications during the procedure he noted that Ms. Walcott had an episode of bradycardia down to 30-40 beats per minute during intubation that resolved at she was given epinephrine. Dr. Swaby estimated that the abruption occurred around 9:15 p.m., when the deceleration was noted and the rupture of membranes performed.

The infant was admitted to the NICU at North Central Bronx Hospital. His admitting diagnosis was respiratory distress. He was awake and alert with good muscle tone, poor suck, fair grasp and weak cry. Dr. Chung noted the infant to be apneic, bradycardic, floppy and pale and that he received bag/mask ventilation as well as oral suctioning and stimulation. She further noted that after ventilation with one hundred percent oxygen for approximately 20 seconds the heart rate increased to greater than one hundred beats per minute which was initially approximately sixty beats per minute. A chest x-ray after transfer to the NICU was unremarkable and

an exam upon arrival at NICU reflected a heart rate of 153 BPM. Dr. Chung's assessment was that the infant was improving due to neonatal depression and possible blood aspiration. A partial Sepsis work-up was done and antibiotics were initiated pending culture results. On June 27, 2005 the infant's vital signs noted respiration at 69/minute and a physical examination revealed mild intermittent tachypnea and mild jaundice. A neurological examination was normal. On June 28th a physical examination noted equal bilateral air entry, clear lungs bilaterally and no distress. A neurological examination and all other findings were unremarkable. The infant was discharged. Subsequently, as per the testimony of the mother and the records of Lincoln Medical Mental Health Center and Bronx Lebanon Hospital, the infant was diagnosed with pervasive development disorder and premature fusing of the sutures connecting the bones of the skull.

On or about May 10, 2011 when the infant was approximately six years old NYCHHC was served with an untimely Notice of Claim. A verified Bill of Particulars served on January 13, 2012 alleges negligence in the prenatal care and treatment and labor and delivery of plaintiff mother and in the neonatal care and treatment rendered to the infant.

Movant argues that the infant plaintiff has failed to serve a timely Notice of Claim and that the case should be dismissed. Furthermore, movant argues that the infant cannot meet the criteria necessary to allow the Court to excuse the late filing of a Notice of Claim. Movant argues that it did not acquire actual notice of the facts

underlying the claim within 90 days or a reasonable time after the facts giving rise to the claim as the subject records of North Central Bronx Hospital did not provide any actual knowledge of a possible claim of medical malpractice.

In support of the motion, movant has provided the Court with the expert affirmations of Board Certified OB/GYN Dr. Haynes and Board Certified Neonatologist Dr. Steele. Dr. Haynes opines, to a reasonable degree of medical certainty, that all the obstetrical care and treatment rendered to India Walcott at the hospital was in accordance with good and accepted standards of medical practice and that no act or omission on the part of the hospital or its staff proximately caused any injury to the infant. He further opines that there is nothing in the hospital record that would have placed the defendants on notice of a possible claim of medical malpractice. Dr. Steele has also opined, to a reasonable degree of medical certainty, that the neonatal care and treatment rendered to the infant herein was at all time in accordance with good and accepted standards of medical care and that no act or omission on the part of North Central Bronx Hospital or its staff proximately caused any injury to the infant. Dr. Steele further opines that there is nothing in the North Central Bronx Hospital record that would have placed defendant on notice of a possible claim for medical malpractice.

Movant points out that plaintiff has not sought leave to serve a Late Notice of Claim or offered an excuse for failing to seek leave to serve a Late Notice of Claim in the two years and five months after they served the Late Notice of Claim. The

Court notes that for the first time as a cross-motion to this motion plaintiff seeks leave to file a Late Notice of Claim herein. Plaintiff served an invalid Notice of Claim approximately five years and eleven months after the date the infant was discharged from the hospital and approximately five years and eight months after a Notice of Claim should have been filed. Furthermore, plaintiff did not try to cure the defect in the next two years. Only when this motion was brought did plaintiff decide to move the Court for leave to serve a Late Notice of Claim.

Dr. Haynes opines that the placental abruption in this case was promptly and appropriately diagnosed in the presence of the fetal heart rate deceleration with poor recovery at 9:08 p.m. on June 25, 2005. The finding of gross blood following the artificial rupture of membranes and a vaginal exam that ruled out placenta previa along with the lack of indication that Ms. Walcott was experiencing an abruption any time up until the late deceleration (with full recovery) leads to the belief that the occurrence of the placenta abruption could not have been predicted prior to that time or that any departures from the standard of care caused the abruption. Dr. Steele has also opined that the North Central Bronx Hospital staff rendered timely and appropriate neonatal care including resuscitation, oxygenation, and ventilation following an emergency C-section secondary to placental abruption. Specifically, Dr. Steele opines that the infant was appropriately placed on nasal CPAP treatment for poor respiratory effort and neonatal depression, that the infant's vital signs were all within normal limits thereafter, that he was placed on room air with oxygen

saturations on June 26th and that follow-up arterial blood gases were within normal limits all indicating that the infant made a rapid recovery. He also opines that nothing in the hospital records indicate any deviations from the standard of care or that the infant suffered any injury due to same.

In opposition to defendants motion for summary judgment and in support of plaintiff's cross-motion to file a Late Notice of Claim, plaintiffs have provided the Court with the expert affirmations of Dr. Chen and Dr. Halbridge. Plaintiffs argue that the records disclose the essential facts upon which the claim is based. Furthermore, because defendant's own records provide actual knowledge of the essential facts of the medical malpractice claim they have not suffered legal prejudice by the delay in receiving a formal Notice of Claim. Furthermore, plaintiff argues that the delay in filing a Notice of Claim within the statutory period resulted from his mother's primary concern in caring for Qasim and although his mother did consult with a number of attorneys she was advised that it could not be proven that the hospital was responsible for her son's injuries. Plaintiffs argue that the person who would suffer from denying leave herein is Quasim and that the overriding factors of actual knowledge and lack of prejudice have been shown.

Plaintiff's expert, Dr. Halbridge, opines that defendants undertook a contra indicated Pitocin induction in the face of maternal pre-eclampsia notwithstanding the fact that both induction and pre-eclampsia carry an increased risk of placental abruption. Dr. Halbridge opines that the fetal heart tracing was non-reassuring long

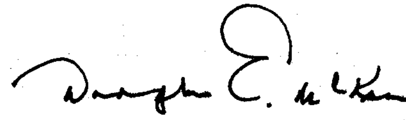
before defendants ordered an emergency C-section and opines that from the time the non-reassuring tracing was recognized at 9:08 p.m. until delivery at 9:37 p.m. an unreasonable amount of time passed and that the infant continued to suffer from a hypoxic ischemic insult to the central nervous system as a result. A second expert, Dr. Chen, opines that the infant suffered neurological injury due to the uteral hypoxic ischemic insult described by Dr. Halbridge and states that the notes in the record evidence same. He notes the infant's depressed condition at birth, including a low Apgar score, acidotic blood gas, apnea, bradycardia and severe hypertonia and neonatal depression.

Defendant's motion is granted to the extent that plaintiff may serve and file a Late Notice of Claim upon defendant for the infant plaintiff within thirty days of entry of this order. The Court finds that plaintiff has demonstrated that the medical records herein contain notice of the essential facts of the claim in accordance with the opinions of plaintiff's experts and that the defendant is not prejudiced by the delay in filing the Notice of Claim herein. Furthermore, although defendant demonstrated a *prima facie* case of entitlement to summary judgment, plaintiff's cross-motion presents competing expert opinions about the presence or absence of departures and the cause of the infant plaintiff's injuries sufficient to require a trial by jury herein. As such, defendant's motion for summary judgment is denied and the cross-motion is granted.

INDEX # 350367/11

So ordered.

Dated: 10/21/15



Douglas E. McKeon, J.S.C.