

Southern v Senzan Hsu
2015 NY Slip Op 32613(U)
February 23, 2015
Supreme Court, Erie County
Docket Number: 1129/03
Judge: John M. Curran
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

EARTHA C. SOUTHERN Individually and as Parent
and Natural Guardian and Administrator of the
ESTATE OF MALACHI SOUTHERN, Deceased

Plaintiff

MEMORANDUM
DECISION

vs.

Index No. 1129/03

SENZAN HSU, M.D.; VICTOR C. MONEKE, M.D.;
CHILDREN'S HOSPITAL OF BUFFALO OF
KALEIDA HEALTH

Defendants

FILED
2015 APR -9 PM 3:00
ERIE COUNTY N.Y.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **EARTHA C. SOUTHERN**
Self-Represented Plaintiff

GIBSON, McASKILL & CROSBY
Attorneys for Defendant Dr. Hsu
Kathleen M. Sweet, Esq., of Counsel

ROACH, BROWN, McCARTHY & GRUBER, P.C.
Attorneys for Defendant Children's Hospital of Buffalo
Gregory T. Miller, Esq., of Counsel

CURRAN, J.

Defendants have moved for summary judgment in this medical malpractice action which arises out of the birth of Malachi Southern on August 10, 2000. Malachi was born in a severely compromised condition and died approximately two and one-half years later.

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Malachi's mother, Eartha Southern, is suing for the injuries suffered by Malachi, as well as for her own injuries suffered as a result of a uterine rupture which was promptly repaired.

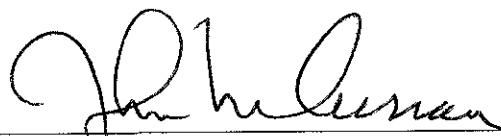
Defendants have submitted the appropriate record materials, including the pleadings, bill of particulars, portions of the deposition testimony, portions of the medical records and expert affidavits. The evidence submitted by the defendants demonstrates that, despite the child's poor condition at birth, there was no indication of any fetal distress throughout the time in the delivery room and therefore no need to deliver the child by any means other than a spontaneous vaginal delivery. Moreover, based on the evidence submitted by the defendants, defendants could not have predicted that the infant plaintiff would be born with perinatal asphyxia with consequent severe global brain damage and other injuries. The records submitted by the defendants further show that there was no objective evidence of fetal jeopardy and that the fetus, by definition, remained well-oxygenated and was in no way compromised. Defendants also have submitted evidence demonstrating that the uterine rupture suffered by Eartha Southern was promptly diagnosed and properly repaired.

Based on the materials submitted by the defendants, the Court concludes that the defendants have met their burden to establish entitlement to summary judgment as a matter of law based on the undisputed material facts presented to the Court. The burden therefore shifts to the plaintiff to establish triable questions of material fact warranting denial of the motions.

In response to the motions, Eartha Southern has submitted various materials which were not organized in any particular fashion. These materials were all marked as Court Exhibits during oral argument and they constitute everything submitted by Ms. Southern in opposition to the motions. Essentially, none of the materials presented by Ms. Southern is in

proper admissible form and to the extent that small portions of the materials she submitted might pass evidentiary muster, they do not raise triable issues of material fact. Furthermore, Ms. Southern did not provide any expert affirmation or affidavit opposing the motion, and therefore as a matter of law cannot raise a triable issue of fact on these motions (*Fiore v Galang*, 64 NY2d 999 [1985]; *Lin v Strong Health*, 82 AD3d 1585 [4th Dept 2001]). In the absence of any record material raising triable questions of fact, and in the absence of any expert medical proof from the plaintiff, the Court is compelled to grant the defendants' motions for summary judgment in all respects. Submit Order.

DATED: February 23, 2015



HON. JOHN M. CURRAN, J.S.C.