

Pena v Jean-Louis
2018 NY Slip Op 31855(U)
May 22, 2018
Supreme Court, Bronx County
Docket Number: 23952/2013E
Judge: Lewis J. Lubell
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NYSCEF DOC. NO. 76

INDEX NO. 23952/2013E

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA- 19A

-----X
FERNANDO PENA, infant, by his mother and
natural guardian, CARMEN ELSA FERNANDEZ,
and CARMEN ELSA FERNANDEZ, Individually,

Plaintiff(s),

- against -

INDEX NO:23952/2013E

PASCALE LYNE JEAN-LOUIS, M.D. and
MONTEFIORE MEDICAL CENTER,

DECISION/ORDER

Defendant(s).

-----X

HON. LEWIS J. LUBELL

Motion by Dr. Pascale Lyne Jean-Louis and Montefiore Medical Center for
an order dismissing plaintiff's complaint is decided as follows.

In this medical malpractice action plaintiffs' allege that the named doctor
and staff at Montefiore failed to timely deliver the baby resulting in hypoxic
ischemic encephalopathy (HIE) and global developmental delays. They argue
that when the fetal head was delivered the plaintiff- mother stopped pushing and
the doctor and staff failed to timely deliver the baby thereafter. Movants argue
that once the fetal head delivered there were no other interventions or maneuvers
which could have expedited delivery and that the evidence shows that they
employed all appropriate interventions and maneuvers to expeditiously deliver the

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infant. They further argue that the infant did not suffer HIE or any hypoxic/anoxic event resulting in delays.

In support of the motion, movants have provided the court with the expert affidavit of Walter Molofsky, MD who opines that although the infant experienced some acute transient neonatal depression he made a complete recovery and sustained no structural brain damage. Expert Gary Mucciolo, MD opines that defendants adhered to the standard of care in expeditiously attempting to deliver the infant and that there was no reason to anticipate that the plaintiff-mother would encounter difficulty delivering the baby. He opines that the doctor recognized and appropriately addressed all complications that arose during delivery. Finally, expert Gordon Sze, M.D. opines that the infant did not experience HIE during labor and delivery as evidenced by the absence of radiographic evidence of grey and white matter cell death.

In opposition, plaintiff argues that conflicting expert opinions have created issues of fact being herein preventing summary judgment. Plaintiff has submitted an expert affidavit from a board certified OB/GYN opining that the defendants departed from good and accepted standards of practice in failing to expedite the delivery of the fetal head and in failing to deliver the remaining portion of the infant's body while the infant's head was on the mother's perineum for a full 5 minutes. This expert lists various departures by both Montefiore staff and defendant Dr. Jean-Louis. Furthermore, plaintiff has also submitted an

affirmation of a pediatric neurologist who opines that hypotonia of all extremities, bilateral foot pronation, global developmental delay and speech delay suffered by the infant would more likely than not be caused by perinatal hypoxic injury.

Movants argue that in opposition to this motion, plaintiffs, for the first time, set forth a new theory of liability which is improper. For the first time, plaintiff claims that the fetal heart monitor showed ominous tracings from 1:05p.m. to 1:47p.m. necessitating an earlier delivery. Prior to this, there was no mention of any fetal heart monitor strips in any of plaintiff's pleadings while plaintiffs bill of particulars set forth that defendants departed from the standard of care in delivering the infants head at 1:47p.m. and not the body until 1:52p.m. resulting in a deprivation of oxygen during that time frame.

Analysis

A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries. (*Anyie B. v Bronx Lebanon Hosp.*, 128 A.D.3d 1, 2, 5 N.Y.S.3d 92, 93 [1st Dept. 2015].) If a defendant in a medical malpractice action establishes prima facie entitlement to summary judgment, by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's prima facie showing

"with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged." (Pullman v Silverman, 125 AD3d 562, 562, 5 NYS3d 38 [1st Dept. 2015], *aff'd* 28 N.Y.3d 1060, 66 N.E.3d 663, 43 N.Y.S.3d 793 [2016].)

The defendants have raised a prima facie case as to the absence of departures and the lack of causation.

In opposition, the affidavit of plaintiff's expert is sufficient to raise an issue of fact as to the theory pursued by the plaintiff that the 5-minute delay in delivery was a departure, and was not the result of the mother's failure to exert effort. In this regard, plaintiffs' expert states that "failure to conform to the appropriate standard of care – which would have been to expedite the delivery of the fetal head and performing a wide episiotomy with fundal pressure after delivery of the fetal head – caused the infant to suffer from hypoxia"

The defendants argue that the alleged failure to monitor the fetal strips for repetitive deep variable decelerations commencing at 1:04 P.M. is a "new theory" which cannot defeat summary judgment. "A plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability for negligence for the first time in opposition to the motion." (*Winters v. St. Vincent's Med. Ctr.*, 273 A.D.2d 465, 711 N.Y.S.2d 892 [2d Dept. 2000]; *Michel v Long Is. Jewish Med. Ctr.*, 125 A.D.3d 945, 946, 5 N.Y.S.3d 162, 164 [2d Dept. 2015] [plaintiff's expert impermissibly attempted to assert a new theory of liability, based on the defendants' alleged failure to provide written notice of the condition

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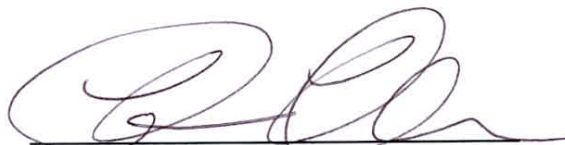
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of the decedent's elbow in her chart, which was not alleged in the complaint or bill of particulars].) However, as noted by the defendants, the plaintiff has served a supplemental bill of particulars asserting this "new theory," and in any event, as noted above, the plaintiffs have raised an issue of fact as to departures based on the theories unquestionably advanced in the earlier bill of particulars.

Plaintiff has also raised an issue of fact as to causation through the submission of an affirmation from a neurologist, who attributes the infant plaintiff's condition to perinatal injury, thus rebutting the defendants' contentions that the infant fully recovered. *Destiny H. v Bronx Lebanon Hosp.*, 137 A.D.3d 607, 607, 27 N.Y.S.3d 552, 553, [1st Dept. 2016] [plaintiffs' expert opined that an infant's Apgar scores are not determinative of the absence of injury, that the infant's medical records showed that within two days after her birth, she displayed seizure activity, and that brain imaging studies revealed early signs of edema, changes consistent with hypoxic-ischemic encephalopathy (HIE) and atrophy, an expected change due to HIE].)

Accordingly, the motion is denied.

Dated: May 22, 2018


Lewis J. Lubell, J.S.C.