

Barrett v Mt Sinai Med. Ctr.

2019 NY Slip Op 30293(U)

January 14, 2019

Supreme Court, Kings County

Docket Number: 515477/2018

Judge: Marsha L. Steinhardt

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of January 2019.

PRESENT:

HON. MARSHA L. STEINHARDT,
Justice

----- X
MARIA BARRETT, individually and as mother and
Natural guardian of HOPE BARRETT, HOPE
BARRETT,

Plaintiff

DECISION AND ORDER
Index No. 515477/2018

-against-

MT SINAI MEDICAL CENTER, DR. HOWARD
KURTZ, DR. ALAN ADLER, DR. ALICIA
CARRANZA, DR. DOE, NYOBYGYN,

Defendants.
----- X

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion _____
Opposition _____
Reply _____

1 _____
2 _____
3 _____

2019 FEB -4 AM 8:05
KINGS COUNTY CLERK
FILED

Upon the foregoing papers, and after oral argument, Defendants' move, in lieu of an answer, for 1) an Order pursuant to CPLR § 3211(a)(7) dismissing the 2nd, 3rd, 4th, and 5th causes of action of Plaintiffs' complaint as legally deficient and 2) an Order pursuant to CPLR §3024(a) compelling Plaintiffs to provide a more definite statement of facts in support of the 1st cause of action – the medical malpractice claim. Plaintiffs oppose.

Background

Plaintiffs commenced this action by filing a Summons and Verified Complaint on or about July 30, 2018 alleging 5 causes of action - 1) medical malpractice, 2) assault and/or battery, 3) breach of duties, 4) breach of contractual duties, and 5) violation of civil rights. Plaintiffs' allegations stem from July 30, 2017 when Maria Barrett gave birth to Hope Barrett. Defendants are the doctors who attended to Ms. Barrett at Mt. Sinai Hospital and delivered Hope.

Analysis

"When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Thaw v. North Shore University Hosp.*, 129 AD3d 937, 938 [2d Dept. 2015], quoting *Bokhour v. GTI Retail Holdings, Inc.*, 94 AD3d 682, 682-683 [2d Dept. 2012]). "In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one . . . [The motion] must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Thaw*, 129 AD3d at 938).

Second Cause of Action: Assault and/or Battery

"To plead a cause of action to recover damages for assault, a plaintiff must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact"

(*Thaw*, 129 AD3d at 938, quoting *Gould v. Rempel*, 99 AD3d 759, 760 [2d Dept. 2012] [internal citations omitted]). “To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature” (*Thaw*, 129 AD3d at 938-939, quoting *Cotter v. Summit Sec. Servs., Inc.*, 14 AD3d 475, 475–476 [2d Dept. 2005]). Here, the evidence in the record establishes that a material fact as claimed by Plaintiffs’ is not actually a fact. Ms. Barrett alleges that she did not give permission to be treated by a resident – Dr. Doe. However, Defendants’ submitted a consent form, signed by Ms. Barrett, to the contrary. Although Ms. Barrett states that she indicated her birth preferences, in writing, prior to her delivery that she did not wish to be treated by a resident, there is nothing to that effect on the signed consent form (*see Thaw*, 129 AD3d at 939). The form states, at paragraph 8, “I have crossed out and initialed any paragraphs to which I do not consent.” It is obvious that no paragraphs are crossed out and/or initialed by Ms. Barrett. Thus, it is clear that no intentional offensive touching occurred between Ms. Barrett and Dr. Doe, by virtue of Dr. Doe attending to/examining Ms. Barrett at the time of Hope’s birth. Plaintiffs’ Second Cause of Action for assault and/or battery must be dismissed without merit.

Third Cause of Action: Breach of Duties

“The distinction between ordinary negligence and [medical] malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of common everyday experience” (*Berger v. State*, 171 AD2d 713, 717 [2d Dept. 1991], quoting *Kerker by Kerker v. Hurwitz*, 163 AD2d 859 [4th Dept. 1990]). “When the duty which is allegedly breached arises from the physician-patient relationship or is

substantially related to medical treatment the resulting cause of action is one for medical malpractice” (*Berger*, 171 AD2d at 717). Here, Defendants are a hospital, licensed medical doctors, and a medical practice. By Plaintiffs’ own accounts, some or all Defendants provided prenatal care to Ms. Barrett, and some or all Defendants participated in the delivery of Hope, thereby creating a physician-patient relationship. Further, Plaintiffs’ negligence cause of action relates to the medical treatment rendered by Defendants during the delivery. In her breach of duties cause of action (ordinary negligence), Ms. Barrett specifically states, “Mt. Sinai asked me at the time of admission to indicate my birth preferences and I did so, in writing. Nevertheless, Mt. Sinai provided inexperienced and untrained personnel . . . in violation of this written agreement . . . These birth choices were not simply for the delivery of my child, but for the specific manner in which I would be attended and my child would be delivered.” Ms. Barrett admits that her negligence claim surrounds the birth of her child thereby rendering her negligence cause of action one for medical malpractice as no claim for ordinary negligence can exist pursuant to the facts surrounding this case. Plaintiffs’ Third Cause of Action for breach of duties is dismissed.

Fourth Cause of Action: Breach of Contractual Duties

“The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach” (*Reznick v. Bluegreen Resorts Management*, 154 AD3d 891, 893 [2d Dept. 2017], quoting *Canzona v. Atanasio*, 118 AD3d 837, 838 [2d Dept. 2014]). “[A] party alleging a breach of contract must demonstrate the existence of a . . . contract reflecting the terms and conditions of their . . . purported agreement

(*Reznick*, 154 AD3d at 893, quoting *Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173 [2011]). The Second Department has accepted that “[w]ithout [an] agreement . . . there can be no contract [and] [w]ithout a contract there can be no breach of the agreement” (*Reznick*, 154 AD3d at 893, quoting *Schaffe v. SimmsParris*, 82 AD3d 867, 868 [2d Dept. 2011]). “A complaint that offers only conclusory allegations without pleading the pertinent terms of the purported agreement requires a court to speculate as to the parties involved and the conditions under which the alleged contract was formed” (*Reznick*, 154 AD3d at 893). “In order to state a cause of action to recover damages for a breach of contract, the plaintiff’s allegations must identify the provisions of the contract that were breached” (*Reznick*, 154 AD3d at 893, quoting *Barker v. Time Warner Cable, Inc.*, 83 AD3d 750, 751 [2d Dept. 2011]). “Further, vague allegations suggesting that there may have been an agreement do not suffice (*Reznick*, 154 AD3d at 893). Here, Plaintiffs’ breach of contractual duties claim only offers conclusory allegations without pleading the pertinent terms of the purported contract. Specifically, Plaintiffs’ claim merely states that “[on] or about July 30, 2017, one or more of the defendants breached contractual duties owed to one or more of the plaintiffs.” By failing to plead the salient terms of a valid and binding contract, Plaintiffs cannot show that a contract exists. Therefore, Plaintiffs’ Fourth Cause of Action for breach of contractual duties is dismissed.

Fifth Cause of Action: Violation of Civil Rights

The Plaintiffs’ pleading does not state a cause of action for the alleged civil rights violation (*see Thaw* 129 AD3d at 938). Plaintiffs’ bare legal conclusion that the Defendants’ violated unspecified civil rights laws is insufficient to sustain a civil rights violation cause of action (*see Asgahar v. Tringali Realty, Inc.*, 18 AD3d 408 [2d Dept. 2005]). Plaintiffs do not

reference any statutory authority for the alleged civil rights violation. Therefore, Plaintiffs' Fifth Cause of Action for violation of civil rights is dismissed.

Ms. Barrett's "affidavit" was not subscribed before a notary or other authorized official. While the Court may consider valid affidavits submitted by the plaintiff to remedy pleading defects, Ms. Barrett's affidavit cannot be considered as it is not admissible evidence (see *Dinger v Cefola*, 133 AD3d 816 [2d Dept. 2015]; see also *Young v. Ryan*, 265 AD2d 547 [2d Dept. 1999]).

In addition, Plaintiffs are hereby directed to augment their remaining cause of action sounding in medical malpractice. The allegations as set forth are vague and non-informative.

This constitutes the opinion, decision and order of this court.

ENTER,

MAP

HON. MARSHA L. STEINHARDT

J.S.C.

2019 FEB -4 AM 8:05
KINGS COUNTY CLERK
FILED