

Audette v Toussaint-Milford
2019 NY Slip Op 30823(U)
March 22, 2019
Supreme Court, Kings County
Docket Number: 513797/2016
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

JEANNINE AUDETTE,

Plaintiff,

-against-

MARY TOUSSAINT-MILFORD, M.D.,
ODESSA FLYNN, C.N.M. and
BROOKDALE HOSPITAL MEDICAL CENTER,

Defendants.

Index No.: 513797/2016

DECISION/ORDER

Hon. Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendant, pursuant to CPLR sec. 3212.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	_____
Other:(memo).....	_____

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KINGS COUNTY CLERK
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Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant, Mary Toussaint-Milford, M.D., (“Dr. Toussaint-Milford”), Odessa Fynn, C.N.M s/h/a Flynn (“Nurse Fynn”) and Brookdale Hospital Medical Center (“Brookdale”) have moved, pursuant to CPLR § 3212, for summary judgment and a dismissal of plaintiff’s complaint, upon the grounds that they did not depart from accepted medical, hospital and nursing practice in the care and treatment rendered to the plaintiff Jeannine Audette (“Ms. Audette”) and that any alleged departure was not the proximate cause of plaintiff’s alleged injuries. In opposition to the defendants’ motions, the plaintiff asserts that summary judgment is not warranted as there are triable issues of fact as to whether these defendants departed from accepted medical, hospital and nursing practice in the care and treatment that was rendered to Ms. Audette at the time of labor

and delivery, as well as during the period of time following delivery that she was a patient at Brookdale and was being treated and cared for by the hospital staff.

Background:

The within action was commenced by the filing of a summons and complaint on behalf of the plaintiff on or about August 9, 2016. A Certificate of Merit was also filed by counsel for the plaintiff on or about August 9, 2016. Issue was joined, on or about August 31, 2016, by the service of defendant, Brookdale's verified answer, and on or about October 20, 2016, by the service of defendant, Dr. Toussaint-Milford's and Nurse Fynn's verified answer. At the time that the defendants served their answer, discovery demands, as well as a Demand for a Bill of Particulars were made of the plaintiff. On or about November 15, 2016, the plaintiff served a Bill of Particulars. Plaintiff's Bill of Particulars alleges that Dr. Toussaint-Milford and Brookdale were negligent (1) in failing to use a proper delivery technique in delivering plaintiff's placenta and (2) in allowing plaintiff's placenta to remain following her delivery and (3) failing to refer the plaintiff for an emergency procedure to remove the placenta. The Bill of Particulars further alleges Nurse Fynn was negligent (1) in discharging the plaintiff from the hospital with the placenta still inside her and failing to recognize plaintiff's abdominal pain and swelling following her delivery and (2) failing to refer the plaintiff for an emergency procedure to remove the placenta.

Depositions were conducted of the plaintiff, Jeannine Audette, as well as the defendants Dr. Toussaint-Milford and Nurse Fynn.

A Note of Issue was filed by the plaintiff on March 8, 2018.

Facts:

The plaintiff, a 37-year-old female, first presented to Brookdale on September 24, 2014, at 27 weeks gestation (estimated date of delivery was December 25, 2014) with complaints of abdominal pain and ruptured membranes. The plaintiff who had one prior C section delivery was alleged to be a heroin addict on methadone maintenance. The

hospital staff attempted to delay delivery to enable the fetus to mature and grow. However, in the ensuing days before delivery, the plaintiff would leave the hospital unit that she was assigned, remove the fetal monitor strips that had been placed upon her and even refused pelvic examinations.

On September 26, 2014, the plaintiff developed chorioamnionitis which allegedly caused her labor to accelerate.

Upon examination of the plaintiff on September 29, 2014 at 5:49 P.M., Dr. Rosenblum (a non-party) determined that the plaintiff was fully dilated. Dr. Rosenblum then attempted to deliver the baby but needed assistance due to the unwillingness on the part of the plaintiff to cooperate and permit the doctor to perform his duties. Dr. Toussaint-Milford then interceded, and along with Dr. Rosenblum delivered the baby at 6:20 P.M. The placenta was delivered at 6:45 P.M.

The plaintiff remained at Brookdale until October 1, 2014, when she left the hospital against medical advice, by pulling out IV's, as she was being treated at that time for an infection following her development of chorioamnionitis. The plaintiff returned to Brookdale on October 15, 2014 with complaints of bleeding which she stated had been occurring for a period of five days. Upon exam and testing of the plaintiff, she was diagnosed with having placenta accreta. On October 15, 2014, a cervical hysterectomy was performed to remove her retained placenta and to prevent hemorrhaging.

Discussion:

On a motion for summary judgment seeking a dismissal of a medical malpractice cause of action, a defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or, if there was a departure, that the departure was not the proximate cause of plaintiff's alleged injuries (Williams v. Bayley Seton Hosp., 112 AD3d 917, 918, 977 NYS2d 395 [2nd Dept. 2013]; Giacinto v. Shapiro, 151 AD3d 1029,1030, 59 NYS3d 42 [2nd Dept. 2017]; Brinkley v. Nassau Health Care Corp., 120 AD3d 1287, 993 NYS2d 73 [2nd Dept. 2014]). Thus, on a motion for summary judgment, the defendant has the initial burden of establishing the

absence of any departure from good and accepted practice or that the plaintiff was not injured by any departure (see Terranova v. Finklea, 45 AD3d 572, 845 NYS2d 389 [2nd Dept. 2007]). “In order to sustain this burden, the defendant is only required to address and rebut the specific allegations of malpractice set forth in the plaintiff’s complaint and bill of particulars” (Bhim v. Dourmashkin, 123 AD3d 862, 864, 999 NYS2d 471 [2nd Dept. 2014]).

Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact (see Fritz v. Burman, 107 AD3d 936, 94, 968 NYS2d 167 [2nd Dept. 2013]; Brinkley v. Nassau Health Care Corp., 120 AD3d at 1287). The plaintiff must “lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such departure was a proximate cause of injury” (Sheridan v. Bieniewicz, 7 AD3d 508, 5089 [2nd Dept. 2004]; Gargiulo v. Geiss, 40 AD3d 811, 911-812 [2nd Dept. 2007]). In order to prevail on a claim for medical malpractice, “expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause” (Nicholas v. Stammer, 49 AD3d 832, 833 [2008]).

In addressing the issue of proximate cause, the Court notes that “in a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant” (Johnson v. Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 [2nd Dept. 2005], quoting Holton v. Sprain Brook Manor Nursing Home, 253 AD2d 852 [2nd Dept. 1998]). “A plaintiff’s evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant’s act or omission decreased the plaintiff’s chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant’s conduct diminished the plaintiff’s chance of

a better outcome or increased the injury” (Semel v. Guzman, 84 AD3d 1054, 1055-1056 [2nd Dept. 2011], quoting Goldberg v. Horowitz, 73 AD3d 691, 694 [2nd Dept. 2010], quoting Alicea v. Liguori, 54 AD3d 784, 786 [2nd Dept. 2008]).

Here, this Court is presented with the issue of whether defendants, Dr. Toussaint-Milford, Nurse Fynn and Brookdale, deviated or departed from accepted medical, hospital and nursing practice while caring for Ms. Audette, and if so, whether their departure from accepted medical, hospital and nursing practice were the proximate cause of the injuries that allegedly occurred.

Defendants (Dr. Toussaint-Milford & Brookdale Hospital):

In support of their motion for summary judgment, the defendants offer the affirmation of Dr. Gary Mucciolo, board certified in obstetrics and gynecology, who opined that the defendants did not depart from accepted medical, hospital and nursing practice in the care and treatment rendered to the plaintiff.

The defendants maintain that when they were initially treating the plaintiff and attempting to delay delivery to save the fetus, plaintiff would refuse pelvic examinations or permit the nursing staff to apply a fetal monitor, and then when they did, she removed the device. Additionally, without permission or justification she would leave her unit and disappear for long periods of time. It is alleged that her treating OB/GYN had followed the proper procedures to protect the fetus by administering Betamethasone, Magnesium Sulphate, Ampicillin and Zithromax to the plaintiff.

The defendants contend that treating the plaintiff was a challenge as she was both verbally and physically abusive to the staff until she was given her treatment of Methadone. In the time period prior to delivery, although the plaintiff complained of having contractions, she refused to permit a vaginal exam.

When Dr. Rosenblum attempted delivery on September 29, 2014, the plaintiff would not cooperate as she refused to push or allow the doctor to touch her. Dr. Toussaint-Milford then interceded and assisted Dr. Rosenblum in delivering the baby. The plaintiff also refused to cooperate during the delivery of the placenta, and as a result,

Dr. Toussaint-Milford could not deliver the placenta until twenty-five minutes after delivery of the baby. It is further alleged that the plaintiff would not permit Dr. Toussaint-Milford to examine her uterus after her delivery nor would she allow the treating medical staff to perform a vaginal examination upon her return from the delivery room.

When the plaintiff returned to Brookdale on October 15, 2014, after having inexplicably left for a period of fifteen days, they properly treated her after having been told that she had been bleeding for the prior five days. The plaintiff after examination and testing was diagnosed with a placenta increta and in order to treat that condition, Dr. Rimarachin performed a cervical hysterectomy. It is asserted that even if plaintiff had been compliant and the placenta increta had been discovered prior to her leaving the hospital, she would have still required a hysterectomy to prevent bleeding and hemorrhage.

The defendants assert that there was no bleeding following delivery which would have indicated that there had been any retained placenta. The main portion of the placenta delivered spontaneously without disturbing the placenta increta and causing massive bleeding. The blood loss of 300 mls at delivery was alleged to be normal for a partial placental accreta. Since the plaintiff would not allow Dr. Toussaint-Milford or any other physician to examine her uterus after delivery, Dr. Toussaint-Milford inspected the placenta which appeared to be intact and she further swabbed the surface of the placenta for the purpose of submitting a culture specimen. The refusal by the plaintiff to permit vaginal examinations prevented the physicians from being able to fully perform their duties and discovering that a small portion of the placental tissue had grown into the myometrium of the uterus. In fact, the pathology report from the delivery did not note any retained placenta.

Defendants further assert that the plaintiff, in opposition to this motion, has introduced new claims that should not be considered by this Court. These new claims by the plaintiff were addressed by the defendants in their reply. Plaintiff's expert opined that the defendants should have used sedatives to assist in calming the plaintiff which

may have had an effect on controlling her conduct and reducing her anxiety. In response, the defendants maintain that on September 30, 2014, a psychiatrist examined the plaintiff and ordered Klonopin for her anxiety. However, the plaintiff left the hospital on October 1, 2014, before Klonopin could be administered and her condition could be further evaluated. The defendants also addressed another new claim of the plaintiff that the defendants failed to perform radiological studies after delivering the placenta. In response, the defendants assert that radiological studies could not be performed since the plaintiff left the hospital before there was any post-operative treatment.

The expert opined that none of the alleged injuries included in the Bill of Particulars (unnecessary surgery to remove the implanted placenta, swelling and pain in plaintiff's legs, blood clotting) were proximately caused by the care and treatment rendered by the defendants. Defendants maintain that they properly treated the plaintiff under difficult conditions, as they were obstructed by plaintiff's extreme non-compliance and they did not deviate from the standard of care during the labor and delivery or in the aftercare that was afforded the plaintiff.

The defendants, in moving for summary judgment and a dismissal of the plaintiff's causes of action, maintain that they have met their burden of establishing both the absence of any departure and that any alleged departure was not the proximate cause of plaintiff's alleged injuries.

This Court finds upon review of the defendants' submissions that the defendants have set forth their prima facie burden of establishing that they had neither departed from good and accepted medical practice or that the plaintiff had not been injured as a result of any alleged departure, and the burden shifted to the plaintiff to establish the existence of a triable issue of fact.

In opposing the motion for summary judgment by the defendants, in which the plaintiff claims there are triable issues of fact, the plaintiff offers the opinion of a medical expert, board certified in Obstetrics and Gynecology, who asserted that there were several departures from good and accepted standards of medical care on the part of the defendants.

The plaintiff maintains that despite the alleged non-compliance on the part of the plaintiff following delivery and despite the allegations of the defendants that they were prevented from performing their duties, Dr. Toussaint-Milford was able to inspect the uterus, and upon exam failed to observe that a portion of the placenta had been retained. The effects of a portion of the placenta remaining in the womb could have been life threatening and if retained placenta is not treated immediately, the mother is susceptible to both blood loss and infection.

Counsel for the plaintiff does not dispute that the plaintiff left Brookdale on October 1, 2014 against hospital orders, but it is alleged that prior to that date the defendants failed to recognize and act upon some obvious signs that the plaintiff may have had a retained placenta. The hospital records of September 30, 2014 indicate that the plaintiff had made complaints of cramping and abdominal pain. Abdominal pain as well as heavy bleeding are some of the symptoms associated with a patient having a retained placenta.

The expert opined that there are also several factors which place a patient at a higher risk for placenta retention and the plaintiff exhibited several of those characteristics. At the time of the pregnancy, the plaintiff was 37 years old and typically patients over the age of 30 are at a higher risk for retaining placenta. Additionally, the plaintiff delivered during the 27th week, and a delivery that occurs prior to the 34th week of gestation is considered to be premature, and pre-maturity is another factor which increases one's risk. Plaintiff maintains that in light of these risk factors, the defendants should have been alerted to the fact that there was a chance of the placenta being retained.

The expert further opined that the aggressiveness and anger that the plaintiff displayed is not uncommon for a woman who has just undergone labor. It was suggested that sedative medications could have been administered to calm the plaintiff which would have enabled medical personnel to fully examine the plaintiff's uterus to ensure that a portion of the placenta was not retained.

Additionally, it is alleged that further radiological studies should have been ordered and conducted, including an MRI or ultrasound of the patient to further inspect the uterine wall.

Finally, the expert opined that over the course of fifteen days (September 30, 2014- October 15, 2014), “the portion of the placenta likely deepened inside the uterine wall, thus requiring a hysterectomy that could have treated non-surgically just fifteen days prior. Additionally, Ms. Audette was allowed to hemorrhage and bleed significantly over the course of fifteen days. Had the placenta been properly identified Ms. Audette’s hemorrhaging and bleeding would have been stopped immediately”.

The plaintiff asserts that they have set forth sufficient grounds to establish that there is a triable issue of fact as to whether the defendants deviated from good and accepted medical standards of care in not identifying that the plaintiff had a retained placenta, in not removing the portion of the retained placenta, and in allowing her to hemorrhage.

This Court finds that in opposition to the defendants’ prima facie showing, the plaintiff’s submissions, including the affirmation of the plaintiff’s expert, failed to raise a triable issue of fact as to whether there was any departure, and if there was, was it the proximate cause of the alleged injuries (see Bezerman v. Bailine, 95 AD3d 1153, 945 NYS2d 166 [2nd Dept. 2012]).

This Court, in reviewing the submissions of the parties, finds that there is no dispute that the plaintiff from the time that she initially presented to Brookdale on September 24, 2014 until the hysterectomy was performed on October 15, 2014 was recalcitrant and an uncooperative patient. Despite the verbal and physical abuse on the part of the plaintiff that the employees of Brookdale had undeniably dealt with, there is nothing in the record that would indicate that the defendants did not employ their best efforts and skills as professionals to ensure the well-being of both the plaintiff and her unborn fetus. They appropriately matured and protected the plaintiff’s fetus despite her non-compliance which included her refusal to take pelvic exams, permitting the use of an electronic fetal monitor and when they were able to employ the fetal monitor, the plaintiff

would remove the fetal monitor strips. In addition, the plaintiff having left her hospital unit and disappearing for periods of time without a reasonable explanation at crucial times could have contributed to the medical condition which is the subject of this action.

When Dr. Rosenblum determined that the plaintiff was fully dilated and attempted to deliver the fetus, the plaintiff was uncooperative, and she refused to allow Dr. Rosenblum to touch her. Dr. Toussaint-Milford then assisted Dr. Rosenblum and they were successful in delivering the baby despite the refusal of the plaintiff to push and cooperate. Thereafter, the plaintiff refused to allow the doctors to examine her, and they were unable to remove the placenta until twenty-five minutes after delivery. Dr. Toussaint-Milford testified that upon removal of the placenta, it was inspected and appeared to be intact. The surface was swabbed for a culture specimen and the pathology report from the delivery did not indicate that there had been any retained placenta. Additionally, there was no massive bleeding at the time of delivery or when the placenta was removed, and the bleeding that did occur was considered to be within normal limits.

Despite the contention by plaintiff's expert that the defendants medical staff had sufficient opportunity to examine the plaintiff and find the retained placenta prior to her leaving the hospital on October 1, 2014, that opinion is nothing more than conjecture and not supported by the record which appears to indicate that the plaintiff repeatedly failed to permit the medical staff to perform their duties, including vaginal examinations. This may have led to the detection of a small portion of the placental tissue that had grown in the myometrium of the uterus.

Finally, when the plaintiff's returned to Brookdale on October 15, (after an unexcused absence of fifteen days) with complaints of having bled for five days, and then having to undergo a hysterectomy, is not a claim for which this Court could find that there is a triable issue of fact as to a departure on the part of the defendants. On September 30th, the plaintiff was continuously monitored and being treated for an infection and the removal of an IV, and the peril that she placed herself in, would negate any claim that the alleged departure was the proximate cause of her alleged injuries. Any

argument that the emergency procedure performed by Dr. Rimarachin was due to a departure on the part of the defendants is not supported by the record and the repeated non-compliance by the plaintiff as to the directives of medical experts in a hospital cannot be minimized where timing is a crucial component and professionals must employ their judgment and trained skills.

A hospital did not have a duty to prevent the plaintiff from leaving the hospital against medical advice. (see Ingutti v. Rochester Gen Hosp., 114 AD3d 1302, 980 NYS2d 692 [4th Dept. 2014]). There is no statute or principle of common law that would permit the hospital to force plaintiff to remain in the hospital when she decided to leave (Kowalski v. St. Francis Hosp. & Health Ctrs., 21 NY 3d 480 [2013]).

This Court finds that the affidavit of plaintiff's expert is speculative and conclusory and nothing in the record would support the inference by plaintiff's expert that there was negligence. "General and conclusory allegations of malpractice, unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician's summary judgment motion" (Myers v. Ferrara, 56 AD3d 78, 84, 864 NYS2d 517 [2nd Dept. 2008]; see also Simpson v. Edghill, 2019 NY Slip Op 00923 [2nd Dept. 2019]).

Defendant (Nurse Fynn):

As to Nurse Fynn, her counsel alleges that her only connection to the plaintiff and her involvement in this matter was that she made an entry in the hospital records that the plaintiff had left the unit without permission. As a result, the defendants assert there should be no finding that Nurse Fynn deviated from any standards of care with respect to the plaintiff.

In considering the cause of action as against Nurse Fynn, the Court notes that the plaintiff's expert affirmation does not address any negligence on the part of Nurse Fynn or opine that Nurse Fynn departed from the standard of care. Accordingly, in the absence of a claim that Nurse Fynn departed from accepted nursing or medical practice, that portion of the motion to dismiss as against Nurse Odessa Fynn is granted.

It is well settled that a motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law to direct judgment in favor of any party. (Alvarez v. Prospect Hosp., 68 NY2d 322, 508 NYS2d 923 [1986]).

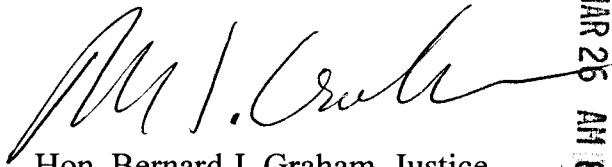
Conclusion:

The motion by defendants, Mary Toussaint-Milford, M.D., Odessa Fynn, C.N.M s/h/a Flynn and Brookdale Hospital Medical Center for summary judgment, and a dismissal of the causes of action as against these defendants, pursuant to CPLR § 3212, is granted.

This shall constitute the decision and order of this Court.

Dated: March 22, 2019
Brooklyn, New York

ENTER



Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

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