

Tedesco v David

2019 NY Slip Op 32349(U)

August 1, 2019

Supreme Court, Suffolk County

Docket Number: 11-11256

Judge: Denise F. Molia

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COFY

INDEX No. 11-11256
CAL. No. 18-01512MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 1-8-19 (008 & 009)
ADJ. DATE 1-11-19
Mot. Seq. # 008 - MG
009 - MG

-----X
JACK TEDESCO, an Infant, by His Mother and
Natural Guardian KATHLEEN TEDESCO,

Plaintiff,

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- against -

AARON DAVID, M.D., DR. AARON DAVID
OB/GYN, PLLC, DINA ELKADY, M.D., ELITE
PERINATOLOGY, P.C., MICHAEL TERRANI,
M.D., OCEAN SONO MEDICAL, PLLC,
OCEAN PERINATOLOGY, PLLC, WENDY L.
KINZLER, M.D., GRAHAM G. ASHMEAD,
M.D. and WOMEN'S CONTEMPORARY
CARE ASSOCIATES, P.C.,

Defendants.
-----X

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RST

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Upon the following papers numbered 1 to 76 read on these motions for summary judgment : Notice of Motion/Order to Show Cause and supporting papers 1-36; 37-76 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#008) by defendant Michael Terrani, M.D., and the motion (#009) by defendants Dina Elkady, M.D., Elite Perinatology, P.C., and Ocean Perinatology, PLLC, are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Michael Terrani, M.D., for summary judgment dismissing all claims against him is granted; and it is further

ORDERED that the branch of the motion by defendant Michael Terrani, M.D., to amend the caption by striking "Michael Terrani, M.D." therefrom is granted; and it is further

ORDERED that the motion by defendants Dina Elkady, M.D., Elite Perinatology, P.C., and Ocean Perinatology, PLLC for summary judgment dismissing all claims against them is granted.

This is a medical malpractice action to recover damages for injuries allegedly sustained on December 18, 2008, as a consequence of plaintiff's premature birth. The complaint alleges J.T.'s injuries were due to the medical malpractice of defendants Aaron David, M.D., Aaron David OB/GYN, PLLC, Dina Elkady, M.D., Elite Perinatology, P.C., Michael Terrani, M.D., Ocean Sono Medical, PLLC, Ocean Perinatology, PLLC, Wendy Kinzler, M.D., Graham G. Ashmead, M.D., and Women's Contemporary Care Associates, P.C. Specifically, plaintiff alleges, *inter alia*, that Drs. Terrani and Elkady were negligent in failing to timely and properly suspect, consider, diagnose, treat and care for Kathleen Tedesco's shortened and/or shortening cervix; in failing to perform a cervical cerclage in a timely manner; in failing to timely and properly determine whether cervical shortening and/or funneling and/or dilation had begun; and in failing to implement an appropriate treatment plan to prevent plaintiff's mother's premature cervical dilation and resultant premature labor. Plaintiff further alleges that Dr. Terrani, Elite Perinatology and Ocean Perinatology are vicariously liable for the acts of Dr. Elkady.

Issue has been joined, discovery completed, and the note of issue filed. Dr. Terrani now moves for summary judgment in his favor, arguing that he he did not render care to the plaintiff's mother and, as such, no physician-patient relationship existed. Dr. Terrani also argues that he is not vicariously liable, as a shareholder of Ocean Perinatology, for the acts of Dr. Elkady, as he did not supervise or control her care of plaintiff's mother. Dr. Terrani also moves for an order amending the caption in this matter to delete his name. In support of his motion, Dr. Terrani submits, *inter alia*, copies of the pleadings and transcripts of the parties' deposition testimony. No papers were submitted in opposition to the motion.

Dina Elkady, M.D., Elite Perinatology and Ocean Perinatology also move for summary judgment in their favor. Dr. Elkady argues that the treatment she provided to Tedesco comported with good and accepted medical practice, and that such treatment was not a proximate cause of J.T.'s alleged injuries. Elite Perinatology and Ocean Perinatology argue that they are not vicariously liable for the acts of Dr. Elkady, as she did not depart from good and accepted medical practice in her treatment of plaintiff's

mother. In support of their motion, they submit, in addition to the materials submitted by Dr. Terrani, an expert affirmation of Dr. Iffath Hoskins, M.D., and uncertified copies of Tedesco's medical records. No papers were submitted in opposition to the motion.

The facts of this case, as they relate to the instant motions, subject to some dispute, can be summarized as follows: Kathleen Tedesco became pregnant in early 2008. The pregnancy ended on April 1, 2008, when she suffered a spontaneous abortion at 19 weeks gestation. She testified she was unaware of the cause of the miscarriage, and that she did not bring the fetal corpse in for testing to determine a cause. In July 2008, Tedesco became pregnant again with infant plaintiff, and became a patient of Dr. Aaron David, a primary obstetrician. On August 26, 2008, Tedesco had her first visit with Dr. David's practice, where her pregnancy was confirmed, her history was obtained, blood work was ordered and prenatal vitamins and folic acid were prescribed. During this visit, Tedesco informed Dr. David's office of her prior loss and the circumstances surrounding it. On September 9, 2008, Tedesco had an extended appointment with Dr. David, who took her history, and performed a physical examination and a transvaginal ultrasound. Dr. David informed her that her blood work revealed high testosterone levels and signs of thrombophilia, for which she was prescribed baby aspirin. Due to these results, and of her history of prior loss, Dr. David advised her to seek a consultation from a maternal fetal medicine specialist.

Tedesco was referred to Ocean Perinatology by Dr. David. She became a patient of Dr. Elkady on September 29, 2008, when she was in her 13th week of pregnancy. It is undisputed that Dr. Elkady was an employee of Ocean Perinatology, which was owned by Dr. Michael Terrani, who serves as the sole shareholder. It is also undisputed that Dr. Elkady owns Elite Perinatology. At this initial appointment, Dr. Elkady performed an ultrasound, conducted a physical examination, and obtained Tedesco's complete family, gynecological and obstetrical history, including her history of a late-term fetal loss. The examination revealed that her cervix was measuring in the normal range. Dr. Elkady prescribed an Ultrascreen test, as a routine screening. During this visit, Dr. Elkady expressed concerns regarding Tedesco's prior miscarriage and counseled her about various options for prolonging her pregnancy. Dr. Elkady recommended a historical cervical cerclage, and recommended that Dr. David perform the procedure during the 15th week of pregnancy. Dr. Elkady did not have hospital privileges to perform the cerclage procedure herself. Dr. Elkady memorialized her consultation and forwarded her findings and recommendations to Dr. David.

On October 2, 2008, Tedesco had an appointment with Dr. David, at which time she spoke with him about Dr. Elkady's recommendation for a cervical cerclage. Tedesco conveyed to Dr. David her desire to have the procedure. Dr. David expressed hesitation about performing the procedure, due to risks associated with it, including miscarriage, infection, premature delivery, and scarring. Dr. David counseled her on alternatives for prolonging her pregnancy. Dr. David prescribed weekly progesterone shots as an alternative to a cervical cerclage, and Tedesco agreed to the treatment plan.

On October 22, 2008, Tedesco had an appointment with Dr. Elkady, who provided a consultation, a physical examination and an ultrasound. Dr. Elkady still recommended a cervical cerclage be placed, but noted that Tedesco's cervix was closed and was of normal size.

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On October 25, 2008, when she was in her 15th week of pregnancy, Tedesco presented to Good Samaritan hospital due to moderate vaginal bleeding. The emergency room physician performed an ultrasound, and found her cervix to be long and closed. At that time, she was diagnosed with a threatened miscarriage and a urinary tract infection, and she was prescribed a course of antibiotics.

On October 27, 2008, Tedesco returned to Dr. David for a follow-up visit. On this date, she was still experiencing vaginal bleeding. Dr. David documented that her cervix was long and closed, and informed her that he could not perform a cervical cerclage procedure while she was actively bleeding. Dr. David recommended that she discontinue consultation with Dr. Elkady and Ocean Perinatology, and instead transfer care to Women's Contemporary Care Associates, P.C. (Women's Contemporary), as their practice was more closely connected to Withrop University Medical Center and had more experience with high risk pregnancy. Mrs. Tedesco did not return again to Dr. Elkady or Ocean Perinatology, and sought treatment from Women's Contemporary.

On November 14, 2008, an ultrasound was performed by Women's Contemporary, which revealed shortening of Tedesco's cervix. On the same day, an emergency cervical cerclage was placed by defendant Graham Ashmead, M.D. Subsequently, on December 18, 2008, Tedesco's pregnancy could no longer be maintained and she delivered infant plaintiff, J.T., at approximately 24 weeks gestation.

It is undisputed that Dr. Terrani did not render any care to Tedesco during the pregnancy or postpartum period. The defendant physicians testified that they did not speak to Dr. Terrani regarding Tedesco's care, and Tedesco testified that she never met, nor received care from, Dr. Terrani.

In an affirmation, Dr. Iffath Hoskins swears that she is licensed to practice medicine in the State of New York, that she is board certified in the field of obstetrics and gynecology, with a sub-specialty in maternal fetal medicine, and that she has familiarity with cervical cerclage procedures. She opines that all of the treatment and consultation provided by Dr. Elkady adhered to accepted standards of medical practice, and that such treatment was not a proximate cause of J.T.'s alleged injuries. Additionally, Dr. Hoskins notes that Dr. Elkady was not the treating obstetrician for Tedesco, and as such, her role was to provide specialized advice and counsel to her and to her treating physician, Dr. David. More specifically, Dr. Hoskins avers that Dr. Elkady's recommendations, including her recommendation for an elective cerclage after Tedesco's first trimester, was within applicable standards of care, and were made in a timely fashion, before she had developed any dilation or shortening of her cervix.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once the moving party has made the requisite showing, the burden then shifts to the opposing party, who is then required to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). On such motion, the court is charged with determining whether issues of fact exist while

viewing any evidence in a light most favorable to the non-moving party; the court is not responsible for resolving issues of fact or determining issues of credibility (see *Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (see *Chimbo v Bolivar*, *supra*; *Benetatos v Comerford*, 78 AD3d 750, 911 NYS2d 155 [2d Dept 2010]).

A cause of action to recover damages for medical malpractice must be founded upon the existence of a physician-patient relationship (*Fox v Marshall*, 88 AD3d 131, 928 NYS2d 317 [2d Dept 2011]; *Delacy v University Radiology Assocs.*, 254 AD2d 450, 679 NYS2d 151 [2d Dept 1998]; see *Forrester v Zwanger-Pesiri Radiology Group*, 274 AD2d 374, 710 NYS2d 620 [2d Dept 2000]; *Heller v Peekskill Community Hosp.*, 198 AD2d 265, 603 NYS2d 548 [2d Dept 1993]; *Lee v New York*, 162 AD2d 34, 560 NYS2d 700 [2d Dept 1990]). A physician-patient relationship is created when professional services are rendered and accepted for purposes of medical treatment (*Thomas v Hermosa*, 110 AD3d 984, 973 NYS2d 344 [2d Dept 2013]; *Heller v Peekskill Community Hosp.*, *supra*; *Miller v Sullivan*, 214 AD2d 822, 625 NYS2d 102 [3d Dept 1995]). It is this relationship which gives rise to the duty imposed upon the doctor to properly treat his or her patient (see *Bazakos v Lewis*, 12 NY3d 631, 883 NYS2d 785 [2009]; *Fox v Marshall*, *supra*).

A medical malpractice action, which is a type of negligence action, involves three basic duties of care owed to a patient by a professional health care provider: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the provider practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (see *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Pike v Honsinger*, 155 NY 201, 49 NE 760 [1898]). A plaintiff asserting a claim for medical malpractice, therefore, must present proof (1) that the defendant deviated or departed from accepted standards of medical practice, and (2) that such deviation or departure was a proximate cause of his or her injury or damage (see *Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.*, 157 AD3d 773, 69 NYS3d 108 [2d Dept 2018]; *Duvidovich v George*, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; *Ahmed v Pannone*, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014], *lv dismissed* 25 NY3d 964, 8 NYS3d 261 [2015]; *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *DiMitre v Monsour*, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]). A plaintiff, therefore, must present proof that the defendant's deviation of care was a substantial factor in bringing about his or her injury (see *Wild v Catholic Health Sys.*, 21 NY3d 951, 969 NYS2d 846 [2013]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]).

A defendant seeking summary judgment on a medical malpractice claim has the initial burden of establishing, through medical records and competent expert affidavits, the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby (see *Gullo v Bellhaven Ctr. for Geriatric Rehabilitative Care, Inc.*, *supra*; *Stucchio v Bikvan*, 155 AD3d 666, 63 NYS3d 498 [2d Dept 2017]; *Mackauer v Parikh*, 148 AD3d 873, 49 NYS3d 488 [2d Dept 2017]; *Feuer v Ng*, 136

AD3d 704, 24 NYS3d 198 [2d Dept 2016]). Furthermore, to satisfy the burden, a defendant must address and rebut the specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Mackauer v Parikh, supra; Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]). Once this burden is satisfied, in opposition, a plaintiff must submit evidentiary proof "to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (*Stukas v Streiter*, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011], quoting *Deutsch v Claglassian*, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]; *see Brady v Westchester County Healthcare Corp.*, 78 AD3d 1097, 912 NYS2d 104 [2d Dept 2010]). The burden on the plaintiff is not to prove his or her entire case, but "merely to raise a triable issue of fact with respect to the elements or theories established by the moving party" (*Stukas v Streiter, supra* at 25). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see Stucchio v Bikvan, supra; Contreras v Adeyemi*, 102 AD3d 720, 958 NYS2d 430 [2d Dept 2013]).

Here, Dr. Terrani established a prima facie case of entitlement to summary judgment in his favor by submitting admissible evidence demonstrating that he did not treat Tedesco during her pregnancy. Tedesco testified at her deposition that she did not know Dr. Terrani and that he did not render care to her during her pregnancy. As such, Dr. Terrani's professional services were never rendered to, or accepted by, plaintiff's mother during the course of her pregnancy (*see Thomas v Hermosa, supra*). Without a physician-patient relationship, Dr. Terrani owed no duty to plaintiff mother (*see Fox v Marshall, supra; Bazakos v Lewis, supra*).

Upon review of the affirmation of their expert, Dr. Iffath Hoskins, a physician with extensive experience in the field of obstetrics, with a sub-certification in maternal-fetal medicine, and the additional exhibits submitted in support of the motion, Dr. Elkady has established, prima facie, that she did not deviate or depart from acceptable standards of medical care during her prenatal treatment of Tedesco (*see Senatore v Epstein*, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; *Stukas v Streiter, supra; Adjetey v New York City Health & Hosps. Corp.*, 63 AD3d 865, 881 NYS2d 472 [2d Dept 2009]; *Costello v Kirmani*, 54 AD3d 656, 863 NYS2d 262 [2d Dept 2008]; *Dandrea v Hertz*, 23 AD3d 332, 804 NYS2d 106 [2d Dept 2005]). Dr. Hoskins opined, to a reasonable degree of medical certainty, that Dr. Elkady did not deviate from good and accepted standards of medical care during the treatment she rendered to Tedesco and that, in any event, Dr. Elkady's treatment of Tedesco was not a proximate cause of any of the injuries allegedly sustained by the infant plaintiff (*see Forrest v Tierney*, 91 AD3d 707, 936 NYS2d 295 [2d Dept 2012]; *Graziano v Cooling*, 79 AD3d 803, 913 NYS2d 302 [2d Dept 2010]). Dr. Hoskins states that Dr. Elkady's role, as a maternal fetal medicine consultant, was to provide specialized advice and counsel to both Tedesco and her primary obstetrician, Dr. David. Dr. Hoskins states that Dr. Elkady rendered an appropriate consultation to Tedesco, including providing all of the available medical options and her own recommendation for an elective cervical cerclage. Dr. Elkady also forwarded her recommendation to Dr. David. Finally, Dr. Hoskins opines that Dr. Elkady's recommendation for an elective cervical cerclage, after the end of Tedesco's first trimester, was within the applicable standard of care, and was made before she developed any dilation or shortening of her cervix.

Dr. Elkady has established prima facie cases of entitlement to summary judgment. The burden now shifts to plaintiff to raise triable issues of fact (*see Alvarez v Prospect Hosp., supra*). Plaintiff submits no opposition to either motion and, as such, summary judgment is granted, and the complaint is

dismissed as against Dr. Elkady and Dr. Terrani (*see Stucchio v Bikvan, supra; Mackauer v Parikh, supra*).

“Business corporations are liable under the doctrine of respondeat superior for the torts of their employees committed within the scope of the corporate business and . . . professional service corporations are similarly vicariously liable for the torts of their servants” (*Poplawski v Gross*, 81 AD3d 801, 802-803, 917 NYS2d 247 [2d Dept 2011], quoting *Connell v Hayden*, 83 NY2d 30, 46, 443 NYS2d 383 [2d Dept 1981]). Both Elite Perinatology and Ocean Perinatology are professional corporations, and thus, they may be vicariously liable for the wrongful acts committed by their employees (*see Poplawski v Gross, supra*). It is undisputed that Dr. Elkady was employed by defendants Dr. Terrani, Elite Perinatology and Ocean Perinatology. In light of the determination herein, there is no viable cause of action against Dr. Elkady to serve as a predicate for imposing vicarious liability on Dr. Terrani, Ocean Perinatology or Elite Perinatology under the theory of respondeat superior. Therefore, the cause of action for vicarious liability must also be summarily dismissed

Accordingly, the motion by Dr. Terrani, and the motion by Dr. Elkady, Elite Perinatology, and Ocean Perinatology are granted.

The caption shall be amended by deleting Dr. Terrani, and the instant action is severed and shall continue as against the remaining defendants. The caption of this action is hereby amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
JACK TEDESCO, an Infant, by His Mother and Natural
Guardian KATHLEEN TEDESCO,

Plaintiff,

-against-

AARON DAVID, M.D., DR. AARON DAVID OB/GYN,
PLLC, DINA ELKADY, M.D., ELITE PERINATOLOGY,
P.C., OCEAN SONO MEDICAL, PLLC, OCEAN
PERINATOLOGY, PLLC, WENDY L. KINZLER, M.D.,
GRAHAM G. ASHMEAD, M.D. and WOMEN’S
CONTEMPORARY CARE ASSOCIATES, P.C.,

Defendants.
-----X

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Dr. Terrani shall promptly serve a copy of this order with notice to its entering upon the parties and upon the clerk of the court, who shall mark the court's records to reflect the amended caption. Dr. Terrani also shall promptly serve upon the county clerk the notice required under CPLR 8019 (c) to amend the caption of this action as specified in this order.

Dated: 8-1-19

John D. ...

A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION