SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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A.B.G. et al.,

MEMORANDUM DECISION

Plaintiffs, Index No. 25352/2015

-against-

ANNE MARIE ROE et al.,

Defendants.

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HON. HOWARD H. SHERMAN:

Upon the foregoing papers, defendants move for an order pursuant to CPLR 3025(b) granting leave to defendants, to serve an Amended Answer to the Verified Complaint to assert an Affirmative Defense for lack of capacity under CPLR 3211(a)(3); and upon granting leave, dismissing claims asserted on behalf of the infant-plaintiff and for the infant-plaintiff's wrongful death and attendant derivative claims pursuant to CPLR 3211(a)(3) on the grounds that the party asserting the cause of action does not have the necessary legal capacity to sue. Defendants also move to dismiss plaintiff-mother's (hereinafter "plaintiff") claims for negligent infliction of emotional distress and lack of informed consent as neither claim states a viable cause of action.

At the outset, defendants' application for leave to amend their answers to include the affirmative defense of lack of capacity under CPLR 3211(a)(3) and their application to dismiss plaintiff's action for wrongful death is granted without opposition.

As to defendants' application to dismiss plaintiff's claims for negligent infliction of emotional distress and lack of informed consent, defendants' application is granted. The complaint states that the infant-plaintiff was delivered on July 1, 2014 and remained in the care of defendants until her death; as a result, the infant-plaintiff sustained severe injuries and complications resulting

in her death.

The plaintiff argues that the complaint alleges that the infant was stillborn, as it must under *Broadnax v Fahey*, 2 NY3d 148 (2004) and *Sheppard-Mobley v King,* 4 NY3d 627 (2005); the defendant argues that the complaint alleges that the infant was born alive. The compliant does not use the word stillborn, and the language used could be viewed as alleging negligent care of a live infant.

In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court's role is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated. *See Campaign for Fiscal Equity v State of New York*, 86 NY2d 307 (1995). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true; all reasonable inferences which can be drawn from the complaint and the allegations therein must be resolved in favor of the plaintiff. *See Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 (2001). When analyzing the complaint in the context of a motion to dismiss, the court must discern whether the facts as alleged fit within any cognizable legal theory. *See Sokoloff v Harriman Estates Development Corp.*, *supra* at 414; *Leon v Martinez*, 84 NY2d 83 (1994).

"When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has

been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate." *Wells Fargo Bank N.A. v E & G Dev. Corp.*, 138 AD3d 986, 986 – 987 (2d Dep't 2016) (citation omitted).

In order to resolve the present dispute, the court considers the evidentiary materials which are submitted by the plaintiff. These materials present cogent evidence supporting the fact that the infant was born stillborn. Plaintiff thus has cause of action for negligent infliction of emotional distress. Plaintiff has not sought to amend the complaint, but even as inartfully drawn, the complaint is therefore viewed by this court as sufficiently alleging that cause of action.

With respect to plaintiff's claim of lack of informed consent, plaintiff must show that a doctor failed to disclose a reasonably foreseeable risk; that a reasonable person, informed of the risk, would have opted against the procedure; that the plaintiff sustained an actual injury; and that the procedure was the proximate cause of that injury. *See* Public Heath Law 2805-d(1), (3); *Orphan v Pilnik*, 15 N.Y.3d 907 (2010); *Messina v Alan Matarasso, MD, FACS, PC*, 284 AD2d 32 (2001).

It is well settled law that a cause of action related to informed consent requires that a procedure or treatment is actually done and that said procedure causes injury to the plaintiff. In the instant matter, it is undisputed that there were no procedures performed. Without a procedure or treatment actually occurring, there is no cause of action for informed consent.

Accordingly, it is hereby

ORDERED that defendants' application to amend the pleadings is granted; and it is

further

ORDERED that defendants' motion to dismiss plaintiff's action for wrongful death is granted; and it is further

ORDERED that defendants' application to dismiss plaintiff's claim for negligent infliction of emotional distress is denied; and it is further

ORDERED that defendants' application to dismiss plaintiff's claim for lack of informed consent is granted; and it is further

ORDERED that defendants are directed to serve this order with notice of entry on plaintiff.

This constitutes the decision and order of the court.

Date: 5/14, 2020
Bronx, New York

HOWARD H. SHERMAN, J.S.C.