

A.D.L.C. v Johnson
2021 NY Slip Op 30958(U)
March 25, 2021
Supreme Court, New York County
Docket Number: 805045/2016
Judge: Judith Reeves McMahon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDITH REEVES MCMAHON PART IAS MOTION 30

Justice

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A. D.L.C., BELQUIS DE LA CRUZ,

Plaintiff,

- v -

AMANDA JOHNSON, LYNN SIMPSON, CLAIRE MCLEAN,
DOROTHY SMOK, NEW YORK - PRESBYTERIAN
HOSPITAL / WASHINGTON HEIGHTS FAMILY HEALTH
CENTER, NEW YORK - PRESBYTERIAN HOSPITAL,

Defendant.

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INDEX NO. 805045/2016

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents,

Defendants', Amanda Johnson, M.D., Lynn Simpson, M.D., Dorothy Smok, M.D., and The New York and Presbyterian Hospital s/h/a New York Presbyterian Hospital/Washington Heights Family Health Center and New York-Presbyterian Hospital, motion for Summary Judgment (Sequence 003) is denied as detailed herein.

This is an action sounding in medical malpractice, wherein Plaintiffs A.C.D.L.C., an Infant by his Mother and Natural Guardian Belquis De La Cruz allege, inter alia, that Defendants negligently failed to treat purported cervical insufficiency and failed to perform a cerclage, allegedly resulting in premature delivery.

Defendants herein move for Summary Judgment, arguing there are no triable issues of fact.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

“The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage.” *Castro v. New York City Health & Hosps. Corp.*, 74 A.D.3d 1005, 903 N.Y.S.2d 152 (N.Y.A.D. 2nd Dept. 2010). “To prevail on a motion for summary judgment in a medical malpractice action, the defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that any departure was not a proximate cause of the patient's injuries.” *Kelly v. Rosca*, 164 A.D.3d 888, 83 N.Y.S.3d 317 (N.Y.A.D. 2nd Dept. 2018).

Defendants submitted an Affirmation from OB-GYN Expert Dr. Nancy Kirshenbaum, which demonstrated their prima facie entitlement to judgment as a matter of law.

In support of Defendants’ motion, Dr. Kirshenbaum opined, “that the medical treatment rendered by the defendants, including, but not limited to, the staff, nurses, residents, fellows, and physicians of defendants NYPH, was in accordance with good and accepted practice, including, but not limited to, obstetrical and maternal fetal medicine practice, and was in no way a proximate cause of the plaintiffs’ claimed damages and/or injuries... the employees, personnel, staff members, residents, nurses, and fellows of the defendants properly followed the orders and directives of the attendings, did not depart from the standard of care, did not proximately cause any of the plaintiffs’ claimed damages and/or injuries, that the attendings properly supervised

and monitored the staff, that the attendings did not depart from the standard of care or proximately cause plaintiffs' claimed damages and/or injuries, and that none of the orders and/or directives were clearly contraindicated or represented departures from the standard of care."

As to the allegations on the necessity of a cerclage, Dr. Kirshenbaum opined, "that in 2007 and 2008, the standard practice for a patient with a past medical history of a prior preterm labor and subsequent preterm birth who presents with, inter alia, a dynamic cervix, cervical shortening, dilation, and/or funneling was continued monitoring, recommendation of bed rest, progesterone administration, and tocolytics as indicated."

Regarding the care and treatment plan formulated by Defendants, Dr. Kirshenbaum opined, "that Ms. De La Cruz was appropriately, timely, and sufficiently managed. It was not a departure from the standard of care to not evaluate Ms. De La Cruz every week. The frequency of surveillance was determined by a maternal fetal medicine team and included visits for progesterone and for ultrasound. More frequent visits would not have changed management or altered outcome. It was not a departure to not perform a cerclage at any time during Ms. De La Cruz's pregnancy, Ms. De La Cruz did not lose the opportunity for any treatment modalities, and her condition was at all times appropriately and timely appreciated... It is my opinion, to a reasonable degree of medical certainty, that the condition of Ms. De La Cruz's cervix was at all times appreciated, including any dynamic changes and any associated uterine irritability and/or contractions. Ms. De La Cruz was appropriately managed with surveillance and progesterone therapy and bed rest."

Dr. Kirshenbaum elaborated, "that whether a cerclage should be performed is a matter of professional medical judgment, and that defendants exercised proper medical judgment at all times with respect to whether or not to perform a cerclage. It was also an appropriate exercise of

medical judgment not to perform a cerclage at any time/point during Ms. De La Cruz's pregnancy... It is also my opinion, to a reasonable degree of medical certainty that even if Ms. De La Cruz had a history of cervical incompetence and/or presented with cervical incompetence (which she did not), cervical incompetence in conjunction with Ms. De La Cruz's clinical presentation and past medical history would not have been an absolute indication to performance of a cerclage."

As to Plaintiffs' allegations of a lack of informed consent, Dr. Kirshenbaum opined, "that if a reasonable person in Ms. De La Cruz's position, was properly informed of the risks benefits and alternatives of expectant management, cerclage, and any risks of preterm birth, progressive cervical shortening, tunneling, and/or dilation, prior preterm birth, prior rupture of membranes, and any increased risks of preterm birth relative to same, and/or advised that there was a low probability the pregnancy would reach term with or without cerclage, that person could have properly and would have properly consented to continued noninvasive medical management. It is my opinion that Ms. De La Cruz was timely and appropriately advised of the risks, benefits, and alternatives of cerclage placement, and that informed consent to continue noninvasive medical management was appropriately obtained."

Finally, Dr. Kirshenbaum concluded, "that defendants exercised appropriate medical/professional judgment at all times, including, but not limited to, regarding Ms. De La Cruz's pregnancy, the administration of progesterone, the implementation of bed rest, the determination regarding whether to perform a cerclage, the referral to the high risk clinic, the frequency of surveillance, the administration of steroids, the administration of tocolytics, whether and when to admit the patient to the hospital, and whether to discharge the patient from the hospital."

“Once this showing has been made [by Defendants], a Plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the Defendant met the prima facie burden.” *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Accordingly, the burden shifts to Plaintiffs "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp., supra*. In a medical malpractice action, this requires that a plaintiff "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant[‘s]... summary judgment motion." *Id.*

“A plaintiff’s expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.” *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Rosario v. Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 (N.Y.A.D. 2nd Dept. 2020); *see also Boston v. Weissbart*, 62 A.D.3d 517, 879 N.Y.S.2d 108 (N.Y.A.D. 1st Dept. 2009).

In opposition to Defendants’ motion, Plaintiff submitted an Affirmation from an OB-GYN doctor.

In opposition to the motion, Plaintiffs’ Expert opined, “that based on MS. DE LA CRUZ’S history from her first pregnancy which was strongly suggestive of cervical

insufficiency, coupled with the sonographic findings of a shortened cervix with funneling in the pregnancy in issue, the existence of cervical insufficiency was highly likely and a cerclage should have been placed as soon as cervical shortening was detected. The failures of the defendants to recommend a cerclage to MS. DE LA CRUZ constituted departures from accepted standards of care as they existed in 2008. It is further my opinion that the defendants departed from accepted standards of care in concluding that MS. DE LA CRUZ 's prior pregnancy history was not suggestive of cervical insufficiency and in advising MS. DE LA CRUZ that cerclage placement in the pregnancy in issue was not indicated. It is further my opinion that the conclusion made by the defendant's expert, that MS. DE LA CRUZ would not have undergone a cerclage if offered is flawed for three reasons. First, the medical records and testimony of the treating physicians as well as MS. DE LA CRUZ reveals that defendants advised that a cerclage was not indicated, and no lay person would ask to have a procedure which they believe is not indicated. Second, the placement of a cerclage prior to dilatation and funneling of the cervix is relatively safe. Third, the evidence supports the conclusion that had the defendants advised MS. DE LA CRUZ that she could avoid a preterm delivery by having a cerclage, she would have had the cerclage done. In fact, MS. DE LA CRUZ did undergo cerclage in her third pregnancy.”

As to Defendant Dr. Johnson, Plaintiffs' Expert opined, “that DR. JOHNSON departed from accepted standards of care in failing to properly estimate the gestational age of the fetus at the visit of 1/31/08, failing to obtain a proper history of the prior pregnancy, and in documenting an incorrect history. In addition, she departed from accepted standards of care in failing to arrange for timely sonogram and timely visit with a maternal fetal medicine specialist at the high risk clinic.”

As to Defendant Dr. Simpson, Plaintiffs' Expert opined, "that DR. SIMPSON departed from accepted standards of care in failing to include in her 3/5/08 report the baseline cervical measurement of 3.12 obtained on 2/13/08, so that the significant shortening of the cervix would be known to the medical providers making decisions for this patient, The failure to report such a significant change in the cervical length and the failure to report the baseline cervical length deprived the medical providers at the MFM clinic of crucial information, which should have been acted on."

As to Defendant Dr. Smok, Plaintiffs' Expert opined, "that DR SMOK departed from accepted standards of care in advising against the cerclage. As per testimony of DR SMOK, she thought the prior preterm delivery was due to preterm labor, a conclusion she reached based on the fact that MS. DE LA CRUZ was receiving Progesterone. She did not advise of the likely benefit cerclage would have based on this pregnancy because she was not aware that MS. DE LA CRUZ was in a class of pregnant women who were known to benefit from cerclage."

As to the injury suffered by Plaintiff, Plaintiffs' Expert opined, "that the extreme prematurity caused the development of PVL which is responsible for the infant plaintiff's injuries...It is further, my opinion, with a reasonable degree of medical certainty, that MS. DE LA CRUZ's pregnancy would have been significantly prolonged by the placement of a cerclage, and had a cerclage been timely placed at or before the twenty-second week of pregnancy, before cervical dilatation occurred, these injuries would have been avoided. It is further my opinion that as of 4/16/08, when MS. DE LA CRUZ was discharged with dilatation of the cervix, had MS. DE LA CRUZ been placed on strict bed rest with her feet higher than the rest of her body, there was a good chance the pregnancy could have been extended a couple of weeks, or even further, and this departure deprived the infant plaintiff of an opportunity for a better outcome."

As to Defendant New York Presbyterian Hospital, Plaintiffs' Expert opined that, "NEW YORK PRESBYTERIAN HOSPITAL further departed from accepted standards of care in failing to have this very high risk patient placed in a scheme of care, wherein her prior history was accurately recorded and known to the providers involved in the care, the evidence of cervical insufficiency was known to the providers who were making decisions during the time period wherein a cerclage could still be performed, and wherein the patient is informed of the available and indicated manners of treating her condition."

"In opposition, the Plaintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that the defendants departed from the accepted standard of care." *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2nd Dept. 2017).

There are numerous questions of fact created by the Plaintiffs' Expert's opinions, including, but not limited to: Defendants' evaluation of Plaintiff, including her prior history, whether Plaintiff was sufficiently informed about treatment options, whether it was a departure to not recommend a cerclage, whether it was a departure to discharge the Plaintiff, and whether it was a departure to not admit the Plaintiff on April 21, 2008.

Accordingly, it is

ORDERED that Defendants', Amanda Johnson, M.D., Lynn Simpson, M.D., Dorothy Smok, M.D., and The New York and Presbyterian Hospital s/h/a New York Presbyterian Hospital/Washington Heights Family Health Center and New York-Presbyterian Hospital, motion for Summary Judgment is denied, and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly; and it is further
 ORDERED that all parties shall appear for a conference, to be conducted remotely via
 Microsoft Teams, on June 17, 2021, at 12:00 PM.

THIS IS THE DECISION AND ORDER OF THE COURT.



<u>3/25/2021</u>			<u>JUDITH REEVES MCMAHON, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE