

Burrell v New York City Health & Hosps. Corp.
2021 NY Slip Op 30978(U)
March 29, 2021
Supreme Court, Kings County
Docket Number: 523591/2018
Judge: Pamela L. Fisher
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At an IAS Term, Part MMESP-7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York, on this 29 day of March 2021

P R E S E N T:
HON. PAMELA L. FISHER, J.S.C.

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CRYSTAL BURRELL

Plaintiff,

DECISION/ORDER

-and-

Index No. 523591/2018

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, KINGS COUNTY HOSPITAL CENTER, CAROL JOHNSON-MENDOZA, CNM, AMMAR MAHMOUD, MD And DANIEL MARTINEZ, MD

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

Papers Numbered

20-38
40-43
44-47

Upon the foregoing papers in this medical malpractice action, defendants New York City Health and Hospitals Corporation S/H/A The New York City Health and Hospitals Corporation and Kings County Hospital, Carol Johnson-Mendoza, CNM, Ammar Mahmoud, MD and Daniel Martinez, MD move in motion sequence 1 pursuant to CPLR 3212, for summary judgment, dismissing plaintiff's complaint against them in its entirety.

Plaintiff commenced this action by filing a summons and complaint on or about November 21, 2018. Issue was joined as to HHC and all remaining defendants on December 12, 2018 and April 4, 2019, respectively. On January 22, 2019, Plaintiff served a bill of particulars on HHC and on June 6, 2019, a supplemental bill of particulars was served on the remaining defendants. On September 2, 2020, a first supplemental bill of particulars and a second supplemental bill of particulars was served on HHC and the remaining defendants. Plaintiff filed her Note of Issue on July 17, 2020. In her complaint and bill of particulars, plaintiff alleges that defendants negligently and improperly failed to diagnose and treat Plaintiff's condition: 3rd degree perineum and sulcus lacerations; in failing to consider episiotomy; and in failing to properly supervise medical treatment rendered (Defendant's motion sequence 1, Exhibit D: Plaintiffs' Bill of Particulars ¶ 3).

The following facts are not in dispute: On October 30, 2017, Plaintiff, then forty-one (41) weeks pregnant with her first child, presented to Kings County Hospital Center ("HHC") due to severe abdominal pains (Defendant's Attorney Affirmation ¶ 6 and Exhibit H: Kings County Medical Records). Pain level was

noted as a nine (9) out of ten (10) and upon request, an epidural was administered for pain relief on October 31, 2017 at approximately 6:50A.M. (Id. ¶ 6-7). A healthy live male baby was born at 10:51 P.M on October 31, 2017 after a spontaneous vaginal delivery (Id. ¶ 10). The baby was delivered by defendant Carol Johnson-Mendoza, CNM (“Midwife Mendoza”) (Id.). During the delivery, Plaintiff sustained a left sulcus laceration and a perineal laceration (Id. ¶ 11). After the delivery, Midwife Mendoza checked on Plaintiff’s lacerations and sought the assistance of defendant Ammar Mahmoud, MD (“Dr. Mahmoud”), attending physician and Daniel Martinez, MD (“Dr. Martinez”), resident physician (Id. ¶ 13). The repair was noted as “complex” and Dr. Mahmoud and Dr. Martinez noted they both encountered friable tissue (Id.). After the repair, Plaintiff was transferred to a recovery room for monitoring where she began to complain of rectal pain and pressure and inability to put pressure on her glutes (Id. ¶ 14). An examination at bedside showed no notable abnormalities or obvious cause for Plaintiff’s complaints and thereafter Plaintiff was taken to the operating room for examination under anesthesia for suspicion of possible vaginal hematoma (Id. ¶ 15). On November 1, 2017 an examination under anesthesia was performed by Dr. Mahmoud and two additional non-party doctors (Id. ¶ 16). The procedure required opening the previous repair for full examination of anatomy and upon examination a second-degree laceration extending to the sulcus was observed as well as friable tissue (Id.). The laceration was repaired, and the Plaintiff was returned to the recovery room with vaginal packing in place (Id. ¶ 17). In recovery, Plaintiff continued to complain of rectal pain and pressure, which subsided slightly after the vaginal packing was removed, and gluteal soreness and discomfort with ambulation, which was alleviated with rest and pain medications. (Id. ¶ 18). Plaintiff was discharged home on November 3, 2017 with a discharge summary that notes Plaintiff had a third degree and bilateral periureteral lacerations (Id. ¶ 19). On December 8, 2017, Plaintiff was seen in the Obstetrics Post-Partum clinic by Midwife Mendoza and complained of pain radiating to the back since the delivery. Plaintiff also complained of difficulty ambulating to a standing position and on examination, Midwife Mendoza noted there was tenderness, and was unable to introduce a speculum into the vagina or perform a digital examination (Id. ¶ 22). On December 15, 2017, Midwife Mendoza documented an earlier telephone discussion with Plaintiff during which Plaintiff reported significant pain and unbearable burning with urination (Id. ¶ 23). On December 15, 2017 and December 20, 2017, Plaintiff was seen by non-party doctors at the clinic, and it was again noted that Plaintiff incurred a third-degree laceration during delivery and antibiotics were prescribed (Id. ¶ 24). On March 12, 2018, Plaintiff presented at HHC where she was seen by Dr. Martinez and during a pelvic exam it was noted that her vaginal laceration had not healed, and she was referred to non-party Dr. Short for a urogynecology evaluation (Id. ¶ 26). On March 22, 2018, Plaintiff was seen by Dr. Short and Dr. Mei, who noted that a pelvic examination revealed polyps in the lateral and posterior walls of the vagina and discussed with Plaintiff the possible revision of vaginal laceration (Id. ¶ 27). Plaintiff agreed to the revision of vaginal laceration but did not schedule the procedure. Thereafter, on May 22, 2018, Plaintiff presented to NYU Langone for a second opinion regarding surgery where it was determined that Plaintiff did not need surgical intervention (Id. ¶ 29).

As a result of defendants' alleged negligence and malpractice, plaintiff claims she sustained numerous complications, including but not limited to pain, discomfort, mental anguish, improper repair of third-degree lacerations and need for future surgeries, (Defendant's motion sequence 1, Exhibit B: Plaintiff's Complaint ¶¶ 40-41).

Defendant's Motion for Summary Judgment:

In support of its motion for summary judgment, defendants submit the pleadings, deposition transcripts, Kings County medical records and an attorney affirmation. Defendants contend that summary judgment is warranted because the treatment rendered by the defendants was at all times in accordance with the accepted standards of practice and that the evidence submitted establishes that the Plaintiff's perineal and sulcus lacerations were properly repaired (Defendant's motion sequence 1, Attorney Affirmation, ¶¶ 30-31).

In further support of their motion, defendants submit an expert affirmation from Dr. Jodi P. Lerner, M.D. a physician board certified in Obstetrics and Gynecology, whose opinion is based on review of the pleadings, deposition transcripts and Kings County medical record (Defendant's motion sequence 1, Exhibit O. at ¶ 3). Dr. Lerner concludes that with a reasonable degree of medical certainty, that there were no departures from the standard of care committed by any of the defendants during the delivery of Plaintiff's baby on October 31, 2017, the subsequent hospitalization, including repair of lacerations and clinic visits and that the lacerations Plaintiff sustained during delivery and the injuries claimed by the Plaintiff were not caused by any departure in the standard of care by the defendants (Id. ¶ 4). Dr. Lerner states that injury to the vagina and adjacent areas and structures, particularly to the perineum is an inherent risk of vaginal delivery and vaginal tears-also known as perineal tears- that extend into the perineum below or even to the rectum and anus are common (Id. ¶ 8). Dr. Lerner maintains that the severity of a tear is categorized according to the depth of the tear and the tissues that are affected and sequelae of perineal lacerations include chronic perineal pain, pelvic floor injury, dyspareunia and incontinence that may persist for years after delivery (Id. ¶¶ 9-10). Dr. Lerner opines that in Plaintiff's second stage of labor (pushing) was not even a minute long and there was no time to perform perineal massage or to apply warm compresses before delivery and that to a reasonable degree of medical certainty, there is no evidence that the defendants committed any departure from the standard of care during the delivery of Plaintiff's baby (Id. ¶ 12). Defendant's expert further opines that the second-degree perineal laceration and sulcus laceration were the results of a precipitous vaginal delivery and also common in first time vaginal deliveries, that they were an inherent risk of delivery and not caused by the actions, or inactions, taken by the defendants (Id. ¶ 12). Dr. Lerner opines that based upon a review of the records and deposition testimony, defendants used the proper technique for a repair of a second-degree laceration and the repair was proper given the friable tissue the doctors encountered (Id. ¶ 16). Dr. Lerner notes that on October 31, 2017, Plaintiff signed a consent form for prenatal and obstetrical services that permitted, among other things, vaginal delivery and that listed potential risks and complications and on November 1, 2017, Plaintiff

signed a consent form permitting Dr. Mahmoud to perform an exam under anesthesia and repair the vaginal laceration that included an explanation of the risks, benefits and alternatives to the procedure (Id. ¶ 24). Based on a review of the consent forms, records and deposition testimony, Dr. Lerner opines that the defendants properly obtained Plaintiff's informed consent (Id. ¶ 24). Dr. Lerner concludes that to a reasonable degree of medical certainty, the defendants met the standard of care in the performance of the vaginal delivery and the repair of lacerations sustained during said delivery and that the injuries claimed including, abnormal healing of vaginal lacerations; infections; dyspareunia; perineal pain; perineal and sulcus tenderness; rectovaginal bleeding; and weak sphincter are all common sequelae of vaginal delivery regardless of whether a patient sustains lacerations (Id. ¶ 28).

In opposition, plaintiff submits an expert affirmation from Dr. Martin Gubernik, M.D., a physician board certified in Obstetrics and Gynecology, whose opinion is based upon a review of the pleadings, deposition transcripts, Dr. Lerner's Affirmation and his own examination of Plaintiff (Plaintiff's Exhibit A: Expert Affirmation ¶¶ 1-2). Dr. Gubernik opines that upon a review of the records and deposition testimony, Plaintiff's laceration repair was too complicated and should not have been attempted by Midwife Mendoza or Dr. Martinez, and that their efforts which subsequently required the removal of the stitches by Dr. Mahmoud further complicated the repair and contributed to Plaintiff's injuries (Id. ¶ 10). Dr. Gubernik further opines that Drs. Mahmoud and Martinez should have examined Plaintiff for a possible hematoma prior to the initial repair of the laceration, and that an examination under anesthesia did not require the re-opening of the prior repair and could have been performed with a scope so that removal of the stitches and repeated stitching would have been unnecessary (Id. ¶ 11). As a result of the suturing completed by the defendants during the initial repair and subsequent repair, Dr. Gubernik opines that Plaintiff developed granulation tissue (thin band of tissue) between her labia and that Plaintiff requires a revision surgery to correct the repair (Id. ¶ 13). Dr. Gubernik states that during his examination of the Plaintiff, he observed scarring on her external perineum, an enlarged vagina and scarring on her anal sphincter which he opines will require surgery and is a direct result of improper repair by the defendants and their failure to diagnose and treat the damage (Id. ¶ 14). Dr. Gubernik concludes that to a reasonable degree of medical certainty, the defendants did not meet the standard of care in the repair of Plaintiff's lacerations and the subsequent treatment of her symptoms and that the damage to Plaintiff's vaginal, perineal and rectal areas could have been avoided, or at the very least minimized if she received proper care (Id. ¶ 16).

In reply, defendants maintain that Dr. Gubernik's affirmation contains nothing more than conclusory statements and misconstrues the evidence in the case. Defendants state that Dr. Gubernik's affirmation fails to explicitly address the inherent risks of vaginal delivery. Defendants further state that Dr. Gubernik does not account for the fact that he examined Plaintiff close to eight (8) months after the repair was completed by defendants nor does he state what kind of surgery is required to address the perineal and sphincter scarring or why scarring indicates the need for surgery at all. Defendants state that Dr. Gubernik's affirmation fails to

show any negligence by the defendants or that any of Plaintiff's alleged injuries were proximately caused by any negligence by the defendants.

To prevail on a cause of action for medical malpractice, the plaintiff must prove that defendant "deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Stukas v. Streiter*, 83 AD3d 18, 23 [2d. Dept. 2011]). On a motion for summary judgment, defendant must "make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Iulo v. Staten Is. Univ. Hosp.*, 106 AD3d 696, 697 [2d. Dept. 2013]). Once the defendant meets its burden, "the burden then shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit attesting to a departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent producing cause of the injury" (*Johnson v. Queens-Long Is. Med. Group, P.C.*, 23 AD3d 525, 526 [2d. Dept. 2005]). Conclusory allegations that are "unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat defendant physician's summary judgment motion" (*Deutsch v. Chaglassian*, 71 AD3d 718, 719 [2d. Dept. 2010]). Where the parties have submitted conflicting expert reports, summary judgment should not be granted; "[s]uch credibility issues can only be resolved by a jury" (*Id.*).

Here, defendants met their prima facie burden. They submitted the expert affirmation of Dr. Jodi P. Lerner, M.D., who described the standard of care in the performance of a vaginal delivery and laceration repair and affirmed that the treating physicians did not deviate from this standard of care during the delivery or subsequent laceration repairs. The expert's opinions constitute competent evidence, in that they are based on the medical records, bill of particulars, and deposition testimony of the parties.

In opposition, Plaintiff produced an expert affirmation, from a physician certified in Obstetrics and Gynecology, attesting to departures from accepted standards of medical practice, and that these departures were a proximate cause of Plaintiff's injuries. Plaintiffs' expert opinion, based on review of the medical records, deposition testimony, bill of particulars, and his own examination of the Plaintiff raises triable issues of fact. Due to the conflicting expert reports, defendants' respective motions for summary judgment are denied (See *Deutsch*, 71 AD3d at 719).

Accordingly, defendants' motion is denied.

This constitutes the decision and order of the Court.

ENTER:



J.S.C.

HON. PAMELA L. FISHER