NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part MD
Justice

THERESA ROBINSON and DEREK ROBINSON

Plaintiff

-against-

NORTHWELL HEALTH, INC, et. al.

Index Number 717964 2018

Motion Date August 25, 2021

Motion Seq. No. 4

X

The following papers read on this motion by defendants Deepak Nanda M.D., P.C. and Deepak Nanda M.D., for an order dismissing the complaint against Deepak Nanda, M.D. on the grounds of statute of limitations; granting summary judgment dismissing the complaint against the defendants in its entirety with prejudice; and directing the Clerk of the Court to enter a judgment against plaintiff and in favor of said defendants.

	Papers Numbered
Notice of Motion-Affirmations-Statement of Material Facts-Exhibits..	EF 87-103
Opposing Affirmations-Exhibits.....	EF 153-155
Reply Affirmation.....	EF 162

Upon the foregoing papers these motions are consolidated for the purposes of a single decision and order and are determined as follows:

Theresa Robinson initially received pre-natal care at LIJMC Women for Women Obstetrics & Gynecology. On December 8, 2015, then approximately 20 weeks pregnant, Ms. Robinson commenced her pre-natal care with Dr. Deepak Nanda at his office located in Rego Park, New York. Ms. Robinson testified at her deposition that Dr. Nanda had delivered her first child via cesarean section, and that his office was closer to her home than LIJMC. She stated that although she made the appointment with Dr. Nanda, she was seen by both Dr. Nanda and Dr. Emmanuel Pafos at her first visit. Her prenatal care was thereafter managed by Dr. Nanda and Dr. Pafos, and she saw either doctor on her subsequent visits at the office of Deepak Nanda, M.D., P.C. Her medical records reflect that in December 2015, she was

registered as a patient of Deepak Nanda, M.D., P.C.

Dr. Nanda and Dr. Pafos each testified at their depositions that in 2016, they were employed by Deepak Nanda, M.D., P.C. and by LIJMC. On April 12, 2016, Ms. Robinson was admitted to LIJMC, at approximately 2:00 a.m., at which time there was rupture of membranes. Ms. Robinson stated that she wanted to have a vaginal delivery, and that she made this known to both Dr. Nanda and Dr. Pafos throughout her prenatal care as well as when she went into labor. Staff members at LIJMC discussed her plan of care with Dr. Nanda. Dr. Nanda testified that Ms. Robinson was admitted to the service of his practice, and that on April 12, 2016, and that he was present in the hospital and monitored her labor until Dr. Pafos took over that day at approximately 5:00 p.m. Dr. Nanda and Dr. Pafos both testified that when Pafos took over for Nanda on April 12, 2016, he was working for the private practice, Deepak Nanda M.D., P.C.

On April 13, 2016, following a trial of labor, fetal tachycardia was noted. Although Ms. Robinson still expressed her desire for a vaginal delivery, after a discussion with the Robinsons, Ms. Robinson signed the consent form for a cesarean section. Dr. Pafos performed an emergency cesarean section, and Ms. Robinson gave birth to a healthy baby girl. During the cesarean section procedure, a uterine rupture and bladder tears were observed. Dr. Pafos and a resident under his supervision performed a uterine repair and Dr. Omid Rofeim, a urologist, repaired the bladder. A Foley catheter was placed along with JP drains which were monitored by urology. Ms. Robinson was discharged from the hospital on April 17, 2016, with the catheter in place. On April 25, 2016, a CT performed at LIJMC, showed an intact bladder repair and Dr. Rofein removed the Foley catheter on the same day. Ms. Robinson did not thereafter return to LIJMC regarding the repair to her uterus or bladder and did not return to Dr. Rofein. She had two follow-up visits with Dr. Pafos for postpartum care at the office of Deepak Nanda, M.D. P.C. on April 28, 2016 and May 23, 2016. Dr. Pafos found nothing remarkable on both visits and on May 23, 2016, determined that no further follow-up was necessary. Ms. Robinson did not return to said private practice after May 23, 2016.

Plaintiffs commenced the within action against all defendants on November 22, 2018. With respect to defendants Deepak Nanda, M.D. P.C. and, Deepak Nanda, M.D., and Emmanuel M. Pafos, M.D., plaintiffs allege causes of action for medical malpractice, lack of informed consent, and a derivative cause of action for loss of services. In their verified complaint plaintiffs allege that defendants' negligent acts and omissions occurred on April 13, 2016 through May 23, 2016.

Defendants Deepak Nanda, M.D. and Deepak Nanda, M.D. P.C. have served an answer and interposed affirmative defenses, including statute of limitations. Defendant

Deepak Nanda, M.D. now moves for summary judgment dismissing the complaint in its entirety on the grounds of statute of limitations. Both defendants also move for summary judgment dismissing the complaint in its entirety.

Plaintiffs' causes of action for medical malpractice and for and for lack of informed consent are governed by a two and a half year statute of limitations (CPLR 214-a; *see also Bleiler v Bodnar*, 65 NY2d 65 [1985]; *Murriello v Crapotta*, 51 AD2d 381 [2d Dept 1976]). A medical malpractice action must be commenced within two and a half years from the date of the "act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure" (CPLR 214–a). "To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired" *(Campone v Panos*, 142 AD3d 1126, 1127 [2d Dept 2016], quoting *Stewart v GDC Tower at Greystone*, 138 AD3d 729, 729 [2d Dept 2016]; *see Geotech Enters., Inc. v 181 Edgewater, LLC*, 137 A.D.3d 1213, 1214 [2d Dept 2016]; *Vissichelli v Glen–Haven Residential Health Care Facility, Inc*., 136 AD3d 1021, 1022 [2d Dept 2016]; *Barry v Cadman Towers, Inc*., 136 AD3d 951, 952 [2d Dept 2016]). "If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*Campone v Panos*, 142 AD3d at 1127, quoting *Barry v Cadman Towers, Inc.*, 136 AD3d at 951; *see Stewart v GDC Tower at Greystone,* 138 AD3d at 730; *Geotech Enters., Inc. v 181 Edgewater, LLC*, 137 AD3d at 1214; *Vissichelli v Glen–Haven Residential Health Care Facility, Inc*., 136 AD3d at 1022).

Here, defendants have established, prima facie, that the complaint is time-barred insofar as asserted against Dr. Nanda, as the evidence submitted establishes that he last treated Ms. Robinson on April 12, 2016, which was more than two and half years prior to the commencement of this action on November 22, 2018. However, in opposition, plaintiffs have raised a triable issue of fact as to whether Ms. Robinson was a patient of Deepak Nanda, M.D., P.C., rather than Dr. Nanda individually, so that the continuous treatment doctrine would toll the statute of limitations during Ms. Robinson's postpartum visits with Dr. Pafos, a physician employed by said professional corporation (*see* CPLR 214–a; *Mendrzycki v Cricchio*, 58 AD3d 171, 176 [2d Dept 2008]; *Scalcione v Winthrop Univ. Hosp.*, 53 AD3d 605, 607-08 [2d Dept 2008]; *Cardenales v Queens–Long Is. Med. Group, P.C.*, 18 AD3d 689, 690 [2d Dept 2005]).

Plaintiffs' reliance upon CPLR 203(b), however, is misplaced. CPLR 203(b) by its terms, only applies where a plaintiff seeks to name an additional defendant after the

expiration of the statute of limitations. As the within action was commenced against all of the defendants on November 22, 2018, the relation-back doctrine is inapplicable.

Plaintiff Derek Robinson's claim for loss of consortium is governed by a three year statute of limitations (*see* CPLR 214; *Chambers v Mirkinson*, 68 AD3d 702 [2d Dept 2009]; *Schrank v Lederman*, 52 AD3d 494,497[2d Dept 2008]), and was timely commenced against the moving defendants. Inasmuch as defendants have not established, at this juncture that Dr. Nanda is entitled to summary judgment dismissing the claims for medical malpractice and lack of informed consent on the grounds of statute of limitation, no basis exists for dismissing the derivative claim based upon the statute of limitations (cf., *Liff v Schildkrout*, 49 NY2d 622 [1980]; *Wright v Morning Star Ambulette Services Inc*., 170 AD3d 1249 [2d Dept 2019]; *Wittrock v Maimonides Medical Center-Maimonides Hosp*., 119 AD2d 748 [2d Dept 1986]).

Turning now to the remainder of defendants' motion, " '[i]n order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries' " (*M.C. v Huntington Hosp*., 175 AD3d 578, 579 [2d Dept 2019], quoting *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011] *see Joyner v Middletown Med., P.C.*, 183 AD3d 593 [2d Dept 2020]; *Simpson v Edghill*, 169 AD3d 737, 738[2d Dept 2019]). "A defendant seeking summary judgment in a medical malpractice action must make a prima facie showing either that he or she did not depart from the accepted standard of care or that any departure was not a proximate cause of the plaintiff's injuries" (*M.C. v. Huntington Hosp*., 175 AD3d at 579). "Where the defendant has satisfied that burden, a plaintiff must 'submit evidentiary facts or materials to rebut the defendant's prima facie showing'" (id., quoting *Stukas v Streiter*, 83 A.D.3d at 30, *see Carradice v Jamaica Hosp. Med. Ctr.*, AD3d , 2021 NY Slip Op 05688 [2d Dept 2021]). " 'Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause' " (*M.C. v Huntington Hosp*., 175 AD3d at 579, quoting *Novick v South Nassau Communities Hosp*., 136 AD3d 999, 1000 [internal quotation marks omitted]). In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant' experts, setting forth an explanation of the reasoning and relying on "specifically cited evidence in the record" (*Tsitrin v New York Community Hosp*., 154 AD3d 994, 995-96 [2d Dept 2017], quoting *Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008]; *see Brinkley v Nassau Health Care Corp*., 120 AD3d 1287, 1290 [2d Dept 2014]).

As regards Deepak Nanda, M.D., P.C., it well settled that "[b]usiness corporations are liable under the doctrine of respondeat superior for the torts of their employees committed within the scope of the corporate business and, as with any other corporation,

professional service corporations are similarly vicariously liable for the torts of their servants" (*Connell v Hayden*, 83 AD2d 30, 46 [citation omitted] [2d Dept 1981; *see Poplawski v Gross*, 81 AD3d 801, 802-03 [2d Dept 2011]).

Defendants Nanda and the professional corporation, in support of their request for summary judgment have submitted, among other things, an affirmation from Genevieve Sicuranza, M.D., a physician licensed to practice medicine in New York and board certified in Maternal Fetal Medicine and Obstetrics and Gynecology. Dr. Sicuranza opines within a reasonable degree of medical certainty that Dr. Nanda and Deepak Nanda, M.D., P.C., acted in accord with good and accepted practice and their involvement in the care and treatment of Theresa Robinson, and that said care and treatment was not a contributing factor in her alleged injuries.

Dr. Sicuranza opines that Ms. Robinson was an appropriate candidate for a trial of labor when she presented to Dr. Nanda's office on December 8, 2015; that although an ultrasound on February 2, 2016, showed that the baby was in a transverse lie and that there was polyhydramnios (an abnormally high amniotic fluid level), Ms. Robinson was closely monitored and this condition did not ultimately alter her prenatal course or the well being of the baby; that based upon her review of the records, Ms. Robinson was an appropriate candidate for a trial of labor to attempt a vaginal delivery after a prior cesarean section up to and including April 12, 2016, when she admitted to deliver her second child; that according to Dr. Nanda's testimony the risks associated with a VBAC delivery were discussed and the risks of surgical complications were also included in this discussion; that the nurses' notes from LIJMC indicate that the VBAC delivery plan was discussed with Ms. Robinson and that her consent was obtained at 2:28 a.m. on April 12, 2016; and that Ms. Robinson expressed her continuing desire for a VBAC delivery and signed the consent to proceed with this delivery option.

Dr. Sicuranza states that throughout the day on April 12, 2016, Ms. Robinson was experiencing irregular contractions, her cervix was not fully dilated and she was being monitored for the onset of active labor; that Dr. Nanda was at her bedside several times according to the LIJMC records and Ms. Robinson's deposition testimony; that although there was some evidence of decelerations on the fetal heart monitoring strips, this is not unusual, and resuscitative measures undertaken by the nursing staff were appropriate. She opines that at no time was a cesarean section indicated between 1:15 a.m. on April 12 and approximately 5 p.m. on April 12 when Ms. Robinson's care was turned over to the co-defendant Dr. Emmanuel Pafos. She states that Dr. Nanda testified that during the day a balloon catheter was placed to attempt mechanical dilation of the cervix and this was good practice, and that around 5:00 p.m., the decision was made to start low dose Pitocin in the hopes of promoting further cervical dilation. Dr. Sicuranza opines that these measures that

were taken to promote the onset of active labor were appropriate. She states that the Pitocin was slowly titrated and Mrs. Robinson began active labor and proceeded to full cervical dilation.

Dr. Sicuranza states that Dr. Pafos took over the management of Mrs. Robinson's labor and delivery at some time between 5:00 p.m. and 6:00 p.m. on April 12, 2016. Dr. Nanda testified he would have given Dr. Pafos a report ofthe days events and the efforts to promote cervical dilation. She states that a Foley catheter was inserted near 7:30 p.m. and at 7:51 p.m. the cervix was now 5 centimeters dilated; that shortly after 8:00 p.m. the Pitocin was increased and then increased a bit more at 9:54 p.m. By 10:49 p.m. there was increased pressure and the cervix was dilated to 10 cm; and that the baby had not significantly descended. Dr. Sicuranza states that at 10:55 Dr. Pafos was at the bedside according to the records and the deposition testimony of Dr. Pafos; that by 11:00 p.m. on April 12, Ms. Robinson was in active labor, fully dilated and around 11:34 p.m. Ms. Robinson started pushing; that at or about 11:45 p.m. recurrent late decelerations were noted and with Dr. Pafos by the bedside, the maternal pushing continued; that due to the recurrent later decelerations oxygen was started at 11:54 a.m. and the Pitocin was discontinued; that Ms. Robinson was placed on her left side which is thought to relieve pressure from the uterine blood vessels and increase blood flow to the baby; and that approximately 3 minutes later it is noted that Dr. Pafos began discussing the need for a cesarean section delivery and the decision was made at 12:11 a.m.

Dr. Sicuranza states that Ms. Robinson was in the delivery room by 12:18 a.m. and a healthy baby girl was delivered at 12:48 a.m.; that significantly as Dr. Pafos testified, shortly before midnight on April 12, 2016 there was concern for the baby's well-being and Dr. Pafos appropriately advised Mr. and Mrs. Robinson that his recommendation was to abandon the VBAC delivery plan and proceed with a cesarian section; that even at that point, and in no uncertain terms, Ms. Robinson expressed her desire for the VBAC delivery plan; that Ms. Robinson vehemently expressed her desire to continue to attempt to deliver vaginally; and that by 12:11 a.m. Dr. Pofos appropriately was able to convince the Robinsons that a cesarean section delivery was the correct course of action. Dr. Sicuranza opines that at that point, the decision to convince the Robinsons to deliver via cesarean section directly led to delivery of a healthy baby; that prior to taking Ms. Robinson to the operating room at 12:18 p.m. on April 13, 2016, it is the testimony of Dr. Pafos that he discussed the risks and benefits of the cesarean section including the risks of bleeding, infection and damage to organs, uterus or the baby with the Robinsons and the nurses' notes indicate Ms. Robinson was aware of the risks and benefits. She states that prior to making the incision in the uterus to retrieve the baby. Dr. Pafos testified that he noted a rupture at the site of the healed uterine scar for the prior cesarean section; that when this area ruptures during labor, Dr. Pafos testified that it tears a portion of the posterior aspect of the bladder

because of adhesions or prior scar tissue; that Dr. Pafos appropriately described this complication of a uterine rupture during labor; and that baby was delivered in good health and Dr. Rofeim, a urologist, was brought in to repair the bladder tear.

Dr. Sircuranza states that the records reflect that Ms. Robinson tolerated the delivery and repair well and was discharged to the recovery room, and that Dr. Pafos testified that he saw Ms. Robinson for several post-partum visits, that she was doing well, and that the skin incision was healing. She opines that Ms. Robinson was an appropriate candidate for a trial of labor after cesarean section with respect to the pregnancy at issue and that neither Dr. Nanda nor the professional corporation deviated from the standard of care in this case by supporting the plaintiff mother's desire to attempt a vaginal delivery after cesarean section. She further opines that Dr. Nanda and the professional corporation appropriately evaluated the plaintiff Theresa Robinson when she presented to LIJMC, considered and ordered the appropriate testing, and had the appropriate discussions regarding the risks and benefits of a trial of labor after cesarean section with Ms. Robinson, and that the care rendered by Dr. Nanda and the professional corporation did not cause the plaintiffs' injuries.

Plaintiffs in opposition submit, among other things, an affirmation from a name-redacted physician licensed to practice medicine in New York who is board certified in Obstetrics and Gynecology. Plaintiffs' expert's affirmation fails to address specific assertions made by defendants' expert, is conclusory and is not based upon evidence in the record.

To the extent plaintiff's expert opines that the defendants failed to assess Ms. Robinson for CPD by performing a modified Mueller-Hillis maneuver and improperly administered Pitocin, these claims were not raised in the complaint, bills of particular, or even mentioned in an expert witness disclosure. These claims therefore will not be considered as "[a] plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars" (*Anonymous v Gleason*, 175 AD3d 614, 616-17 [2d Dept 2019], quoting *Palka v Village of Ossining*, 120 AD3d 641, 643, [2d Dept 2004]; *see Samer v Desai*, 179 AD3d 860, 861-64 [2d Dept 2020]; *Hanson v Sewanhaka Cent. High Sch. Dist.*, 155 AD3d 702, 703[2d Dept 2017]; *Shaw v City of New York*, 139 AD3d 698, 699–700 [2d Dept 2016]; *Garcia v Richer*, 132 AD3d 809, 810 [2d Dept 2015]; *Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]).

To the extent that plaintiffs' expert opines that Dr. Nanda departed from good and accepted standard of care in treating Ms. Robinson by negligently causing a delay in performing the cesarean section, and specifically not delivering the baby at approximately 10:00 p.m. on April 12, 2016, rather than more than two hours later, said opinion is not supported by the evidence in the record. The evidence presented establishes that Dr. Pafos

took over for Dr. Nanda at some time between 5:00 p.m. and 6:00 p.m. on April 12, 2016, and there is no evidence that Dr. Nanda continued to manage Ms. Robinson's labor after Pafos took over for him. Plaintiffs' expert does not opine that a cesarean section was warranted at the time Dr. Nanda managed the plaintiff's labor, which was limited to the hours prior to 6:00 p.m. on April 12, 2016

To the extent that plaintiffs' expert opines that Dr. Nanda departed from a good and accepted standard of care by failing to sufficiently follow-up Ms. Robinson's condition during labor based is based upon the intervals between physician evaluations, said opinion is lacking in specificity and is entirely conclusory.

Finally, as plaintiffs' expert does not address the cause of action for lack of informed consent, this claim is deemed abandoned.

This Court therefore finds that there are no conflicting expert opinions that would warrant a jury determination regarding the causes of action against Dr. Nanda for medical malpractice, lack of informed consent, and loss of consortium (*see Tsitrin v New York Community Hosp.*, 154 AD3d 994 [2d Dept 2017]). In view of the fact that Dr. Nanda has established his entitlement to summary judgment, Deepak Nanda, M.D., P.C., cannot be held vicariously liable for the alleged acts or omissions of Dr. Nanda.

In view of the foregoing that branch of the motion which seeks to dismiss the complaint as to Deepak Nanda, M.D. on the grounds of statute of limitations, is denied. That branch of the motion which seeks summary judgment dismissing the complaint in its entirety with prejudice against Deepak Nanda, M.D., is granted. That branch of the motion which seeks summary judgment dismissing the complaint against Deepak Nanda, M.D., P.C., is granted as to all claims based upon vicarious liability with respect to Deepak Nanda, M.D., The causes of action against Deepak Nanda M.D. P.C. for medical malpractice, lack of informed consent and loss of consortium that are based upon the vicarious liability of defendant Pafos remain viable, and are not dismissed. The Clerk of the Court is directed to enter a judgment in accordance with this order.

(SEE NEXT PAGE)

The amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

THERESA ROBINSON and DEREK ROBINSON

Plaintiffs

-against-

NORTHWELL HEALTH, INC, LONG ISLAND JEWISH MEDICAL CENTER, DEEPAK NANDA, MD, PC, and EMMANUEL M. PAFOS, M.D.

Defendants.

Dated: December 6, 2021

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Hon. Peter J. O'Donoghue, J.S.C.