Wacher v Zapantis
2021 NY Slip Op 33189(U)
April 12, 2021
Supreme Court, Nassau County
Docket Number: Index No. 609644/2018
Judge: Sharon M.J. Gianelli
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 11
Present: Hon. Sharon M.J. Gianelli

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MANMEET WACHER and DAVID WACHER,

Plaintiffs, Index No. 609644/2018

-against- Mot. Seq. No. 002

GREGORY ZAPANTIS, M.D., Decision and Order
NEW YORK REPRODUCTIVE WELLNESS, P.C.,
SERHAN OZENSOY, B.S.
and CELLAVITA, LLC,

Defendants.

_____X

Papers submitted:

Defendants' Notice of Motion _____X
Defendants' Affirmation in Support with Exhibits_____X
Plaintiffs' Affirmation in Opposition _____X
Defendants' Affirmation in Reply to Opposition _____X

This is Defendant Gregory Zapantis, M.D. and New York Reproductive Wellness, P.C.'s (hereinafter "Defendants") motion for summary judgment pursuant to CPLR 3212.

Facts/History

This is an action sounding in medical malpractice and lack of informed consent in connection with infertility treatment. The underlying action was commenced by Plaintiffs' on July 19, 2018 by the filing of a Summons and Complaint. Issue was joined with respect to Defendants on August 29, 2018.

Plaintiff Manmeet Wacher (hereinafter "Plaintiff") and her husband, David Wacher (also a party herein) sought and received infertility services from Defendants Gregory

Zapantis, M.D., a reproductive endocrinologist, and New York Reproductive Wellness, P.C., commencing on September 2, 2015. Plaintiff sought Defendants' services in aid of becoming pregnant and having a baby. Prior to commencing in-vitro fertilization (IVF) treatment, Plaintiffs executed certain consent forms. Plaintiff underwent two cycles of IVF under Defendants' care. Defendants utilized the services of Cellavita, Inc., to provide embryology services. The first IVF cycle occurred in December 2015, utilizing Plaintiffs' eggs and sperm and produced no viable embryos, and the non-viable embryos were discarded.

Upon review, the embryologist noted that Plaintiff's oocytes retrieved in the first cycle had abnormal morphology in that they were malformed. The assessment following the first unsuccessful cycle led to confirmation of a diagnosis of diminished ovarian reserve, a diagnosis that includes poor egg quality in addition to diminished quantity.

Plaintiff underwent a second IVF cycle in January 2016. The second cycle was different from the first in that instead of incubating the embryos until blastocyst stage, it was planned to do a day three embryo transfer, which transfer is earlier in the embryo development stage than had been attempted in the first cycle that aimed for transfer at the blastocyst stage (later in development than day three).

As in the first cycle, the embryologist utilized Plaintiffs' eggs and sperm and produced four embryos. At the time of the oocyte retrieval, it was determined that Plaintiff was not in an ideal hormonal state to proceed with and receive the embryo transfer for implantation. Consequently, all four retrieved embryos were cryopreserved (frozen) by

embryologist and stored to be thawed and developed further and implanted at a later more suitable time via a procedure called a frozen embryo transfer.

The embryologist thereafter froze the four embryos together within one container. Plaintiffs executed an embryo disposition plan dated April 9, 2016. The plan provided that two of the four embryos would undergo a procedure called assisted hatching and those two hatched embryos would be transferred into Plaintiff. The remaining two embryos would remain in culture and be observed to be cryopreserved if possible.

In April 2016, Plaintiff was prepped to undergo an embryo transfer procedure. In preparation for same, the four frozen embryos, which were together in one container, were all thawed and permitted to resume development. Of the four, two embryos underwent assisted hatching, which is a procedure utilized by the embryologist to assist with proper implantation of the embryo into Plaintiff's uterus. The two embryos that underwent assisted hatching were transferred into Plaintiff on April 19, 2016, on day three of their development.

The consent forms executed by Plaintiffs provide, "some or all cryopreserved embryos [were] thawed." Here, all four embryos, which had been frozen within the same container, were all thawed. The two embryos that were not transferred into Plaintiff on April 19, 2016 were cultured further by the embryologist in the lab, and their development continued to be observed with the directive to cryopreserve them, if possible.

The two embryos that remained in the lab following the day three embryo transfer on April 19, 2016, were cultured until April 22, 2016. Both embryos failed to reach the blastocyst stage. As the two remaining embryos failed to reach the blastocyst stage, they no longer had developmental potential and had become non-viable. As a result, the embryologist discarded the two embryos.

Plaintiff failed to become pregnant with the two embryos implanted in her on April 19, 2016. Defendant Zapantis informed Plaintiff that the two embryos that remained in culture after the April 19, 2016 embryo transfer had failed to develop to blastocyst stage, had lost any developmental potential and therefore, were discarded.

Defendants assert that discarding the two non-viable embryos was consistent with the Embryo Disposition document executed by Plaintiffs and Defendant Zapantis, dated April 9, 2016, as that document directed that the embryos were to be cryopreserved only "if possible." Additionally, Plaintiff asserts that same form provides, "...some or all of the cryopreserved embryos may be thawed to attempt a pregnancy in a subsequent cycle." The document further provides, "I/We understand that there is no guarantee that I will become pregnant as a result of In Vitro Fertilization and Embryo Transfer procedures at [NYRW]. Any of the following conditions may occur which would prevent establishment of pregnancy:...The embryos may not develop normally."

A third IVF cycle was not attempted under the care of Defendants. Plaintiff sought treatment elsewhere and thereafter, had a successful pregnancy and birth with the use of donor eggs.

Defendants claim entitlement to summary judgment as a matter of law because the diagnosis and treatment of Plaintiff Manmeet Wacher was within the accepted medical standard of care in the field of reproductive endocrinology.

Plaintiffs oppose Defendants' motion on the basis that Defendants have failed to demonstrate that Defendants' care of Plaintiff did not depart from accepted medical practice. Plaintiffs assert that Defendants failed to utilize proper procedures and failed to segregate the second cycle embryos into more than one container for cryopreservation. Plaintiffs also assert that Defendants failed to properly inform them and obtain their consent to proceed in the way that they did. Plaintiffs argue that countless material facts are disputed and therefore, summary judgment is not warranted.

Law/Analysis

CPLR 3212 provides that, "a motion for summary judgment shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Pullman v. Silverman,* 28 NY3d 1060, 43 NYS3d 793, 795, 206 NY Slip p 071087 9216*), citing Alvarez v. Prospect Hosp.,* 68 NY2d 320, 324, 508 NYS2d 923, 925 (1986)*; Jacobson v. New York City Health and Hosps. Corp.*, 22 NY3d 824, 833, 988 NYS2d 86, 92, 2014 NY Sloip Op 02098 (2014). Moreover, in a medical malpractice case, genuine issues of material fact as to whether

the Defendants departed from the standard of care and whether such departures were a proximate cause of Plaintiff's injury preclude summary judgment. *Gachette v. Leak*, 172 AD3d 1327, 101 NYS3d 432 (2d Dep't. 2019). The initial burden is a heavy one and...the facts must be viewed in the light most favorable to the non-moving party." *Jacobson, 22 NY3d at 833,* 988 NYS2d at 92-93. In deciding a summary judgment motion, the court "must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference." *Zapata v. Buitriago,* 969 NYS2d 79, 81 (2d Dep't. 2013).

Upon review and consideration of all papers, Defendants have failed to demonstrate the absence of material issues of fact.

Accordingly,

It is

ORDERED, that Defendant Gregory Zapantis, M.D. and New York Reproductive Wellness, P.C.'s motion for summary judgment pursuant to CPLR 3212, is Denied.

All applications not specifically addressed herein are denied.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
April 12, 2021

HON. SHARON M.J. GIANELLI
Justice of the Supreme Court

The conformed signature on this Order and copies thereof shall be deemed original.

ENTERED
Apr 16 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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