

**Horvath v Albany Med. Ctr. Hosp.**

2021 NY Slip Op 33679(U)

September 16, 2021

Supreme Court, Albany County

Docket Number: Index No. 901433-15

Judge: James H. Ferreira

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY

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TIMEA E. HORVATH and JASON  
MARSHALL,

Plaintiffs,

-against-

ALBANY MEDICAL CENTER HOSPITAL,  
ALBANY MEDICAL CENTER, and ALBANY  
MEDICAL COLLEGE,

Defendants.

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(Supreme Court, Albany County, Motion Term)

APPEARANCES: Roger M. Kunkis, Esq.  
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HON. JAMES H. FERREIRA, Acting Justice:

Plaintiffs commenced this medical malpractice action in November 2015, seeking damages arising from medical treatment that plaintiff Timea E. Horvath received in May 2015 relating to her delivery of deceased twins. Plaintiffs allege causes of action sounding in medical malpractice and lack of informed consent.<sup>1</sup> Issue was joined and plaintiffs filed a note of issue and certificate of

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<sup>1</sup> The claim of plaintiff Jason Marshall is derivative.

readiness in July 2019.<sup>2</sup> By Decision and Order dated May 26, 2020, the Court granted defendants' unopposed motion to compel discovery and for sanctions. By Decision and Order dated November 13, 2020, the Court granted defendants' motion for an order enforcing the Court's conditional order of preclusion and ordered that plaintiffs are precluded from presenting any expert proof in this matter and from presenting any evidence and/or testimony with respect to certain responses in their amended bill of particulars. By Decision and Order dated May 7, 2021, the Court, among other things, denied plaintiffs' motion for leave to reargue defendants' motion for an order enforcing the Court's conditional order of preclusion.

Presently pending before the Court is defendants' motion for summary judgment dismissing the complaint. This motion was filed and served while plaintiffs' motion for leave to reargue was pending and, in opposition, plaintiffs originally argued that they could not respond to defendants' motion until the Court determined their motion for reargument and requested that the motion be adjourned until after the determination of their motion. In its May 7, 2021 Decision and Order, the Court determined that it would "hold its decision on defendants' summary judgment motion until plaintiffs have had the opportunity to submit a substantive response" and set a new return date for the motion (Court's Decision and Order, dated May 7, 2021, at 5). Plaintiffs thereafter filed and served additional opposition papers and defendants submitted a reply.

Summary judgment is a drastic remedy which should only be granted where there are no doubts as to the existence of a triable issue of fact (see Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Andre v Pomeroy, 35 NY2d 361, 364 [1974]; Black v Kohl's Dept. Stores, Inc., 80 AD3d 958, 959 [3d Dept 2011]). "[T]he proponent of a summary judgment motion must make a

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<sup>2</sup> Following joinder of issue, the action was discontinued as against several defendants and the caption was amended so that it identified only the three remaining defendants in this action.

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” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Smalls v AJI Indus., Inc., 10 NY3d 733, 735 [2008]; Baird v Gormley, 116 AD3d 1121, 1122 [3d Dept 2014]). If the proponent’s burden is met, “the burden shifts to the party opposing the motion for summary judgment 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., 68 NY2d at 324; Town of Kirkwood v Ritter, 80 AD3d 944, 945-946 [3d Dept 2011]).

Defendants seek summary judgment dismissing the complaint on the ground that, due to the preclusion order and their resulting inability to present expert proof, plaintiffs cannot establish a prima facie case of medical malpractice or lack of informed consent. The Court agrees. In order to make out a prima facie case of medical malpractice, “a plaintiff is required to demonstrate, through expert testimony, that the defendant deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff’s injury” (D.Y. v Catskill Regional Med. Ctr., 156 AD3d 1003, 1005 [3d Dept 2017] [emphasis added; internal quotation marks and citation omitted]; see Knight v State of New York, 127 AD3d 1435, 1435 [3d Dept 2015], appeal dismissed 25 NY3d 1212 [2015]; Peluso v C.R. Bard, Inc., 124 AD3d 1027, 1028 [3d Dept 2015]). Likewise, expert testimony is required to make out a prima facie case of medical malpractice based upon lack of informed consent (see Bauernfeind v Albany Med. Ctr. Hosp., 195 AD2d 819, 820 [3d Dept 1993], lv dismissed and lv denied 82 NY2d 885 [1993]; CPLR 4401-a). Here, without the ability to present expert proof, plaintiffs’ claims necessarily fail, and defendants are therefore entitled to summary judgment dismissing the complaint (see Grassel v Albany Med. Ctr. Hosp., 223 AD2d 803, 805 [3d Dept 1996], lv dismissed and lv denied 88 NY2d 842 [1996]). The Court notes that, in opposition

to the motion, plaintiffs do not argue that they have any claim that may be established in the absence of expert proof. Rather, plaintiffs attempt to reargue points made in prior motions. As such, defendants' motion is granted and the complaint is dismissed in its entirety.

Accordingly, it is hereby

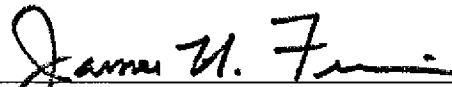
ORDERED that defendants' motion is granted and the complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York  
September 16, 2021

  
James H. Ferreira  
Acting Justice of the Supreme Court

Papers Considered:

09/17/2021



1. Notice of Motion, dated January 6, 2021;
2. Affirmation/Memorandum of Law in Support by Lia B. Mitchell, Esq., dated January 6, 2021;
3. Affirmation/Memorandum of Law in Further Support by Lia B. Mitchell, Esq., dated February 10, 2021;
4. Affirmation in Opposition by Roger M. Kunkis, Esq., dated February 11, 2021; Reply Affirmation/Memorandum of Law by Lia B. Mitchell, Esq., dated February 12, 2021, with attached exhibit;
5. Affirmation in Opposition by Roger M. Kunkis, Esq., dated June 28, 2021, with attached exhibits; and
6. Reply Affirmation/Memorandum of Law by Lia B. Mitchell, Esq., dated July 6, 2021.