

Galvez v Jackson

2021 NY Slip Op 34205(U)

June 25, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 1993/2019

Judge: David T. Reilly

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SHORT FORM ORDER

INDEX No. 1993/2019
CAL. No. 202000947MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

P R E S E N T :

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 1/19/21
ADJ. DATE 3/31/21
Mot. Seq. # 001 MD

-----X
ANNA RODRIGUEZ GALVEZ,

Plaintiff,

- against -

LISA JACKSON, KHALDUN FERREIRA,
M.D., BRENTWOOD LEGION
AMBULANCE and SOUTHSIDE HOSPITAL,

Defendants.
-----X

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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendants Jackson and Brentwood Legion Ambulance dated January 7, 2021 ; Notice of Cross Motion and supporting papers _____ ; Answering Affidavits and supporting papers by plaintiff dated March 16, 2021 ; Replying Affidavits and supporting papers by defendants dated March 25, 2021 ; Other ____ ; it is

ORDERED that the motion of defendants Lisa Jackson and Brentwood Legion Ambulance pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

The plaintiff commenced this action to recover damages for injuries that she allegedly sustained as a result of the medical malpractice of the defendants. The plaintiff delivered her daughter, Baby Rodriguez Galvez, stillborn, at her home on January 29, 2017. She alleges that the emergency medical service and hospital personnel who provided care to her and the baby at the time of her delivery were negligent, and that their negligence resulted in the death of her baby and in injury to her. By her bill of particulars, the plaintiff alleges that the defendants, among other things, failed to properly position her

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during delivery; failed to timely provide her with oxygen; failed in transporting her to the hospital in a timely manner; and failed to properly assess her condition. The plaintiff further alleges that because of the defendants' alleged medical malpractice, she suffered post-traumatic stress disorder; severe depression; nightmares; involuntary recurrent memories; mental and emotional distress; severe and permanent personal injuries; pain and suffering; and loss of enjoyment of life.

Defendants Lisa Jackson and Brentwood Legion Ambulance ("Brentwood Ambulance") (collectively, moving defendants) now move for summary judgment dismissing the plaintiff's complaint on the ground that her allegations have no merit. Brentwood Ambulance also contends that it is entitled to government immunity. The plaintiff opposes the motion.

The record shows that on January 28, 2017, the plaintiff, who was approximately 40 weeks pregnant, went to Southside Hospital because she believed that she was in labor. The plaintiff's doctor, Dr. Ferreira, examined her and informed her she was only one centimeter dilated; therefore, she was sent home and instructed to return to the hospital when her contractions were more frequent. The plaintiff arrived at her home at approximately 9:00 p.m., and approximately one hour later, her water broke, and she started experiencing contractions every two to three minutes. The plaintiff's boyfriend called 911. Lisa Jackson, the paramedic who arrived on the scene, observed that the baby's head was visible in the vaginal canal when she examined the plaintiff. Jackson attempted to deliver the baby on site but was unsuccessful. As the plaintiff was being transferred to the ambulance to be transported to the hospital, the plaintiff experienced a contraction and the baby was born. The baby did not have a heartbeat, and she was pronounced dead at Southside hospital at 12:59 a.m. An autopsy report revealed that the baby was delivered stillborn at 40 weeks gestation following extramural labor complicated by shoulder dystocia.

At her deposition, the plaintiff testified that when the ambulance crew and paramedic arrived at her home, the baby's head was "crowning." She stated that she was taken from the bathroom and she was placed on a stretcher where the paramedic placed her hands between her legs in attempt to deliver the baby. The plaintiff testified that the paramedic asked her to push, but she did not have the strength to do so. She testified that the paramedic did not touch her stomach and did not place her hand inside of her vagina during the delivery attempt. The plaintiff recalled that she remained on the stretcher for approximate 20 to 25 minutes before she was taken to the ambulance. She further testified that she was left alone on the stretcher in the parking lot for a period of time while the ambulance crew collected their equipment inside of the home, and that she gave birth alone while outside without the assistance of medical personnel. She testified that she did not receive oxygen until she was inside the ambulance.

Jackson, the paramedic at the scene, testified that she was employed by Brentwood Ambulance when she responded to the plaintiff's 911 call. The call was relayed to her at 12:16 a.m., and she arrived at the plaintiff's home at 12:22 a.m. When Jackson arrived, the plaintiff was laying on her bed. Upon examining the plaintiff, Jackson observed the baby's head at the edge of the vaginal canal, and she instructed the plaintiff to lift her legs and push. Jackson testified that after some time, the baby's head came out of the vaginal canal and she observed that it was "blue." Jackson removed the umbilical cord from around the baby's neck after her head was out of the plaintiff's vaginal canal. Jackson then instructed the plaintiff to push, and the plaintiff responded that she could not. After making a determination that the baby was stuck, Jackson attempted the McRoberts Maneuver on the plaintiff by

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requesting that the plaintiff “draw her knees up to her chest.” No other person assisted with the maneuver. After moving the plaintiff from the bed to the stretcher, Jackson attempted the McRoberts Maneuver again. Jackson did not make a determination whether shoulder dystocia was present because it was not within the scope of her practice. She did not attempt any “traction to the baby’s head,” she did not attempt any “suprapubic pressure,” and she did not place her hands inside of the vagina to manipulate the baby’s shoulders because those actions were outside of her scope of practice. Jackson testified that the baby was not breathing when her head emerged from the vaginal canal, and when asked whether she attempted to resuscitate the baby at that point, Jackson testified that there was “not a whole lot that [she could] do while the baby [was] still inside.” Jackson testified that she was not with the plaintiff when the baby was born, and that she did not know who was with the plaintiff at the time. According to Jackson, she was inside of the ambulance when the plaintiff gave birth. After the baby was born, Jackson used a bulb syringe to suction secretion from the baby’s airway but no respiration was noted. The baby and the plaintiff were transported to the hospital thereafter.

The defendants’ expert physician, Dr. Robert Scanlon, opined that Jackson did not depart from good and accepted emergency medical services practice during the delivery. Dr. Scanlon stated that Jackson appropriately assessed the plaintiff on arrival to the plaintiff’s home. Jackson unwrapped the umbilical cord after she observed a positive nuchal cord, and properly decided to transfer the plaintiff and the baby to a medical facility so that she could receive advanced care. According to Dr. Scanlon, Jackson also appropriately requested that the plaintiff raise her knee to her chest to effectuate delivery of the baby.

The moving defendants have failed to sustain their burden on the motion. To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was not the proximate cause of plaintiff’s injuries (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see Roques v Noble*, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; *Ward v Engel*, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (*see Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 924 NYS2d [2d Dept 2011]).

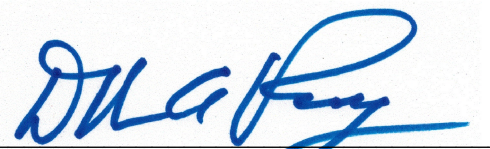
Dr. Scanlon fails to address the essential allegations in the plaintiff’s bill of particulars. For example, the plaintiff alleges that the paramedic failed to position her correctly to effectuate the birth, failed to provide her with oxygen in a timely manner, and improperly delayed her transport to the hospital. Dr. Scanlon made no mention of these allegations in his opinion. Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 5088 NYS2d 923 [1986]). Accordingly, the motion of the moving defendants for summary judgment on the ground that the plaintiff’s complaint has no merit is denied.

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The moving defendants further contend that Brentwood Ambulance is entitled to governmental immunity inasmuch as it operates its service within the Town of Islip providing supplemental support for a critical governmental duty. "When a municipality provides ambulance service by emergency medical technicians in response to a 911 call for assistance, it performs a governmental function and cannot be held liable unless it owed a 'special duty' to the injured party" (*Earle v Vil. of Lindenhurst*, 130 AD3d 973, 973, 14 NYS3d 469 [2d Dept 2015]). Brentwood Ambulance, which is privately owned and operated, has failed to show that it functions as a municipality by providing ambulance services in the Town of Islip (*see generally Murtha v New York Homeopathic Med. Coll. and Flower Hosp.*, 228 NY 183, 185 [1920]). Accordingly, the motion of the moving defendants for summary judgment dismissing the claims against them is denied.

Dated: June 25, 2021





David T. Reilly, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION