

**M.F. v Albany Med. Ctr.**

2022 NY Slip Op 34585(U)

October 13, 2022

Supreme Court, Albany County

Docket Number: Index No. 902135-18

Judge: Christina L. Ryba

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STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ALBANY

M.F., Infant by his Mother and Natural Guardian,  
CASSANDRA DURIVAGE,

Plaintiff,

-against-

**DECISION/ORDER**

Index No. 902135-18

RJI No. 01-18-129043

ALBANY MEDICAL CENTER,

Defendant.

**APPEARANCES:**

Sanders, Sanders, Block, Woycik,  
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For Plaintiff  
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Garden City, NY 11530

Maynard, O'Connor, Smith & Catalinotto LLP  
For Defendant  
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Albany, NY 12203

RYBA, J.,

In this action commenced by plaintiff Cassandra Durivage (hereinafter plaintiff) in 2018 to recover damages for alleged medical malpractice committed by defendant during the course of prenatal care and delivery of her infant daughter, plaintiff engaged in a lengthy and egregious pattern of noncompliance with discovery deadlines which culminated in a decision and order dated August 30, 2022 (hereinafter the Preclusion Order) granting defendant's motion pursuant to CPLR 3126 to strike certain responses in plaintiff's Bill of Particulars and preclude expert testimony. As a result of the Preclusion Order, plaintiff is now precluded from offering any expert testimony at trial.

regarding 1) Bill of Particulars responses to demand numbers 5, 7, 8, 9, and 10<sup>1</sup>, 2) the nature and extent of the infant plaintiff's injuries, the degree to which such injuries impact her daily living, and what care and special services will be needed in the future; 3) testimony and proof from her experts in pediatric neurology, pediatric orthopedics, and biomedical engineering as to obstetrical standards of care for labor and delivery, any alleged deviations/departures from obstetrical standards of care for labor and delivery, and any alleged causal links between any alleged deviations/departures from obstetrical standards of care for labor and delivery and any alleged injuries; 4) any testimony and proof from plaintiff's ob/gyn expert; and 5) any testimony and proof from plaintiff's pediatric neurology expert. A jury trial in this matter is scheduled to commence on October 31, 2022.

On September 14, 2022, defendant filed the present motion for summary judgment dismissing the complaint, arguing that the Preclusion Order prevents plaintiff from presenting the expert proof required to establish a prima facie case of medical malpractice at trial. The summary judgment motion was given a return date of October 11, 2022, with any opposition papers due from plaintiff on October 7, 2022. On September 15, 2022, plaintiff filed a motion with this Court seeking reargument of the Preclusion Order. That motion was made returnable on September 29, 2022. On September 30, 2022, plaintiff filed a motion with the Appellate Division, Third

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<sup>1</sup>The information requested by each demand was as follows: (5) each and every act of omission and commission constituting the alleged negligence and/or medical malpractice of defendant, (7) if a misdiagnosis or failure to diagnose was claimed, and if so, what diagnosis was claimed to be in error, (8) if any procedures were claimed to be improperly timed, performed, or contraindicated, identify said procedures, as well as the date, time, and place where said procedures were performed, (9) whether any treatments were claimed to be improperly timed, performed, or contraindicated, and if so identify said treatment, as well as the date, time, and place where said treatment, and (10) and if any claim that any medications were improperly timed, administered, or contraindicated, identify said medications, as well as the time and approximate place where they were administered.

Department requesting a stay of the October 31, 2022 trial pending its appeal from the Preclusion Order or, alternatively, an order directing this Court to adjourn the trial. Notably, plaintiff's motion merely requested a stay of the trial in this matter, and did not seek a stay of the Preclusion Order itself. That motion is returnable before the Appellate Division on October 14, 2022.

Plaintiff served a response to defendant's summary judgment motion on October 3, 2022. In her responding papers, plaintiff acknowledges that if the Preclusion Order remains in effect, it prevents her from proving a prima facie case and renders her unable to oppose summary judgment on the merits. However, plaintiff argues that granting summary judgment would be inappropriate in the event that the Appellate Division grants her motion to stay the trial. Plaintiff also argues that the summary judgment motion would be rendered moot if the Court grants her motion for reargument of the Preclusion Order. Notably, the Court thereafter issued a decision and order dated October 5, 2022 denying plaintiff's motion for reargument of the Preclusion Order. Defendant served reply papers on the summary judgment motion on October 5, 2022, thereby rendering the summary judgment motion fully submitted and ripe for determination.<sup>2</sup>

Initially, the Court rejects plaintiff's contention that granting summary judgment at this juncture may create a potential inconsistency in the event that the Appellate Division grants her motion for a stay or adjournment of trial. Even if the trial is stayed or adjourned, defendant's motion for summary judgment would remain pending before this Court. The motion before the Appellate Division does not seek to stay enforcement of the Preclusion Order or determination of the summary

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<sup>2</sup> After the summary judgment motion was fully submitted, the Court received a letter from plaintiff requesting an adjournment of the motion return date. Inasmuch as the motion was already ripe for determination when the request was made, the Court declines to adjourn the return date of defendant's summary judgment motion.

judgment motion, but merely seeks to stay or adjourn the October 31, 2022 trial date. Moreover, if this Court grants defendant's summary judgment motion, plaintiff's complaint will be dismissed and the motion for a stay of the trial date would become moot. If this Court denies defendant's summary judgment motion, the matter will proceed to trial on October 31, 2022 or on some future date as determined by the Appellate Division. In either case, this Court's determination of defendant's summary judgment motion would not create any inconsistency with a potential decision by the Appellate Division on plaintiff's pending motion for a stay.

Turning to defendant's motion for summary judgment dismissing the complaint, plaintiff's complaint alleges a single cause of action sounding in medical malpractice. "In a medical malpractice action, establishment of a prima facie case requires expert testimony that there was a deviation from accepted standards of medical care and that such deviation was the proximate cause of the injury" (Hytko v Hennessey, 62 AD3d 1081, 1082 [2009]; see, Martuscello v Jensen, 134 AD3d 4, 12 [2015]; Caruso v Northeast Emergency Medical Associates, PC, 85 AD3d 1502, 1504 [2011]). Absent the presentation of expert medical proof at trial, a plaintiff is unable to establish a prima facie case of medical malpractice to submit to the jury (see, Hytko v Hennessey, 62 AD3d at 1084 [2009]; James v Wormuth, 21 NY3d 540, 545 [2013]; Dentes v Mauser, 91 AD3d 1143, 1144 [2012], lv denied 19 NY3d 811 [2012]; Grassel v Albany Med. Ctr. Hosp., 223 AD2d 803, 805 [1996], lv dismissed, lv denied 88 NY2d 843 [1996]). Thus, where a preclusion order prevents a plaintiff from introducing expert proof in support of a medical malpractice claim, a prima facie case of medical malpractice cannot be established and summary judgment dismissing the claim is warranted (see, Gibbs v St. Barnabas Hosp., 16 NY3d 74, 82-83 [2010]; Peluso v C.R. Bard, Inc., 124 AD3d 1027, 1028 [2015]; Grassel v Albany Med. Ctr. Hosp., 223 AD2d 803, 805 [1996]).

Here, the Preclusion Order prohibits plaintiff from offering any expert proof at trial. Inasmuch as plaintiff cannot establish a prima facie case of medical malpractice without the benefit of expert testimony, defendant's motion for summary judgment dismissing the complaint is granted (see, Gibbs v St. Barnabas Hosp., 16 NY3d at 82-83 [2010]; Grassel v Albany Med. Ctr. Hosp., 223 AD2d at 805 [1996]).

Accordingly, for the foregoing reasons, it is

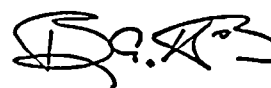
ORDERED that the motion for summary judgment is granted, and plaintiff's complaint is dismissed in its entirety.

This shall constitute the Decision and Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, defendant's counsel shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: October 13, 2022



HON. CHRISTINA L. RYBA  
Supreme Court Justice



10/13/2022