

Dray v Staten Is. Univ. Hosp.

2023 NY Slip Op 32824(U)

August 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 500510/14

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of August 2023.

P R E S E N T:

HON. GENINE D. EDWARDS,

Justice.

-----X

RINAT DRAY,

Plaintiff,

-against-

STATEN ISLAND UNIVERSITY HOSPITAL,
LEONID GORELIK,
METROPOLITAN OB-GYN ASSOCIATES, P.C.,
and JAMES C. DUCEY,

Defendants.

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DECISION AND ORDER

Index No. 500510/14

Mot. Seq. Nos. 26, 27, 29

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion/Cross Motion, Affirmations,
and Exhibits Annexed _____
Affirmations in Opposition _____
Reply Affirmations _____

480-491; 492-493; 513-516
509; 522
523; 526

In this action to recover damages for medical malpractice, the following motions and cross-motion were consolidated for disposition:

In Seq. No. 26, defendants Leonid Gorelik, M.D. (incorrectly sued herein as Leonid Gorelik) (“Dr. Gorelik”), and Metropolitan Ob-Gyn Associates, P.C. (“Metropolitan” and, collectively with Dr. Gorelik, the “Gorelik defendants”), jointly move for leave, pursuant to CPLR 2221 (d), to reargue the portion of their prior motion in Seq. No. 23 which was for summary judgment dismissing the medical malpractice claim of Rinat Dray (“plaintiff” or “mother”) as against the Gorelik defendants and, upon reargument, granting that portion of their prior motion;

In Seq. No. 27, defendants James C. Ducey, M.D. (incorrectly sued herein as James C. Ducey) (“Dr. Ducey”), and Staten Island University Hospital (“SIUH” and, collectively with Dr. Ducey, the “Ducey defendants”) jointly move for leave, pursuant to CPLR 2221 (d), to reargue the portion of their prior motion in Seq. No. 24 which was for summary judgment dismissing plaintiff’s medical malpractice claim as against the Ducey defendants and, upon reargument, granting that portion of their prior motion; and

In Seq. No. 29, plaintiff cross-moves, pursuant to CPLR 2221 (f), for leave to renew and/or reargue, the portion of her prior cross-motion in Seq. No. 25 for partial summary judgment on the issue of liability on her “failure to consult” claim as against the Gorelik defendants and, upon renewal and/or reargument, granting that portion of her prior cross-motion.

On June 30, 2023, the Court heard oral argument, denied plaintiff’s cross-motion by ruling from the bench, and reserved decision on the motions of the Gorelik and Ducey defendants (collectively, “defendants”). The underlying facts are set forth in *Dray v. Staten Is. Univ. Hosp.*, 2022 N.Y. Slip. Op. 32994(U) (Sup. Ct., Kings County 2022) (the “prior order”),¹ as amplified by *Dray v. Staten Is. Univ. Hosp.*, 160 A.D.3d 614, 75 N.Y.S.3d 59 (2d Dept., 2018), and *Dray v. Staten Is. Univ. Hosp.*, 2019 WL 13079315 (Sup. Ct., Kings County 2019), and need not be restated.

In the prior order (at page 14 thereof), the Court found “triable issues of material fact as to both the departure and causation elements regarding both aspects of plaintiff’s medical

¹ The prior order is on appeal and cross-appeal to the Second Judicial Department under Docket No. 2022-09357.

malpractice claim” (emphasis added). Upon reargument, the Court concludes that its ruling was only partially correct, in that (contrary to the Court’s finding in the prior order) plaintiff *failed* to raise a triable issue of fact on the *causation* element of her *medical necessity* claim (*i.e.*, whether an emergent C-section was necessary) (the “medical necessity claim”).

Plaintiff’s expert’s broadly advanced contention that plaintiff should have been allowed an additional trial of labor before she was taken to the operating room for her C-section at 2:37 pm on July 26, 2011,² overlooked the crucial factor that, under the circumstances, she was *not* (nor could she have been) a candidate for vaginal delivery of her third child. It is undisputed that, on the day in question, plaintiff – a multipara with two prior consecutive C-sections for (and without a single prior vaginal delivery of) her two children – remained in the second stage of labor for an uninterrupted period of approximately 2-1/2 hours from 10:38 am to 1:01 pm *without* any interim increase in her cervical dilatation (persisting at 5-6 centimeters) and *without* any interim improvement in the fetal station (persisting at minus one), *before* defendants decided to embark on the C-section over plaintiff’s objection.³

Plaintiff’s expert’s further assertion that “[i]f [defendants] had allowed the labor to continue, there was a *substantial chance* that [plaintiff] could have delivered vaginally,”⁴ was insufficient, as a matter of law, to raise a triable issue of fact on the subject of causation for her medical necessity claim. It is black-letter law that to raise a triable issue of fact on the subject of causation, a plaintiff’s expert needed to establish that “the defendant’s act or omission

² Affirmation of Katharine Morrison, M.D., dated February 25, 2022 (NYSCEF Doc. No. 428) (“plaintiff’s expert’s affirmation”), ¶ 36 (“The mother should have been allowed to continue her labor.”).

³ OB Progress Notes at pages 5-6 (NYSCEF Doc. No. 220).

⁴ Plaintiff’s expert’s affirmation, ¶ 25.

decreased the . . . chance of a better outcome or increased . . . [an] injury.” Flaherty v. Fromberg, 46 A.D.3d 743, 849 N.Y.S.2d 278 (2d Dept., 2007) (emphasis added); see also Johnson v. Jamaica Hosp. Med. Ctr., 21 A.D.3d 881, 800 N.Y.S.2d 609 (2d Dept., 2005).

A substantial chance by which plaintiff was deprived of vaginal delivery (in the opinion of her expert) was not equivalent to a decrease of her baby’s chance of a better outcome or an increase in her baby’s injury, sufficient to establish the proximate cause element of the medical necessity claim.⁵

Accordingly, it is

ORDERED that in Seq. Nos. 26 and 27, upon a de novo review of defendants’ prior motions, the Court, in its discretion, *grants* defendants’ leave to reargue and, *upon reargument*: (1) *vacates* the portions of the prior order which denied defendants’ prior motions insofar as they sought summary judgment dismissing the medical necessity claim; and (2) *grants* the portions of defendants’ prior motions which were for summary judgment dismissing the medical necessity claim; and it is further

ORDERED that to reflect the Court’s ruling upon reargument of defendants’ prior motions, the first, second, and fourth decretal paragraphs of the prior order (at pages 17-18 thereof) are amended and restated to read in their entirety as follows (the added language is double-underlined, whereas the deleted language is indicated by a double strike-through):

“**ORDERED** that in Seq. No. 23, the Gorelik defendants’ joint motion for summary judgment dismissing all claims as against them is *granted solely to*

⁵ To supplement footnote 29 of the prior order, the Court did not take judicial notice of the National Institutes of Health, Consensus Development Conference Statement, Vaginal Birth After Cesarean: New Insights, March 8-10, 2010, published in *Obstetrics & Gynecology*, Vol. 115, No. 6 (June 2010). The document, which was not provided to the Court by any party, was referenced in ¶ 6 of defense expert Dr. James Gerald Quirk’s opening affirmation at NYSCEF Doc. No. 490.

the extent that plaintiff's "failure to consult" claim (*i.e.*, the remainder of her first cause of action as pleaded in her amended complaint) and her "medical necessity" claim (*i.e.*, a portion of her second cause of action as pleaded in her amended complaint) ~~are~~ dismissed as against them; and *the remainder of their motion is denied*; and it is further

ORDERED that in Seq. No. 24, the Ducey defendants' joint motion for summary judgment dismissing all claims as against them is granted ~~solely~~ to the extent that plaintiff's "failure to consult" claim (*i.e.*, the remainder of her first cause of action as pleaded in her amended complaint) and her "medical necessity" claim (*i.e.*, a portion of her second cause of action as pleaded in her amended complaint) ~~are~~ dismissed as against them; and *the remainder of their motion is denied*; and it is further

* * *

ORDERED that for the avoidance of doubt, this action shall proceed solely on plaintiff's medical malpractice claim (as pleaded in the second cause of action of her amended complaint) insofar as such claim is predicated on the ~~"medical necessity" and "proper technique" aspects~~ aspect thereof;"

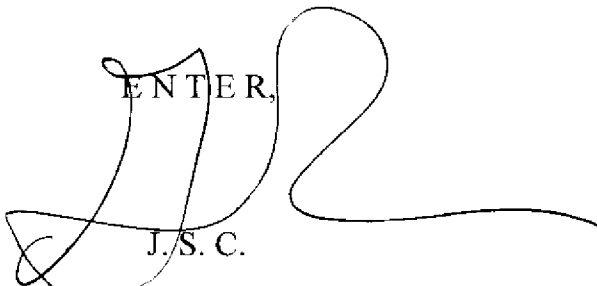
; and it is further

ORDERED that in Seq. No. 29, leave to renew/reargue plaintiff's prior cross-motion is *denied*; and it is further

ORDERED that the Gorelik defendants' counsel shall electronically serve a copy of this Decision and Order on plaintiff's counsel and on the Ducey defendants' newly substituted counsel, Laura M. Papa, Esq., Shaub, Ahmuty, Citrin & Spratt, LLP, at LPapa@sacsllaw.com (NYSCEF Doc. Nos. 528 and 529), and shall electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that jury selection shall commence on March 28, 2024, at 9:30 am.

This constitutes the decision and order of the Court upon reargument.

ENTER,

J.S.C.
HON. GENINE D. EDWARDS