N.S.E. v Biswas
2023 NY Slip Op 35297(U)
November 10, 2023
Supreme Court, Queens County
Docket Number: Index No. 718211/2020
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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N.S.E., an Infant by his mother and natural guardian, LATOYA TULLOCH,

Plaintiff,

-against-

SMITA BISWAS, SADAF KHAN, TENZIN SHERAB, MARLENE MANGOME, CONTEMPORARY WOMEN'S HEALTH CARE, PLLC and NEW YORK HOSPITAL QUEENS,

Defendants.

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Index No. 718211/2020

Part MDP

Motion Date: May 24, 2023

Sequence No. 1

The following papers numbered EF-34 through EF-59 read on this motion by defendants SMITA BISWAS, M.D. and CONTEMPORARY WOMEN'S HEALTH CARE, PLLC for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits……	EF34-EF48
Affirmation in Opposition, Exhibits……...	EF52-EF56
Reply Affirmation……...	EF58-59

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants Smita Biswas, M.D. and Contemporary Women's Health Care, PLLC's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted solely as to defendant Contemporary Women's Health Care, PLLC and denied as to defendant Smita Biswas, M.D. (*See France v. Packy*¸ 121 A.D.3d 836 [2d Dept. 2014].)

Plaintiff commenced this medical malpractice action for damages sustained during plaintiff Latoya Tulloch's labor and delivery of infant plaintiff at defendant New York Hospital Queens (hereinafter referred to as "NYHQ") on February 16, 2015. Plaintiff filed the Summons and Complaint on October 9, 2020, and issue was joined by defendants on January 15, 2021.

Defendants argue that summary judgment is warranted, as the treatment rendered to plaintiff was in accordance with good and accepted standards of medical care and practice. Defendants present the pleadings, deposition testimony of the parties, medical records and expert affirmation of Gary Mucciolo, M.D. in support of their motion. They argue that there was no basis for a Caesarean section delivery, as plaintiff was appropriately tested for gestational diabetes which was ruled out. Defendants further argue that plaintiff had a prior successful vaginal delivery and infant plaintiff's weight was within normal limits. They further argue that Dr. Biswas timely recognized the dystocia and appropriately performed maneuvers to deliver infant plaintiff within sixty seconds of encountering the dystocia. Defendants argue that any of infant plaintiff's injuries were unpredictable and unpreventable and entirely unrelated to defendants' care and treatment. They also argue that plaintiff's claim for lack of informed consent should be dismissed, as they obtained consent for a vaginal delivery and there was no reason to discuss the option of a Caesarean section delivery prior to plaintiff's labor. Defendants also argue that all claims against Contemporary Women's Health Care, PLLC should be dismissed, as Dr. Biswas testified that at the time of plaintiff's care and treatment, she had split from that practice and established her own private practice after 2013. As Dr. Biswas testified that she performed medical care and treatment to plaintiff on behalf of her solo practice entitled Smita Biswas, M.D., P.C., summary judgment is warranted as to Contemporary Women's Health Care, PLLC.

Defendants present the expert affirmation of Dr. Gary Mucciolo in support of their motion. Dr. Mucciolo affirmed he is a licensed physician in New York who is board certified in Obstetrics and Gynecology. Dr. Mucciolo opined that Dr. Biswas' care and treatment of plaintiff during her pregnancy and her admission to co-defendant New York Hospital Queens from February 16, 2015 through February 23, 2015 was in accordance with good and accepted standards of medical care and practice. He argued that plaintiff's medical records show she was having a fairly normal and routine pregnancy until her presentation to the hospital on February 16th. Dr. Mucciolo found that Dr. Biswas performed timely evaluations, examinations and routine sonograms throughout plaintiff's pregnancy, and there was no clinical basis to recommend or discuss a Caesarean section delivery. He also opined that Dr. Biswas appropriately managed plaintiff's labor, and timely recognized and managed infant plaintiff's shoulder dystocia, and performed appropriate maneuvers to resolve the dystocia and deliver infant plaintiff within sixty seconds of detecting the dystocia.

Dr. Mucciolo opined within a reasonable degree of medical certainty that there were no departures from the accepted standards of medical care and practice by Dr. Biswas or anyone in her practice. He further opined that there was nothing in plaintiff's obstetrical history or course of pregnancy that would have indicated that shoulder dystocia would be encountered and a Caesarean section delivery was indicated. Dr. Mucciolo reviewed plaintiff's medical records and found that there was no clinical evidence that plaintiff had gestational diabetes and thus no indication to perform the three hour glucose test. Dr. Mucciolo also opined that there was no clinical basis to

convert the vaginal delivery to a Caesarean section during the course of delivery, as there was no evidence of fetal distress and there was the absence of fetal hypoxia at delivery. His opinion was that plaintiff had a shorter time of labor, which increased the risk of encountering shoulder dystocia. Dr. Mucciolo opined within a reasonable degree of medical certainty that the obstetric care and treatment provided by Dr. Biswas and her staff was in accordance with good and accepted standards of medical care and none of their acts or omissions were a substantial factor in causing infant plaintiff's left-sided brachial plexus injury. Dr. Mucciolo also opined that there was no basis for a claim of lack of informed consent as plaintiff presented to the hospital in active delivery.

Plaintiff opposes defendants' motion, arguing they failed to present evidence in admissible form to establish a prima facie case. She also argues that there are issues of fact in dispute, as plaintiff's expert affirmation established infant plaintiff's shoulder dystocia was foreseeable and defendants failed to take adequate and sufficient steps that would have avoided plaintiff's excessive weight gain and shoulder dystocia. Plaintiff also argues that there is an issue of fact with regard to whether defendant departed from failing to discuss the risks of a vaginal delivery based upon the size of infant plaintiff.

Plaintiff presents an expert affirmation in support of her motion. The expert affirmed to be a licensed physician in New York who is board certified by the American Board of Obstetrics and Gynecology. The expert reviewed the parties' deposition testimony, medical records and defendants' expert affirmation in support of the opinions rendered. The expert opined within a reasonable degree of medical certainty that Dr. Biswas departed from the standards of good and accepted medical and obstetric practice in plaintiff's care and treatment in that she failed to timely and appropriately recognize and respond to signs of fetal macrosomia and shoulder dystocia, and failed to timely and appropriately deliver infant plaintiff. The expert argued that plaintiff had multiple known risk factors for delivering a macrosomic baby. The expert opined within a reasonable degree of medical certainty that infant plaintiff suffered a brachial plexus/Erb's palsy injury because Dr. Biswas applied excessive lateral traction to infant plaintiff's head at the time of delivery and the traction was a departure from good and accepted medical practice that caused permanent injury to infant plaintiff.

The expert opined within a reasonable degree of medical certainty that the shoulder dystocia was predictable and could have been prevented if a Caesarean section had been performed. The expert opined that it was a departure from good and accepted medical standards not to counsel plaintiff concerning risk factors and the baby's size and to offer the option of a Caesarean section, and the expert opined that if a Caesarean section had been performed, the injury to infant plaintiff's brachial plexus would have been avoided. The expert also opined that Dr. Biswas departed from good and accepted medical care by not treating the shoulder dystocia properly, and this departure was a substantial factor in causing infant plaintiff's injuries. The expert also opined that plaintiff's weight gain during the last weeks of pregnancy should have

prompted Dr. Biswas to reconsider plaintiff's diabetic status and the size of the fetus. The expert opined that to a reasonable degree of medical certainty that Dr. Biswas and staff failed to properly evaluate plaintiff during the prenatal course, failed to anticipate a macrosomic baby, and applied lateral traction upon infant plaintiff's head causing a left sided brachial plexus/Erb's palsy injury.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New Yor*k, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id*.). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp*., 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].)

In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting within the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

Defendants established a prima facie entitlement to summary judgment as to Contemporary Women's Health Care, PLLC, as they established that Dr. Biswas was not working for the corporation at the time she provided medical care to plaintiff. As plaintiff failed to present any evidence in opposition, defendants' motion is granted as to Contemporary Women's Health Care, PLLC.

Defendants established a prima facie entitlement to summary judgment for medical malpractice and lack of informed consent through the medical records, deposition testimony, and expert affirmation. (*See Lau v. Wan*, 93 A.D.3d 763 [2d Dept. 2012].) Defendant Dr. Biswas established that she provided appropriate prenatal medical care to plaintiff, and monitored her appropriately. She further demonstrated through the medical records and expert testimony that she did not have to discuss the possibility of a C-section with plaintiff, because plaintiff's obstetrical history or course of pregnancy did not indicate that shoulder dystocia would be encountered or a Caesarean section was indicated. Defendants' expert further demonstrated that Dr. Biswas properly monitored plaintiff during labor and delivery, and immediately responded to the shoulder dystocia. Defendants further demonstrated through expert testimony that none of Dr. Biswas' acts or omissions were a proximate cause of infant plaintiff's injuries. (*See Gattling v. Sisters of Charity Med. Ctr.*, 150 A.D.3d 701 [2d Dept. 2017].)

However, plaintiff raised triable issues of fact in dispute. (*See Loaiza v. Lam*, 107 A.D.3d 951 [2d Dept. 2013].) Plaintiff's medical records, deposition testimony and expert affirmation raised issues of fact whether defendant Dr. Biswas departed from good and accepted medical care in failing to inform plaintiff of the risks and complications of a vaginal delivery and discuss the option of a Caesarean section, and whether said departure was a proximate cause of infant plaintiff's injuries. The expert affirmation also raised issues of fact as to whether defendant departed in failing to consider a Caesarean section in the final weeks of plaintiff's pregnancy and during the labor and delivery, and whether defendant Dr. Biswas departed from good and accepted care in addressing the shoulder dystocia during delivery of infant plaintiff, and whether these departures were a proximate cause of infant plaintiff's injuries. (*See id.*)

Accordingly, defendants Smita Biswas, M.D. and Contemporary Women's Health Care, PLLC's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted solely as to defendant Contemporary Women's Health Care, PLLC and denied as to defendant Smita Biswas, M.D. The parties shall appear for a pretrial conference on Wednesday, December 13, 2023 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: November 10, 2023

Tracey Catapano-Fox

Hon. Tracy Catapano-Fox, J.S.C.