

**Mancini v Goncharov**

2024 NY Slip Op 34134(U)

November 21, 2024

Supreme Court, New York County

Docket Number: Index No. 805388/2019

Judge: Kathy J. King

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

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MARIJA MANCINI, BERNARD MANCINI

Plaintiff,

- v -

ALEXANDER GONCHAROV, GONCHAROV MEDICAL, P.C.,

Defendant.

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INDEX NO. 805388/2019

MOTION DATE 03/29/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 81 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing papers, Defendants, Alexander Goncharov, M.D. ("Dr. Goncharov") and Goncharov Medical, P.C. (collectively referred to as "the Defendants"), move for summary judgment, pursuant to CPLR § 3212, and dismissal of the complaint with prejudice, and directing entry of the judgment with prejudice in favor of the moving Defendants; or in the alternative, granting partial summary judgment, pursuant to CPLR § 3212 (e) and (g), dismissing any of Plaintiffs' claims for which no issue of fact is raised in opposition. Plaintiffs oppose the motion.

In this action, Plaintiff Marija Mancini ("Plaintiff") and her husband, Bernard Mancini, who sues derivatively for loss of consortium (collectively referred to as "Plaintiffs"), assert causes of action sounding in medical malpractice as to each Defendant; negligent hiring and retention by Defendant Goncharov and lack of informed consent against the Defendants arising out of care and treatment.

### BACKGROUND FACTS

On January 4, 2019, Plaintiff consulted with non-party Dr. Cemalovic for an examination with complaints of amenorrhea for five weeks. A urine pregnancy test confirmed that she was pregnant. The examination showed signs of ovarian cysts, and an ultrasound was ordered. On the same day, non-party Lenox Hill Radiology performed an ultrasound which revealed an oval cystic structure, which was noted as possibly being a gestational sac corresponding to gestation of four to six weeks. A follow-up sonogram was suggested in two weeks to confirm a live uterine pregnancy.

On January 11, 2019, the Plaintiff had a telephone discussion with Dr. Cemalovic regarding the pelvic sonogram that had been performed on January 4, 2019. The record states that the sonogram revealed the presence of an intrauterine sac 0.23cm in diameter, with no yolk sac or fetal pole present. Plaintiff denied any pain or bleeding, and ectopic precautions were given to the Plaintiff. The record indicates that blood work drawn on January 11, 2019, indicated that the Plaintiff's BHCG level was 7292mIU/ml.<sup>1</sup>

On the following day, Dr. Cemalovic referred Plaintiff to Dr. Bourara to conduct a sonogram to confirm the viability of the pregnancy. Plaintiff did not schedule an appointment with Dr. Bourara, and instead scheduled an appointment with Dr. Goncharov for January 14, 2019. According to the record, on the date of the initial visit the Plaintiff brought the Lenox Hill Radiology Report from the January 4<sup>th</sup> pelvic sonogram for review by Dr. Goncharov, which had revealed an intra-uterine gestational sac. Dr. Goncharov requested the Plaintiff's records from Dr. Cemalovic, however Dr. Goncharov only received pap smear results. The Plaintiff orally reported that she had a previous BHCG level of 7000 (mIU/ml). She also reported having

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<sup>1</sup> According to the record, "BHCG" refers to a hormone that is indicative of pregnancy. In early pregnancy, BHCG levels double every two days.

experienced vaginal bleeding three days prior and cramping mid-line pain for approximately four to six days. A transvaginal ultrasound was performed, which Dr Goncharov interpreted as showing no evidence of either an early intrauterine pregnancy or an ectopic pregnancy. On January 15, 2019, follow-up laboratory tests ordered by Dr. Goncharov revealed that Plaintiff's BHCG levels had increased to 15,950 mIU/ml.

On January 17, 2019, Plaintiff was seen by Dr. Goncharov again, and another ultrasound was done, which showed no evidence of either an intrauterine or an ectopic pregnancy. During this visit, Dr. Goncharov scheduled the Plaintiff for a suction D&C to be performed on January 19, 2019. It was his impression that Plaintiff was in the process of having a miscarriage. Dr. Goncharov advised Plaintiff of precautions to be taken regarding pain and bleeding.

Later that day, the Plaintiff felt unwell, and presented at Mount Sinai Hospital in Queens via ambulance with complaints of abdominal pain, dizziness, hypotension, and pale skin. An ultrasound revealed that the Plaintiff was seven weeks pregnant. It was also determined that she was severely anemic, hypotensive and tachycardic. An emergency blood transfusion was started, and two units of packed red blood cells were given. A transvaginal ultrasound confirmed the existence of a right tubal ectopic pregnancy, and a large amount of blood in the abdomen and posterior cul-de-sac. The Plaintiff was then taken to the operating room for a laparoscopy and removal of the ruptured right tubal ectopic pregnancy and fallopian tube. Plaintiff was discharged on January 18, 2019. Thereafter, on May 13, 2020, Plaintiff presented to CNY Fertility for in vitro fertilization treatment. She was noted to be a 34-year-old female with a history of a right tube removal for rupture last year. Her other tube was noted as open and she was diagnosed with "ovarian dysfunction." Plaintiff gave birth to a healthy baby girl on or about December 21, 2021, after undergoing IVF therapy to conceive.

In the instant action, Plaintiff now sues to recover damages from the following acts of negligence which include, among other things, Defendants' failure to properly detect the signs of ectopic pregnancy and prescribe methotrexate, which caused Plaintiff to suffer a punctured fallopian tube, internal bleeding, delayed termination of pregnancy, potential infertility, and pain and suffering. Plaintiffs claim that the alleged period of negligence took place from December 31, 2018, continuing through January 17, 2019.

“To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury” (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *see Roques v Noble*, 73 AD3d 204 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521 [1st Dept 2004]). A Defendant moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to the alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24), or by establishing that the Plaintiff was not injured by such treatment (*see McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy this burden, a Defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques*, 73 AD3d at 206; *Joyner-Pack v Sykes*, 54 AD3d 727 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). Furthermore, to satisfy the burden on a motion for summary judgment, a Defendant must address

and rebut specific allegations of malpractice set forth in the Plaintiffs' bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once the Defendant establishes prima facie entitlement to judgment as a matter of law, the burden shifts to the Plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the Defendant's acts or omissions were a competent producing cause of the Plaintiff's injuries (*see Roques*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]).

In support of the motion, the Defendants submit the expert affirmation of Gary Mucciolo, ("Dr. Mucciolo"), a physician board certified in Obstetrician and Gynecologist, who opines to a reasonable degree, based upon a review of the Plaintiff's medical records, deposition transcripts and the verified bill of particulars, that the care and treatment rendered to the Plaintiff was consistent with good and accepted standards of Obstetrical practice, and that the alleged acts and/or omissions by the Defendants were not the proximate cause of Plaintiff's claimed injuries.

Dr. Mucciolo notes that Dr. Goncharov's care and treatment of the Plaintiff occurred on January 14<sup>th</sup> and January 17<sup>th</sup> of 2019, and that prior to her first visit on January 14, 2019, Dr. Goncharov only had received pap smear results from Dr. Cemalovic. On January 14, 2019, the Plaintiff provided Dr. Goncharov with a copy of the pelvic ultrasound which had been performed on January 4, 2019, showing an intra-uterine gestational sac.

Dr. Mucciolo opines that based on the previous ultrasound of January 4, 2019, which showed an intra-uterine gestational sac; the BHCG level reported on January 11, 2019 suggesting that the Plaintiff was pregnant; the Plaintiff's current complaint of vaginal bleeding three days

prior; the lack of any signs of an intra-uterine pregnancy on the subsequent ultrasound of January 14, 2019; and the limited information available concerning Plaintiff, who was a new patient, Dr. Goncharov's suspicion of a miscarriage was reasonable medical judgment and was in accord with the standard of care. He further opines that Plaintiff's rising BHCG levels, and the downward direction of endometrium thickness, as seen on the ultrasound, were more consistent with a miscarriage than an ectopic pregnancy; thus Dr. Goncharov's assessment and plan to schedule a suction D&C was proper and in accord with the standard of care.<sup>2</sup> Further, according to Dr. Mucciolo, even if the Plaintiff had been diagnosed with an ectopic pregnancy on January 14, 2019, the outcome would have been the same, and it would have been necessary to surgically remove the Plaintiff's fallopian tube.

Dr. Mucciolo explains that the Plaintiff's pregnancy was beyond the first few weeks, and in the circumstances presented here, surgery to remove the fallopian tube (a salpingectomy) is a safer option and more likely to work than medical management using methotrexate to end the pregnancy. He opines that Plaintiff's BHCG level was well beyond the recommended threshold for the use of methotrexate and was contraindicated.

Dr. Mucciolo opines that on January 17, 2019, Dr. Goncharov's differential diagnosis of incomplete abortion, possible ectopic heterotopic or molar pregnancy was appropriate, as the Plaintiff was clinically stable, there were no unusual findings on examination, and the ultrasound did not show an intrauterine or ectopic pregnancy. Dr. Mucciolo opines that none of the care and treatment rendered on January 17, 2019, was the proximate cause of the Plaintiff's alleged

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<sup>2</sup> Dr. Mucciolo avers that Dr. Goncharov's plan to perform a suction D&C was intended to look for evidence of spontaneous abortion by examining the products of conception removed during the procedure, which if confirmed would have ruled out an ectopic pregnancy.

injuries because even if the ectopic pregnancy had been diagnosed on this visit the outcome would have essentially been the same.

Finally, Dr. Mucciolo opines that Plaintiff's claim of infertility is without merit since she subsequently was diagnosed with "ovarian dysfunction", and in any event, the Plaintiff later successfully conceived and gave birth to a baby girl via IVF.

Based on the expert affirmation of Dr. Mucciolo, the Defendants have established their prima facie entitlement to summary judgment as a matter of law, which demonstrates that the care and treatment rendered to Plaintiff by the Defendants was within good and accepted standards of Obstetrical care and was not the proximate cause of the Plaintiff's alleged injuries.

In opposition to the motion, Plaintiffs have raised triable issues of fact sufficient to rebut the Defendants' prima facie showing based on the expert affirmation of a physician board certified in Obstetrician and Gynecologist<sup>3</sup>. Expert A opines to a reasonable degree of medical certainty based upon a review of the pleadings, deposition transcripts, relevant medical records, and Defendants' summary judgment motion submissions, that the Defendants deviated from good and accepted standards of medical care in treating the Plaintiff, which proximately caused the Plaintiff's alleged injuries. Specifically, Expert A opines that the Defendants departed from good and accepted Obstetrical care by failing to detect the signs of ectopic pregnancy and failing to properly treat the condition, causing Plaintiff to suffer, inter alia, a ruptured fallopian tube, internal bleeding and surgical removal of the fallopian tube.

Expert A opines that given Plaintiff's symptoms on January 15, 2019, i.e., a positive pregnancy test, an ultrasound that showed no yolk sac and no fetal pole, and rising BHCG levels, the standard of care required that the Plaintiff be presumptively diagnosed with an ectopic

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<sup>3</sup> Plaintiff has redacted the name of their expert pursuant to CPLR 3101(d). The expert will be referred to as "Expert A".

pregnancy. The expert further opines that the standard of care was to follow serial BHCG measurements until it could be confirmed whether there was either an intrauterine pregnancy, an ectopic pregnancy or a miscarriage. If an ectopic pregnancy could not be confirmed, methotrexate should have been administered to prevent the pregnancy from growing and rupturing the fallopian tube and causing life-threatening hemorrhage.

Expert A opines that considering the aforementioned factors, and the potential for having an ectopic pregnancy, Dr. Goncharov departed from good and accepted medical care in scheduling a suction D&C rather than administering methotrexate, and that had Dr. Goncharov done so, the Plaintiff would not have suffered a ruptured fallopian tube, requiring emergency surgery for the removal of the tube.

The Court finds that the respective expert affirmations submitted by the Plaintiffs and Defendants are of equal strength and supported by the facts in the record, addressing the essential allegations in the bill of particulars and setting forth their opinions with a reasonable degree of medical certainty (*see Roques*, 73 AD3d 204). Thus, although Defendants met their initial burden of establishing their prima facie case, the affirmation of Plaintiffs' expert establishes the requisite nexus between the malpractice allegedly committed by the Defendants and the Plaintiff's injury, thereby rebutting the Defendants' prima facie showing (*Alvarez*, 68 NY2d at 324; *Mignoli v Oyugi*, 82 AD3d 443 [1st Dept 2011]; *Polanco v Reed*, 105 AD3d 438 [1st Dept 2013]). “Summary judgment is not appropriate ... [when] the parties [submit] conflicting medical expert opinions because [s]uch conflicting expert opinions will raise credibility issues which can only be resolved by a jury” (*Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017], quoting *DiGeronimo v Fuchs*, 101 AD3d 933 [2d Dept 2012] [internal quotation marks omitted];

*see Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]; *Leto v Feld*, 131 AD3d 590 [2d Dept 2015]).

As to Plaintiffs' claims of negligence prior to that date, as set forth in the Plaintiffs' complaint and verified bill of particulars, the Court finds that according to the record and the expert affirmations submitted by Plaintiffs and Defendants, the Defendants did not establish a physician-patient relationship with the Plaintiff prior to January 14, 2019, thus, these claims must be dismissed.

The Court further finds that Plaintiffs' claim that the Defendants' deviations from the standard of care reduced the Plaintiffs' ability to have children in the future, are speculative and conclusory. The Plaintiffs' expert fails to support this claim, and merely states in conclusory fashion, that the fallopian rupture "reduced Mrs. Mancini's ability to have children." "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation... the opinion should be given no probative force and is insufficient to defeat summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002] [citations omitted]; *see also Wagner v Parker*, 172 AD3d 954, 955 [2d Dept 2019]). In this regard, the Court notes that the Plaintiff subsequently conceived a child via IVF and gave birth to a healthy baby girl.

The Court notes that the parties' submissions do not address Plaintiffs' causes of action sounding in vicarious liability and informed consent, and therefore Defendants' motion is denied as to those causes of action.

Accordingly, it is hereby

**ORDERED**, that the prong of Defendants' motion seeking partial summary judgment, pursuant to CPLR § 3212(e) and (g), is granted to the extent that: 1) all claims of negligence/medical malpractice asserted against the Defendants in Plaintiffs' complaint and

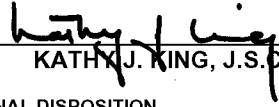
verified bill of particulars alleged to have occurred prior to January 14, 2019 are dismissed; and

2) Plaintiffs' claim that the Defendants' alleged departures from the standard of care reduced

Plaintiff's ability to have children in the future is dismissed; and it is further

**ORDERED**, that the Defendants' motion is denied in all other respects.

This constitutes the Decision and Order of the Court.

11/21/2024		
DATE		KATHY J. KING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE