

Mohamad v Csompo

2024 NY Slip Op 34760(U)

July 19, 2024

Supreme Court, Queens County

Docket Number: Index No. 704903/2020

Judge: Tracy Catapano-Fox

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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NAFEESH MOHAMAD, as mother and natural guardian
of A.A. and NAFEESH MOHAMAD, Individually,

Index No. 704903/2020

Part MDP

Plaintiff,

Motion Date: June 26, 2024

-against-

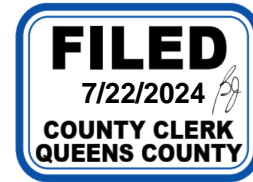
Calendar No. 24

Sequence No. 4

MICHAEL CSOMPO and NEW YORK
PRESBYTERIAN QUEENS HOSPITAL,

Defendants.

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The following papers numbered EF-41 to EF-56 read on this motion by defendants MICHAEL CSOMPO, M.D. and NEW YORK PRESBYTERIAN QUEENS HOSPITAL for summary judgment and dismissal of plaintiff’s Complaint pursuant to CPLR §3212.

Papers
Numbered

- Notice of Motion, Affirmation, Exhibits.....EF41-EF50
- Affirmation in Opposition, Exhibits.....EF51-EF54
- Reply Affirmation.....EF55-EF56

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

Defendants Michael Csompo, M.D. and New York Presbyterian Queens Hospital’s (hereinafter referred to as “NYPQ”) motion for summary judgment and dismissal of plaintiff’s Complaint pursuant to CPLR §3212 is granted, as defendants eliminated all triable issues of fact as to whether they departed from accepted standards of care and proximately caused plaintiff’s injuries. (*See Galluccio v. Grossman*, 161 A.D.3d 1049 [2d Dept. 2018].)

Plaintiff commenced this medical malpractice, lack of informed consent and negligent hiring action against defendants due to the failure to appreciate the signs and symptoms of shoulder dystocia during the delivery of infant plaintiff on June 28, 2018. Plaintiff filed the Summons and Complaint on March 20, 2020 and issue was joined by moving defendants via the filing of their Answers on May 12, 2020.

Defendants Dr. Csompo and NYPQ argue that they are entitled to summary judgment and present the plaintiffs' Bills of Particulars and medical records, the parties' deposition testimony, a memorandum of law and the expert affirmation of Victor R. Klein, M.D. in support of their motion. Defendants argue that they rendered care and treatment at all times within good and accepted medical practice and did not proximately cause plaintiff's injuries. Defendants also argue that plaintiff's claim for negligent hiring and supervision should be dismissed as there is no competent, admissible evidence that NYPQ negligently hired employees or its employees failed to comply with orders. They further argue that plaintiff's claim of lack of informed consent must be dismissed because there was no clinical indication to perform a Cesarean section, and therefore no procedure that should have been discussed as an alternative to natural delivery.

Defendants present the affirmation of Dr. Victor R. Klein in support of their motion. Dr. Klein affirmed to being a physician licensed in New York and board-certified in obstetrics and gynecology, maternal fetal medicine, and clinical genetics. Dr. Klein further affirmed that he reviewed plaintiff's Bills of Particulars and medical records in rendering his opinions. He noted that plaintiff mother treated with defendant Dr. Csompo for the majority of her pregnancy which was normal throughout the first and second trimester. On April 9, 2018, plaintiff mother presented to NYPQ for a twenty-eight-week ultrasound due to marginal cord insertion and poor growth in the third trimester. Plaintiff continued to be monitored and by her last appointment with Dr. Csompo, at almost thirty-nine weeks, reported good fetal movement with occasional, irregular contractions and had normal blood pressure. On June 27, 2018, plaintiff mother presented to NYPQ at 9:42pm with contractions that had been ongoing for six hours and denied vaginal bleeding or fluid leakage but reported decreased fetal movement. Upon examination, plaintiff mother was four centimeters dilated, eighty percent effaced, and negative two station. Plaintiff later complained of prior fluid leakage preceded by contractions and was subsequently administered Pitocin to augment labor. The following afternoon at 12:05pm, infant plaintiff's head was delivered; however, the anterior shoulder was not emerging and defendant Dr. Csompo immediately called out shoulder dystocia and called for Team Blue. Dr. Csompo performed the McRoberts maneuver with suprapubic pressure and delivered infant plaintiff at 12:07pm without forceps or vacuum extraction. Infant plaintiff was sent to the NICU and a minimally displaced fracture of the right clavicle on the mid shaft was noted.

Based upon the foregoing, Dr. Klein opined to a reasonable degree of medical certainty that defendants rendered care and treatment to plaintiff within the standard of care and did not proximately cause plaintiff's injuries, including infant plaintiff's Erb's palsy. Dr. Klein reasoned that there was no indication leading up to the labor and delivery that plaintiff mother had any risk factors for delivering a baby with shoulder dystocia such as morbid obesity, diabetes, or a larger than average fetus. He further noted that this was plaintiff's first baby so there was no prior history of shoulder dystocia or use of forceps or vacuum during a delivery. Dr. Klein also reasoned that

infant plaintiff was delivered at eight pounds, eight ounces, which does not warrant a recommendation for a Cesarean procedure. Dr. Klein further reasoned that prior to 12:05pm, there was no indication that a shoulder dystocia would occur and when it did occur, Dr. Csompo followed the standard procedure for shoulder dystocia by calling Team Blue and applying suprapubic pressure while plaintiff mother was in the McRoberts position.

Dr. Klein opined that there is no indication of a forceful delivery as claimed in the Bill of Particulars because neither a vacuum nor forceps were used. Dr. Klein further reasoned that the mere occurrence of shoulder dystocia does not mean that the delivering doctor was negligent, as it could occur with average size babies such as infant plaintiff. He further noted that infant plaintiff was delivered within two minutes after the head emerged. Dr. Klein further reasoned that a clavicle fracture in and of itself is not evidence of negligence as it is not even a reportable birth injury and in some instances is done on purpose to expeditiously deliver a baby faced with shoulder dystocia.

Dr. Klein also reasoned that there is no indication infant plaintiff developed Erb's palsy as a result of Dr. Csompo's delivery. Dr. Klein reasoned that Erb's palsy is a muscle weakness in the arm or shoulder that can occur if the newborn's neck is stretched to the side during a difficult delivery. Dr. Klein further reasoned that while lateral or excessive traction has been implicated in Erb's palsy cases, there is no indication that Dr. Csompo applied lateral or excessive traction here. Lastly, Dr. Klein reasoned that there is no evidence that defendant NYPQ's staff failed to follow the orders and directions of Dr. Csompo, as they acted in accordance with the standard of care at all times. Based upon the foregoing, defendants Dr. Csompo and NYPQ argue that they are entitled to summary judgment.

Plaintiff opposes the motion and argue that defendants Dr. Csompo and NYPQ failed to eliminate all triable issues of fact with respect to whether they departed from accepted standards of care and proximately caused or contributed to plaintiff's injuries. She argues that defendants' expert affirmation was insufficient to establish a prima facie case as it was conclusory, whereas plaintiff's expert articulated in detail defendants' departures and the basis of the opinions. Plaintiff further argues that the obstetrical care and treatment defendants rendered failed to comply with the standard of care and proximately cause plaintiff's injuries.

Plaintiff presents an affidavit of merit where she attested that her deposition testimony is incomplete because it is devoid of critical information. Plaintiff attested that when her child's head was not coming out, more than one nurse or doctor began to push on her stomach with great force each using a closed fist and applying pressure in a downward direction to the upper portion of her stomach, on the top of the baby, directly under her breasts, continuously until the baby was fully delivered.

Plaintiff also presents the affidavit of a physician licensed in New York and board certified

in obstetrics and gynecology. Plaintiff's expert affirmed to reviewing the pleadings, pertinent medical records, deposition testimony, and plaintiff Nafeesh Mohamad's affidavit in rendering opinions. Plaintiff's expert opined to a reasonable degree of medical certainty that defendants did not render care and treatment in accordance with good and accepted medical practice and proximately caused plaintiff's injuries. The expert reasoned that shoulder dystocia is an obstetrical emergency where the anterior fetal shoulder becomes stuck on the maternal pubic symphysis that delays the birth of the baby's body. Plaintiff's expert agreed with Dr. Klein that shoulder dystocia is not necessarily evidence of negligence, however, the expert opined that the manner in which defendants addressed the shoulder dystocia in this case constitutes departures from the standard of medical care that proximately caused injuries. Plaintiff's expert reasoned that excessive traction and force on a baby's head and neck that is encountering a shoulder dystocia during delivery will result in stretching and tearing the brachial plexus nerves, leaving the baby with significant neurological deficits. Plaintiff's expert opined that defendants encouraging or permitting plaintiff mother to push when faced with a shoulder dystocia was a departure from the standard of care and reasoned that all pushing must stop once the shoulder dystocia is identified. The expert further opined that plaintiff mother pushing under these circumstances further trapped the shoulder and placed excessive traction on infant plaintiff's head and neck.

Plaintiff's expert also opined that based upon plaintiff mother's deposition testimony and affidavit, fundal pressure was applied during the delivery, which is a departure from the standard of care. The expert noted that this is dangerous and should not be used under any circumstances when faced with shoulder dystocia, as it causes infant plaintiff's shoulder to become further impacted. Plaintiff's expert also opined that it was a departure to not attempt an internal rotational maneuver to effectuate delivery and reasoned that the medical records are completely devoid of any mention of Dr. Csompo or NYPQ staff utilizing this maneuver. Plaintiff's expert disagreed with Dr. Klein's opinion that there is no evidence that NYPQ departed from accepted standards of care and reasoned that NYPQ nurses negligently applied fundal pressure when faced with shoulder dystocia, which is a departure from the standard of care. Plaintiff's expert also disagreed with Dr. Klein's opinion that infant plaintiff did not develop Erb's palsy as a result of the delivery and opined that based upon the medical records, consulting pediatric neurologist Dr. Kan Li stated that infant plaintiff was assessed and diagnosed as having Erb's palsy due to a birth injury. Based upon the foregoing, plaintiff argues that defendants' motion should be denied.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence

of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolina & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

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 with the scope of employment under the doctrine of *respondeat superior*. (*See Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

Defendants Dr. Csompo and NYPQ established a prima facie entitlement to summary judgment. (*See Loaiza v. Lam*, 107 A.D.3d 951 [2d Dept. 2013].) Defendants demonstrated through their production of the documentary evidence and affirmation of Dr. Klein that they rendered care and treatment to plaintiff in accordance with good and accepted standards of care and did not proximately cause or contribute to the injuries including infant plaintiff's Erb's palsy. Defendants demonstrated through Dr. Klein's affirmation that prior to labor and delivery, there was no indication that plaintiff would have shoulder dystocia, as there were no risk factors presented. Defendants also demonstrated through Dr. Klein's affirmation that there was no lack of informed consent, as plaintiff mother did not qualify for a Cesarean section and therefore a vaginal delivery was warranted. Defendants further demonstrated through Dr. Klein's affirmation that as soon as the shoulder dystocia became apparent, Dr. Csompo properly and timely called it out, called for Team Blue, and placed plaintiff mother into the McRoberts position to apply

suprapubic pressure and safely deliver infant plaintiff without clamps or a vacuum. Defendants also demonstrated that based upon Dr. Klein's affirmation, the medical records, and deposition testimony, there is no evidence of a forceful delivery. Defendants demonstrated that Dr. Csompo followed shoulder dystocia protocol, and the occurrence of shoulder dystocia is not evidence of negligence. Defendants also demonstrated through Dr. Klein's affirmation that defendants did not proximately cause infant plaintiff's Erb's palsy, as Erb's palsy is a muscle weakness caused when a baby's neck is stretched to the side during a difficult delivery and is often associated with lateral or excessive traction, which did not occur. Defendants further demonstrated that NYPQ did not depart from accepted standards of care, as there is no indication in the record that NYPQ staff did not follow protocols or instructions established by Dr. Csompo. Defendants also demonstrated that plaintiffs' claims for negligent hiring and retention and lack of informed consent should be dismissed, as they are unsupported by the record. Based upon the foregoing, defendants established a prima facie entitlement to summary judgment.

Plaintiff failed to raise a triable issue of fact in dispute, as plaintiff's expert affirmation was conclusory and speculative, and plaintiff Nafeesh Mohamad's self-serving affidavit was insufficient to rebut defendants' prima facie case. (*See Lau v. Wan*, 93 A.D.3d 763 [2d Dept. 2012].) Plaintiff's expert affirmation was conclusory and failed to sufficiently address claims in the Bills of Particulars and Dr. Klein's findings. Plaintiff's expert's opinion that defendants departed from accepted medical practice by allowing plaintiff mother to push while faced with shoulder dystocia is conclusory and unsupported by the record. (*See Longhi*, 187 A.D.3d at 878 ["In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record"].) Based upon plaintiff Nafeesh Mohamad's deposition testimony, defendants' doctors and nurses were trying to push the baby out *without* her effort to push. Therefore, plaintiff's affidavit of merit and expert's opinion are conclusory and contradicted by the medical record and deposition testimony.

Plaintiff also failed to raise an issue with regard to the application of fundal pressure during delivery. The expert's opinion regarding fundal pressure allegedly applied during delivery is conclusory and unsupported by the record, as there is no evidence in the record to indicate that fundal pressure was applied, other than plaintiff's self-serving affidavit articulating the same. (*Haxhia v. Varanelli*, 170 A.D.3d 679, 682 [2d Dept. 2019][holding that a plaintiff's self-serving affidavit contradicting his prior deposition testimony is insufficient to defeat summary judgment].) The medical records and deposition testimony demonstrate that rather than applying fundal pressure, Dr. Csompo placed plaintiff mother in the McRoberts position and applied suprapubic pressure. Plaintiff's self-serving affidavit is insufficient to rebut defendants' prima facie case, and it is noted that plaintiff had a lengthy deposition during which she could have presented these claims regarding pressure during the delivery. (*See generally Matter of Agai v. Diontech Consulting, Inc.*, 138 A.D.3d 736 [2d Dept. 2016].) Plaintiff's expert's opinion that defendants

departed from accepted medical practice by failing to perform an internal rotating maneuver is similarly without merit, as the expert failed to articulate that it was required pursuant to the standard of care or that it would have had an effect on plaintiffs' claimed injuries.

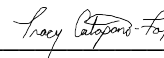
Plaintiff also failed to raise a triable issue of fact as to causation. Plaintiff's expert's opinion that infant plaintiff's Erb's palsy was caused by defendants is based upon conjecture and hearsay, as the expert relied upon records from Dr. Li with regard to infant plaintiff's Erb's palsy that were not properly admitted before the Court in opposition to the motion. (*See Wagman v. Bradshaw*, 292 A.D.2d 84, 87 [2d Dept. 2002][holding that expert opinion based on unreliable secondary evidence is nothing more than conjecture].) As plaintiff's expert's affirmation was conclusory, speculative, and unsupported by the evidence, plaintiff failed to raise a triable issue of fact in dispute. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022]; *see also Elstein v. Hammer*, 192 A.D.3d 1075 [2d Dept. 2021].)

Accordingly, defendants Michael Csompo, M.D. and New York Presbyterian Queens Hospital's motion for summary judgment and dismissal of plaintiff's Complaint is granted. It is hereby

ORDERED that plaintiff's Complaint is dismissed.

This constitutes the decision and Order of the Court.

Dated: July 19, 2024



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

