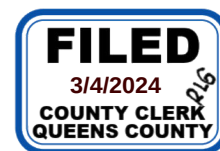


Gaskins v Robinson
2024 NY Slip Op 35303(U)
March 4, 2024
Supreme Court, Queens County
Docket Number: Index No. 700843/2021
Judge: Tracy Catapano-Fox
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
EBONY GASKINS as mother and natural guardian of
A.I., an infant, and EBONY GASKINS, Individually,

Index No. 700843/2021



Part MDP

Plaintiff,

Motion Date: February 21, 2024

-against-

Calendar No. 8

Sequence No. 3

JENELLE ROBINSON, M.D., NICOLE SWEENEY,
D.O., and NYU LANGONE HOSPITALS, and LONG
ISLAND WOMEN'S HEALTH GROUP, P.C.,

Defendants.

-----X
The following papers numbered EF-46 to EF-96 read on this motion by defendants
NICOLE SWEENEY, D.O. and NYU LANGONE HOSPITALS for summary judgment and
dismissal of plaintiff's Complaint as to defendant NYU Langone Hospitals, and this cross-motion
by attorney for plaintiffs to withdraw as counsel pursuant to CPLR §321(b)(2).

Papers

Numbered

Notice of Motion, Affirmation, Exhibits.....EF46-EF69

Notice of Cross-Motion, Affirmation.....EF95-EF96

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Defendant NYU Langone Hospitals' motion for summary judgment and dismissal of
plaintiff's Complaint pursuant to CPLR §3212 is granted, as defendant demonstrated it did not
depart from accepted standards of care or proximately cause plaintiff's injuries. (*See generally*
DiLorenzo v. Zaso, A.D.3d 1111 [2d Dept. 2017].) Plaintiff counsel's cross-motion to be relieved
as counsel pursuant to CPLR §321(b)(2) is denied. It is noted that the parties executed a stipulation
of discontinuance as to Nicole Sweeney, D.O. on November 1, 2023.

Plaintiff commenced this medical malpractice action arising out of a cheek laceration infant
plaintiff suffered during an emergency Caesarian section delivery. Plaintiff filed the Summons
and Complaint on January 13, 2021 followed by an Amended Complaint filed on January 21, 2021.

Issue was joined by defendant NYU Langone Hospitals on February 25, 2021.

Defendant NYU Langone Hospitals argue it is entitled to summary judgment and presents the pleadings, deposition testimony, medical records, an affidavit of merit from Dr. Sweeney, and the expert affirmation of Irving Zoltan, M.D. in support of its motion. Defendant argues that the evidence demonstrates it did not depart from accepted standards of care and did not proximately cause or contribute to plaintiff's injuries. Defendant argues that co-defendant Dr. Robinson was not employed by defendant NYU, but rather was a private employee of co-defendant Long Island Women's Healthcare Group. Defendant further argues that defendant NYU Langone Hospitals cannot be liable for co-defendant Dr. Robinson's actions based upon an apparent or ostensible agency theory because her services were retained independently and not through NYU Langone Hospitals. It further argues that there were no independent acts by NYU staff for which the hospital would be liable. Defendant also argues that plaintiff cannot maintain a cause of action for loss of services because there is no evidence that the plaintiff mother was receiving services from infant plaintiff.

Defendant NYU Langone Hospitals presents the affirmation of Dr. Irving Zoltan in support of its motion. Dr. Zoltan affirmed that he is a physician licensed to practice in New York and board certified in pediatrics. Dr. Zoltan also affirmed that he reviewed plaintiff's Bill of Particulars and medical records as well as the deposition testimony in rendering his opinions. Dr. Zoltan opined to a reasonable degree of medical certainty that defendant NYU Langone Hospitals acted within the standard of care and did not proximately cause or contribute to plaintiff's injuries. Dr. Zoltan further opined that infant plaintiff received excellent care at Winthrop – specifically, the laceration was promptly identified and appropriately treated right away with the application of steri-strips. Dr. Zoltan further opined that the plastic surgery department was appropriately and timely consulted, and the department administered appropriate and consistent treatment. Dr. Zoltan reasoned that infant plaintiff's medical records demonstrate that the laceration was already healing three days post-delivery. Dr. Zoltan also opined that based upon the deposition testimony, co-defendant Dr. Robinson oversaw the labor and delivery as a private physician employed by neither NYU nor Winthrop. Based upon the foregoing, Dr. Zoltan opined that defendant NYU Langone Hospitals and its staff adhered to the standard of care at all times and did not proximately cause or contribute to plaintiff's injuries.

Defendant also presents the affidavit of merit of defendant Dr. Sweeney in support of its motion. Defendant Dr. Sweeney attested that her only interaction with plaintiff was a physical examination and clinical assessment she performed of infant plaintiff on January 27, 2020 wherein she noted infant plaintiff's right cheek laceration. Dr. Sweeney further attested that she was not involved in ordering or authorizing treatment for plaintiff and merely evaluated infant plaintiff at the time of discharge. Dr. Sweeney further attested that other than the one exam, she had no role in the care and treatment rendered prior to and after the exam. Based upon the foregoing, defendant

argues that it is entitled to summary judgment and dismissal of plaintiff's Complaint.

Plaintiff did not submit opposition to defendant's motion, but rather counsel for plaintiff cross-moved to be relieved as counsel. Attorney for plaintiff argues that counsel and plaintiff have reached an impasse that would hinder further representation, and the matter should be stayed for ninety days for plaintiff to find new representation. Defendants partially oppose the motion to the extent that the matter should not be stayed for ninety days to avoid unnecessary delay.

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. Nicolía & 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*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

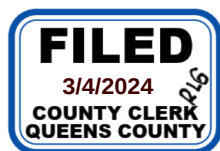
Defendant NYU Langone Hospitals established a prima facie entitlement to summary judgment through the documentary evidence presented, including the expert affirmation of Dr. Zoltan, that defendant NYU Langone Hospitals and its staff adhered to good and accepted standards of care and did not proximately cause or contribute to plaintiff's injuries. Defendant demonstrated that co-defendant Dr. Robinson treated plaintiff as a private physician that was neither employed by NYU nor Winthrop. Defendant further demonstrated that plaintiff received timely and appropriate treatment at Winthrop, as the plastic surgery department was timely consulted, the laceration was timely and appropriately treated, and the laceration was reportedly healing within three days. Dr. Sweeney also attested that she performed one examination of infant plaintiff, during which she noted and properly treated the face laceration, and was not involved in the emergency Caesarean section delivery. Based upon the documentary evidence, defendant demonstrated that there is no theory of liability for which NYU may be held liable for plaintiff's injuries. Based upon the foregoing, defendant established a prima facie entitlement to summary judgment.

Plaintiff did not present any opposition to defendant's motion and thereby failed to raise triable issues of fact. Plaintiff's cross-motion to be relieved as counsel is denied. Attorney for plaintiff failed to bring the application as an Order to Show Cause and counsel's affirmation did not reference the client in the instant action, but rather referenced non-party Tamara Moore and different factual allegations from the instant case. Based upon the foregoing, attorney for plaintiff's cross-motion is denied.

Accordingly, defendant NYU Langone Hospitals' motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted. Attorney for plaintiff's cross-motion to be relieved as counsel pursuant to CPLR §321(b)(2) is denied. Plaintiff's Complaint is dismissed as to defendant NYU Langone Hospitals.

This constitutes the decision and Order of the Court.

Dated: March 4, 2024



A handwritten signature in black ink, appearing to read "Tracy Catapano-Fox".

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