SHORT FORM ORDER

INDEX No. 09-27041
CAL. No. 11-00199MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 8-10-11
Mot. Seq. # 001 - MG; CASEDISP

LORESHA THOMAS,	:	SILBERSTEIN, AWAD & MIKLOS, P.C.
	:	Attorney for Plaintiff
Plaintiff,	:	600 Old Country Road, Suite 412
- against -	:	Garden City, New York 11530
	:	
PLANNED PARENTHOOD HUDSON PECONIC, INC.,	:	McALOON & FRIEDMAN, P.C.
	:	Attorney for Defendant
	:	123 Williams Street, 25th Floor
Defendant.	:	New York, New York 10038

Upon the following papers numbered 1 to 19 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 19 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant Planned Parenthood Hudson Peconic, Inc. for summary judgment dismissing the complaint is granted and the complaint is dismissed.

This is a medical malpractice action wherein the plaintiff, Loresha Thomas, alleges that during the performance of a second semester abortion on April 18, 2009, that the defendant, Planned Parenthood Hudson Peconic, Inc., by its staff, negligently perforated her uterus, resulting in her having to undergo an hysterectomy and suffer other permanent injury.

The defendant seeks summary judgment dismissing the complaint on the bases that it was not negligent in performing the abortion, that there was no iatrogenic perforation of the plaintiff's uterus, and that the rupture occurred spontaneously at a scar on the uterus resulting from a previous cesarean section, a known risk associated with the use of the drug Misoprostol, and a risk of which she was advised prior to the procedure.

While a motion for summary judgment is required to be made within 120 days of the filing of the note of issue, which was February 2, 2010 in the instant action, the parties have submitted a copy of a signed and "so ordered" stipulation permitting the defendant to serve the motion for summary judgment by July 8, 2011. This motion is therefore deemed timely, having been served July 1, 2011.

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 eliminate any material issues of fact

from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious,*** 221 AD2d 674, 638 NYS2d 700 2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

In support of this motion (004), defendant submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the answer, and plaintiff's verified, and amended verified, and supplemental verified bills of particulars as to defendant Planned Parenthood and Dr. Timothy Ryntz; unsigned copies of the examination before trial of Loresha Thomas dated January 11, 2010, non-party witness Sharon Martin dated February 17, 2010; copies of the signed transcripts of the examinations before trial of Timothy Ryntz, M.D., Donna Wiemann dated December 7, 2010; copies of the plaintiff's medical records; and the affirmation of Deborah Nucatoa, M.D. The unsigned copy of the deposition transcripts are not in admissible form as required by CPLR 3212 (see ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), are not accompanied by an affidavit or proof of service pursuant to CPLR 3116, and thus are not considered in this application.

Timothy Ryntz, M.D. testified that he is licensed to practice medicine in New York and Massachusetts and is board certified in obstetrics and gynecology. He first started performing abortions in 2002. He had been employed by Planned Parenthood of New York City, and coordinated education and training programs (self-study materials) for residents of family medicine programs in New York City interested in learning how to provide abortions. He started working part-time for Planned Parenthood of

Hudson Peconic in 2008. He was also employed by Columbia University and worked at Columbia Presbyterian of New York practicing obstetrics and gynecology.

Dr. Ryntz testified that on April 18, 2009, Loresha Thomas was scheduled for an abortion at Planned Parenthood. As he was performing the procedure, he thought a perforation of the uterus may have occurred. He performed an ultrasound to determine the location of the instruments in the uterine cavity because he received no fetal parts back when he suctioned inside the uterus. Because he viewed the instrument below the fetus on the ultrasound, he believed there may have been a posterior perforation of the uterus. He therefore had Ms. Thomas transferred to Stony Brook University Hospital. He called Stony Brook several times over the following days to follow up on her condition, but did not know the names of the physicians he spoke with. He stated he was advised by the physician who performed the hysterectomy at Stony Brook that the cesarean section scar ruptured at the lower anterior portion of the uterus. He was further advised that the vertex of the fetus was virtually in the perforation at the lower uterine segment, anteriorly.

When asked if he had an opinion within a reasonable degree of medical certainty how the perforation could have occurred, he stated that his suspicion was that since the perforation appeared to have occurred through the old uterine cesarean section scar, that it was associated with the use of Misoprostol which Ms. Thomas received preoperatively. He continued that the contractions caused by the Misoprostol caused dehiscence (separation) and opening of a section of the scar. He continued that Misoprostol is used to soften the cervix and is the standard of care at Planned Parenthood for the opening of the cervix between twelve to fourteen weeks of gestational age, even with a patient who has had a prior cesarean section. He further stated that the pathology report indicated that there was a separation of the myometrium in the location of the prior cesarean section scar, and that there were two openings that connect with the flap of the loose myometrial tissue originating from the anterior inferior margin. He stated that the placenta was probably located anteriorly and that is why the placental tissue protruded through the more central opening. He continued that it appeared that the placenta separated from the lower portion of the uterus and involved the inferior region where the separation of the uterine incision occurred. He opined that the fetal vertex passed through the opening between the uterine cavity and the abdominal cavity made by the separation as the uterus contracted, expelling the fetus.

Dr. Ryntz continued that perforation can occur with any instrument during an abortion, but in this case, the perforation occurred as a consequence of the Misoprostol as the perforation occurred at the location of myometrial scar from the prior cesarean section located in the lower uterine segment anteriorly. Dr. Ryntz testified that when he passed instruments into the uterus, they were passed beneath the fetus and remained posteriorly, while the fetus remained anteriorly, which is why he suspected a posterior perforation. Dr. Ryntz also testified about the risks of the procedure and medication used. The risks included excessive bleeding requiring surgery, allergic reaction, and uterine rupture or tear in the uterus requiring surgery. When he suspected perforation posteriorly, he ordered the administration of Methergine to help stop any bleeding.

Donna Wiemann testified that she was a high school graduate and a medical assistant, certified in New York State. She was employed by the defendant Planned Parenthood office, and was working on April 18, 2009. She stated her training program was for assistanting for things such as phlebotomy and

EKG, but not particularly for abortions. She interned for 80 hours at an ob/gyn office in Smithtown after completion of the program. She assisted Dr. Ryntz, handing him what he needed. She did not observe any bleeding. She continued that the plaintiff was lying there while the doctor was performing the procedure. She testified that the plaintiff did not speak at all during the procedure. While she was in the room, she did not hear the plaintiff ask to have the procedure stopped. She remembered Dr. Ryntz abruptly stopping the procedure, pushing his chair away and telling her he needed assistance. She went out to get assistance but did not thereafter return to the plaintiff's room. She learned afterwards that the plaintiff had to be transferred to a hospital. Ms. Wiemann continued that the person going over the paperwork sits down and goes over the consents with the patient, asking if they have read it and if they fully understand the risks involved, and advising that there is only IV sedation. Thereafter, the patient's signature would be witnessed. She did not assist with the ultrasound as that is done by the ultrasound technician.

Deborah Nucatola, M.D. affirms that she is licensed to practice medicine in New York and California and has further set forth her educational background and experience practicing in the area of obstetrics and gynecology and family planning. She set forth the materials and records reviewed and further set forth her opinions based upon a reasonable degree of medical certainty. It is Dr. Nucatola's opinion that the defendant, Planned Parenthood Hudson Peconic, Inc. (Planned Parenthood) did not depart from accepted standards of practice in the care and treatment of Loresha Thomas when she presented for her elective second trimester termination of pregnancy on April 18, 2009.

Dr. Nucatola continued that Ms. Thomas was a 22 year old female who presented with her third pregnancy. She had one prior cesarean delivery and one prior termination of pregnancy by abortion. Her last menstrual period was January 17, 2009, making her 13 weeks pregnant by date, and fourteen weeks by sonogram. Upon presenting to the facility, Ms. Thomas met with various members of the medical staff. A medical history was obtained and she was counseled on the risks, benefits, and alternatives of abortion. She watched a videotape which described the abortion procedure, and also gave the risks, benefits and alternatives to abortion. She stated that Ms. Thomas read the consent forms which specifically stated the risks of undergoing an elective second trimester surgical abortion, and that she signed the form which specifically includes the risks of uterine rupture, which can result in a hysterectomy.

Dr. Nucatola described the abortion procedure, and discussed the administration of Misoprostol, a synthetic prostaglandin drug which is used to induce labor or dilate the cervix in preparation of surgical abortion, especially in the second trimester. Ms. Thomas was explained the rare but commonly accepted risk of uterine rupture, when the uterus opens via tearing of the uterine wall, associated with the use of Misoprostol. After the administration of Misoprostol, and after a two hour waiting period to allow the cervix, or lower portion of the uterus, to soften and dilate, Ms. Thomas was brought to the procedure room, was sedated by a certified registered nurse anesthetist, and Dr. Timothy Ryntz examined Ms. Thomas and determined that the cervical dilation was adequate to safely perform the abortion. Dr. Ryntz introduced a suction catheter through the vagina, through the cervix and into the uterus. When Dr. Ryntz turned on the suction machine, he observed that there were no products of conception being removed. With the assistance of staff at Planned Parenthood, Dr. Ryntz utilized a

sonogram to visualize the uterine cavity and observed that the tip of the catheter was posterior to the products of conception, and that the products of conception were above the catheter tip.

Dr. Nucatola continued that, generally, if the sonogram image reveals that the tip of the catheter is posterior to the fetus and placenta, and the products of conception are in the uterine cavity, an operating physician can reasonably believe that the posterior (rear) uterine wall has been perforated. Following emergency protocol, Dr. Ryntz had Ms. Thomas transferred to Stony Brook University Hospital emergency room where she was diagnosed with a possible uterine perforation. She was taken to the operating room and underwent a diagnostic laparoscopy, exploratory laparotomy, cervical dilation and curettage, supracervical hysterectomy and lysis of adhesions. Dr. Nucatola states that the surgeon, Dr. Daniel Kiefer, wrote in his operative report, that the uterine perforation was through the site of the previous cesarean scar encompassing the right aspect of the uterine incision. The perforation extended into the broad ligament with perforation of the anterior broad ligament by the fetal vertex, revealing that the fetus migrated through the now open cesarean section scar and damaged the blood vessels of the broad ligament, specifically, the uterine artery. Therefore, a decision was made to remove Ms. Thomas' uterus, which was an appropriate treatment for this complication.

Dr. Nucatola continues that the pathologist noted that there was no clear tract or perforation through the uterine wall and that the defect in the uterus occurred at the location of the scar from the previous cesarean section. Placental tissue was also noted to protrude through the opening in the uterus at the rupture site of the open cesarean section scar. Dr. Nucatola adds, that in reviewing the operative report and the pathology report, it is noted that no posterior perforation was found as there was no perforation through the posterior wall of the uterus as Dr. Ryntz had thought occurred. She continued that the only opening in the uterus was at the sight of the previous cesarean section scar at the anterior of the uterus. Dr. Nucatola states that no actual perforation through and through was found that was caused by an instrument being placed in the uterus at Planned Parenthood. She added that the suction catheter was located posterior to the fetus and not in the anterior portion of the uterus where the cesarean section scar was located.

Dr. Nucatola continued that there was no mechanical perforation of the uterus and that Ms. Thomas actually suffered a uterine rupture at the previous cesarean section scar secondary to the administration of Misoprostol. When this occurred, the fetus exited the uterus and penetrated the broad ligament. During the surgery at Stony Brook, when the fetal parts were removed from the uterine artery section of the broad ligament, Ms. Thomas started bleeding, resulting in the need for an hysterectomy. Dr. Nucatola stated that had there been a mechanical perforation of the uterus at Planned Parenthood, there would have been a posterior perforation through and through, and that was not present. Dr. Nucatola added that Misoprostol causes the uterus to contract, an intended purpose of the medication, and during the contraction, she believes, the uterine scar from the previous cesarean section dehisced, resulting in the uterine rupture. Dr. Nucatola stated that it is unfortunate that Ms. Thomas suffered this known and accepted, but rare, complication. She added that studies show that the expulsion of the fetus into the broad ligament is a complication that can occur in a second trimester termination of pregnancy, and often happens secondary to uterine rupture. Dr. Nucatola concluded that employees of Planned Parenthood, and Dr. Ryntz, acted in accordance with the proper standard of practice, that the abortion procedure was properly performed, and that Ms. Thomas received adequate informed consent.

Based upon the foregoing, the defendant has demonstrated prima facie entitlement to summary judgment dismissing the complaint. The evidentiary submissions establish that the plaintiff's uterus ruptured, or dehisced and tore, at the site of the scar from the incision made into the anterior uterus during a previous cesarean section. The dehiscence and opening of the scar was a result of the administration of Misoprostol which causes uterine contractions. The Misoprostol was appropriately used to soften and dilate the cervix of the uterus to facilitate the entry of the instruments necessary to perform the abortion. The evidentiary submissions also establish that there was no posterior rupture of the uterus caused by Dr. Ryntz during the procedure. It has been further established that the defendant did not depart from good and accepted standards of care during the performance of the abortion, that there was nothing that it did or did not do that proximately caused the injuries alleged by the plaintiff, and that the plaintiff was given proper informed consent.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (see ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.***, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (***Bengston v Wang,*** 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]). Here, the plaintiff has not opposed the defendant's motion and has not raised a factual issue to preclude summary judgment from being granted to the defendant.

Accordingly, defendant Planned Parenthood's motion (001) is granted and the complaint is dismissed.

Dated: SEP 16 2011

J.S.C.
HON. JEFFREY ARLEN SPINNER

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION