

Johnson v Staten Is. Med. Group

2009 NY Slip Op 33290(U)

July 24, 2009

Supreme Court, Richmond County

Docket Number: 103695/07

Judge: Judith N. McMahon

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X
YAMDA JOHNSON

Plaintiff(s),

- against-

**STATEN ISLAND MEDICAL GROUP, LANCE
JUNG, MD, NICOLE BORGER, MD and ST
VINCENTS HOSPITAL**

Defendant(s).
-----X

DCM PART 5

Present:

HON. JUDITH N. McMAHON

DECISION AND ORDER

Index No. 103695/07

Motion Nos. 001

The following papers numbered 1 through 3 were used on this motion this 14th day of July, 2009:

Notice of Motion (Defendants)(Affirmation in Support)-----	1
Affirmation in Opposition (Plaintiffs) -----	2
Reply Affirmation (Defendants)-----	3

Plaintiff commenced this medical malpractice action on or about September 25, 2007, alleging, *inter alia*, that defendants failed to perform proper testing and examinations and failed to obtain informed consent for removal of the plaintiff's gallbladder. Issue has been joined and discovery is now complete. Presently, defendants Staten Island Medical Group and Drs. Lance Jung and Nicole Borger are moving for summary judgment seeking to dismiss the complaint in its entirety.

Initially, the Court notes that the plaintiff has failed to oppose the motion with respect to the first cause of action and as such, summary judgment is appropriate in favor of defendants Staten Island Medical Group and Drs. Jung and Borger on the first cause of action. Further, the plaintiff failed to oppose the motion with respect to the second cause of action as against Dr. Borger and Staten Island Medical Group. As such, summary judgment is granted on the second cause of action with respect to Dr. Nicole Borger and Staten Island Medical Group.

With respect to the second cause of action, namely, informed consent, as against Dr. Lance Jung, it is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]), and in this regard “the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference” (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). Nevertheless, upon a prima facie showing by the moving party, it is incumbent upon the party opposing the motion to produce “evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Public Health Law § 2805-d (1) defines lack of informed consent as ‘the failure of the person providing the professional treatment . . . to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation’. (Manning v. Brookhaven Memorial Hosp. Med. Ctr., 11 AD3d 518, 520 [2d Dept., 2004]).

To recover for a lack of informed consent cause of action the plaintiff “must allege that the wrong complained of arose out of some affirmative violation of plaintiff’s physical integrity” and further that “a reasonably prudent person in the plaintiff’s position would

not have undergone the treatment if he or she had been fully informed and that the lack of consent is a proximate cause of the injury or condition for which recovery is sought (Smith v. Fields, 268 AD2d 579, 580 [2d Dept., 2000]; Iazzetta v. Vicenzi, 200 AD2d 209, 213-214 [3d Dept., 1994]).

Here, the defendant Dr. Lance Jung has presented evidence sufficient to warrant granting summary judgment (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Smith v. Fields, 268 AD2d 579, 580 [2d Dept., 2000]; Iazzetta v. Vicenzi, 200 AD2d 209, 213-214 [3d Dept., 1994]). Namely, defendant Jung's expert Dr. William Miller, opined that the plaintiff was "fully apprised that the subject surgery would involve the removal of the gallbladder as well as the risks associated with that surgery such as bleeding, infection and that all of her questions were answered".

In opposition, the plaintiff has successfully raised triable issues of fact regarding whether Dr. Jung provided the plaintiff with all the risks of the procedure sufficient for the plaintiff to make a knowledgeable evaluation (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). Specifically, the plaintiff provided evidence that raised questions as to whether the defendant Dr. Lance Lung fully apprised the plaintiff that surgery would involve removing her gallbladder and/or all the risks associated with said surgery. As such, summary judgment is inappropriate on the alleged lack of informed consent cause of action as against Dr. Jung.

Accordingly, it is

ORDERED that the defendant Dr. Lance Jung's motion for summary judgment on the first cause of action is hereby granted, and it is further

ORDERED that plaintiff's first cause of action as against Dr. Lance Jung is hereby dismissed, and it is further

ORDERED that the defendant Dr. Lance Jung's motion for summary judgment on the second cause of action is hereby denied, and it is further

ORDERED that the defendant Dr. Nicole Borger's motion for summary judgment is granted, in its entirety, and it is further

ORDERED that the complaint is hereby dismissed entirely as against Dr. Nicole Borger, and it is further

ORDERED that the defendant Staten Island Medical Group's motion for summary judgment is granted, and it is further

ORDERED that the complaint is dismissed as against the individual causes of action against Staten Island Medical Group, however, to the extent they may be held vicariously liable for their employee, defendant Dr. Lance Jung, they remain in the case, and it is further,

ORDERED that any and all remaining requests for relief are found to be completely without merit, and it is further

ORDERED that the Clerk enter judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: July 24, 2009

E N T E R

Hon. Judith N. McMahon
Justice of the Supreme Court