Aquilino v Gerling
2020 NY Slip Op 32453(U)
July 21, 2020
Supreme Court, New York County
Docket Number: 805331/2017
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER **PART 6**
Justice

YOLANDA AQUILINO,

Plaintiff,

- against -

MICHAEL CHRISTOPHER GERLING, M.D., individually and d/b/a SPINECARE NYC ORTHOPEDIC and SPINECARE NYC ORTHOPEDIC, PC, and NY ORTHOPEDICS, P.C.,

Defendants.

INDEX NO. 805331/2017

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes X No

Defendants Michael Christopher Gerling, M.D. ("Dr. Gerling") and NY Orthopedics, P.C., and NY Orthopedics, P.C., s/h/a Spinecare NYC Orthopedic, P.C. (collectively, "Defendants") move pursuant to CPLR § 3212 for an Order granting summary judgment dismissing Plaintiff Yolanda Aquilino's ("Plaintiff") Summons and Verified Complaint.

Background

This action, sounding in negligence and medical malpractice, arises out of Dr. Gerling's alleged malpractice on November 16, 2015 during the L3-L4, L4-L5 Extreme Lateral Interbody Fusion Surgery ("XLIF") which was performed at NYU Hospital for Joint Diseases. Plaintiff alleges that Dr. Gerling "improperly performed this spinal surgery by negligently and improperly misplacing a screw at L5, missing the pedicle (bone) completely and entering the neural canal, thereby impinging on the LS nerve root and causing nerve damage." Plaintiff alleges that Dr. Gerling committed malpractice in the performance of the surgery and post-operative care rendered to Plaintiff.

Plaintiff first presented to Dr. Gerling on April 3, 2015, with complaints of "low[er] back pain radiating into the buttocks and down the legs primarily [the] lateral thigh." Dr. Gerling noted that Plaintiff's pain:

> worsened recently after a slip and fall on the job 10/01/2010 (sic.). She denies prior history and since then has had difficulty with activities of daily living, including chores, cooking and grocery shopping. She has not been able to return to work as she has retired and requires a cane. She has difficulty walking for 15 minutes at a time. There is weakness in the arms, balance problems occasionally. Bag and leg symptoms are worsened standing and walking. Back pain is exacerbated sitting as well.

Dr. Gerling further noted that Plaintiff received conservative management following her fall including two years of physical therapy chiropractic care, and a home exercise program. In addition, she had undergone four lumbar injections that provided only short-term relief. Following an exam, Dr. Gerling noted that "[t]here is marked restriction of motion with tenderness and spasm" of the thoracolumbar spine and the "[c]ervical has restricted range of motion without deformity." Dr. Gerling assessed Plaintiff with "L4-L5 and L5-S1 disc herniations with spondylolisthesis, and foraminal stenosis status post on the job injury." Dr. Gerling further noted that the MRI of Plaintiff's lumbar spine from October 18, 2010, "shows disc herniations with L5-S1 grade 1 spondylolisthesis." Dr. Gerling recommended "L5-S1 TLIF [Transforaminal Lumbar Interbody Fusion surgery]." Plaintiff scheduled a follow-up appointment in two months with Dr. Gerling.

Plaintiff returned to Dr. Gerling on June 15, 2015. Dr. Gerling noted that Plaintiff had "[n]o significant changes other than worsening Low (sic.) back and bilateral LE [leg] pain." Dr. Gerling further noted that Plaintiff's "symptoms are worsened standing and walking" and Plaintiff's "[b]ack pain is exacerbated sitting as well." Dr. Gerling reported additional diagnostic imaging, including an MRI of the lumbar spine dated February 6, 2013, which showed a "L4-L5 posterior disc herniation with bilateral foraminal stenosis" and "L5-SI grade 1 anterolisthesis with disc herniation, L5 spondylolysis and bilateral foraminal stenosis with L5 nerve root impingement." Dr. Gerling recommended "L5-S1 TLIF [Transforaminal Lumbar Interbody Fusion surgery]." Plaintiff scheduled a follow-up appointment in two months with Dr. Gerling.

Plaintiff returned to Dr. Gerling on September 4, 2015 for follow-up care. On November 5, 2016, Plaintiff saw Dr. Gerling to further discuss her surgery. Dr. Gerling testified that he discussed the risks and benefits of surgery with Plaintiff.

On November 16, 2015, "Plaintiff presented to NYU Hospital for the following procedures: (1) L3-L4, L4-L5 XLIF using nuvasive peek case (1 per level); (2) posterior spinal fusion with segmental instrumentations at the L3-L4, L4-L5, and L5-S1 spinal segments; (3) a left sided extraforaminal approach with foraminal decompression at the L5-S1 segments with discectomy and decompression." Dr. Gerling's operative report note that:

> Risks and benefits of surgery were discussed at length. She understands that she is likely to have ongoing back pain and is likely to require further surgical interventions in the future. She understands that she may have hardware failure, nonunion, or adjacent segment disease. I explained that I would be using a minimally-invasive technique and at sometime, additional adjustments or decompression is required. Adjacent segment disease and adjacent level fractures can occur on occasion requiring further surgery and causing new pain. She may have new pain or neurologic symptoms regardless. She understands the concept the wound complications and medical complications intrinsic to surgery. Abdominal complications associated with the XLIF procedure were discussed.

Plaintiff signed an informed consent form. Dr. Gerling's operative note detailed the procedure:

> a left-sided extra-cavitary approach was used. Exhibit I, p. 000062-65; Exhibit J, p. 0000129-132. He was able to palpate the disks at L3-L4 and L4-L5 and obtained excellent visualization of the disk spaces. The disk herniations were noted and removed. Two PEEK spacer cages were then filled with bone grafting material and the cages placed into the aforementioned disk spaces. Dr. Gerling confirmed stable placement of the cages. The patient was then flipped to the prone position for the placement of titanium rods on the left and right sides from L3 to S1. With respect to the placement of this hardware,

> he documented that the titanium rod was placed from L3 to S1 on the right side with distraction initially placed at L5 – S1 in order to assist in the decompression of the foramen. After completion of the of the foraminotomy, he compressed the pedicle screws on the right side and final tightened in extension. On the left side, decompression with extraforaminal approach at L5 – S1 was required due to significant foraminal stenosis. The L5 – S1 disk was visualized and directly excised. He was then able to "palpate as deep as the lateral recess after complete decompression". The left-sided rod was then placed under compression with "excellent stability". *Id.*

(Defendants' Affirmation in Support at 6).

Dr. Gerling's operative note further stated that complications were "NONE."

Plaintiff presented at NYU on November 21, 2015, for an x-ray of her lumbar spine which revealed "[i]nterval posterior decompression/spinal fusion spanning L3-S1 spinal segment without evidence of hardware complication."

Plaintiff returned to Dr. Gerling on December 11, 2015, for her first post-operative follow-up appointment. Dr. Gerling noted that Plaintiff "is having back pain and difficulty sitting, standing and laying. Numbness in the left leg. Using wheelchair and walker." Dr. Gerling's plan was continued conservative management including physical therapy, home exercise, analgesic medications, and further diagnostic testing. Plaintiff was also fitted for a brace. Plaintiff scheduled a follow-up appointment in six weeks with Dr. Gerling.

Plaintiff returned to Dr. Gerling for her final office visit on February 5, 2016. Plaintiff was noted to have continued back pain and numbness in the left leg and was utilizing a walker. Dr. Gerling again recommended conservative management but also discussed an exploratory procedure of the lumbar fusion. Plaintiff did not follow-up with Dr. Gerling and she had no further appointments.

On May 2, 2016, Plaintiff presented to Paul M. Brisson, M.D. ("Dr. Brisson") for a consultation. Dr. Brisson noted:

> [Plaintiff] is here today for an initial consultation. She is a 69-year-old female, who injured her lumbar spine in a work-related accident on October 1, 2010. She was a

> medical records clerk when she injured her spine pulling out records from a very tight compact area. She ended up falling and hitting a metal cabinet behind her. She received chiropractic care, pain management and physical therapy and eventually underwent surgery in November 2015. She denies any previous injuries to her spine. Today, her son drove her to the office because she can hardly walk. She uses a cane to ambulate. She underwent surgery with an outside surgeon. Before surgery, she had pain in her lumbar spine that radiated to both of her buttocks and posterior thighs. Following surgery, she has pain and numbness in the entire left leg down to her foot. She has had two months of physical therapy postoperatively, but nothing is changing. She has pain numbness, tingling and weakness in the leg. She is so weak that she cannot go up or down the stairs. She rates the pain as 8/10 and describes it as sharp, shooting, stabbing and constant. Standing, sitting, walking lifting, squatting, kneeling, bending, lying, twisting and exercising provoke pain.

Dr. Brisson further noted:

> I reviewed the x-rays taken today at the lumbar spine including AP, lateral, flexion, extension and Ferguson views indicating that she has a graft bone implanted at L3-L4 and L4-L5. She has hardware at L3-S1. At the left L5, there is a screw that is completely out of a pedicle. It is posterior to the pedicle, most likely irritating and compressing the existing left L4 nerve root. There is a persistent spondylolisthesis of L5 over S1. There is most likely pseudoarthrosis of L5- S1 with lucency around the L5 and S1 screws bilaterally.

Dr. Brisson stated that Plaintiff "is suffering from a direct consequence of the surgery, including radiculopathy due to a misplaced screw left L5. She has pseudoarthrosis, L5-S1." Dr. Brisson recommended that Plaintiff undergo a revision surgery. Plaintiff returned to Dr. Brisson on June 8, 2016 and August 29, 2016, for follow-up visits.

On October 18, 2016, Dr. Brisson performed the revision surgery on Plaintiff. Dr. Brisson noted in the operative report that:

> intraoperative findings consistent with pseudoarthrosis of L5-S1 and active radiculopathy. I noted intraoperatively during the anterior approach. A considerable portion of the anterior surgery was spent to regain and correct alignment issues of L5-S1 levels. The dorsal surgery demonstrated in vivo the expected hardware failure of the left of L5 screw penetrating the neural canal inferior to the pedicle. The L5-S1 had motion consistent with a failed L5-S1 fusion.

Plaintiff returned to Dr. Brisson on November 9, 2016 for a post-operative follow-up appointment. Dr. Brisson noted that Plaintiff:

> no longer complains of left sided lower extremity pain. What she is suffering from is low back incisional pain and pain in the right leg below her knee. She is using a walker to ambulate for stability. She has been taking Oxycodone for pain because she cannot tolerate the medication with the added Tylenol. In general, she has been walking better. Her experience following her revision surgery was better than her experienced after her first surgery when she needed to spend many weeks in a rehabilitation center. She rates the pain as 5-6/10. She lives alone and it is hard for her to perform activities of daily living. She is fearful she will trip and fall since her gait is still unsteady.

Dr. Brisson recommended physical therapy for Plaintiff.

Summary Judgment Standard

CPLR § 3212 provides in relevant part, that a motion for summary judgment,

> "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion 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… [t]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

A defendant moving for summary judgment in a medical malpractice case has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law by showing that "there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged" by introducing expert testimony that is supported by the facts in the record. *Rogues v. Nobel*, 73 A.D.3d 204, 206 [1st Dept. 2010]. Once the defendant has made this showing, the burden shifts to 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 Hospital,* 68 N.Y.2d 320, 324 [1986]. Specifically, a plaintiff "must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." *Rogues*, 73 A.D.3d at 207.

"To succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment." *Orphan v Pilnik*, 15 NY3d 907, 908 [2010] (*see* Public Health Law § 2805–d).

<u>Parties' Experts</u>

In support of Defendants' motion for summary judgment, Defendants submit the Affirmation of Franco P. Cerabona, M.D., ("Dr. Cerabona"), a physician, Board Certified by the American Board of Orthopedic Surgery and the American Board of Spinal Surgery. According to Dr. Cerabona's Affirmation, he reviewed the pleadings, including the Verified Bill of Particulars, medical records and deposition transcripts. Dr. Cerabona opines with a reasonable degree of medical certainty that "the care and treatment rendered to [Plaintiff] by Dr. Gerling was appropriate at all times, did not deviate or depart from the standard of care in any respect, and was not a proximate cause of any of the injuries alleged by plaintiff in this lawsuit." Dr. Cerabona opines that based on Plaintiff's "history of debilitating back pain with the failure of conservative treatment to alleviate the symptoms" and Plaintiff's "symptoms in conjunction with the objective imaging studies" the XLIF surgery was appropriate "as it allowed for both the removal of the herniated discs and for stabilization of the spine with hardware." Dr. Cerabona that "[t]he XLIF procedure

is one of a number of commonly used minimally invasive surgical techniques used for decompression and spinal fusion."

Dr. Cerabona opines that informed consent was obtained orally and by written documentation prior to Plaintiff's surgery. Dr. Cerabona opines that "Dr. Gerling testified to the risks and benefits he discussed with [Plaintiff] in the office, and his operative report and consent form in the NYU chart signed by plaintiff, further corroborate the fact that appropriate informed consent was obtained." Dr. Cerabona opines that Dr. Gerling properly advised Plaintiff "that there were no guarantees that she was going to have improvement of her back or leg symptoms, that the neurological symptoms could worsen after surgery, that there was a risk of hardware failure and that a revision surgery might in some cases be necessary." Dr. Cerabona opines that "Dr. Gerling's surgical technique here was consistent and in keeping with accepted medical practice and was not a deviation from the standard of care" because Dr. Gerling:

> correctly identified the anatomy and placed the screw into the pedicle bone on the left side at L-5. He directly confirmed during the surgery that the screw was in the bone and not encroaching into the foramen space (the canal that the nerve root travels through). While the screw may not have been ideally placed, as he recognized on the post-op x-ray, he was confident that based on his inspection during surgery that the screw was not impinging on any nerve root. Importantly, the post-op x-ray was interpreted by a radiologist at NYU and this specialist found no evidence of "hardware complication."

Dr. Cerabona opines that it is appropriate to leave the screw in place if it is stable in the pedicle and not blocking the canal where never roots pass or is not impinging on the nerves.

Moreover, Dr. Cerabona opines that "Plaintiff's contention that Dr. Gerling was negligent in failing to put in an anterior lumbar cage at level L5-SI is entirely meritless." Dr. Cerabona opines that Dr. Gerling made an appropriate assessment before and during the surgery. Dr. Cerabona opines that the post-operative care rendered by Dr. Gerling was appropriate by appreciating "[Plaintiff's] complaints of pain and numbness and recognized that an exploratory surgery may be warranted." Additionally, Dr. Cerabona opines that "[i]t is unclear whether the left L-5 pedicle screw was in fact the cause of plaintiff's complaints related to pain and numbness in her left leg" during Plaintiff's visit to Dr. Brisson six months after Dr. Gerling's

surgery. Dr. Cerabona opines that "[d]espite Dr. Brisson's assertion that during his surgery he resolved any impingement on the nerve root, plaintiff continued to have the same symptoms after his surgery" and after the procedure performed by Dr. Brisson, Plaintiff "developed a new symptom of right-sided leg and foot numbness."

In opposition, Plaintiff submits a redacted Affidavit of Merit of a physician ("Plaintiff's Expert"), board certified in Orthopedic Surgery and Spine Surgery. The Affidavit states that Plaintiff's Expert has reviewed the hospital records, including the operative reports of Dr. Gerling and Dr. Brisson, pertinent CT scans, MRIs and x-rays, both pre and post-operative to Dr. Gerling's November 16, 2015 surgery, and Dr. Gerling's deposition transcript. Plaintiff's Expert opines that within a reasonable degree of medical certainty that Dr. Gerling's improper placement of the L5 screw "which penetrated the neural canal inferior to the pedicle" during the November 16, 2015 surgery "was the direct and proximate cause of the failure of the fusion surgery and the L5 nerve root injury." Plaintiff's Expert opines that the post op CT scan take on May 5, 2016 of the Lumbar spine (attached as Exhibit C to Plaintiff's Opposition) shows that Dr. Gerling incorrectly placed the L5 screw on November 16, 2015. Plaintiff's Expert opines that:

> The CT scan clearly shows that the screw is completely out of the pedicle and traverses the upper half of the neural foramen. There is no haloing of the bone which proves the screw had never originally been placed in the pedicle, and possibly migrated out after the surgery. This study also confirms that the screw was never placed in the pedicle and was originally totally misplaced.

Plaintiff's Expert opines that Dr. Gerling departed from accepted standards of orthopedic surgical care and treatment by negligently inserting the L5 screw "into the neural foramen, and then fail[ing] to diagnose and correct this negligent instrumentation."

Plaintiff's Expert opines that Plaintiff's complaints of numbness down her left leg to her foot was a new complaint that developed after Dr. Gerling's surgery and was documented Dr. Brisson's medical records. Plaintiff's Expert opines that "Dr. Brisson's consultation included a review of an MRI of the lumbar spine dated April 12, 2016 which showed a left screw at L5 completely out of the pedicle and impinging on the left L5 nerve root." Plaintiff's Expert further opines that Dr. Brisson noted in the medical records that Plaintiff's complaints of numbness were due to the misplaced instrumentation and Dr. Brisson recommended surgical revision. Plaintiff's Expert opines that:

> the surgery performed by Dr. Brisson at NY Presbyterian Hospital on October 18, 2016 (as outlined in his operative report annexed hereto as part of Exhibit A) confirmed that the L5 screw was misplaced and confirmed it to be in the spinal canal, impinging on the nerve root. The surgery demonstrated hardware failure of the Left L5 screw penetrating the neural canal inferior to the pedicle. The L5-S1 had motion consistent with a failed L5-S1 fusion.

Plaintiff's Expert opines that after Dr. Brisson's surgery "plaintiff had resolution of some of her post-operative pain, but she remains with residual lower extremity radiculopathy and pain due to injury to the L5 nerve which was caused by the misplaced screw (see Exhibit A-Dr. Brisson's office records office visit of September 20, 2017.)"

In reply, Defendants assert that Plaintiff fails to raise a triable issue of fact and their motion for summary judgment should be granted. Defendants argue that Plaintiff's Expert rests on "conclusory and speculative statements" that are not supported by admissible evidence. Defendants assert that Plaintiff's Expert relies on a specific radiology study, however Plaintiff fails to attach it as an exhibit to her papers. Defendants argue "that the failure to include, in admissible form, the actual record relied on renders the expert's opinion invalid and meritless." Additionally, Defendants argue that "by not specifically identifying and attaching the actual images relied on from a certain CT scan, plaintiff has prevented defendants from having an opportunity to assess the basis for the expert's opinion and respond accordingly." Defendants assert that Plaintiff's Expert does not address Dr. Cerabona's opinions in his Affidavit and fails to oppose Defendants assertion that there is no claim for lacked of informed consent. Defendants contend that Plaintiff's Expert has failed to provide a proper foundation for his opinion because "Plaintiff's expert argues that based on his review of the images from a CT scan which was taken 6 months after the surgery performed by Dr. Gerling, he can discern and opine within a reasonable degree of medical certainty that Dr. Gerling must have committed malpractice 6 months earlier."

Discussion

Defendants make a *prima facie* showing of entitlement to summary judgment. *Alvarez,* 68 N.Y.2d at 324. Defendants, through Dr. Cerabona's Affirmation, demonstrate that "the care and treatment rendered to [Plaintiff] by Dr. Gerling was

appropriate at all times, did not deviate or depart from the standard of care in any respect, and was not a proximate cause of any of the injuries alleged by plaintiff in this lawsuit." Dr. Cerabona opines that the surgery performed by Dr. Gerling was appropriate based on Plaintiff's history and "the failure of conservative treatment to alleviate the symptoms." Dr. Cerabona further opines that "Dr. Gerling's surgical technique here was consistent and in keeping with accepted medical practice and was not a deviation from the standard of care" and there was "no evidence of hardware complications." Dr. Cerabona opines that it is appropriate to leave the screw in place if it is stable in the pedicle and not blocking the canal where never roots pass or is not impinging on the nerves. Additionally, Dr. Cerabona opines that "[i]t is unclear whether the left L-5 pedicle screw was in fact the cause of plaintiff's complaints related to pain and numbness in her left leg" during Plaintiff's visit to Dr. Brisson six months after Dr. Gerling's surgery. Dr. Cerabona opines that "[d]espite Dr. Brisson's assertion that during his surgery he resolved any impingement on the nerve root, plaintiff continued to have the same symptoms after his surgery" and after the procedure performed by Dr. Brisson, Plaintiff "developed a new symptom of right-sided leg and foot numbness."

Since Defendants have made a *prima facie* showing of entitlement to summary judgment, the burden now shifts to Plaintiff to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Lindsay-Thompson*, 147 A.D.3d at 639. Plaintiff submits the redacted Affidavit of Plaintiff's Expert which show "material issues of fact which require a trial of the action." *Alvarez,* 68 N.Y.2d at 324. Plaintiff's Expert opines that Dr. Gerling departed from accepted standards of orthopedic surgical care and treatment by negligently inserting the L5 screw "into the neural foramen, and then fail[ing] to diagnose and correct this negligent instrumentation." Plaintiff's Expert opines that within a reasonable degree of medical certainty that Dr. Gerling's improper placement of the L5 screw "which penetrated the neural canal inferior to the pedicle" during the November 16, 2015 surgery "was the direct and proximate cause of the failure of the fusion surgery and the L5 nerve root injury." Plaintiff's Expert opines that Plaintiff's complaints of numbness down her left leg to her foot was a new complaint that developed after Dr. Gerling's surgery and was documented in Dr. Brisson's medical records, which included a review of an MRI of the lumbar spine dated April 12, 2016 which showed a left screw at L5 completely out of the pedicle and impinging on the left L5 nerve root. Plaintiff's Expert opines that Dr. Brisson's surgery on October 18, 2016, "confirmed that the L5 screw was misplaced and confirmed it to be in the spinal canal, impinging on the nerve root… [and] demonstrated hardware failure of the Left L5 screw penetrating the neural canal inferior to the pedicle."

Plaintiff's Expert explains that he viewed the films of the CT scan and opines that the:

> CT scan clearly shows that the screw is completely out of the pedicle and traverses the upper half of the neural foramen. There is no haloing of the bone which proves the screw had never originally been placed in the pedicle, and possibly migrated out after the surgery. This study also confirms that the screw was never placed in the pedicle and was originally totally misplaced.

The fact in dispute is whether the screw was stable and placed in the pedicle at the time of Dr. Gerling's surgery, as Defendants' Expert, Dr. Cerabona, claims, or the screw was never placed in the pedicle and should not have been allowed to remain in place. Therefore, Plaintiff has satisfied her burden and Defendants' motion for summary judgment on the medical malpractice cause of action is denied[1].

Turning to informed consent, Defendants argue that Dr. Gerling "discussed the risks and benefits with the patient pre-operatively, and [Dr. Gerling's] operative report and the consent form in the NYU chart signed by plaintiff further corroborate the fact that informed consent was obtained." Defendants further argue that "the records clearly demonstrate that in accordance with accepted medical practice, the patient was advised of the risks and benefits of the surgery by Dr. Gerling and she agreed to proceed with the surgery as reflected by her signing of the consent form." Plaintiff does not oppose Defendants' motion to dismiss the claim for lack of informed consent. Thus, Defendants' motion for summary judgment on the informed consent cause of action is granted without opposition.

Wherefore, it is hereby

ORDERED that Defendants Michael Christopher Gerling, M.D. ("Dr. Gerling") and NY Orthopedics, P.C., and NY Orthopedics, P.C., s/h/a Spinecare NYC Orthopedic, P.C.'s motion for summary judgment is granted only to the extent

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[1] Neither Defendants' nor Plaintiff's Expert supported their opinion with actual films made a part of the record. The Court recognizes that e-filing was not consistently accessible to the parties during the pandemic. The Court reached out to both sides while the Court was considering this motion and invited them to supplement their filings with whatever films they deemed germane. The films Defendants' Expert relies on and the films Plaintiff's Expert refers to are now contained in the e-filed record.

that Plaintiff Yolanda Aquilino's informed consent claim is dismissed as against Defendants; and is further

ORDERED that the parties are directed to appear on September 22, 2020 at 9:30am in Part 6 at 71 Thomas Street for a Pre-Trial conference.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: July 21, 2020

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION