

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D15434
W/cb

_____AD3d_____

Argued - March 5, 2007

ROBERT W. SCHMIDT, J.P.
ROBERT A. SPOLZINO
ANITA R. FLORIO
PETER B. SKELOS, JJ.

2006-02028

DECISION & ORDER

Josephine Morris, etc., respondent, v Queens-
Long Island Medical Group, P.C., et al., appellants,
et al., defendant.

(Index No. 2358/04)

Ivone, Devine & Jensen, LLP, Lake Success, N.Y. (Brian E. Lee of counsel), for
appellants.

Law Offices of Mark R. Bower, P.C., New York, N.Y., for respondent.

In an action, inter alia, to recover damages for medical malpractice, etc., the
defendants Queens-Long Island Medical Group, P.C., and Neelima Phatak appeal, as limited by their
brief, from so much of an order of the Supreme Court, Queens County (Kelly, J.), entered January
24, 2006, as denied that branch of their motion which was to dismiss the fifth cause of action pursuant
to CPLR 3211(a)(7).

ORDERED that the order is reversed insofar as appealed from, on the law, with costs,
and that branch of the motion of the defendants Queens-Long Island Medical Group, P.C., and
Neelima Phatak which was to dismiss the fifth cause of action pursuant to CPLR 3211(a)(7) is
granted.

A plaintiff in a medical malpractice action is required only to show that the defendant
deviated from the standard of medical care and that said deviation was a substantial factor in bringing
about the injuries the plaintiff is alleged to have sustained (*see e.g. Abrams v Ho*, 3 AD3d 544; *De*

August 7, 2007

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Stefano v Immerman, 188 AD2d 448; *see also* PJI 2:150). Here, the plaintiff failed to demonstrate that a “capitation” negligence cause of action, alleging that the appellants did not provide the requisite level of medical care because their contract with a health maintenance organization effectively compelled them to economize by providing substandard care, can survive independently of proof of medical malpractice (*cf. Pegram v Herdrich*, 530 US 211, 228-229, 235). Accordingly, the Supreme Court erred in denying that branch of the appellants’ motion which was to dismiss the fifth cause of action alleging so-called “capitation” negligence.

The issue of whether the plaintiff may offer proof that financial incentives influenced the appellants’ exercise of medical judgment was not addressed in the order appealed from and thus is not properly before us (*see Katz v Katz*, 68 AD2d 536).

SCHMIDT, J.P., SPOLZINO, FLORIO and SKELOS, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court