

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

D15599
C/cb

_____AD3d_____

Argued - May 8, 2007

HOWARD MILLER, J.P.
WILLIAM F. MASTRO
GABRIEL M. KRAUSMAN
EDWARD D. CARNI, JJ.

2006-04615

DECISION & ORDER

Paula Bengston, appellant, v Edward Wang,
etc., respondent.

(Index No. 03-09936)

Siben & Ferber, Hauppauge, N.Y. (David M. Schwarz of counsel), for appellant.

Ptashnik & Associates, New York, N.Y. (Richard O. Mannarino of counsel), for
respondent.

In an action to recover damages for medical malpractice and lack of informed consent,
the plaintiff appeals from an order of the Supreme Court, Suffolk County (Jones, J.), dated March
3, 2006, which granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is modified, on the law, by deleting the provision thereof
granting that branch of the defendant's motion which was to dismiss the plaintiff's cause of action
alleging medical malpractice and substituting therefor a provision denying that branch of the motion;
as so modified, the order is affirmed, without costs or disbursements.

The defendant performed a nerve decompression and neurolysis procedure upon the
plaintiff to relieve symptoms such as pain and weakness in her left arm and hand. Following the
surgery, the plaintiff was unable to extend three of the fingers on her left hand and was diagnosed
with nerve damage. In this action alleging, inter alia, medical malpractice, the defendant's motion for
summary judgment was granted. We modify.

June 19, 2007

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The defendant established his prima facie entitlement to summary judgment dismissing the causes of action sounding in medical malpractice (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320). The affirmation of the defendant's medical expert established that the procedure was performed in accordance with good and accepted medical practices and that the damage the plaintiff suffered was a known risk of the procedure that occurs in the absence of malpractice. In opposition, however, the plaintiff raised a triable issue of fact by submitting the affirmation of an expert who opined, in contradiction to the defendant's expert, that the defendant was negligent in operating upon the motor branch of the radial nerve, which was not the source of the plaintiff's clinical problem, and in the manner in which he conducted the procedure. "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" (*Feinberg v Feit*, 23 AD3d 517, 519 [internal citations and quotation marks omitted]; *see Dandrea v Hertz*, 23 AD3d 332, 333 ; *Shields v Baktidy*, 11 AD3d 671, 672; *Fotinas v Westchester County Med. Ctr.*, 300 AD2d 437, 439).

As for the plaintiff's lack of informed consent cause of action, the defendant established his prima facie entitlement to summary judgment by demonstrating that the plaintiff signed a consent form after being informed of the risks, benefits, and alternatives of the procedure (*see Ericson v Palleschi*, 23 AD3d 608, 610). The plaintiff failed to submit an affirmation from a medical expert to raise a triable issue of fact.

MILLER, J.P., MASTRO, KRAUSMAN and CARNI, JJ., concur.

ENTER:


James Edward Selzer
Clerk of the Court