

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

D18651  
O/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - January 14, 2008

REINALDO E. RIVERA, J.P.  
ROBERT A. LIFSON  
DANIEL D. ANGIOLILLO  
RUTH C. BALKIN, JJ.

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2006-09932

DECISION & ORDER

Margaret Smalls, respondent, v  
Mercy Medical Center, appellant.

(Index No. 18560/01)

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Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains, N.Y. (Edward J. Guardaro, Jr., and Patricia D’Alvia of counsel), for appellant.

Joshua A. Schulman, P.C., New York, N.Y. (Stephen D. Chakwin, Jr., of counsel), for respondent.

In an action to recover damages for medical malpractice, the defendant appeals from an order of the Supreme Court, Nassau County (Winslow, J.), entered August 8, 2006, which denied its motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

Contrary to the defendant’s contention, the Supreme Court properly denied its motion for summary judgment dismissing the complaint. The plaintiff seeks to recover damages against the defendant based upon a theory of *res ipsa loquitur*. In support of its motion, the defendant failed to make a *prima facie* showing of entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Porter v Milhorat*, 303 AD2d 736). A triable issue of fact exists, *inter alia*, as to whether the injury at issue was “caused by an agency or instrumentality within the exclusive control of the defendant” (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494). The defendant’s failure to make such a *prima facie* showing requires denial of the motion, regardless of

the sufficiency of the plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

RIVERA, J.P., LIFSON, ANGIOLILLO and BALKIN, JJ., concur.

ENTER:

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

James Edward Pelzer  
Clerk of the Court