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

D25631
C/prt

_____AD3d_____ Argued - December 1, 2009

REINALDO E. RIVERA, J.P.
HOWARD MILLER
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS, JJ.

2008-10653 DECISION & ORDER

Bridget Wigand, appellant, v
Saul Modlin, etc., respondent.

(Index No. 827/07)

John T. Wisell, Jr., Kew Gardens, N.Y., for appellant.

Kelly, Rode & Kelly, LLP, Mineola, N.Y. (Susan M. Ulrich 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, Nassau County (Murphy, J.), dated October 27, 2008, which denied her motion for summary judgment on the issue of liability.

ORDERED that the order is affirmed, with costs.

Although the plaintiff established her prima facie entitlement to judgment as a matter of law on the cause of action to recover damages for medical malpractice (*see* Public Health Law § 2805-d; *Alvarez v Prospect Hospital,* 68 NY2d 320, 324-325; *Feinberg v Feit,* 23 AD3d 517, 518-519), the defendant raised a triable issue of fact as to whether he deviated from the relevant standard of care (*see Flanagan v Catskill Regional Med. Ctr.,* 65 AD3d 563, 565-567; *DiMitri v Monsouri,* 302 AD2d 420, 420-421). Similarly, in response to the plaintiff's establishment of her prima facie entitlement to judgment as a matter of law on the cause of action alleging lack of informed consent, the defendant raised a triable issue of fact as to whether the risks at issue were foreseeable and, therefore, should have been communicated to the plaintiff prior to the procedure (*see* Public Health Law § 2805-d; *Spano v Bertocci,* 299 AD2d 335, 337-338; *Bernard v Block,* 176 AD2d 843).

Accordingly, the Supreme Court properly denied the plaintiff's motion for summary judgment on the issue of liability (*see Feinberg v Feit,* 23 AD3d at 519; *Shields v Baktidy,* 11 AD3d 671, 672).

RIVERA, J.P., MILLER, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court