

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

D30247
H/prt

_____AD3d_____

Argued - February 4, 2011

WILLIAM F. MASTRO, J.P.
PETER B. SKELOS
RANDALL T. ENG
SANDRA L. SGROI, JJ.

2010-01769

DECISION & ORDER

Yamda Johnson, appellant, v Staten Island Medical
Group, et al., respondents, et al., defendant.

(Index No. 103695/07)

Michael N. David, New York, N.Y., for appellant.

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York, N.Y. (Steven C.
Mandell of counsel), for respondents Staten Island Medical Group and Lance Jung.

In an action to recover damages for medical malpractice and lack of informed consent the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Richmond County (McMahon, J.), dated December 17, 2009, as, upon reargument, in effect, vacated a prior determination in an order of the same court dated July 24, 2009, denying that branch of the motion of the defendants Staten Island Medical Group, Lance Jung, and Nicole Borger which was for summary judgment dismissing the cause of action based upon an alleged lack of informed consent insofar as asserted against the defendant Lance Jung, and thereupon granted that branch of the motion.

ORDERED that the order dated December 17, 2009, is affirmed insofar as appealed from, with costs to the defendants Staten Island Medical Group and Lance Jung.

Public Health Law § 2805-d(1) defines lack of informed consent as “the failure of the person providing the professional treatment . . . to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to

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make a knowledgeable evaluation.” To establish a cause of action sounding in lack of informed consent, a plaintiff must establish that “a reasonably prudent person in the patient’s position would not have undergone the treatment . . . if he [or she] had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought” (Public Health Law § 2805-d[3]; *see Thompson v Orner*, 36 AD3d 791; *Manning v Brookhaven Mem. Hosp. Med. Ctr.*, 11 AD3d 518).

Here, the defendants Staten Island Medical Group, Lance Jung, and Nicole Borger (hereinafter collectively the defendants) established their prima facie entitlement to judgment as a matter of law dismissing the cause of action based upon an alleged lack of informed consent insofar as asserted against the defendant Lance Jung by demonstrating that the plaintiff signed a consent form which stated, inter alia, that she had been informed about the proposed surgical procedure, and the alternatives thereto, as well as the reasonably foreseeable risks and benefits. In addition, Jung testified at his deposition that he informed the plaintiff regarding these issues during a pre-operative discussion with her (*see Ortaglia v Scanlon*, 35 AD3d 421; *Ericson v Palleshci*, 23 AD3d 608). Furthermore, the defendants demonstrated that, in any event, a reasonably prudent person in the plaintiff’s position would not have declined to undergo the surgery (*see* Public Health Law § 2805-d[3]; *Thompson v Orner*, 36 AD3d 791; *Agnese v Cattani*, 291 AD2d 515; *Hylick v Halweil*, 112 AD2d 400, 401), and that any lack of informed consent did not proximately cause any injury (*see Trabal v Queens Surgi-Center*, 8 AD3d 555; *Mondo v Ellstein*, 302 AD2d 437; *Bernard v Block*, 176 AD2d 843; *Flores v Flushing Hosp. & Med. Ctr.*, 109 AD2d 198). In response to these showings, the plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320).

Accordingly, the Supreme Court properly, upon reargument, granted that branch of the defendants’ motion which was for summary judgment dismissing the cause of action based upon an alleged lack of informed consent insofar as asserted against Jung (*see Ortaglia v Scanlon*, 35 AD3d 421; *Agnese v Cattani*, 291 AD2d at 516; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320).

MASTRO, J.P., SKELOS, ENG and SGROI, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court