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

D31987
W/kmb

_____AD3d_____ Argued - November 15, 2010

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2009-07275 DECISION & ORDER ON MOTION

Michael J. Young, et al., appellants, v Steven Struhl, et al., respondents, et al., defendants.

(Index No. 37887/05)

Motion by the respondents for leave to reargue an appeal from an order of the Supreme Court, Kings County, dated June 15, 2009, which was determined by decision and order of this Court dated January 11, 2011, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the branch of the motion which is for leave to appeal to the Court of Appeals is denied; and it is further,

ORDERED that the branch of the motion which is for leave to reargue is granted and, upon reargument, the decision and order of this Court dated January 11, 2011 (*Young v Struhl*, 80 AD3d 605), is recalled and vacated, and the following decision and order is substituted therefor:

Godosky & Gentile, P.C., New York, N.Y. (Pollack Pollack Isaac & De Cicco [Brian J. Isaac and Michael H. Zhu], of counsel), for appellants.

Callan, Koster, Brady & Brennan LLP, New York, N.Y. (Michael P. Kandler and Stephen J. Barrett of counsel), for respondents.

In an action to recover damages for medical malpractice, etc., the plaintiffs appeal from an order of the Supreme Court, Kings County (Rosenberg, J.), dated June 15, 2009, which granted the motion of the defendants Steven Struhl and Steven Struhl, M.D., P.C., for summary judgment dismissing the complaint insofar as asserted against those defendants.

ORDERED that the order is reversed, on the law, with costs, and the motion of the defendants Steven Struhl and Steven Struhl, M.D., P.C., for summary judgment dismissing the complaint insofar as asserted against them is denied.

The moving defendants failed to establish their prima facie entitlement to judgment as a matter of *law* with respect to the issue of the statute of limitations (*see* CPLR 214-a; *Zito v Jastremski,* 58 AD3d 724, 726; *Vaughn v City of New York,* 4 AD3d 412, 414; *Denlea v Hanswirth,* 303 AD2d 711, 712). Moreover, although the moving defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting the affidavit of two experts who opined, inter alia, that the moving defendants did not deviate from accepted standards of care in their treatment of the plaintiff Michael J. Young, and that any alleged deviation was not the proximate cause of the plaintiffs' damages, the affidavit of the plaintiffs' expert, submitted in opposition to the motion, raised triable issues of fact (*see Martin v Siegenfeld,* 70 AD3d 786, 787-788; *Colao v St. Vincent's Med. Ctr.,* 65 AD3d 660, 661-662; *Howard v Kennedy,* 60 AD3d 905, 906). Accordingly, the Supreme Court should have denied the motion of the defendants Steven Struhl and Steven Struhl, M.D., P.C., for summary judgment dismissing the complaint insofar as asserted against them.

RIVERA, J.P., DICKERSON, CHAMBERS and LOTT, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court