

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

D32591
H/prt

_____AD3d_____

Argued - October 3, 2011

PETER B. SKELOS, J.P.
CHERYL E. CHAMBERS
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

2010-05403
2010-10641

DECISION & ORDER

Kevin Healy, et al., respondents, v Paul S. Damus,
etc., et al., defendants, St. Francis Hospital, appellant.

(Index No. 30197/03)

Bower Monte & Greene, P.C., New York, N.Y. (Mitchell A. Greene of counsel), for
appellant.

Duffy & Duffy, Uniondale, N.Y. (Brian C. Lockhart of counsel), for respondents.

In an action to recover damages for medical malpractice, etc., the defendant St. Francis Hospital appeals from (1) an order of the Supreme Court, Suffolk County (Rebolini, J.), dated April 8, 2010, which denied its motion for summary judgment dismissing the complaint insofar as asserted against it, and (2) an order of the same court dated September 20, 2010, which denied its motion for leave to renew and reargue its motion for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the appeal from so much of the order dated September 20, 2010, as denied that branch of the motion of the defendant St. Francis Hospital which was for leave to reargue its motion for summary judgment dismissing the complaint insofar as asserted against it is dismissed, as no appeal lies from an order denying reargument; and it is further,

ORDERED that the order dated September 20, 2010, is affirmed insofar as reviewed; and it is further,

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ORDERED that the order dated April 8, 2010, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiffs.

The appeal by the defendant St. Francis Hospital (hereinafter the defendant) from so much of the order dated September 20, 2010, as denied that branch of its motion which was for leave to reargue its motion for summary judgment dismissing the complaint insofar as asserted against it must be dismissed, as no appeal lies from an order denying reargument (*see* CPLR 2221[d]).

That branch of the defendant's motion which was for leave to renew its motion for summary judgment dismissing the complaint insofar as asserted against it was properly denied, since there was no reasonable justification for failing to submit the purportedly new evidence in support of the original motion (*see* CPLR 2221[e]; *Ellis v Eng*, 70 AD3d 887, 893).

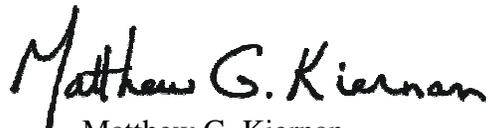
The Supreme Court also properly denied the defendant's motion for summary judgment dismissing the complaint insofar as asserted against it. To establish liability for medical malpractice, a plaintiff must prove that the defendant deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (*see Stukas v Streiter*, 83 AD3d 18, 23; *Heller v Weinberg*, 77 AD3d 622). On a motion for summary judgment, a defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Heller v Weinberg*, 77 AD3d at 622-623).

The defendant failed to establish its prima facie entitlement to judgment as a matter of law, as its expert did not opine that it did not depart or deviate from accepted medical practice or that any such departure was not the proximate cause of the alleged injury. Instead, the expert merely pointed to gaps in the plaintiffs' evidence, which is insufficient (*see Corrigan v Spring Lake Bldg. Corp.*, 23 AD3d 604, 605; *Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410; *Katz v PRO Form Fitness*, 3 AD3d 474, 475). Since the defendant failed to meet its burden, the burden did not shift to the plaintiffs, and the sufficiency of the plaintiffs' opposition papers need not be considered (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Petry v Hudson Val. Pavement, Inc.*, 78 AD3d 1145, 1147).

Accordingly, the Supreme Court properly denied the defendant's motion for summary judgment dismissing the complaint insofar as asserted against it.

SKELOS, J.P., CHAMBERS, SGROI and MILLER, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court