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

D33855
N/kmb

_____AD3d_____ Argued - January 12, 2012

ANITA R. FLORIO, J.P.
CHERYL E. CHAMBERS
L. PRISCILLA HALL
ROBERT J. MILLER, JJ.

2011-02269 DECISION & ORDER

Michael Caggiano, et al., respondents, v
David Cooling, etc., appellant, et al., defendants.

(Index No. 27017/06)

Kaufman Borgeest & Ryan LLP, Valhalla, N.Y. (Jacqueline Mandell of counsel), for appellant.

Christopher A. Bacotti, Middle Island, N.Y., for respondents.

In an action to recover damages for medical malpractice, etc., the defendant David Cooling appeals from so much of an order of the Supreme Court, Suffolk County (Mayer, J.), dated January 21, 2011, as denied his motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him.

ORDERED that the order is affirmed insofar as appealed from, with costs.

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). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party (*see Stukas v Streiter*, 83 AD3d at 23).

Here, the appellant failed to satisfy his prima facie burden of establishing his entitlement to judgment as a matter of law because he failed to demonstrate that he did not depart or deviate from accepted medical practice or that any alleged departure was not a proximate cause of the alleged injury. Since the appellant failed to meet his 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).

Accordingly, the Supreme Court properly denied the appellant's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him.

FLORIO, J.P., CHAMBERS, HALL and MILLER, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court