

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 09-01939

PRESENT: SMITH, J.P., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

MARGUERITE JAMES, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DAVID WORMUTH, M.D., AND CNY THORACIC
SURGERY, P.C., DEFENDANTS-RESPONDENTS.

WOODRUFF LEE CARROLL, SYRACUSE, FOR PLAINTIFF-APPELLANT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., SYRACUSE (JOHN GANOTIS
OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered September 10, 2009 in a medical malpractice action. The order, insofar as appealed from, granted defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint is reinstated.

Memorandum: Plaintiff appeals, as limited by her brief, from that part of an order granting the motion of defendants for summary judgment dismissing the complaint in this medical malpractice action. Defendants had " 'the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby' " (*Sandmann v Shapiro*, 53 AD3d 537, 537; see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). "Where, as here, an expert's affidavit fails to address each of the specific factual claims of negligence raised in [the] plaintiff's bill of particulars, that affidavit is insufficient to support a motion for summary judgment as a matter of law" (*Larsen v Banwar*, 70 AD3d 1337, 1338; see *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874). Indeed, defendants submitted affidavits from two medical experts, neither of which addressed the specific claims of negligence raised in the complaint, as amplified by the bill of particulars. Consequently, defendants' motion should have been denied, regardless of the sufficiency of plaintiff's opposing papers (see *Winegrad*, 64 NY2d at 853; *Kuri v Bhattacharya*, 44 AD3d 718).

Entered: June 18, 2010

Patricia L. Morgan
Clerk of the Court