

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

D54131  
M/hu

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Argued - September 19, 2017

RUTH C. BALKIN, J.P.  
SYLVIA O. HINDS-RADIX  
COLLEEN D. DUFFY  
FRANCESCA E. CONNOLLY, JJ.

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2015-11973

DECISION & ORDER

William Burger, et al., respondents, v Kaushik Das,  
etc., et al., appellants, et al., defendants.

(Index No. 6284/12)

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Heidell, Pittoni, Murphy & Bach, LLP, White Plains, NY (Daniel S. Ratner and Daryl Paxson of counsel), for appellants Kaushik Das, Kaushik Das, M.D., P.C., and Neurological and Spine Surgery Associates, P.C.

Marulli, Lindenbaum & Tomaszewski, LLP, New York, NY (Sandford R. Lindenbaum and Aleksandr Gelerman of counsel), for appellant Joseph N. Annichiarico.

Sullivan Papain Block McGrath & Cannavo P.C., New York, NY (Brian J. Shoot and Elizabeth Montesano of counsel), for respondents.

In an action to recover damages for medical malpractice, etc., the defendants Kaushik Das, Kaushik Das, M.D., P.C., and Neurological and Spine Surgery Associates, P.C., appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Bunyan, J.), dated November 2, 2015, as denied their motion for summary judgment dismissing the amended complaint insofar as asserted against them, and the defendant Joseph N. Annichiarico separately appeals, as limited by his brief, from so much of the same order as denied, as untimely, his motion for summary judgment dismissing the amended complaint insofar as asserted against him.

ORDERED that the order is reversed insofar as appealed from by the defendants Kaushik Das, Kaushik Das, M.D., P.C., and Neurological and Spine Surgery Associates, P.C., on the law, and the motion of those defendants for summary judgment dismissing the amended complaint insofar as asserted against them is granted; and it is further,

March 7, 2018

Page 1.

BURGER v DAS

ORDERED that the order is affirmed insofar as appealed from by the defendant Joseph N. Annichiarico; and it is further,

ORDERED that one bill of costs is awarded to the defendants Kaushik Das, Kaushik Das, M.D., P.C., and Neurological and Spine Surgery Associates, P.C., payable by the plaintiffs, and one bill of costs is awarded to the plaintiffs, payable by the defendant Joseph N. Annichiarico.

“In an action sounding in medical malpractice, a defendant moving for summary judgment must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient’s injuries” (*Matos v Khan*, 119 AD3d 909, 910; *see Guctas v Pessolano*, 132 AD3d 632, 633; *Poter v Adams*, 104 AD3d 925, 926; *Salvia v St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053, 1053-1054; *Heller v Weinberg*, 77 AD3d 622, 622-623). Once the defendant has made such a showing, the plaintiff, in opposition, must submit evidentiary facts or materials to rebut the defendant’s prima facie showing, but only as to those elements on which the defendant met the prima facie burden (*see Guctas v Pessolano*, 132 AD3d at 633; *Poter v Adams*, 104 AD3d at 926; *Stukas v Streiter*, 83 AD3d 18, 23-24).

Here, in moving for summary judgment dismissing the amended complaint insofar as asserted against them, the defendants Kaushik Das, Kaushik Das, M.D., P.C., and Neurological and Spine Surgery Associates, P.C. (hereinafter collectively the Das defendants), met their prima facie burden by submitting the affidavit of their expert, who opined that they did not deviate or depart from accepted medical practice in treating the plaintiff William Burger (*see Giacinto v Shapiro*, 151 AD3d 1029, 1030; *Guctas v Pessolano*, 132 AD3d at 633; *Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819). In opposition, the plaintiffs failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted the Das defendants’ motion for summary judgment dismissing the amended complaint insofar as asserted against them.

The motion of the defendant Joseph N. Annichiarico for summary judgment dismissing the amended complaint insofar as asserted against him was untimely. In any event, we note that Annichiarico failed to make a prima facie showing of entitlement to judgment as a matter of law. Accordingly, Annichiarico’s motion for summary judgment dismissing the amended complaint insofar as asserted against him was properly denied.

BALKIN, J.P., HINDS-RADIX, DUFFY and CONNOLLY, JJ., concur.

ENTER:



Aprilanne Agostino  
Clerk of the Court