

**Walsh v Daniel C. Baker, M.D, P.C.**

2007 NY Slip Op 31540(U)

May 14, 2007

Supreme Court, New York County

Docket Number: 0117856/2004

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN  
*Justice*

PART 6

JAMES WALSH, et al.  
Plaintiffs,

INDEX NO. 117856/04

MOTION DATE 3/13/07

- v -

MOTION SEQ. NO. 01

DANIEL C. BAKER, M.D, P.C., et al.  
Defendants

The following papers, numbered 1 to 3 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion


**IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION**

**FILED**

MAY 22 2007

NEW YORK  
COUNTY CLERK

Dated: 5-14-07

  
EILEEN BRANSTEN, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

NOTICE OF APPEARANCE

May 14, 2007

Case Name: *Walsh v. Daniel C. Baker, M.D, P.C.*

Index Number: 117856/04

Nature of Appearances      **Settlement Conference--June 12, 2007 at 9:30 a.m.**  
Dates & Times:                **Trial--July 12, 2007.**

Additional Notes:                If it has not already been done, plaintiffs are to immediately (within 10 days) make a demand for settlement purposes. Defendants are to consider the demand. Adequate time has been afforded to enable defendants to investigate settlement of the case. The parties are to appear on June 12th prepared for substantive, serious settlement discussions and if the case does not settle the trial will proceed on the scheduled July 12, 2007 date. The July 12, 2007 date should be used for purposes of CPLR 3101(d) expert exchange.

**FILED**  
MAY 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

3 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART SIX

-----X  
JAMES WALSH AND CHRISTINE MARKUSSEN,

Plaintiffs,

-against-

Index No.117856/04

Motion Date: 03/13/07

Motion Seq. No: 01, 02

DANIEL C. BAKER, M.D., P.C., DANIEL C. BAKER  
M.D., GARY MELLEN, M.D. AND LENOX HILL  
ANESTHESIOLOGY, PLLC

Defendants.  
-----X

PRESENT: EILEEN BRANSTEN, J.

Motion sequence numbers 01 and 02 are hereby consolidated for disposition.

In motion sequence number 01, Gary Mellen, M.D., ("Dr. Mellen"), and Lenox Hill Medical Anesthesiology, PLLC (collectively the "Anesthesiology Defendants") move, pursuant to CPLR 3212, for summary judgment dismissal of the complaint brought by plaintiffs James Walsh ("Mr. Walsh") and his wife, Christine Markussen ("Ms. Markussen"), who is asserting a derivative claim.

In motion sequence number 02, defendants Daniel C. Baker, M.D., P.C., and Daniel C. Baker, M.D. ("Dr. Baker"), (collectively the "Baker Defendants") similarly move for summary judgment dismissal of the complaint.

Plaintiffs oppose both motions.

**FILED**

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### Background

Sixty-six year old Mr. Walsh complained of bags underneath his eyes and loose skin on his neck. At his wife's suggestion on December 11, 2002, Mr. Walsh presented at Dr. Baker's office for an initial consultation. Affirmation in Support of Anesthesiology Defendants' Motion ("Anesth. Aff."), at ¶ 7. Dr. Baker recommended that Mr. Walsh undergo bilateral blepharoplasties (eye lid lift surgery) on the upper and lower eyelids and a z-plasty (surgical technique used to reposition a scar so that it will be less noticeable) of the neck to remove excess skin and fat. *Id.* Dr. Baker informed Mr. Walsh of the surgical technique that would be used and discussed the benefits, risks and potential complications associated with the procedures. Anesth. Aff., Ex. G, at 13 to 14.

During Mr. Walsh's pre-operative appointment on February 20, 2003, Dr. Baker again discussed the surgery and answered Mr. Walsh's questions. Anesth. Aff., at ¶ 7; *see also*, Ex. G, at 19. On February 29, 2003, both Mr. Walsh and Dr. Baker signed a Permission for Operative and/or Diagnostic Procedure(s) and/or Treatment(s) form, which indicated that Mr. Walsh authorized Dr. Baker to perform the specified procedures on him, and acknowledged that Dr. Baker had fully explained the procedures' expected benefits and potential associated complications. *Id.*

Dr. Mellen, the anesthesiologist assigned to the procedure, maintains that he telephoned Mr. Walsh to evaluate his medical history and determine the best anesthesia

options. Anesth. Aff., Ex. H, at 22 to 23. Mr. Walsh and his wife, however, dispute whether any substantive discussion took place at that time. See, Anesth. Aff., Ex. E, at 50-51; Affirmation in Support of Baker Defendants' Motion, ("Baker Aff."), Ex. F, at 21 (Ms. Markussen testified at her deposition that Dr. Mellen called but Mr. Walsh was not home).

On March 7, 2003, at his medical office, Dr. Baker performed the surgery on Mr. Walsh. Anesth. Aff., at ¶ 8. Before starting the procedure, Dr. Mellen met with Mr. Walsh. Anesth. Aff., at ¶ 8. At 7:25 a.m., Dr. Mellen began a an intravenous Propofol drip (general anesthesia). *Id.* Throughout the surgery, Dr. Mellen kept track of Mr. Walsh's blood pressure with a monitor attached to Mr. Walsh's arm. *Id.*

After the intravenous anesthesia was administered, Dr. Baker subcutaneously injected each of Mr. Walsh's eyelids several times with a local anesthetic comprised of Lidocaine and Epinephrine. No more than twenty minutes later, Mr. Walsh's blood pressure began to rise. Anesth. Aff., at ¶¶ 8 to 9.

In response, Dr. Mellen restarted the Propofol infusion and then administered Labetalol, Thorazine, and Hydrolazine (antihypertensive medication), to increase Mr. Walsh's sedation and reduce his blood pressure. Anesth. Aff., at ¶ 9.

After the procedure was finished, Dr. Baker examined Mr. Walsh in the recovery room and determined that he was in good condition to be discharged. Anesth. Aff., at ¶ 10. Additionally, after performing his own recovery-room examination, Dr. Mellen confirmed

that Mr. Walsh had no complaints and that his blood pressure was within normal limits at 91/50. Anesth. Aff., Ex. H, at 78-79. Mr. Walsh was discharged into the care of a private-duty nurse at 3:45 p.m. in good condition, with decreased swelling and with no active sites of bleeding. Anesth. Aff., Ex. H, at 4.

The private-duty nurse subsequently telephoned Dr. Baker after Mr. Walsh complained that he had loss of vision in his left eye and experienced an elevated blood pressure. Anesth. Aff., Ex. H, at 4. At Dr. Baker's request, the nurse brought Mr. Walsh to Manhattan Eye, Ear and Throat Hospital where the attending ophthalmologist diagnosed a retrobulbar hemorrhage, with swelling of the eye and separation of the incision. Anesth. Aff., Ex. H, at 51 to 53.

With Dr. Baker's approval, the ophthalmologist performed a canthotomy (surgical division of a canthus, which is the angle at either end of the slit between the eyelids) and cantholysis (incision of an optic canthus of an eye), which successfully removed blood and decreased intraorbital pressure from Mr. Walsh's left eye. Anesth. Aff., Ex. H, at 51 to 55.

Mr. Walsh and his wife, Ms. Markussen, commenced this medical malpractice action on or about December 17, 2004. Baker Aff., at ¶¶ 3 to 4. They allege that Dr. Baker was negligent because, among other things, he failed to properly perform Mr. Walsh's upper and lower eyelid plasty; failed to follow and observe Mr. Walsh's condition properly; failed to consult proper specialists including surgeons, anesthesiologists and/or ophthalmologists;

ignored Mr. Walsh's complaints, signs and/or symptoms; and failed to properly inform Mr. Walsh of the risk of puncture of the eye. Baker Aff., at ¶ 6 and Ex. D. These departures, plaintiffs assert, resulted in many injuries, including multiple punctures, a massive suprachoroidal hemorrhage, vitreous hemorrhage, diminished vision, a drooping eyelid and a cataract that required surgery. *Id.*, at ¶ 7.

Plaintiffs also allege that Dr. Mellen was negligent in that, among other things, he failed to properly administer the local anesthetic; failed to detect a suprachoroidal hemorrhage and vitreous hemorrhage of Mr. Walsh's left eye; failed to administer medication to lower increased blood pressure during surgery; failed to obtain informed consent; and failed to perform proper tests and studies including operative and postoperative examinations of the Mr. Walsh's left eye. Anesth. Aff., at ¶ 5. In sum, Plaintiffs asserts that Dr. Mellen was negligent in administering anesthesia and in his management of Mr. Walsh's blood pressure during and after the surgical procedures. *Id.* Mr. Walsh asserts that because of Dr. Mellen's malpractice he was forced to undergo additional surgical procedures and sustained injuries to his left eye. Anesth. Aff., at ¶ 5.

The Anesthesiology Defendants (Dr. Mellen and his associated PLLC) now seek summary judgment dismissal of the complaint. In support of their motion, they rely on an expert affidavit by Stanford Miller, M.D., ("Dr. Miller") a Clinical Associate Professor of Anesthesiology at New York University Medical Center and the Assistant Director of

Anesthesiology at Bellevue Hospital. Def. Aff., Ex. K, at ¶ 1. Dr. Miller opines—based on review of, among other things, the bills of particulars, medical records, and deposition transcripts – that:

“It is my opinion that there were no departures from the standard of care by [the Anesthesiology Defendants], in the care and treatment rendered to the plaintiff. Futhermore, I am of the opinion that the care rendered by [the Anesthesiology Defendants] was not a proximate cause of any of the plaintiff’s alleged injuries.

\* \* \*

“In particular, it is my opinion, based on a reasonable degree of medical certainty that Dr. Mellen’s administration of general anesthesia and monitoring of blood pressure on behalf of Lenox Hill Medical Anesthesiology, PLLC was proper in all respects.”

Anesth. Aff., Ex. K, at ¶¶ 8 to 9.

Additionally, Dr. Miller states that Dr. Mellen

“vigilantly monitored plaintiff’s blood pressure throughout the use of a non-invasive blood pressure monitor. And once plaintiff’s blood pressure became slightly elevated to 160/88 at 8:00am, Dr. Mellen promptly and appropriately utilized the first line of intervention by titrating Propofol to provide more sedation and lower the blood pressure. Dr. Mellen then promptly administered the intravenous antihypertensive medications, Labetalol, Thorazine and Gydralazine. The plaintiff quickly responded to these medications and his blood pressure decreased. At the conclusion of the procedure, the plaintiff’s blood pressure had decreased to 100/60. Following the procedure, Dr. Mellen appropriately monitored the plaintiff’s blood pressure, by taking a reading before the plaintiff was discharged. The plaintiff was appropriately discharged when his blood pressure was at 91/50.”

Anesth. Aff., Ex. K, at ¶ 13.

Further, Dr. Miller explains that

“Dr. Mellen did not owe a duty to plaintiff to monitor his blood pressure or condition, once plaintiff was discharged from Dr. Baker’s office in stable condition with normal blood pressure, and with no apparent complaints relative to anesthesia.”

Anesth. Aff., Ex. K, at ¶ 14.

As for informed consent, Dr. Miller opines that on December 11, 2002, at a preoperative visit, Dr. Baker explained the proposed anesthesia regimen and Mr. Walsh signed an informed-consent form stating that he was informed of anesthesia risks. Dr. Miller further sets forth:

“Several days prior to [Mr. Walsh’s] arrival at Dr. Baker’s office, Dr. Mellen performed a proper pre-anesthesia evaluation of [Mr. Walsh] via a twenty minute telephone conference with the plaintiff and his wife. During this conversation [Mr. Walsh] expressed his preference to be less sedated and more aware of his surroundings. Dr. Mellen informed [him] that this level of anesthesia would be possible, however, he would have to review the level of sedation with Dr. Baker and that deeper sedation may be required.”

Anesth. Aff., Ex. K, at ¶ 9. He asserts that:

“Dr. Mellen obtained the informed consent of [Mr. Walsh]. \* \* \* Dr. Baker provided [him] with a detailed description of the risks, \* \* \* including the use of anesthesia. In fact, on February 29, 2003, both [Mr. Walsh] and Dr. Baker signed a form stating that [Mr. Walsh] had been advised of all the possible complications and risks of the procedure, including anesthesia. As such, [Mr. Walsh’s] informed consent was properly obtained prior to him undergoing the procedures.”

Anesth, Aff., Ex. K, at ¶ 15.

In sum, Dr. Miller concludes to a reasonable degree of medical certainty that “the alleged injuries were not caused by Dr. Mellen’s administration of intravenous anesthesia or the slight increase in plaintiff’s blood pressure.” Anesth. Aff., Ex. K, at ¶ 16. Dr. Miller points out that plaintiff’s blood pressure during the surgery never reached “such heights as to cause traumatic bleeding behind the eye.” *Id.* Therefore, Dr. Miller opines that “the treatment and care rendered to the plaintiff by Dr. Mellen was within good and accepted medical practice and was not the proximate cause of plaintiff’s alleged injuries.” Anesth. Aff., Ex. K, at ¶ 17.

The Baker Defendants (Dr. Baker and his associated P.C.) also move for summary judgment dismissal of the complaint against them. In support of their motion, they rely on an expert affidavit submitted by Dr. Ameet Goyal, M.D., a physician specializing in ophthalmology, oculoplasty and reconstructive surgery who is also a member of the American Society of Ophthalmic Plastic and Reconstructive Surgery. Baker Aff., Ex. A, at ¶ 1. Dr. Goyal opines—based on review of, among other things, the bills of particulars, medical records and deposition transcripts—“that the alleged injuries sustained by Mr. Walsh can and did occur in the absence of any departure from the standard of care by the Baker defendants.” Baker Aff., Ex. A, at ¶ 6. He concludes with a reasonable degree of medical certainty, that “the Baker defendants acted in accordance in good and accepted standards of care and did not deviate from the standard of care.” Baker Aff., Ex. A, at ¶ 7.

Dr. Goyal asserts that the Baker Defendants “properly assessed plaintiff’s fitness for the procedures performed.” Baker Aff., Ex. A, at ¶ 8. Before conducting the surgery, Dr. Baker required Mr. Walsh to “obtain medical clearance and ophthalmologic clearance prior to performing the procedures and there was nothing in Mr. Walsh’s medical or ophthalmologic history, as it was reported by Mr. Walsh and his clearing physicians and as determined by the Baker defendants, that suggested that he was not an appropriate candidate for the procedures performed or that any special precautions should be taken.” *Id.*

Dr. Goyal further opines that informed consent “was obtained and documented in a manner which met or exceeded the applicable standard of care.” Baker Aff., Ex. A, at ¶ 9. Dr. Goyal specifies that Dr. Baker properly discussed the surgical technique with Mr. Walsh, and advised him of the risks, benefits and alternatives to the surgery. *Id.* Dr. Goyal refers to the informed consent form signed by Mr. Walsh on February 29, 2003, indicating that he was informed of the risks and complications associated with the blepharoplasties and anesthesia. Baker Aff., Ex. A, at ¶ 12.

Dr. Goyal asserts that the Baker Defendants did not depart from good and accepted standards of care in the surgical technique used, in relying on an anesthesiologist to administer the anesthesia, in relying on an anesthesiologist to monitor Mr. Walsh’s blood pressure, in handling reports of a change in Mr. Walsh’s condition following discharge, and

in the care and treatment rendered to Mr. Walsh following his discharge from the Hospital. Baker Aff., Ex. A, at ¶ 5.

Plaintiffs vehemently oppose both summary judgment motions, arguing that there are questions of fact as to whether the physicians departed from accepted standards of medical practice. Plaintiffs rely on a six-page expert affidavit from a physician actively engaged in the practice of medicine for over 25 years who is board certified in anesthesia and critical care medicine, duly licensed to practice medicine in the state of New York, and familiar with the practice of anesthesiology and the performance of plastic surgery procedures in an office surgery setting. Affirmation in Opposition (“Aff. Opp.”), Ex. A, at 1. Based on, among other things, Mr. Walsh’s medical records and the deposition testimony, the expert opines that “punctures of the globe, and choroidal and retrobulbar hemorrhages of the type the occurred here do not normally occur in the absence of negligence in the course of blephroplasty.” Aff. Opp., Ex. A, at 3.

According to this expert, “[p]roperly administered local anesthesia for blephroplasty should never be done in such a way as to cause perforations of the choroid - and it did, in my opinion with a reasonable degree of medical certainty - here.” *Id.*

The expert concludes that Dr. Mellen’s use of light sedation on Mr. Walsh during the surgery “rendered him less able to manage the blood pressure during the surgery, and this represented another departure from accepted anesthesiologic practice and this contributed to the severity of the hemorrhage.” Aff. Opp., Ex. K, at 4.

Indicating that the original plan had been for provision of general anesthesia, plaintiffs' expert emphasizes that on the morning of the procedure itself the plan changed and sedation and local anesthesia were used instead. Aff. Opp., Ex. K, at 4. This last-minute change, the expert states, was made without properly taking into account the patient's blood pressure and therefore constituted a departure from accepted practice. *Id.* The expert further points out that although Dr. Mellen affirms in sworn testimony that he had a twenty minute consultation with the plaintiff and his wife on March 6, 2003, both plaintiffs deny that this conversation ever took place and maintain that the first time Mr. Walsh spoke to Dr. Mellen was on the morning of the procedure. *Id.*

Additionally, the expert states that Dr. Baker departed from the medically accepted standards in administering local anesthetic. The expert explains that Dr. Baker should have taken into account Mr. Walsh's abnormal anatomy (he has a high myope which rendered him nearsighted and also an elongated fundus which affects the back of his eye) when he placed needles for subcutaneous anesthetic administration. Aff. Opp., Ex. K, at ¶ 5. Further, this expert opines that "had proper planning and technique been used in the administration of anesthesia for this blephroplasty procedure, these hemorrhages would not have occurred, the visual loss, pain and suffering that followed also would not have occurred." *Id.*

In sum, plaintiffs' expert sets forth, with a reasonable degree of medical certainty, that "the distortion of the anatomy of Mr. Walsh's left eye, resulting from his well-

documented and lifelong high myopia was not properly anticipated by Dr. Baker, and this resulted in the needles used for the local anesthesia administration being placed such as to cause the perforations found." Aff. Opp., Ex. K, at 5 to 6.

Significantly, plaintiffs' expert does not opine that Dr. Baker or Dr. Mellen failed to properly obtain Mr. Walsh's informed consent.

#### Analysis

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issues. *Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dep't 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dep't 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted where an issue of fact is even "arguable." *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1991). Further, "on a defendant's motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision 'must be made on the version of the facts most favorable to [plaintiff].'" *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dep't 1991).

The proponent of a summary judgment motion at the outset has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden

then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Id.* If, for example, the nonmovant submits an affidavit from a competent expert showing the existence of a triable issue of fact as to whether defendants were negligent, the summary judgment motion must be denied. *See, Cooper v. St. Vincent's Hosp.*, 290 A.D.2d 358 (1st Dep't 2002); *Dellert v. Kramer*, 280 A.D.2d 438 (1st Dep't 2000); *Avacato v. Mount Sinai Medical Center*, 277 A.D.2d 32 (1st Dep't 2000).

#### Procedure-Related Departures

Because the parties' respective experts conflict as to whether there was a departure from accepted medical practice in connection with performance of Mr. Walsh's procedure, these vigorously contested summary-judgment motions must be denied in that regard.\* *See, e.g., Santiago v. Brandeis*, 309 A.D.2d 621, 622 (1st Dep't 2003) (summary judgment inappropriate where there is a "conflict between experts"). Although defendants' experts opine that there were no departures from accepted medical practice that caused Mr. Walsh any injury, plaintiffs' expert counters, for example, that Dr. Mellen's use of light sedation

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\* Plaintiffs suggest that the Baker Defendants' motion for summary judgment is untimely, arguing that it was made more than 60 days after the note of issue was filed. *Aff. Opp.*, at 1. In a December 12, 2006 Stipulation and Order, however, the deadline for the Baker Defendants' summary judgment motion was extended to December 21, 2006, and this Order to Show Cause was submitted before that date. *See, Baker Aff., Ex. J*, at 1; *Baker Aff.*, at ¶ 36.

was improper and that Dr. Baker departed from accepted medical practice in administering the local anesthetic. Plaintiffs' expert further asserts that these departures caused Mr. Walsh's injuries. Plaintiffs' expert's affidavit is not conclusory. It refers to facts in the record and the expert's conclusions are drawn from those facts.

In the end, it is for a jury--not this Court--to decide whether there has been malpractice, as plaintiffs' expert submits, or whether Mr. Walsh's injuries can and did occur in the absence of any departure from the standard of care, as the defendants' experts urge. It is not for this Court to interpret the facts or assess their weight. Nor is it for the Court to credit one particular expert's interpretation and analysis and reject another's. Those inquiries are for the jury after hearing all of the evidence.

#### Lack of Informed Consent

Public Health Law § 2805-d(1) requires that a person providing professional medical treatment or diagnosis disclose to the patient such alternatives and the reasonably foreseeable risks and benefits involved "as a reasonable medical \* \* \* practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation."(McKinney's 2003).

To prevail on a lack of informed consent claim, a plaintiff must adduce expert medical evidence to establish the “qualitative insufficiency of the consent.” *See, Hylick v. Halweil*, 112 A.D.2d 400, 401 (2d Dep’t 1985); *Briggins v. Chynn*, 204 A.D.2d 158 (1st Dep’t 1994).

Here, Dr. Baker and Dr. Mellen made *prima facie* showings of entitlement to judgment as a matter of law with regard to plaintiffs’ lack of informed consent claims. Their experts Dr. Goyal and Dr. Miller both opine that Dr. Baker provided Mr. Walsh with sufficient information and that Mr. Walsh’s execution of informed-consent forms satisfied their obligations. In response, plaintiffs’ expert is silent as to any informed-consent departures. There is absolutely no discussion of what, if any, additional information should have been provided to Mr. Walsh before his surgery. Plaintiffs’ medical expert does not even give one example of a single risk that a “reasonable medical \* \* \* practitioner under similar circumstances would have disclosed” that was not actually disclosed to Mr. Walsh. *See*, Public Health Law § 2805-d(1). Thus, there is no issue to present to a jury regarding the insufficiency of the consent and summary judgment in favor of the defendants is warranted in this very limited regard.

Accordingly, it is

ORDERED that the Anesthesiology Defendants’ motion for summary judgment is granted in limited part in that Mr. Walsh’s lack of informed consent claim is dismissed. In all other respects the motion for summary judgment is denied; it is further

ORDERED that the Baker Defendants' motion for summary judgment is granted in limited part in that Mr. Walsh's lack of informed consent claim is dismissed. In all other respects the motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York

May 14, 2007

ENTER



Hon. Eileen Bransten

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