Siska v Mount Sinai Hosp.
2009 NY Slip Op 32952(U)
December 15, 2009
Supreme Court, New York County
Docket Number: 118842/2006
Judge: Joan B. Carey
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SCANNED ON 12/18/2009
[* 1]

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

PRESENT: Hon Joan B. Carey, Justice PART 29

Index Number : 118842/2006
SISKA, HARRY
VS.
MT. SINAI HOSPITAL
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT
1-32

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for Summary judgment

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Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with this Court's attached decision + Order.

All remaining parties are directed to appear for a pre-trial conference on 1/22/10 @ 9:30 a.m.

FILED
DEC 18 2009
NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 12/15/09

[signature] J.S.C.

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 29

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HARRY SISKA,

Plaintiff,

-against-

Index No. 118842/2006

THE MOUNT SINAI HOSPITAL, THE MOUNT SINAI MEDICAL CENTER, INC., DAVID H. ADAMS, M.D., SOUTH BAY CARDIOVASCULAR ASSOCIATES, P.C., DAVID REICH, M.D., LAWRENCE Y. ONG, M.D., JOSEPH MUSSO, M.D., NORTH SHORE UNIVERSITY HOSPITAL and NORTH SHORE - LONG ISLAND JEWISH HEALTH SYSTEM, INC.,

Defendants.

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FILED
DEC 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

Joan B. Carey, J.:

In this medical malpractice action, defendants The Mount Sinai Hospital, The Mount Sinai Medical Center, Inc. and David H. Adams, M.D. move, pursuant to CPLR 3212, for an order granting summary judgment and dismissing all claims asserted as against them, on the ground that the undisputed evidentiary record conclusively demonstrates that they did not depart from good and accepted medical practice in not operating on the left side of plaintiff's heart.

In 1983, plaintiff Harry Siska, then 36 years old, experienced an acute myocardial infarction. Plaintiff underwent a coronary artery bypass graft (CABG) of the right coronary artery (RCA). A saphenous vein was used to bypass an occlusion in the RCA. In addition, because of an occlusion found in the left main artery, the left internal mammary artery (LIMA) was grafted onto the left anterior descending artery (LAD). Plaintiff apparently did well until 2000, when he began experiencing chest pain. Plaintiff was subsequently followed by defendant South Bay Cardiovascular Associates, P.C. Over the next several years, plaintiff underwent tests, treatments, and procedures, including catheterizations, and was diagnosed as suffering from angina and ischemia. In 2002, defendant David Reich, M.D., at South Bay Cardiovascular, became plaintiff's treating interventional cardiologist.

On December 28, 2000, plaintiff underwent a coronary angiography and left heart catheterization at defendant North Shore University Hospital. In the Cardiac Cath Lab final report, the surgeon concluded that the procedures revealed significant stenosis of the left main artery, one vessel coronary artery disease of the RCA, patent left internal mammary artery graft to the LAD, patent saphenous vein graft to the right posterior descending branch

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(RPDA) of the RCA, normal left ventricular function, and elevated left ventricular end diastolic pressure. In the report, the surgeon recommended that medical therapy and coronary artery bypass surgery be considered. Almost two years later, on October 2, 2002, at Good Samaritan Hospital, Dr. Reich performed an angiogram and an angioplasty on plaintiff and found an aneurysm in the RCA graft. In November 2002, at Lenox Hill Hospital, plaintiff underwent a procedure during which a stent was placed in the RCA graft at the site of the aneurysm, successfully closing off the aneurysm sac.

On February 25, 2003, at North Shore University Hospital, Dr. Reich attempted to perform an angioplasty of plaintiff's distal left main artery in hopes of revascularizing the circumflex artery. In the February 26, 2003 Cardiac Cath Lab final report, Dr. Reich noted that the procedure was unsuccessful because of the total occlusion of the distal segment of the left main artery and the inability to cross the lesion with a guide wire. Dr. Reich also noted that plaintiff had developed an aneurysmal dilatation in the saphenous vein graft to the RCA, distal to the stent. On April 10, 2003, at Lenox Hill Hospital, plaintiff underwent a second unsuccessful attempt at an angioplasty of the left main artery. A conservative approach was adopted and plaintiff's doctors, including Dr. Reich, decided to leave the aneurysm alone, if it remained stable. Plaintiff continued to suffer from angina and ischemia.

The following year, on February 19, 2004, at North Shore University Hospital, Dr. Reich performed an angiogram that again revealed obstructive disease of the saphenous vein graft to the RCA, and a patent LIMA graft to the LAD, as well as a normal left ventricular ejection fraction, mild mitral regurgitation, and elevated left ventricular end diastolic pressure. In the February 20, 2004 Cardiac Cath Lab final report, Dr. Reich noted that there was a 95% single discrete stenosis of the graft in the RCA, resulting in decreased distal blood flow to the area served by the RCA, and that the 1983 LIMA graft was patent and provided the main blood supply to the heart. In the report, Dr. Reich commented that, "[t]he aneurysm distal to the covered stent has thrombosed due to compromised inflow secondary to restenosis proximally, [t]he mid LAD proximal to the insertion of the LIMA has progressed, [t]he native LM [left main] is known to be closed, LM intervention to be considered."

On June 24, 2004, defendant Lawrence Y. Ong, M.D. and Dr. Reich attempted an angioplasty of plaintiff's left main artery lesion at North Shore University Hospital, this time using the safecross system. In the June 25, 2004 Cardiac Cath Lab final report, Drs. Ong and Reich concluded that the procedure was unsuccessful because of "an inability to cross lesion with a guide wire. The vessel was totally occluded following this intervention. There was no antegrade distal flow (TIMI Grade 0). Chronically occluded distal left main. Attempted recanalization with safecross wire unsuccessful" (emphasis in original omitted). They recommended that plaintiff be referred for coronary artery bypass surgery.

Plaintiff testified at deposition that Dr. Reich advised him that they were out of options, and that he would have to undergo surgery, which Dr. Reich described as a two-vessel procedure to clear both the left and right arteries (*see* Harry Siska Oct. 6, 2008 Dep Tr, at 44-46, 129). Plaintiff also testified that Dr. Reich referred him to Dr. Adams (*see id.* at 44, 130). According to Dr. Reich's deposition testimony, he advised plaintiff that his was

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a very complicated case, and that he "couldn't guarantee that [plaintiff] would have his circumflex and right coronary both bypassed. That would be something that David Adams would have to decide either pre-op or peri-op, at the time of surgery, whether he could bypass the circumflex, in addition to the right coronary" (David Reich Dec. 1, 2008 Dep Tr, at 94-95).

Dr. Adams, a cardiothoracic surgeon at Mount Sinai Hospital, first examined plaintiff on July 21, 2004. After review of his July 21, 2004 letter to Dr. Reich, Dr. Adams testified at deposition that he discussed various possible surgical approaches with plaintiff, and recommended that plaintiff undergo another graft on the right side (*see* David Adams Nov. 12, 2008 Dep Tr, at 26-27). In the letter, Dr. Adams stated that his initial recommendation was that he should perform a repeat sternotomy and bring the right internal mammary artery (RIMA) down to provide blood to the posterior descending artery (PDA). Dr. Adams testified that he reviewed plaintiff's medical records and the compact disks (CDs) of the February and June 2004 left-sided angiograms (*see id.* at 18). The medical records and CDs had been delivered directly to Dr. Adams by plaintiff (*see* Siska Dep Tr, at 157-158). Dr. Adams concluded, as to the left, that no artery other than the LAD was a good candidate for a graft or any other procedure, and that any procedure on the left side ran the risk of injuring the LIMA graft, which was the sole supply of blood to the heart, and that such an injury could send plaintiff into cardiac arrest in a matter of seconds (*see* Adams Dep Tr, at 37-40). Dr. Adams further testified that he was concerned that, as a result of the first operation, adhesions and scar tissue would have formed, which would increase the risk of injury to the LIMA during a reoperation (*see id.*).

On September 14, 2004, at Mount Sinai Hospital, Dr. Adams performed a reoperation on plaintiff, placing a new graft on the right (CABG to the RCA). In the September 27, 2004 operative report, Dr. Adams noted that plaintiff was "referred for reop coronary artery bypass grafting. He has a left main and a right main occlusion and his entire blood flow depends on the left internal mammary artery." Dr. Adams testified that, in addition to the operative report, he also noted in his consult note that plaintiff's entire cardiac circulation came from the patent LIMA (*see id.* at 30-31). Dr. Adams also testified that, during the surgery, he focused on the right side of plaintiff's heart and did not operate on the left side (*see id.* at 38-39). In the operative report, Dr. Adams noted that the RCA distal to the graft was calcified, which restricted where he could connect a new bypass onto that artery. He further noted in the report that he placed a new vein graft from the aorta to the initial vein graft distal to the stent and the aneurysm, in order to reestablish blood flow to the distal RCA. After surgery, plaintiff was taken to the intensive care unit in stable condition. Plaintiff recovered from the surgery with no complications, and was discharged four days later, on September 18, 2004. Plaintiff testified that, at a post-operative check-up, Dr. Reich advised him that a bypass was completed only on the right side of his heart, not on both sides or on the left side, as he had expected (*see* Siska Dep Tr, at 75-76, 170).

Plaintiff last visited Dr. Reich on December 5, 2006, and that visit was his last to a cardiologist (*see id.* at 18, 20). Since that date, plaintiff has been treated solely by his internist, Mark Seigelheim, M.D. (*see id.* at 17-18). Plaintiff alleges that, since the September 2004 surgery, he has continued to experience angina symptoms that have substantially impaired his lifestyle and quality of life, and needs to take nitroglycerin with exertion, as he

did prior to the surgery (*see Id.* at 50-51, 77-78).

In December 2006, plaintiff commenced this action against Mount Sinai Hospital, Mount Sinai Medical Center, and Dr. Adams.[1] In the bill of particulars, plaintiff alleges that these defendants failed to properly evaluate and treat his left coronary artery disease by failing to perform appropriate preoperative testing, and failing to operate on the left side of plaintiff's heart at the time of the right coronary artery bypass surgery on September 14, 2004. Plaintiff further alleges that he sustained injury as the result of movants' misconduct, including exacerbation of his left coronary artery disease, and the need for an unnecessary third open heart surgery in the future, causing him severe conscious pain and suffering, and a loss of enjoyment of life. Plaintiff also alleges that movants failed to obtain proper informed consent.

Mount Sinai Hospital, Mount Sinai Medical Center, and Dr. Adams now seek summary judgment in their favor and dismissal of all claims as asserted against them, contending that their expert witness, upon review of the evidentiary record, opines that it was not a departure from good and accepted medical care for Dr. Adams to determine that surgery should not be performed on the left side of plaintiff's heart. Movants also contend that Dr. Adams obtained informed consent from plaintiff; that no reasonable person in plaintiff's position, having been fully informed, would have agreed to undergo surgery on the left side of his heart; that plaintiff is not an appropriate candidate for surgery on the left side; and that no act or omission by Dr. Adams, or any Mount Sinai employee, was a proximate cause of the alleged injuries.

In opposition, plaintiff contends that movants have not established a prima facie right to summary judgment in their favor because their expert witness' affirmation is conclusory and speculative. Plaintiff also contends that his expert witness has raised genuine triable issues regarding whether movants' failure to operate on the left side diminished plaintiff's chance of a better outcome or increased his injury.

In a medical malpractice action, the plaintiff must prove that the defendant deviated from the standards of accepted medical practice, and that such departure was the proximate cause of the plaintiff's injury (*Lee v Shields*, 188 AD2d 637, 639 [2d Dept 1992]; *Amsler v Verrilli*, 119 AD2d 786, 786 [2d Dept 1986]). Summary judgment is a drastic remedy, and is not warranted unless the movant demonstrates that no genuine triable issues of fact exist (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see* CPLR 3212). Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence

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[1] By stipulation dated June 1, 2009 and entered August 3, 2009, plaintiff voluntarily discontinued with prejudice the claims asserted against defendants Lawrence Y. Ong, M.D., Joseph Musso, M.D., North Shore University Hospital, and North Shore-Long Island Jewish Health System, Inc. By stipulation dated June 10, 2009 and entered August 12, 2009, plaintiff voluntarily discontinued with prejudice the claims asserted against defendants South Bay Cardiovascular Associates, P.C., and David Reich, M.D.

of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In a medical malpractice action, sufficient evidence often takes the form of expert medical opinion (*see Alvarez v Prospect Hosp.*, 68 NY2d at 327; *Alicea v Ligouri*, 54 AD3d 784, 785 [2d Dept 2008]).

Failure to Operate on the Left Side

Movants have made a prima facie showing of their entitlement to summary judgment and dismissal of plaintiff's claims arising out of movants' decision not to operate on the left side of plaintiff's heart in September 2004. Movants rely upon, inter alia, an affidavit of an expert physician that is licensed to practice medicine in New York and is board-certified in general and cardiothoracic surgery. He is a professor of cardiothoracic surgery and director of the Cardio-Thoracic Research Area at New York University School of Medicine, and chief of cardiothoracic surgery at New York Harbor VA Health Care System.

In his May 19, 2008 affirmation, upon review of plaintiff's bill of particulars and relevant medical records and deposition testimony, movants' expert concurs with Dr. Adams' determination not to attempt a reoperation on the left side of plaintiff's heart, and opines that the determination was consistent with good and accepted medical practice. He attests that attempting surgery on the left side of plaintiff's heart would have been "a questionable approach carrying with it a significant risk for the development of a devastating complication" (Movants' Expert Witness Aff., ¶ 16).

Movants' expert also attests that plaintiff's allegation that plaintiff did not have preoperative testing is untenable. Movants' expert notes that five cardiac catheterization procedures, each preceded by appropriate standard preoperative tests, had been performed on plaintiff from 2000 to 2004, prior to the surgery by Dr. Adams. The last of these procedures was performed on plaintiff on June 24, 2004, just prior to the bypass surgery by Dr. Adams on September 14, 2004. Movants' expert notes that, prior to the September 2004 surgery, Dr. Adams reviewed the CDs of the procedures performed in February and June 2004 and the results of the preoperative tests performed. Movants' expert concludes that no additional preoperative testing of any kind was necessary for plaintiff, or was required by good and accepted medical practice.

Moreover, movants' expert opines that Dr. Adams' decision "to revascularize only the right side of the heart was proper decision and a wise exercise of [Dr. Adams'] surgical judgment" (*id.*, ¶ 19). He attests that Dr. Reich's February 19, 2004 "cardiac catheterizations and angiograms demonstrated the absence of an appropriate target vessel on the left, distal to the left main artery, upon which to operate" (*id.*, ¶ 21). Movants' expert also attests that the "angiogram showed a very small, calcified and totally occluded left ramous/circumflex branch off the left main artery which would not be suitable as a revascularization target" (*id.*). He further attests that plaintiff's circumflex arteries were half the size of the LAD and that neither the February nor the June 2004 catheterization procedure provided any basis for concluding that revascularization or grafting would have been appropriate.

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Movants' expert attests that the February 2004 catheterization showed that the LIMA graft to the LAD was patent and that the LAD and its branches were providing satisfactory blood flow to the heart. He opines that "any revascularization or grafting on these vessels would have required extensive mobilization of the left side of the heart, which would have presented a significant risk to the patient's properly functioning LIMA graft which was the sole blood supply to [plaintiff's] heart" (*id.*, ¶ 22).

Movants' expert quotes Dr. Adams' deposition testimony regarding his decision to operate only on the right side. In relevant part, Dr. Adams testified that:

> [m]y opinion is that on the balance of [plaintiff's] particular anatomy, the safest operation for him on that day would be to re-bypass the right coronary artery and exclude his aneurysm and limit the dissection of his left heart and not perform any left sided grafts . . . Our goal is not to identify anything on the left side. It's to focus on the right side of the heart . . . that decision is made actively and consciously and is all about safety, particularly in a patient where [his] heart lives off the [left] internal mammary artery

(*Id.*, ¶ 23, quoting Adams Dep Tr, at 38-39).

Movants' expert opines that, had Dr. Adams attempted to perform surgery on the left side of plaintiff's heart, such surgery would have required extensive dissection through adhesions and scar tissue in the vicinity of the LIMA connection to the LAD. He further attests that, in a reoperation, there is a significantly increased risk of injury to key structures on and around the heart because scar tissue has formed after the first operation and extensive dissection is used to gain exposure to the heart. Movants' expert opines that, thus, Dr. Adams' decision not to attempt a left-sided bypass graft was a proper exercise of his medical judgment and experience because, here, the risks of attempting such a maneuver outweighed the possible benefits.

Movants' expert also addresses plaintiff's claim that he will require future bypass surgery on the left side, as a result of Dr. Adams' failure to perform it in 2004. He opines that it is reasonable to believe that the LIMA graft will continue to function indefinitely. Movants' expert points out that plaintiff has not required further surgery and that he reports that he has not been followed by a cardiologist since December 2006. With these opinions expressed by their expert witness, movants have made a prima facie showing of entitlement to summary judgment in their favor with regard to plaintiff's allegation that movants improperly failed to operate on the left side of plaintiff's heart.

In opposition to movants' showing, plaintiff has submitted an expert witness affirmation sufficient to raise triable issues regarding whether movants acted within accepted standards and practices in the medical community, prevailing in September 2004, in failing to operate on the left side. Plaintiff's expert witness is licensed to practice medicine in Connecticut, and was previously licensed to practice medicine in New York. Plaintiff's expert is board certified in cardiothoracic surgery, and has been so certified for more than 25 years. Plaintiff's expert was chief of cardiovascular surgery at a major

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Connecticut hospital, and presently serves as chief emeritus of cardiovascular surgery at the same hospital.

In his July 31, 2009 affirmation, plaintiff's expert attests that he reviewed copies of plaintiff's relevant medical records, transcripts of the depositions of plaintiff and Drs. Adams and Reich, and the affirmation by movants' expert witness. Based on this review, plaintiff's expert concludes that Dr. Adams departed from accepted standards and practices in the medical community concerning the care and treatment that he rendered to plaintiff, by failing to perform bypass surgery on both the right and left sides of plaintiff's heart.

Moreover, plaintiff's expert expressly disagrees with many of movants' expert's conclusions, including that there was no suitable target on the left side for grafting, and that the LAD and its branches were providing satisfactory blood flow to the heart. Specifically, plaintiff's expert attests that the diagonal and obtuse marginal branch of the circumflex appear suitable for grafting. The expert opines, within a reasonable degree of medical certainty, that, as of February, July, and September 2004, "the collateral flow to the large circumflex territory was compromised, and this compromised flow was an extremely significant factor in both [plaintiff's] angina and ischemia during exertion" (Plaintiff's Expert Witness Aff., ¶ 45). The expert notes plaintiff's continuing complaints of increasing pain, and concludes that it appears that the compromised flow would explain plaintiff's anginal symptoms. Plaintiff's expert notes that the February 2004 angiogram shows severely compromised flow through the SVG/RCA graft, as indicated by Dr. Reich, and that the LAD and its branches were not providing satisfactory blood flow to the heart.

Plaintiff's expert concludes that, within a reasonable degree of medical certainty, in September 2004, coronary bypass surgery on the left side, as well as on the right, was an appropriate option for plaintiff, given the nature of plaintiff's symptoms and the catheterization findings, and in view of Dr. Reich's repeated attempts to open the blockage in the left main artery. The expert opines that plaintiff was an "excellent surgical candidate" (*Id.*, ¶ 54). The expert further opines that, in September 2004, accepted standards and practices in the medical community "required that coronary bypass surgery performed at that time attempt to directly revascularize both right and circumflex coronary artery systems," that "[t]o only revascularize the right coronary circulation, as Dr. Adams did, was inadequate" and a departure from the accepted standards (*id.*, ¶¶ 47, 49, 60).

Plaintiff's expert opines that "a substantial percentage of cardiac patients undergoing re-operative bypass surgery require complete dissection of the heart, including both right and left sides" (*see Id.*, ¶ 62). The expert further opines that the risk presented by dissecting both sides of plaintiff's heart during the September 2004 surgery "was acceptable since there was already substantial risk of morbidity or mortality given the nature of the surgery" (*id.*, ¶ 63). Plaintiff's expert opines that, by failing to operate on the left side, Dr. Adams took away from plaintiff a meaningful and substantial opportunity to relieve the ongoing cardiac symptoms that are severe enough to require plaintiff to take nitroglycerin daily. Lastly, plaintiff's expert opines that, by performing only one bypass on September 14, 2004, Dr. Adams subjected plaintiff to the need for a third open heart surgery and its related risks.

With these attestations by an expert witness regarding the proximate cause of plaintiff's alleged injuries, plaintiff has presented evidence from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the severity of the injury (*see Alicea v Ligouri*, 54 AD3d at 786). Plaintiff has sustained his burden of demonstrating, with admissible evidence, the existence of genuine triable issues.

Based on the conflicting expert witness affirmations submitted by the parties, issues of fact and credibility exist regarding whether movants departed from good and accepted medical practice in connection with the failure by Dr. Adams to perform surgery on the left side of plaintiff's heart at the time that he operated on the right side. Such issues cannot be resolved on a motion for summary relief and are reserved for the trier of fact (*see Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1st Dept 2004]; *Morris v Lenox Hill Hosp.*, 232 AD2d 184, 185 [1st Dept 1996], *affd* 90 NY2d 953 [1997]).

Lack of Informed Consent

The parties have raised genuine triable issues of material fact concerning whether movants properly disclosed to plaintiff the various options available and Dr. Adams' intention not to perform bypass surgery on the left side of plaintiff's heart. Pursuant to the Public Health Law, to recover on a claim of lack of informed consent, a plaintiff must show that the physician providing the treatment failed "to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation" (Public Health Law § 2805-d [1]). By referring to what a reasonable practitioner would disclose, the statute has been interpreted as requiring expert proof of what good and accepted medical practice requires be disclosed qualitatively (*see DeCintio v Lawrence Hosp.*, 33 AD3d 329, 329 [1st Dept 2006]; *Briggins v Chynn*, 204 AD2d 158, 159 [1st Dept 1994]).

Here, Dr. Adams testified, in relevant part, by quoting from his letter to Dr. Reich, as follows:

> I just will refer back to my letter again where I said I talked to [plaintiff]; 'I talked to [plaintiff] at length about the various approaches we might take. I told him I would like to look at his left-sided angiogram before making a final decision, but I would lean toward a repeat sternotomy at this point with hopes of bringing the internal mammary artery down to the PDA' . . . On the right side . . . I obviously talked to him at length about all of the different options, including single vessel revascularization or multivessel revascularization and what approach we might take, so I don't – have the specific – I have to refer to my letter [to Dr. Reich] for the specifics of the conversation almost 5 years ago, but certainly at the time and having reviewed the angiogram, I'm sure I was wanting – needing to see – or review the reports. I needed to see the angiogram to make a final decision, and I am sure that was exactly the discussion that I

> had with [plaintiff], as is documented in my letter quite – quite precisely

(Adams Dep Tr, at 26-27, quoting Adams' Jul. 21, 2004 Letter to Reich).

Movants' expert opines that, from this testimony, it is clear that Dr. Adams spoke with plaintiff about various options for both the right and left sides and advised plaintiff that, based on what Dr. Adams knew, he was leaning toward surgery on the right side only. After review of the CDs of the 2004 catheterizations, Dr. Adams concluded that no vessel on the left side was appropriate for surgery. Movants' expert opines that, as to the lack of informed consent allegations, Dr. Adams provided plaintiff with an appropriate amount of information with regard to the proposed surgery, in accordance with the prevailing standards of medical practice.

In direct contradiction of Dr. Adams' testimony and the July 21, 2004 letter to Dr. Reich, plaintiff testified that Dr. Adams told him that a procedure addressing both the right and left arteries was "very doable," and did not mention needing to review the 2004 angiogram CDs before making his final decision (Siska Dep Tr, at 53-56, 131). Plaintiff testified that Dr. Adams told him that, after the procedure, he would be "a new man" (*see id.* at 62).

Plaintiff's expert witness opines that, within a reasonable degree of medical certainty, and in view of plaintiff's testimony, Dr. Adams departed from accepted standards and practices in the medical community by failing to provide plaintiff with appropriate information sufficient to permit him to make an informed decision concerning options for surgery different from that performed by Dr. Adams, in September 2004. The expert opines that plaintiff should have been informed that only the right side would be bypassed, and that, by bypassing only that side, there was a substantial chance that the angina and ischemia with exertion would remain, and that a third coronary bypass surgery to the left side of the heart would be needed to address plaintiff's ongoing coronary symptoms. The expert also opines that plaintiff should have been informed that bypass surgery on both sides of his heart could alleviate or eliminate his symptoms and avoid the need for future surgery, without significantly increasing the normal risks associated with open heart surgery.

The Public Health Law also requires a plaintiff to prove that "a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he [or she] had been fully informed" and that the lack of informed consent was a proximate cause of the injuries (Public Health Law § 2805-d [3]; *Tibodeau v Keeley*, 208 AD2d 610, 612 [2d Dept 1994], *lv denied* 85 NY2d 802 [1995]). Here, movants' expert attests that any reasonably prudent person in plaintiff's position would have agreed to a graft on the right side, and agreed that no surgery be performed on the left side, while plaintiff's expert's attestations are sufficient for a jury to determine that an informed, reasonably prudent person would not have consented to the surgery, as performed by Dr. Adams in September 2004.

Lastly, contrary to plaintiff's contention, it is not necessary to hold a "Frye" hearing (*see United States v Marshall*, 986 F Supp 747, 748 [ED NY 1997], citing *Frye v United States*, 293 F 1013 [DC Cir 1923]) to determine the admissibility of movants' proffered expert witness testimony regarding whether movants acted within accepted standards and practices in the medical community prevailing in September 2004 in deciding not to operate on the left side of plaintiff's heart. It is clear from movants' expert witness affirmation that, rather than "junk science" regarding bypass surgery, this expert has presented opinions formed from his experience and training as a cardiothoracic surgeon and on facts in the evidentiary record. As this expert is not offering an opinion which requires his reliance on a newly minted procedure or test, this Court does not think that a *Frye* hearing is necessary to determine the reliability of such opinion. See *Marsh v. Smyth*, 12 AD3d 307 [concurring, Saxe, J.][1st Dept. 2004]. The mere fact that movants' expert contradicts some of the opinions voiced by some of plaintiff's treating cardiologists, raises triable issues, but does not render the affirmation inadmissible.

Accordingly, the motion is denied.

Dated: December 15, 2009

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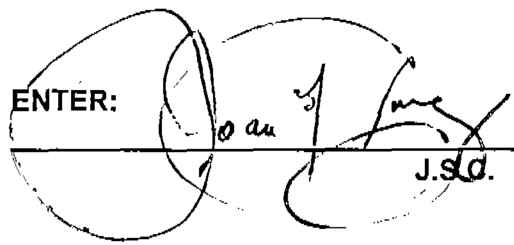

J.S.C.

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