

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

20

**CA 18-01379**

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, CURRAN, AND WINSLOW, JJ.

---

THOMAS P. JOUSMA AND ELLENE PHUFAS-JOUSMA,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

DR. VENKATESWARA R. KOLLI AND KALEIDA HEALTH,  
DOING BUSINESS AS DEGRAFF MEMORIAL HOSPITAL,  
DEFENDANTS-APPELLANTS.

---

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MARK R. AFFRONTI OF  
COUNSEL), FOR DEFENDANT-APPELLANT DR. VENKATESWARA R. KOLLI.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLET OF  
COUNSEL), FOR DEFENDANT-APPELLANT KALEIDA HEALTH, DOING BUSINESS AS  
DEGRAFF MEMORIAL HOSPITAL.

LAW OFFICE OF FRANCIS LETRO, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

---

Appeals from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 15, 2018. The order, among other things, denied in part the motion of defendant Kaleida Health, doing business as DeGraff Memorial Hospital for summary judgment and denied in its entirety the motion of defendant Dr. Venkateswara R. Kolli for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Dr. Venkateswara R. Kolli in part and dismissing the second cause of action against him, and granting that part of the motion of defendant Kaleida Health, doing business as DeGraff Memorial Hospital, with respect to the second cause of action and dismissing that cause of action against it, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action asserting causes of action for medical malpractice and lack of informed consent. Defendants separately moved for summary judgment dismissing the complaint against them, and they now appeal from an order that, *inter alia*, denied the motions except as to the negligent hiring, supervision and credentialing claim against defendant Kaleida Health, doing business as DeGraff Memorial Hospital.

We agree with plaintiffs that defendants failed to demonstrate

their entitlement to judgment as a matter of law dismissing in its entirety the first cause of action, for medical malpractice (see *Kleinman v North Shore Univ. Hosp.*, 148 AD3d 693, 694 [2d Dept 2017]). Thus, although Supreme Court properly denied the motions to that extent, the court should have done so without regard to the sufficiency of plaintiffs' opposing papers (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We agree with defendants, however, that they separately established their entitlement to judgment as a matter of law dismissing the second cause of action, for lack of informed consent, and that plaintiffs failed to raise a triable issue of fact in opposition (see *Harris v Saint Joseph's Med. Ctr.*, 128 AD3d 1010, 1013 [2d Dept 2015]). The court therefore erred in denying defendants' motions to that extent, and we modify the order accordingly. Finally, we reject plaintiffs' contention, raised as an alternative ground for affirmance, that the court abused its discretion in considering defendants' motions notwithstanding their untimeliness (see *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 128-129 [2000]).

Defendants' remaining contentions are academic.