

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

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CA 18-02224

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

EILEEN A. GARDINER AND DONALD T. GARDINER,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

DAVID R. HALLERAN, M.D., INDIVIDUALLY AND AS
AGENT, OFFICER AND/OR EMPLOYEE OF COLON RECTAL
ASSOCIATES OF CENTRAL NEW YORK, LLP, ET AL.,
DEFENDANTS,

LAWRENCE C. CALABRESE, M.D., INDIVIDUALLY AND
AS AN AGENT, OFFICER AND/OR EMPLOYEE OF ST.
JOSEPH'S IMAGING ASSOCIATES, PLLC, AND ST.
JOSEPH'S IMAGING ASSOCIATES, PLLC,
DEFENDANTS-RESPONDENTS.

PORTER NORDBY HOWE LLP, SYRACUSE (ERIC C. NORDBY OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (CHRISTOPHER F.
DEFRANCESCO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County
(Anthony J. Paris, J.), entered April 19, 2018. The order granted the
motion of defendants-respondents for summary judgment and dismissed
the complaint against them.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs, the motion of
defendants-respondents is denied, and the complaint against
defendants-respondents is reinstated.

Memorandum: Plaintiffs commenced this medical malpractice action
in connection with a surgical procedure performed upon plaintiff
Eileen A. Gardiner. Supreme Court erred in granting the motion of
defendants-respondents (defendants) for summary judgment dismissing
the complaint against them. Even assuming, arguendo, that defendants
met their initial burden on their motion, we agree with plaintiffs
that their medical expert's affidavit raised triable issues of fact in
opposition (*see Fay v Satterly*, 158 AD3d 1220, 1221 [4th Dept 2018]).
Where, as here, the "nonmovant's expert affidavit 'squarely opposes'
the affirmation of the moving parties' expert, the result is 'a
classic battle of the experts that is properly left to a jury for

resolution' " (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court