

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

D12888
T/cb

_____AD3d_____

Submitted - November 15, 2006

THOMAS A. ADAMS, J.P.
FRED T. SANTUCCI
WILLIAM F. MASTRO
ROBERT A. LIFSON, JJ.

2005-10374

DECISION & ORDER

Chizuko Nakanishi, respondent, v Asaz Sadaqat,
et al., appellants.

(Index No. 34566/03)

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Michael I. Josephs of counsel), for appellants Asaz Sadaqat and Midi Taxi, Inc.

Longo & D'Apice, Brooklyn, N.Y. (Mark A. Longo and Deborah Ann Kramer of counsel), for appellants Danielle L. Corsaro and Richard R. Corsaro.

Shapiro, Beilly, Rosenberg, Aronowitz, Levy & Fox, LLP, New York, N.Y. (Roy J. Karlin of counsel), for appellant Nissan Infiniti, LT.

Flomenhaft & Cannata, LLP, New York, N.Y. (Benedene N. Cannata of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants Asaz Sadaqat and Midi Taxi, Inc., appeal, and the defendants Nissan Infinity, LT, and the defendants Danielle L. Corsaro and Richard R. Corsaro separately appeal, as limited by their respective briefs, from so much of an order of the Supreme Court, Kings County (Bunyan, J.), dated September 19, 2005, as denied their respective motions for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is affirmed, with one bill of costs.

December 5, 2006

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While we affirm, we do so on a ground other than that relied upon by the Supreme Court in the order appealed from. Contrary to the Supreme Court's holding, the defendants failed to make a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345; *Gaddy v Eyer*, 79 NY2d 955). The defendants relied on the same evidentiary submissions in their attempts to establish their prima facie burdens. Their submissions included only one affirmed medical report. Although the defendants' neurologist recorded in this report, dated October 21, 2004, that the plaintiff had not worked since the subject accident, a period of time of more than a year and a half, he never addressed one of the major allegations contained in the plaintiff's bill of particulars, that she sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for a period of not less than 90 days during the 180-day period immediately following the accident (*see Talabi v Diallo*, 32 AD3d 1014; *Sayers v Hot*, 23 AD3d 453; *Nembhard v Delatorre*, 16 AD3d 390).

Since the defendants failed to establish their prima facie burdens in the first instance, it is unnecessary to reach the question of whether the plaintiff's papers were sufficient to raise a triable issue of fact (*see Talabi v Diallo*, *supra*; *Sayers v Hot*, *supra*; *Coscia v 938 Trading Corp.*, 283 AD2d 538).

ADAMS, J.P., SANTUCCI, MASTRO and LIFSON, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court