

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

D18430
Y/prt

_____AD3d_____

Argued - February 5, 2008

ROBERT A. LIFSON, J.P.
DAVID S. RITTER
ANITA R. FLORIO
EDWARD D. CARNI, JJ.

2006-11167

DECISION & ORDER

Neith Newberger, et al., appellants,
v Bobbi Hirsch, respondent, et al., defendant.

(Index No. 7951/04)

Mallilo & Grossman, Flushing, N.Y. (Francesco Pomara, Jr., of counsel), for appellants.

Shapiro, Beilly, Rosenberg & Aronowitz, LLP, New York, N.Y. (Roy J. Karlin of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiffs appeal from an order of the Supreme Court, Queens County (Dorsa, J.), dated October 18, 2006, which granted the motion of the defendant Bobbi Hirsch for summary judgment dismissing the complaint insofar as asserted against her on the ground that none of the plaintiffs sustained a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the motion of the defendant Bobbi Hirsch which was to dismiss the complaint insofar as asserted by the plaintiff Neith Newberger against her, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed, without costs or disbursements.

The plaintiff Neith Newberger was operating a minivan in which her four minor children were passengers, when it was struck by a second motor vehicle, which allegedly was backing out of a driveway and onto the roadway of the Horace Harding Expressway, in Queens. After the

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plaintiffs commenced the present action, the defendant Bobbi Hirsch moved for summary judgment dismissing the complaint on the ground that none of the plaintiffs sustained a serious injury within the meaning of Insurance Law § 5102(d).

The medical evidence which the movant submitted in support of her motion failed to establish, prima facie, that Neith Newberger did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see Tchjevskaiia v Chase*, 15 AD3d 389). Notably, the affirmed medical report prepared by the movant's orthopedic expert raised a triable issue of fact (*see* CPLR 3212[b]) as to whether Neith Newberger sustained a "significant limitation of use of a body function or system" (Insurance Law § 5102[d]). Under these circumstances, it is unnecessary to consider the sufficiency of the opposition papers submitted by Neith Newberger (*see Tchjevskaiia v Chase*, 15 AD3d at 389).

However, the medical evidence which the movant submitted in support of her motion as it related to the other plaintiffs established, prima facie, that none of those plaintiffs sustained a serious injury within the statutory definition (*see Gaddy v Eycler*, 79 NY2d 955, 956-957). In opposition, those plaintiffs failed to raise a triable issue of fact.

LIFSON, J.P., RITTER, FLORIO and CARNI, JJ., concur.

ENTER:


James Edward Felger
Clerk of the Court