

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

D21608
G/prt

_____AD3d_____

Submitted - November 12, 2008

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
WILLIAM E. McCARTHY
CHERYL E. CHAMBERS, JJ.

2008-03498

DECISION & ORDER

Ashley Diaz, etc., et al., respondents,
v Robert Lopresti, appellant.

(Index No. 9204/06)

Richard T. Lau, Jericho, N.Y. (Gene W. Wiggins of counsel), for appellant.

Riconda & Garnett, LLP, Valley Stream, N.Y. (Louis A. Badolato of counsel), for respondents.

In an action, inter alia, to recover damages for personal injuries, etc., the defendant appeals from an order of the Supreme Court, Nassau County (McCormack, J.), entered April 2, 2008, which denied his motion for summary judgment dismissing the first, second, and sixth causes of action asserted by the plaintiff Ashley Diaz on the ground that she did not sustain a serious injury within the meaning of Insurance Law § 5102(d), dismissing the claim of the plaintiff Ashley Diaz to recover damages for economic loss in excess of basic economic loss within the meaning of Insurance Law § 5104, and dismissing the third cause of action asserted by the plaintiff Debbie Diaz for loss of services of Ashley Diaz.

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the first, second, and sixth causes of action asserted by the plaintiff Ashley Diaz, on the ground that she did not sustain a serious injury within the meaning of Insurance Law § 5102(d), dismissing the claim of the plaintiff Ashley Diaz to recover damages for economic loss in excess of basic economic loss within the meaning of Insurance Law § 5104, and dismissing the third cause of action asserted by the plaintiff Debbie Diaz for loss of services of Ashley Diaz, is granted.

December 23, 2008

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The Supreme Court correctly determined that the defendant established, prima facie, his entitlement to judgment as a matter of law dismissing the first, second, and sixth causes of action asserted by the plaintiff Ashley Diaz (hereinafter Ashley), and the third cause of action asserted by the plaintiff Debbie Diaz for loss of Ashley's services by showing that Ashley did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyer*, 79 NY2d 955, 956-957). However, in opposition, the plaintiffs failed to raise a triable issue of fact as to whether Ashley sustained a serious injury as a result of the subject accident. The medical reports of Ashley's treating orthopedist failed to raise a triable issue of fact as to whether she sustained a serious injury under the permanent consequential limitation of use and/or the significant limitation of use categories of Insurance Law § 5102(d) since they were not based on a recent examination of her (*see Landicho v Rincon*, 53 AD3d 568, 569; *Cornelius v Cintas Corp.*, 50 AD3d 1085; *Park v Orellana*, 49 AD3d 721; *Amato v Fast Repair, Inc.*, 42 AD3d 477).

Moreover, the plaintiffs failed to submit competent medical evidence that the injuries allegedly sustained by Ashley as a result of the subject accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*see Rabolt v Park*, 50 AD3d 995; *Roman v Fast Lane Car Serv., Inc.*, 46 AD3d 535; *Sainte-Aime v Ho*, 274 AD2d 569).

Without a serious injury, no claim can be made on behalf of Ashley to recover damages for economic loss in excess of basic economic loss within the meaning of Insurance Law § 5104 (*see Abbas v Cole*, 44 AD3d 31, 33). Moreover, Ashley failed to establish economic loss in excess of basic economic loss (*see Watford v Boolukos*, 5 AD3d 475).

RIVERA, J.P., FLORIO, ANGIOLILLO, McCARTHY and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court