

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

D22140  
Y/kmg

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - January 21, 2009

WILLIAM F. MASTRO, J.P.  
STEVEN W. FISHER  
ANITA R. FLORIO  
EDWARD D. CARNI  
RANDALL T. ENG, JJ.

---

2008-06432

DECISION & ORDER

Francisco Torres, respondent, v  
Israel Garcia, et al., appellants.

(Index No. 27927/05)

---

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Thomas Torto of  
counsel), for appellants.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (F. Rivera, J.), dated June 17, 2008, which denied their motion for summary judgment dismissing the complaint 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, without costs or disbursements.

The defendants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. In support of their motion, the defendants relied, inter alia, on the affirmed medical report of their examining orthopedic surgeon. In that report, the orthopedic surgeon noted the existence of significant range-of-motion limitations in the plaintiff's cervical spine (*see Hurtte v Budget Roadside Care*, 54 AD3d 362; *Jenkins v Miled Hacking Corp.*, 43 AD3d 393; *Bentivegna v Stein*, 42 AD3d 555, 556; *Zamaniyan v Vrabeck*, 41 AD3d 472, 473). The defendants' orthopedic surgeon failed to explain or substantiate, with objective medical evidence, the basis for his conclusion that the restrictions in cervical motion were self-imposed.

February 24, 2009

Page 1.

TORRES v GARCIA

Since the defendants failed to meet their prima facie burden, it is unnecessary to consider the sufficiency of the evidence submitted in opposition to the motion (*see Hurtte v Budget Roadside Care*, 54 AD3d 362).

MASTRO, J.P., FISHER, FLORIO, CARNI and ENG, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer  
Clerk of the Court