

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

D22834
C/hu

_____AD3d_____

Submitted - March 11, 2009

REINALDO E. RIVERA, J.P.
MARK C. DILLON
JOSEPH COVELLO
RANDALL T. ENG, JJ.

2008-08675

DECISION & ORDER

Maribel Cuevas, et al., respondents, v Compote
Cab Corp., et al., appellants.

(Index No. 26984/04)

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Holly E. Peck and
Stacy R. Seldin of counsel), for appellants.

Harmon, Linder, & Rogowsky (Mitchell Dranow, Mineola, N.Y., of counsel), for
respondents.

In an action to recover damages for personal injuries, etc., the defendants appeal from
an order of the Supreme Court, Kings County (Battaglia, J.), dated August 4, 2008, which denied
their motion for summary judgment dismissing the complaint on the ground that the plaintiff Maribel
Cuevas did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of
the subject accident.

ORDERED that the order is affirmed, with costs.

The defendants failed to meet their prima facie burden of showing that the plaintiff
Maribel Cuevas 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). The defendants' neurologist found restrictions in the range of motion of the
plaintiff's lumbar spine, which he described as "self-restricted." However, the neurologist failed to
explain or substantiate, with any objective medical evidence, the basis for his conclusion that the
limitations that were noted were self-restricted (*see Colon v Chuen Sum Chu*, _____AD3d_____
[Appellate Division Docket No. 2008-04607; decided herewith]; *Torres v Garcia*, 59 AD3d 705;

April 21, 2009

Page 1.

CUEVAS v COMPOTE CAB CORP.

Busljeta v Plandome Leasing, Inc., 57 AD3d 469). Accordingly, the Supreme Court properly denied the defendants' motion for summary judgment without considering the sufficiency of the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

RIVERA, J.P., DILLON, COVELLO 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