

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

D23752
T/kmg

_____AD3d_____

Submitted - April 29, 2009

WILLIAM F. MASTRO, J.P.
STEVEN W. FISHER
HOWARD MILLER
THOMAS A. DICKERSON
CHERYL E. CHAMBERS, JJ.

2008-11272

DECISION & ORDER

Shakeelah McFadden, etc., et al., respondents,
v Alpha Barry, et al., appellants.

(Index No. 16601/05)

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Marjorie E. Bornes of counsel), for appellants.

In an action to recover damages for personal injuries, etc., the defendants appeal from an order of the Supreme Court, Kings County (Saitta, J.), dated October 23, 2008, which denied their motion for summary judgment dismissing the complaint on the ground that the plaintiff Shakeelah McFadden 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 injured plaintiff 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 Eycler*, 79 NY2d 955, 956-957). In their bill of particulars, the plaintiffs clearly set forth their allegation that the injured plaintiff had sustained injuries to the lumbar region of her spine. The defendants' examining neurologist and orthopedist, however, both failed to address whether there were any limitations in the injured plaintiff's range of motion in the rotation of her lumbar spine. Under the circumstances of this case, given that omission, the Supreme Court properly concluded that the defendants failed to meet their burden of establishing, prima facie, that the injured plaintiff had not sustained a serious injury (*see Staubitz v Yaser*, 41 AD3d 698, 699). Inasmuch as the defendants did not meet their

June 30, 2009

Page 1.

McFADDEN v BARRY

prima facie burden, it is unnecessary to consider the sufficiency of the plaintiffs' papers in opposition (see *Delayhaye v Caledonia Limo & Car Serv., Inc.*, 61 AD3d 814; *Ali v Rivera*, 52 AD3d 445, 446).

MASTRO, J.P., FISHER, MILLER, DICKERSON and CHAMBERS, 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