

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

D24012
Y/cb

_____AD3d_____

Submitted - March 18, 2009

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

2008-05497

DECISION & ORDER

Susan Carr, appellant, v Giuseppe Macaluso, et al.,
respondents.

(Index No. 36747/05)

Julien & Schlesinger, P.C., New York, N.Y. (Mary Elizabeth Burns of counsel), for
appellant.

Nicoletti Gonson Spinner & Owen, LLP, New York, N.Y. (Lorenzo Lugara of
counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an
order of the Supreme Court, Kings County (Schack, J.), dated April 28, 2008, which granted the
defendants' motion for summary judgment dismissing the complaint on the ground that she did not
sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is reversed, on the law, with costs, and the defendants'
motion for summary judgment dismissing the complaint is denied.

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 (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955, 956-957).
The accident occurred on December 27, 2003, and the plaintiff was not examined by the defendants'
expert, Dr. Steven Zaretsky, until July 24, 2007, approximately three years and seven months later.

July 28, 2009

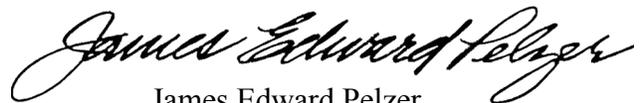
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Nevertheless, Dr. Zaretsky stated in his affirmed report that his testing revealed limitations in cervical range of motion “in all planes.” Dr. Zaretsky concluded that the subject accident exacerbated a significant preexisting condition, which was made worse due to the plaintiff’s obesity. Thus, 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 and, accordingly, the Supreme Court should have denied their motion for summary judgment dismissing the complaint (*see Scarano v Wehrens*, 46 AD3d 797, 798; *Cebularz v Diorio*, 32 AD3d 975, 976; *Gentile v Snook*, 20 AD3d 389, 389; *Derby v Menchenfriend*, 18 AD3d 694, 694-695; *Trunk v Spross*, 306 AD2d 463, 463), regardless of the sufficiency of the plaintiff’s opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

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

ENTER:



James Edward Pelzer
Clerk of the Court