

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

D24027
C/kmg

_____AD3d_____

Submitted - April 29, 2009

PETER B. SKELOS, J.P.
ANITA R. FLORIO
RUTH C. BALKIN
ARIEL E. BELEN
LEONARD B. AUSTIN, JJ.

2008-08902

DECISION & ORDER

Kazi Mohammed Ismail, appellant, v Manuel
Tejeda, et al., respondents.

(Index No. 33019/06)

Tumelty & Spier, LLP, New York, N.Y. (Michael J. Andrews of counsel), for
appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Stacy R. Seldin 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 August 8, 2008, which granted the
defendants' 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 reversed, on the law, with costs, and the defendants'
motion for summary judgment dismissing the complaint is denied.

The defendants did not meet their prima facie burden of establishing 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, 352; *Gaddy v Eyler*, 79 NY2d
955). The plaintiff clearly alleged in his bill of particulars that he had sustained, inter alia, a
medically-determined injury or impairment of a nonpermanent nature which prevented him from
performing substantially all of the material acts constituting his usual and customary activities for not

August 4, 2009

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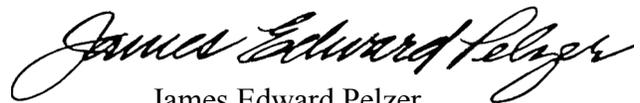
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less than 90 days during the 180 days immediately following the accident. However, the affirmed report of the defendants' examining physician did not specifically relate any of his findings to the 90/180 day category of serious injury for the relevant time period following the accident, and the defendants did not submit any other evidence to refute the plaintiff's claim (*see Neuburger v Sidoruk*, 60 AD3d 650; *Miller v Bah*, 58 AD3d 815; *Scinto v Hoyte*, 57 AD3d 646). Since the defendants failed to meet their prima facie burden with respect to the 90/180 day category of a serious injury, it is unnecessary to examine the sufficiency of the plaintiff's opposition papers in this regard (*see Neuburger v Sidoruk*, 60 AD3d at 652; *Miller v Bah*, 58 AD3d at 816; *Scinto v Hoyte*, 57 AD3d at 647).

In light of the foregoing, the defendants' remaining contention has been rendered academic (*see Insurance Law* § 5102[d]).

SKELOS, J.P., FLORIO, BALKIN, BELEN and AUSTIN, 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