

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

D24185
C/prt

_____AD3d_____

Submitted - June 17, 2009

ROBERT A. SPOLZINO, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL
PLUMMER E. LOTT, JJ.

2008-11208

DECISION & ORDER

Otto Moriera, respondent, v
Miguel A. Durango, et al., appellants.

(Index No. 10711/07)

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

Schwartz Goldstone & Campisi, LLP, South Salem, N.Y. (Annette G. Hasapidis of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the defendants appeal from an order of the Supreme Court, Kings County (Kramer, J.), dated September 22, 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, with costs.

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 defendants' orthopedist found restrictions in the range of motion of the cervical and lumbar regions of the plaintiff's spine which he described as "a subjective examination parameter." However, he failed to explain or substantiate, with any objective medical evidence, the basis for his conclusion that the noted limitations were self-restricted (*see Busljeta v Plandome Leasing, Inc.*, 57 AD3d 469). Accordingly, the Supreme Court properly denied the defendants' motion for summary judgment

September 8, 2009

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without considering the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

SPOLZINO, J.P., SANTUCCI, ANGIOLILLO, LEVENTHAL and LOTT, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court