

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

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Submitted - September 23, 2009

WILLIAM F. MASTRO, J.P.
MARK C. DILLON
THOMAS A. DICKERSON
ARIEL E. BELEN
PLUMMER E. LOTT, JJ.

2009-02964

DECISION & ORDER

Victor Delacruz, respondent, v Ostrich Cab Corp., et al., appellants.

(Index No. 17736/07)

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

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Saitta, J.), dated March 5, 2009, 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, without costs or disbursements.

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 Eycler*, 79 NY2d 955, 956-957). During his examination of the plaintiff, the defendants' orthopedic surgeon found restrictions in the range of motion of the plaintiff's lumbar spine, which he described as "self-restricted." However, he 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 Cuevas v Compote Cab Corp.*, 61 AD3d 812; *Colon v Chuen Sum Chu*, 61 AD3d 805; *Torres v Garcia*, 59 AD3d 705; *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

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(see *Cuevas v Compote Cab Corp.*, 61 AD3d 812; *Coscia v 938 Trading Corp.*, 283 AD2d 538).

MASTRO, J.P., DILLON, DICKERSON, BELEN 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