

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

D24712  
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Submitted - September 23, 2009

STEVEN W. FISHER, J.P.  
ANITA R. FLORIO  
DANIEL D. ANGIOLILLO  
RANDALL T. ENG  
SHERI S. ROMAN, JJ.

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2009-01776

DECISION & ORDER

Jimmy Washington, respondent, v Asdotel Enterprises,  
Inc., et al., appellants.

(Index No. 22091/07)

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

Jacoby & Meyers, LLP, Newburgh, N.Y. (Kristine M. Cahill of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Jacobson, J.), dated January 29, 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, 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 Eycler*, 79 NY2d 955, 956-957). Here, the defendants relied on, inter alia, the affirmed medical report of Dr. Gregory Montalbano, their examining orthopedic surgeon. During his examination of the plaintiff on June 20, 2008, Dr. Montalbano noted significant limitations in the plaintiff's cervical and lumbar spine ranges of motion. While Dr. Montalbano concluded that the plaintiff suffered from pre-existing degenerative disc

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disease in the cervical and lumbar spine, he did not address the plaintiff's allegation in his bill of particulars that the subject accident exacerbated pre-existing degenerative conditions in his cervical and lumbar regions. Thus, the findings of Dr. Montalbano failed to establish that the limitations noted were not caused by the subject accident (*see McKenzie v Redl*, 47 AD3d 775).

Since the defendants failed to meet their prima facie burden, it is unnecessary to consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact (*id.* at 775; *see Coscia v 938 Trading Corp.*, 283 AD2d 538).

FISHER, J.P., FLORIO, ANGIOLILLO, ENG and ROMAN, 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