

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

D25566
W/nl

_____AD3d_____

Submitted - December 2, 2009

STEVEN W. FISHER, J.P.
FRED T. SANTUCCI
THOMAS A. DICKERSON
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2009-01145

DECISION & ORDER

Evelyne Mondert, respondent, v Iglesia De Dios
Pentecostal Cristo Viene, Inc., appellant, et al.,
defendant.

(Index No. 12916/05)

Nicolini, Paradise, Ferretti & Sabella, PLLC, Mineola, N.Y. (Barbara L. Hall of
counsel), for appellant.

Paul G. Vesnaver (Victor A. Carr, Mineola, N.Y., of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant Iglesia De Dios
Penetecostal Cristo Viene, Inc., appeals from an order of the Supreme Court, Kings County
(Schneier, J.), dated January 24, 2008, which denied its motion for summary judgment dismissing the
complaint insofar as asserted against it 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 appellant failed to meet its 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).
In support of its motion, the appellant relied on, inter alia, the affirmed medical report of its
examining neurologist. In that report, he noted that the plaintiff had a significant limitation in her
lumbar spine range of motion, and concluded that the decreased range of motion was “voluntary.”

January 5, 2010

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However, he failed to explain or substantiate, with objective medical evidence, the basis for his conclusion that the limitation was voluntary (*see Hi Ock Park-Lee v Voleriaperia*, 67 AD3d 734, 734; *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).

Since the defendants failed to establish their prima facie entitlement to judgment as a matter of law, it is unnecessary to determine whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see Hi Ock Park-Lee v Voleriaperia*, 67 AD3d 734; *Cuevas v Compote Cab Corp.*, 61 AD3d 812).

FISHER, J.P., SANTUCCI, DICKERSON, CHAMBERS and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court