

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

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Submitted - December 2, 2009

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

2009-06890

DECISION & ORDER

Cecilia Smith, respondent, v Celeste Rodriguez,
et al., appellants, et al., defendants.

(Index No. 4054/08)

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

In an action to recover damages for personal injuries, the defendants Celeste Rodriguez and Ferando Tapia appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Schneier, J.), dated June 19, 2009, as denied their motion for summary judgment dismissing the complaint insofar as asserted against them 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 insofar as appealed from, without costs or disbursements.

Although we affirm the order insofar as appealed from, we do so for reasons different from those relied upon by the Supreme Court. The appellants 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 Eyster*, 79 NY2d 955, 956-957). In support of their motion, the appellants relied on, inter alia, the affirmed medical report of Dr. Gregory Montalbano. Dr. Montalbano, the appellants' examining orthopedic surgeon, examined the plaintiff for evaluation on October 24, 2008, and found significant limitations in the plaintiff's lumbar spine range of motion (*see Washington v Asdotel Enters., Inc.*,

66 AD3d 880; *Buono v Sarnes*, 66 AD3d 809; *Landman v Sarcona*, 63 AD3d 690; *Bagot v Singh*, 59 AD3d 368; *Hurtte v Budget Roadside Care*, 54 AD3d 362). While Dr. Montalbano asserted that a report referable to a magnetic resonance imaging scan of the plaintiff's lumbar spine demonstrated that the range of motion in that portion of the spine was normal, he did not address the limitations he found during his examination of the plaintiff. Thus, Dr. Montalbano's findings and conclusions failed to establish that the limitations he noted with respect to the plaintiff's lumbar spine were not caused by the subject accident (*see McKenzie v Redl*, 47 AD3d 775).

Since the appellants 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 (*see Washington v Asdotel Enters., Inc.*, 66 AD3d 880; *Coscia v 938 Trading Corp.*, 283 AD2d 538).

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

ENTER:



James Edward Pelzer
Clerk of the Court