

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

D26534
C/kmg

_____AD3d_____

Submitted - March 3, 2010

PETER B. SKELOS, J.P.
JOSEPH COVELLO
RANDALL T. ENG
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2009-05293

DECISION & ORDER

Vernon Senior, respondent, v Valery Mikhailov,
defendant, Atlantis Taxi Corp., appellant.

(Index No. 10600/07)

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Colin F. Morrissey of counsel), for appellant.

Clay M. Evall, Esq., P.C., New York, N.Y., for respondent.

In an action to recover damages for personal injuries, the defendant Atlantis Taxi Corp. appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Battaglia, J.), dated May 1, 2009, as 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 insofar as appealed from, with costs.

The defendant Atlantis Taxi Corp. (hereinafter the defendant) 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 Eycler*, 79 NY2d 955, 956-957). The defendant's examining orthopedist noted, in his affirmed medical report, that the plaintiff, inter alia, had a significant loss of power in his right shoulder and stated that this finding may be related to the rotator cuff tear and labral tear noted in the bill of particulars. Since the defendant's orthopedist did not state that this significant loss of power

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was unrelated to the injuries sustained in the accident, the defendant's proof failed to objectively demonstrate that the plaintiff did not sustain a serious injury to his right shoulder as a result of the subject accident. Since the defendant failed to meet his prima facie burden, the sufficiency of the plaintiff's opposition papers need not be considered (*see Facci v Kaminsky*, 18 AD3d 806).

SKELOS, J.P., COVELLO, ENG, CHAMBERS and SGROI, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court