

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

D26553
G/kmg

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Submitted - March 3, 2010

MARK C. DILLON, J.P.
HOWARD MILLER
RUTH C. BALKIN
JOHN M. LEVENTHAL
LEONARD B. AUSTIN, JJ.

2009-05526

DECISION & ORDER

Diane Euvino, appellant, v Joseph Rauchbauer, et al.,
respondents.

(Index No. 1794/07)

Mallilo & Grossman, Flushing, N.Y. (Francesco Pomara, Jr., of counsel), for
appellant.

Morris Duffy Alonso & Faley, New York, N.Y. (Anna J. Ervolina and Andrea M.
Alonso of counsel), for respondents.

In an action, inter alia, to recover damages for personal injuries, the plaintiff appeals,
as limited by her brief, from so much of an order of the Supreme Court, Queens County (Agate, J.),
entered May 28, 2009, as granted that branch of the defendants' motion which was for summary
judgment dismissing the first cause of action to recover damages for personal injuries 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 defendants established, prima facie, through the affirmed reports of their expert
neurologist and orthopedist, as well as the plaintiff's deposition testimony, 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, 352; *Gaddy v Eycler*, 79 NY2d 955, 956-
957; *Richards v Tyson*, 64 AD3d 760, 761; *Berson v Rosada Cab Corp.*, 62 AD3d 636, 637; *Byrd*
v J.R.R. Limo, 61 AD3d 801, 802). In opposition, the plaintiff's submissions were insufficient to

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raise a triable issue of fact as to whether she sustained a serious injury.

The plaintiff submitted affirmations from four physicians, none of whom saw the plaintiff during the first year after the accident. The plaintiff did not provide any affirmations from any of the physicians who had treated her in the months immediately following the accident, nor did she submit any medical records from that time period, although they were available from her initial treating physician's office after he died and physicians from his practice continued to treat her. She therefore failed to set forth any evidence that she suffered from any injuries contemporaneous with the accident (*see Collado v Satellite Solutions & Electronics of WNY, LLC*, 56 AD3d 411; *Kurin v Zyuz*, 54 AD3d 902, 903; *Perdomo v Scott*, 50 AD3d 1115, 1116; *Scotto v Suh*, 50 AD3d 1012, 1013; *Morris v Edmond*, 48 AD3d 432, 433). In addition, none of the physicians indicated that they had reviewed the medical records from an accident that had occurred just a month before the instant accident and in which the plaintiff had injured her back and left arm (*see Cantave v Gelle*, 60 AD3d 988, 989; *Gentilella v Board of Educ. of Wantagh Union Free School Dist.*, 60 AD3d 629, 630; *Silla v Mohammad*, 52 Ad3d 681, 682). Accordingly, the defendants were entitled to summary judgment dismissing the first cause of action to recover damages for personal injuries.

DILLON, J.P., MILLER, BALKIN, LEVENTHAL and AUSTIN, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court