

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

D26668
G/kmg

_____AD3d_____

Submitted - March 10, 2010

WILLIAM F. MASTRO, J.P.
FRED T. SANTUCCI
THOMAS A. DICKERSON
ARIEL E. BELEN
LEONARD B. AUSTIN, JJ.

2009-08479

DECISION & ORDER

Albert Croyle, respondent, v Monroe Woodbury
Central School District, et al., appellants.

(Index No. 3902/07)

Henderson & Brennan (Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale, N.Y. [Gregory A. Cascino], of counsel), for appellants.

DeProspero, Petrizzo & Longo (Steven A. Kimmel, Washingtonville, N.Y., of counsel),
for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Orange County (Owen, J.), dated August 10, 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.

While we affirm the order appealed from, we do so on a ground different from that relied upon by the Supreme Court. Contrary to the Supreme Court's determination, 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). In support of their motion, the defendants relied upon, inter alia, the affirmed medical report of Denise McHale, their examining neurologist. Dr. McHale, who examined the plaintiff on May 5, 2008, noted significant limitations

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in the range-of-motion of the plaintiff's cervical spine on that date (*see Kjono v Fenning*, 69 AD3d 581; *Held v Heideman*, 63 AD3d 1105, 1106; *Torres v Garcia*, 59 AD3d 705; *Bagot v Singh*, 59 AD3d 368; *Hurtte v Budget Roadside Care*, 54 AD3d 362; *Jenkins v Miled Hacking Corp.*, 43 AD3d 393; *Bentivegna v Stein*, 42 AD3d 555, 556; *Zamaniyan v Vrabeck*, 41 AD3d 472, 473). Since the defendants failed to meet their initial burden, their motion should have been denied without regard to the sufficiency of the plaintiff's opposition papers (*see Kjono v Fenning*, 69 AD3d 581; *Held v Heideman*, 63 AD3d 1105).

MASTRO, J.P., SANTUCCI, DICKERSON, BELEN and AUSTIN, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court