

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

D28668
H/prt

_____AD3d_____

Argued - October 1, 2010

PETER B. SKELOS, J.P.
RANDALL T. ENG
ARIEL E. BELEN
L. PRISCILLA HALL, JJ.

2009-03337

DECISION & ORDER

Cathleen M. Britt, appellant, v Antonio L. Bustamante,
et al., respondents, et al., defendant.

(Index No. 609/04)

Wallace, Witty, Frampton & Veltry, P.C., Brentwood, N.Y. (Peter J. Graff of counsel), for appellant.

Christine Malafi, County Attorney, Hauppauge, N.Y. (Diana T. Bishop of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (R. Doyle, J.), entered March 3, 2009, which, upon remittitur from this Court (*see Britt v Bustamante*, 55 AD3d 858), granted that branch of the motion of the defendants Antonio L. Bustamante and County of Suffolk which was for summary judgment dismissing the complaint insofar as asserted against them on the ground that she did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is reversed, on the law, with costs, and that branch of the motion of the defendants Antonio L. Bustamante and County of Suffolk which was 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) is denied.

The defendants Antonio L. Bustamante and County of Suffolk (hereinafter together 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 Eyer*, 79 NY2d 955, 956-957). In support of their motion, the defendants relied, inter alia, on the affirmed medical report of an orthopedist who examined the plaintiff more than three years after the accident, and noted significant range-of-motion limitations in the plaintiff's cervical spine. In view of the orthopedist's findings, the defendants failed to establish their prima facie entitlement to judgment as a matter of law (see *Fields v Hildago*, 74 AD3d 740; *Smith v Hartman*, 73 AD3d 736; *Leopold v New York City Tr. Auth.*, 72 AD3d 906; *Catalan v G & A Processing, Inc.*, 71 AD3d 1071, 1072; *Kjono v Fenning*, 69 AD3d 581; *Buono v Sarnes*, 66 AD3d 809, 810).

Since the defendants failed to meet their prima facie burden, the Supreme Court should have denied their motion regardless of the sufficiency of the plaintiff's opposing papers (see *Kjono v Fenning*, 69 AD3d at 582; *Buono v Sarnes*, 66 AD3d at 810; *Held v Heideman*, 63 AD3d 1105, 1106).

SKELOS, J.P., ENG, BELEN and HALL, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court