

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

D28881
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_____AD3d_____

Submitted - October 20, 2010

STEVEN W. FISHER, J.P.
MARK C. DILLON
RUTH C. BALKIN
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2010-05627

DECISION & ORDER

Silverio Catana, respondent, v Khalid Hussain,
et al., appellants.

(Index No. 27435/06)

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Mead, Hecht, Conklin & Gallagher, LLP, Mamaroneck, N.Y. [Elizabeth M. Hecht], of counsel), for appellants.

William Pager, Brooklyn, N.Y., for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Solomon, J.), dated May 6, 2010, 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.

Contrary to the defendants' assertions, they 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 Eyley*, 79 NY2d 955, 956-957). In support of their motion, the defendants relied on, among other things, the affirmed medical report of Dr. Daniel Arick, an otolaryngologist. Dr. Arick conducted a hearing examination on April 23, 2009, and determined that the plaintiff was "essentially" deaf in his right ear. Dr. Arick opined that this condition was permanent. Dr. Arick did not opine as to the

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cause of this specific finding. Thus, the defendants' motion papers failed to demonstrate, prima facie, that the plaintiff's alleged hearing loss was not causally related to the subject accident (*see Lubrano v Brown*, 251 AD2d 383).

Since the defendants did not sustain their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Coscia v 938 Trading Corp.*, 283 AD2d 538).

FISHER, J.P., DILLON, BALKIN, CHAMBERS and SGROI, 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