

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

D29495
W/hu

_____AD3d_____

Submitted - December 8, 2010

REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
RANDALL T. ENG
JOHN M. LEVENTHAL
LEONARD B. AUSTIN, JJ.

2010-06344

DECISION & ORDER

Jennifer J. Rhodes, respondent, v Suzanne M. Stoddard,
appellant.

(Index No. 7462/07)

Eisenberg & Kirsch, Liberty, N.Y. (Betsy N. Abraham of counsel), for appellant.

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

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Nassau County (Brandveen, J.), entered May 25, 2010, which denied her 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 other than that relied upon by the Supreme Court. The defendant failed to meet her prima facie burden of establishing 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 Eyler*, 79 NY2d 955, 956-957). In support of her motion, the defendant relied upon, inter alia, the affirmed medical report of Dr. Jerrold M. Gorski, her retained examining orthopedic surgeon. Dr. Gorski examined the plaintiff on August 4, 2009. At that time, Dr. Gorski noted a significant limitation in the range of motion of the plaintiff's cervical spine (*see Kjono v Fenning*, 69 AD3d 581; *Landman v Sarcona*, 63 AD3d 690). Moreover, while Dr. Gorski made certain findings with respect to the range of

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motion of the plaintiff's left shoulder, he failed to compare all of those findings to what is normal (*see Frasca-Nathans v Nugent*, _____AD3d_____, 2010 NY Slip Op 07890 [2d Dept 2010]; *Chiara v Dernago*, 70 AD3d 746; *Page v Belmonte*, 45 AD3d 825, 826).

Since the defendant failed to meet her prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiff in opposition to the motion were sufficient to raise a triable issue of fact (*see Kjono v Fenning*, 69 AD3d at 582; *Frasca-Nathans v Nugent*, _____AD3d_____, 2010 NY Slip Op 07890 [2d Dept 2010]).

RIVERA, J.P., COVELLO, ENG, LEVENTHAL and AUSTIN, 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