

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

D29617
H/kmb

_____AD3d_____

Submitted - December 15, 2010

PETER B. SKELOS, J.P.
DANIEL D. ANGIOLILLO
L. PRISCILLA HALL
SHERI S. ROMAN, JJ.

2009-09645

DECISION & ORDER

Fritz Rocourt, appellant, v Melmartis Alvelo,
et al., respondents.

(Index No. 34327/06)

Harmon, Linder, & Rogowsky (Mitchell Dranow, Mineola, N.Y. of counsel), for appellant.

White Fleischner & Fino, LLP, New York, N.Y. (Jennifer L. Coviello of counsel), for respondent Melmartis Alvelo.

Morris Duffy Alfonso & Faley, New York, N.Y. (Iryna S. Krauchanka and Andrea M. Alonso of counsel), for respondents Rajiu R. Latchman and Candice Jarome-Davis.

James G. Bilello & Associates, Westbury, N.Y. (Patricia McDonagh of counsel), for respondents Junior A. Williams and Karen M. Rose.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Balter, J.), dated September 1, 2009, which granted the separate motions of the the defendant Melmartis Alvelo, the defendants Rajiu R. Latchman and Candice Jarome-Davis, and the defendants Junior A. Williams and Karen M. Rose for summary judgment dismissing the complaint insofar as asserted against each of those defendants on the ground that he did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is reversed, on the law, with one bill of costs to the plaintiff,

December 28, 2010

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payable by the defendants appearing separately and filing separate briefs, and the defendants' separate motions for summary judgment dismissing the complaint insofar as asserted against each of them are denied.

Contrary to the Supreme Court's determination, the defendants failed to meet their respective prima facie burdens 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 respective motions, the defendants relied on, among other things, the affirmed medical report of Dr. Alan J. Zimmerman, an orthopedic surgeon, dated October 22, 2008, who opined that the plaintiff had significant limitations in his lumbar spine range of motion resulting from the subject accident (*see Mondevil v Kumar*, 74 AD3d 1295; *Smith v Hartman*, 73 AD3d 736; *Quiceno v Mendoza*, 72 AD3d 669; *Giacomaro v Wilson*, 58 AD3d 802).

Since the defendants failed to meet their respective prima facie burdens, it is unnecessary to consider 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).

SKELOS, J.P., ANGIOLILLO, HALL and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court