

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

D29775
G/kmb

_____AD3d_____

Submitted - January 5, 2011

PETER B. SKELOS, J.P.
JOSEPH COVELLO
RANDALL T. ENG
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2010-06371

DECISION & ORDER

Wayne Hightower, appellant, v Christopher R.
Ghio, respondent.

(Index No. 3580/09)

Basch & Keegan, LLP, Kingston, N.Y. (Derek J. Spada of counsel), for appellant.

Goergen, Manson & Huenke, Middletown, N.Y. (David B. Manson of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Orange County (Ritter, J.), dated June 1, 2010, which granted the defendant's 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 reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is denied.

The defendant established, prima facie, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyster*, 79 NY2d 955, 956-957; *Acosta v Rubin*, 2 AD3d 657, 659). In opposition, the plaintiff raised triable issues of fact as to whether he sustained serious injuries to the cervical and/or thoracolumbar regions of his spine under the permanent consequential limitation of use and/or the significant limitation of use categories of Insurance Law § 5102(d) (*see Compass v GAE Transp., Inc.*, 79 AD3d 1091; *Boskey v GTWY, Inc.*, 78 AD3d 1095).

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Although the defendant supported his initial moving papers with evidence that the plaintiff was involved in an automobile accident approximately five years prior to the subject accident, he failed to make a prima facie showing that the plaintiff's injuries were caused by the prior accident. Therefore, the burden did not shift to the plaintiff to raise a triable issue of fact as to whether his injuries were caused by the subject accident, rather than by the prior accident (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *see also Stukas v Streiter*, _____AD3d_____, 2011 NY Slip Op 01832 [2d Dept 2011]).

Accordingly, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

SKELOS, J.P., COVELLO, ENG, CHAMBERS and SGROI, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court