

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

D30191
W/kmb

_____AD3d_____

Submitted - February 9, 2011

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

2010-08928

DECISION & ORDER

Veronica Lewis, et al., respondents, v Anthony F.
John, et al., appellants, et al., defendant.

(Index No. 130/09)

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Timothy M.
Sullivan of counsel), for appellants.

Robert K. Marchese, Esq., P.C., Staten Island, N.Y. (Elizabeth Mark Meyerson of
counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendants Anthony
F. John and Takis Corp. appeal, as limited by their brief, from so much of an order of the Supreme
Court, Kings County (Bayne, J.), dated July 30, 2010, as denied their motion for summary judgment
dismissing the complaint insofar as asserted against them on the ground that the plaintiff Veronica
Lewis did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is affirmed insofar as appealed from, with costs.

The appellants failed to meet their prima facie burden of showing that the plaintiff
Veronica Lewis (hereinafter the injured 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). The plaintiffs adequately set forth a claim in
their bill of particulars that the injured plaintiff sustained a medically-determined injury or impairment
of a nonpermanent nature which prevented her from performing substantially all of the material acts

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which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*see* Insurance Law § 5102[d]; hereinafter the 90/180 category of serious injury). Despite this claim, neither the appellants' expert neurologist, Dr. Maria De Jesus, nor their expert orthopedist, Dr. Lisa Nason, who did not examine the injured plaintiff until approximately 1½ years after the accident, related their findings to the 90/180 day category of serious injury (*see Bright v Moussa*, 72 AD3d 859, 860; *Menezes v Khan*, 67 AD3d 654, 654-655).

Since the appellants did not sustain their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiffs in opposition were sufficient to raise a triable issue of fact (*see Linton v Nawaz*, 14 NY3d 821, 822; *Bright v Moussa*, 72 AD3d at 860; *Menezes v Khan*, 67 AD3d at 654-655).

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

ENTER:


Matthew G. Kiernan
Clerk of the Court