

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

D30515
Y/ct

_____AD3d_____

Submitted - March 9, 2011

WILLIAM F. MASTRO, J.P.
DANIEL D. ANGIOLILLO
RUTH C. BALKIN
PLUMMER E. LOTT
ROBERT J. MILLER, JJ.

2010-10668

DECISION & ORDER

Claudia Heumann, respondent, v JACO Transportation,
Inc., et al., appellants.

(Index No. 7719/09)

Lewis Johs Avallone Aviles, LLP, Melville, N.Y. (Michael G. Kruzynski and Seth M. Weinberg of counsel), for appellants.

Rubin & Licatesi, P.C., Garden City, N.Y. (Joseph Aufenanger of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Nassau County (Mahon, J.), dated September 23, 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 reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is granted.

The defendants met 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 Eyler*, 79 NY2d 955, 956-957).

In opposition to the defendants' motion, the plaintiff failed to raise a triable issue of

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fact. The plaintiff primarily relied upon the affirmation of her treating hand surgeon, Dr. Alan M. Freedman. The defendants' examining physician, Dr. Thomas Joseph Palmieri, unequivocally found that the plaintiff's complained-of injuries to her right hand were not causally related to the subject accident. Dr. Freedman merely opined that the plaintiff's "right trigger finger condition may have been caused or exacerbated by the automobile accident in which she was involved in January 3, 2007." This speculative language was not sufficient to raise a triable issue of fact in opposition to the defendants' prima facie showing of entitlement to judgment as a matter of law (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544; *Gaddy v Eyler*, 79 NY2d at 957-958; *Nieves v Michael*, 73 AD3d 716, 716).

Moreover, although Dr. Freedman noted in his "Chart Note" dated January 4, 2007, that the plaintiff's "[r]ange of motion [of her right wrist] is limited by pain," he failed to set forth any quantitative or qualitative evaluation of the extent of the reported limitation (*see Toure v Avis Rent A Car Sys.*, 98 NY2d at 350-351; *Dufel v Green*, 84 NY2d 795, 798). "Without such contemporaneous findings, the plaintiff could not have raised a triable issue of fact under the permanent loss, permanent consequential limitation of use, or the significant limitation of use categories of Insurance Law § 5102(d)" (*Nieves v Michael*, 73 AD3d at 717).

Accordingly, the Supreme Court should have granted the defendants' motion for summary judgment dismissing the complaint.

MASTRO, J.P., ANGIOLILLO, BALKIN, LOTT and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court