

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

D31045
C/ct

_____AD3d_____

Submitted - January 5, 2011

MARK C. DILLON, J.P.
JOHN M. LEVENTHAL
ARIEL E. BELEN
JEFFREY A. COHEN, JJ.

2010-04414

DECISION & ORDER

Lenert Mitchell, respondent, v Casa Redimix
Concrete Corporation, et al., appellants.

(Index No. 3023/08)

Camacho Mauro & Mulholland, LLP, New York, N.Y. (Kathleen Mulholland and Peter J. Lo Polo of counsel), for appellants Casa Redimix Concrete Corporation and Robert J. Nicodemo.

Cheven, Keely & Hatzis, New York, N.Y. (William B. Stock of counsel), for appellants Jimmie J. Buie and Zepora Meadows.

Lozner & Mastropietro (Pollack, Pollack, Isaac & DeCicco, New York, N.Y. [Dean G. Delianites and Brian J. Isaac], of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants Casa Redimix Concrete Corporation and Robert J. Nicodemo appeal, and the defendants Jimmie J. Buie and Zepora Meadows separately appeal, from an order of the Supreme Court, Kings County (Solomon, J.), dated February 25, 2010, which denied their separate motions for summary judgment dismissing the complaint insofar as asserted against them 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 one bill of costs.

While we affirm the order appealed from, we do so on a ground other than that relied upon by the Supreme Court. Contrary to the Supreme Court's determination, the defendants, who

April 26, 2011

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relied on the same submissions, met their 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 Eycler*, 79 NY2d 955, 956-957; *see also Kearse v New York City Tr. Auth.*, 16 AD3d 45, 51-52).

However, in opposition, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury to his lumbar and/or cervical spine under the permanent consequential limitation of use and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (*see Dixon v Fuller*, 79 AD3d 1094; *Gussack v McCoy*, 72 AD3d 644; *Casiano v Zedan*, 66 AD3d 730; *Ortiz v Zorbas*, 62 AD3d 770). The plaintiff also provided an adequate explanation for the gap in his treatment history (*see Pommells v Perez*, 4 NY3d 566, 577; *see also Gaviria v Alvarado*, 65 AD3d 567).

DILLON, J.P., LEVENTHAL, BELEN and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court