

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

D32209
H/prt

_____AD3d_____

Argued - June 3, 2011

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
CHERYL E. CHAMBERS, JJ.

2010-02958

DECISION & ORDER

Rosalia Cracchiolo, et al., appellants, v
Michael Omerza, et al., respondents.

(Index No. 103802/07)

Friedman, Khafif & Sanchez, LLP, Brooklyn, N.Y. (Emil J. Sanchez and Andrew M. Friedman of counsel), for appellants.

Cheven, Keely & Hatzis, New York, N.Y. (William B. Stock of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Richmond County (Maltese, J.), dated February 3, 2010, as granted the defendants' cross motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and the defendants' cross motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d) is denied.

Contrary to the Supreme Court's determination, the defendants failed to meet their prima facie burden of showing that the plaintiffs 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). Based on the inconsistent norms utilized in the findings of the defendants' examining orthopedist, Dr. Harvey Fishman, as to the range of motion

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tests for the cervical and thoracolumbosacral regions of the spine of each of the plaintiffs, the defendants failed to establish their prima facie entitlement to judgment as a matter of law (*see Frey v Fedorciuc*, 36 AD3d 587, 588; *Powell v Alade*, 31 AD3d 523; *see also Corcione v John Dominick Cusumano, Inc.*, 84 AD3d 1010).

The parties' remaining contentions either are without merit or have been rendered academic in light of our determination.

MASTRO, J.P., FLORIO, BELEN and CHAMBERS, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court