

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

D32244
H/prt

_____AD3d_____

Submitted - May 25, 2011

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
RANDALL T. ENG
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2010-05086

DECISION & ORDER

Mohamed Nour, appellant, v
Michel Klein, respondent.

(Index No. 27164/08)

Law Offices of Paul Bryan Schneider, P.C., Melville, N.Y., for appellant.

Russo, Keane & Toner, LLP, New York, N.Y. (Tina Altinel Profita of counsel), for respondent.

In an action, inter alia, to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Rothenberg, J.), dated April 2, 2010, which granted the defendant's motion for summary judgment dismissing the complaint on the ground that he 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 failed to meet his 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). The papers the defendant submitted failed to adequately address the plaintiff's claim, set forth in the bill of particulars, that the plaintiff sustained a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180

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days immediately following the subject accident (*see DeVille v Barry*, 41 AD3d 763, 763-764).

Since the defendant did not sustain his prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*id.*).

Accordingly, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint.

RIVERA, J.P., ANGIOLILLO, ENG, CHAMBERS and SGROI, 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