

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

D32245
H/prt

_____AD3d_____

Submitted - May 11, 2011

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

2010-01886

DECISION & ORDER

Godfrey Stewart, et al., appellants, v Alberto Perez,
et al., respondents (and a third-party action).

(Index No. 26064/06)

Elovich & Adell, Long Beach, N.Y. (Darryn Solotoff and Mitchel Sommer of counsel), for appellants.

Robert P. Tusa, Garden City, N.Y. (Donald W. Sweeney of counsel), for respondent Alberto Perez.

Cheven, Keely & Hatzis, New York, N.Y. (William B. Stock of counsel), for respondents Sue Jun-Om and Jong-Hoon Om.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Satterfield, J.), dated January 26, 2010, as granted the motion of the defendants Sue Jun-Om and Jong-Hoon Om and that branch of the cross motion of the defendant Alberto Perez which were for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the plaintiff Godfrey Stewart 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 one bill of costs payable by the respondents appearing separately and filing separate briefs, and the motion of the defendants Sue Jun-Om and Jong-Hoon Om and that branch of the cross motion of the

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defendant Alberto Perez which were for summary judgment dismissing the complaint insofar as asserted against each of them are denied.

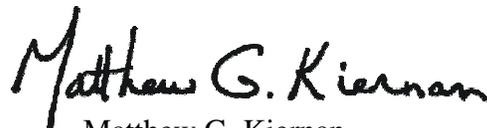
The defendants Sue Jun-Om and Jong-Hoon Om (hereinafter together the Oms) and the defendant Alberto Perez failed to meet their prima facie burdens of showing that the plaintiff Godfrey Stewart (hereinafter the injured plaintiff) did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyer*, 79 NY2d 955, 956-957). The papers submitted by the Oms and Perez failed to adequately address the plaintiffs' claim, set forth in the bill of particulars, that the injured 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 days immediately following the subject accident (*see Mugno v Juran*, 81 AD3d 908). The defendants' examining physicians did not relate any of their findings to this category of serious injury for the period of time immediately following the subject accident (*see Takaroff v A.M. USA, Inc.*, 63 AD3d 1142, 1143). In addition, the Oms and Perez provided no evidence supporting their assertion that during the 180 days immediately following the accident, the injured plaintiff's injuries or condition did not "curtail[]" the injured plaintiff "from performing his usual activities to a great extent" (*Licari v Elliott*, 57 NY2d 230, 236).

Since the Oms and Perez did not sustain their prima facie burdens, it is unnecessary to determine whether the papers submitted by the plaintiffs in opposition were sufficient to raise a triable issue of fact (*see Mugno v Juran*, 81 AD3d at 909).

Accordingly, the Supreme Court should have denied the Oms' motion and that branch of Perez's cross motion which were for summary judgment dismissing the complaint.

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

ENTER:



Matthew G. Kiernan
Clerk of the Court