

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

D32308
H/prt

_____AD3d_____

Submitted - September 7, 2011

WILLIAM F. MASTRO, J.P.
RUTH C. BALKIN
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2010-08725

DECISION & ORDER

Kevin P. Kelly, et al., appellants, v
Carly C. Ghee, et al., respondents.

(Index No. 555/09)

Goldstein & Metzger LLP, Poughkeepsie, N.Y. (Paul J. Goldstein of counsel), for appellants.

McCabe & Mack LLP, Poughkeepsie, N.Y. (Kimberly Hunt Lee of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Dutchess County (Wood, J.), dated August 5, 2010, which, in effect, granted the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff Kevin P. Kelly 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 denied.

The defendants failed to meet their prima facie burden of showing that 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 Eyler*, 79 NY2d 955, 956-957). The plaintiffs alleged, inter alia, that as a result of the subject accident, the injured plaintiff sustained certain injuries to the cervical region of his spine. However, the defendants failed to provide competent medical evidence establishing, prima facie, that those alleged injuries did not

constitute serious injuries within the meaning of Insurance Law § 5102(d) (*see Torres v Torrano*, 79 AD3d 1124; *Connors v Flaherty*, 32 AD3d 891, 893). Furthermore, although the defendants contended that those alleged injuries were not caused by the subject accident (*see Pommells v Perez*, 4 NY3d 566, 579), the defendants' evidentiary submissions actually demonstrated the existence of a triable issue of fact as to whether those alleged injuries were caused by the subject accident (*see Coscia v 938 Trading Corp.*, 283 AD2d 538).

Since the defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiffs in opposition were sufficient to raise a triable issue of fact (*id.*).

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

MASTRO, J.P., BALKIN, 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