

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

D32623
C/prt

_____AD3d_____

Submitted - October 5, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
JOHN M. LEVENTHAL
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2010-09368
2010-11914

DECISION & ORDER

Antonio Lodato, respondent, v
Carolyn Mahler, appellant.

(Index No. 3128/09)

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

Sobo & Sobo, LLP, Middletown, N.Y. (Suzan D. Paras of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals (1) from an order of the Supreme Court, Orange County (Cohen, J.), dated August 31, 2010, which denied her motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and (2), as limited by her brief, from so much of an order of the same court dated November 15, 2010, as denied that branch of her motion which was for leave to renew her prior motion.

ORDERED that the order dated August 31, 2010, is reversed, on the law, and the defendant's motion for summary judgment dismissing the complaint is granted; and it is further,

ORDERED that the appeal from the order dated November 15, 2010, is dismissed as academic in light of our determination on the appeal from the order dated August 31, 2010; and it is further,

October 18, 2011

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ORDERED that one bill of costs is awarded to the defendant.

The defendant met her 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 Eyley*, 79 NY2d 955, 956-957). The plaintiff alleged that as a result of the subject accident, his left shoulder and the cervical region of his spine sustained certain injuries, and the defendant provided competent medical evidence establishing, prima facie, that those alleged injuries did not constitute serious injuries within the meaning of Insurance Law § 5102(d) (see *Perl v Meher*, 74 AD3d 930; *Rodriguez v Huerfano*, 46 AD3d 794, 795). The plaintiff also alleged that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d), and the defendant provided evidence establishing, prima facie, that he did not sustain such an injury. In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted the defendant's motion for summary judgment dismissing the complaint.

In light of our determination, the defendant's remaining contention need not be reached.

DILLON, J.P., DICKERSON, LEVENTHAL, AUSTIN and MILLER, 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