

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

D32763
Y/ct

_____AD3d_____

Submitted - October 19, 2011

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

2011-01852

DECISION & ORDER

Phyllis Brouman, respondent, v Alex Gorokhovskiy,
appellant.

(Index No. 5387/09)

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Mead, Hecht, Conklin & Gallagher, LLP [Elizabeth M. Hecht], of counsel), for appellant.

Edelstein & Grossman, New York, N.Y. (Jonathan L. Edelstein of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Kramer, J.), dated December 20, 2010, which denied his 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).

ORDERED that the order is affirmed, with costs.

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 Eyer*, 79 NY2d 955, 956-957). The papers the defendant submitted failed to adequately address the plaintiff's claim, set forth in the bills of particulars, that the plaintiff sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts

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which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*see Reynolds v Wai Sang Leung*, 78 AD3d 919, 920; *cf. Tinsley v Bah*, 50 AD3d 1019, 1019-1020).

Moreover, the defendant failed to adequately address the plaintiff's claim that, as a result of the subject accident, a bone in her left foot sustained a fracture (*see Olic v Pappas*, 47 AD3d 780).

In light of the defendant's failure to meet his prima facie burden, it is unnecessary to review the sufficiency of the plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Accordingly, the Supreme Court properly denied the defendant's motion for summary judgment dismissing the complaint.

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

ENTER:


Matthew G. Kiernan
Clerk of the Court