

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

D32916  
Y/ct

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Submitted - October 13, 2011

DANIEL D. ANGIOLILLO, J.P.  
ANITA R. FLORIO  
JOHN M. LEVENTHAL  
JEFFREY A. COHEN, JJ.

2010-03435

DECISION & ORDER

Gabriel Valera, et al., appellants, v Balwinder Singh,  
defendant third-party plaintiff-respondent; Zobeida  
Valera, third-party defendant-respondent.

(Index No. 25161/07)

Harmon, Linder, & Rogowsky, New York, N.Y. (Mitchell Dranow of counsel), for  
appellants.

Novins O’Leary & Associates, Melville, N.Y. (Marina O’Leary of counsel), for  
defendant third-party plaintiff-respondent.

Kaplan, Hanson, McCarthy, Adams, Finder & Fishbein, Lake Success, N.Y. (Alex  
Fooksman of counsel), for third-party defendant-respondent.

In an action to recover damages for personal injuries, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Nelson, J.), dated March 11, 2010, as granted the motion of the defendant third-party plaintiff, and that branch of the cross motion of the third-party defendant, which were for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and denied, as academic, their motion for summary judgment on the issue of liability against the defendant third-party plaintiff.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

Contrary to the plaintiffs’ assertion, the defendant third-party plaintiff and the third-

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party defendant met their prima facie burdens of showing on their respective motion and cross motion that the plaintiffs 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 Eyster*, 79 NY2d 955, 956-957). In opposition, the plaintiffs failed to raise a triable issue of fact.

The plaintiffs failed to raise a triable issue of fact as to whether either one of them sustained a serious injury under the permanent loss, the permanent consequential limitation of use, or the significant limitation of use categories of Insurance Law § 5102(d), since they failed to set forth any objective medical findings from a recent examination (*see Rovelov v Volcy*, 83 AD3d 1034; *Jean v Labin-Natochenny*, 77 AD3d 623; *Clarke v Delacruz*, 73 AD3d 965; *Kin Chong Ku v Baldwin-Bell*, 61 AD3d 938; *Diaz v Lopresti*, 57 AD3d 832, 832-833; *Soriano v Darrell*, 55 AD3d 900, 900-901; *Mejia v DeRose*, 35 AD3d 407; *Diaz v Wiggins*, 271 AD2d 639, 640; *Kauderer v Penta*, 261 AD2d 365, 366; *Marin v Kakivelis*, 251 AD2d 462, 463).

The plaintiffs further failed to raise a triable issue of fact as to whether their respective injuries prevented them from performing substantially all of their usual and customary daily activities during at least 90 of the first 180 days following the subject accident (*see McLoud v Reyes*, 82 AD3d 848; *Roman v Fast Lane Car Serv., Inc.*, 46 AD3d 535; *Sainte-Aime v Ho*, 274 AD2d 569). The plaintiff Gabriel Valera testified at his deposition that he missed, at most, one to two days of work as a result of the accident, and the plaintiff Ani Valera testified at her deposition that she missed no time from work as a result of the accident.

The plaintiffs' remaining contention has been rendered academic in light of our determination.

ANGIOLILLO, J.P., FLORIO, LEVENTHAL and COHEN, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court