

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

D33276
W/kmb

_____AD3d_____

Argued - November 10, 2011

MARK C. DILLON, J.P.
DANIEL D. ANGIOLILLO
ANITA R. FLORIO
THOMAS A. DICKERSON, JJ.

2010-10988

DECISION & ORDER

Jeremy K. Poverud, et al., respondents, v Joyce E.
Kwartler, appellant.

(Index No. 4012/09)

Craig P. Curcio, Middletown, N.Y. (Bryan R. Kaplan of counsel), for appellant.

Dupée & Monroe, P.C., Goshen, N.Y. (James E. Monroe of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals from so much of an order of the Supreme Court, Orange County (Cohen, J.), dated September 22, 2010, as denied her cross motion for summary judgment dismissing the complaint on the ground that the plaintiff Jeremy K. Poverud did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

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

The evidence submitted by the defendant in support of her cross motion failed to eliminate all triable issues of fact as to whether the plaintiff Jeremy K. Poverud sustained a “fracture” to his right patella as a result of the subject motor vehicle accident (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Olic v Pappas*, 47 AD3d 780, 780; *see generally* Insurance Law § 5102[d]). Since the defendant failed to meet her prima facie burden, it is unnecessary to determine whether the plaintiffs, in opposition to the defendant’s cross motion, raised a triable issue of fact (*see Coscia v 938 Trading Corp.*, 283 AD2d 538). Accordingly, the Supreme Court properly denied the defendant’s cross motion for summary judgment dismissing the complaint.

December 13, 2011

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In light of our determination, we need not reach the parties' remaining contentions.

DILLON, J.P., ANGIOLILLO, FLORIO and DICKERSON, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court