

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

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C/kmb

_____AD3d_____

Submitted - December 14, 2011

PETER B. SKELOS, J.P.
DANIEL D. ANGIOLILLO
ARIEL E. BELEN
PLUMMER E. LOTT
SHERI S. ROMAN, JJ.

2011-05704

DECISION & ORDER

Che Hong Kim, respondent, v Barbara K. Kossoff,
defendant, Mary Cestaro, et al., appellants.

(Index No. 4386/09)

Adams, Hanson, Finder, Hughes, Rego, Kaplan & Fishbein, Yonkers, N.Y. (Howard J. Kaplan of counsel), for appellants.

Kelner & Kelner, New York, N.Y. (Joshua D. Kelner of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants Mary Cestaro and On Site Construction, Inc., appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Strauss, J.), dated April 27, 2011, as denied their cross motion for summary judgment dismissing the complaint insofar as asserted against them 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 insofar as appealed from, with costs.

The appellants failed to meet their 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 Eyler*, 79 NY2d 955, 956-957). The appellants' motion papers failed to adequately address the plaintiff's claim, clearly set forth in the bills of particulars, that he sustained a medically-determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his 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,

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920; *cf. Tinsley v Bah*, 50 AD3d 1019, 1019-1020).

Since the appellants failed to meet their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Reynolds v Wai Sang Leung*, 78 AD3d at 920).

SKELOS, J.P., ANGIOLILLO, BELEN, LOTT and ROMAN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court