

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

D32782
Y/prt

_____AD3d_____

Submitted - October 19, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
RANDALL T. ENG
L. PRISCILLA HALL
JEFFREY A. COHEN, JJ.

2010-11534

DECISION & ORDER

Linnete Martinez, appellant, v Yi Zhong Chen,
et al., respondents.

(Index No. 28966/08)

Costella & Gordon, LLP, Garden City, N.Y. (Roy C. Gordon of counsel), for
appellant.

Baker McEvoy Morrissey & Moskovits, P.C., New York, N.Y. (Stacy R. Seldin of
counsel), for respondent Yi Zhong Chen.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Vaughan, J.), dated September 29, 2010, which granted the motion of the defendant Yi Zhong Chen and the separate motion of the defendant Jasmine Romero for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that she did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is reversed, on the law, with costs, and the defendants' motions for summary judgment dismissing the complaint insofar as asserted against each of them are denied.

The defendant Jasmine Romero failed to make a prima facie 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* Insurance Law § 5102[d]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352;

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Gaddy v Eycler, 79 NY2d 955, 955-956). On her motion for summary judgment, Romero did not address the injuries to the plaintiff's left ankle alleged in the plaintiff's bill of particulars, and did not submit a report from any physician who examined the plaintiff's left ankle (see *Bitterman v Dennis*, 78 AD3d 627; *McMillian v Naparano*, 61 AD3d 943; *Lopez v Felton*, 60 AD3d 822; *O'Neal v Bronopolsky*, 41 AD3d 452). Since Romero did not sustain her prima facie burden, the Supreme Court should have denied her motion regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Kharzis v PV Holding Corp.*, 78 AD3d 1122, 1123; *Kelly v County of Suffolk*, 62 AD3d 837).

In support of his separate motion for summary judgment, the defendant Yi Zhong Chen (hereinafter Chen) sustained 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 Eycler*, 79 NY2d at 956-957). Chen made a prima facie showing, through the affirmed reports of his examining orthopedist and neurologist, that the injuries the plaintiff allegedly sustained to the lumbar region of her spine, her left knee, and her left ankle did not constitute a serious injury within the meaning of Insurance Law § 5102(d) (see *McKenna v Williams*, 89 AD3d 698; *Dunbar v Prahovo Taxi, Inc.*, 84 AD3d 862, 863; *Estaba v Quow*, 74 AD3d 734; *Staff v Yshua*, 59 AD3d 614; *Rodriguez v Huerfano*, 46 AD3d 794, 795), and, in any event, were not caused by the subject accident (see *Carballo v Pacheco*, 85 AD3d 703; *Jilani v Palmer*, 83 AD3d 786, 787). However, in opposition, the plaintiff submitted, inter alia, the affirmed report of her treating specialist in physical medicine and rehabilitation, which concluded that she had suffered permanent injuries to the lumbar region of her spine resulting in significant range-of-motion limitations. The plaintiff's submissions were sufficient to raise a triable issue of fact as to whether she sustained a serious injury under the permanent consequential limitation of use or the significant limitation of use categories of Insurance Law § 5102(d), and as to whether those injuries were caused by the subject accident (see *Perl v Meher*, 18 NY3d 208; *Tudor v Yetman*, 88 AD3d 870). Accordingly, the Supreme Court should have also denied Chen's motion for summary judgment dismissing the complaint insofar as asserted against him.

RIVERA, J.P., FLORIO, ENG, HALL and COHEN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court