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

D33113
W/kmb

_____AD3d_____ Submitted - November 16, 2011

WILLIAM F. MASTRO, A.P.J.
RUTH C. BALKIN
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2011-01482 DECISION & ORDER

Ubirajara Franco, appellant, v Supreme Poultry, Inc., et al., respondents.

(Index No. 14858/08)

Joel J. Turney, LLC, New York, N.Y. (Jeffrey B. Manca of counsel), for appellant.

Robert P. Tusa (Sweetbaum & Sweetbaum, Lake Success, N.Y. [Marshall D. Sweetbaum], of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Silber, J.), dated December 20, 2010, which granted the defendants' motion for summary judgment dismissing the complaint on the ground that he 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' motion for summary judgment dismissing the complaint is denied.

The defendants met 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 plaintiff alleged, inter alia, that as a result of the subject accident, he sustained certain injuries to his left shoulder. The defendants submitted competent medical evidence establishing, prima facie, that the alleged injuries to the plaintiff's left shoulder did not constitute a serious injury within the meaning of Insurance Law § 5102(d) (*see Rodriguez v Huerfano,* 46 AD3d 794, 795). In opposition, however, the plaintiff submitted competent medical evidence raising a triable issue of fact as to whether the alleged injuries to his left shoulder constituted a serious injury under the permanent

consequential limitation of use category or the significant limitation of use category of Insurance Law § 5102(d) (*see Perl v Meher*, 18 NY3d 208 *5). Accordingly, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the complaint.

MASTRO, A.P.J., BALKIN, CHAMBERS and SGROI, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court