

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

D33728
H/prt

_____AD3d_____

Submitted - October 5, 2011

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

2010-10698

DECISION & ORDER

Andrew M. Thaler, as trustee of the estate of
Theresa D'Amico, appellant, v John W. Felsberg,
et al., respondents, et al., defendants.

(Index No. 39000/07)

Siben & Siben, LLP, Bay Shore, N.Y. (Alan G. Faber of counsel), for appellant.

Carman, Callahan & Ingham, LLP, Farmingdale, N.Y. (Tracy S. Reifer of counsel),
for respondents John W. Felsberg and John J. Felsberg, and John T. Ryan &
Associates, Lake Success, N.Y. (David M. Reilly of counsel), for respondents Selma
Stewart and Phillip C. Stewart (one brief filed).

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Pitts, J.), dated September 30, 2010, as granted the separate motions of the defendants John W. Felsberg and John J. Felsberg, and the defendants Selma Stewart and Phillip C. Stewart, for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that Theresa D'Amico did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and denied, as academic, his cross motion, in effect, to compel those defendants to accept a supplemental bill of particulars.

ORDERED that the order is reversed insofar as appealed from, on the law, with one bill of costs, the separate motions of the defendants John W. Felsberg and John J. Felsberg, and the defendants Selma Stewart and Phillip C. Stewart, for summary judgment dismissing the complaint

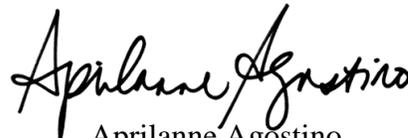
insofar as asserted against each of them are denied, and the plaintiff's cross motion, in effect, to compel those defendants to accept a supplemental bill of particulars is granted.

The defendants John W. Felsberg and John J. Felsberg, and the defendants Selma Stewart and Phillip C. Stewart (hereinafter collectively the defendants), failed to meet their prima facie burdens of showing that Theresa D'Amico 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, 350; *Gaddy v Eyer*, 79 NY2d 955, 956-957). The plaintiff, who was the trustee of D'Amico's bankruptcy estate, essentially alleged, inter alia, that as a result of the subject accident, the cervicothoracic region of D'Amico's spine sustained certain injuries. On their motions for summary judgment, the defendants addressed those alleged injuries by arguing that they were not caused by the subject accident (*see Pommells v Perez*, 4 NY3d 566, 579). However, the defendants' evidentiary submissions revealed the existence of a triable issue of fact as to whether those alleged injuries were caused by the subject accident (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Rose v City of New Rochelle*, 57 AD3d 506). Since the defendants failed to meet their prima facie burdens, we need not consider the sufficiency of the plaintiff's opposition papers (*see Rose v City of New Rochelle*, 57 AD3d at 506; *Litz v F.J. Gray & Co.*, 39 AD3d 490, 491).

Under the circumstances, it is clear that the plaintiff did not need leave of court to serve a supplemental bill of particulars (*see CPLR 3043[b]*; *see Zenteno v Geils*, 17 AD3d 457, 458). Accordingly, the Supreme Court should have granted the plaintiff's cross motion, in effect, to compel the defendants to accept a supplemental bill of particulars.

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

ENTER:



Aprilanne Agostino
Clerk of the Court