

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

D33814
N/kmb

_____AD3d_____

Submitted - January 18, 2012

MARK C. DILLON, J.P.
RUTH C. BALKIN
ARIEL E. BELEN
LEONARD B. AUSTIN, JJ.

2011-07361

DECISION & ORDER

Patsorida Paul-Austin, respondent, v
Linnette McPherson, et al., appellants.

(Index No. 16179/09)

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

Mallilo & Grossman, Flushing, N.Y. (Francesco Pomara, Jr., of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Queens County (Rosengarten, J.), dated June 17, 2011, which denied their motion for summary judgment dismissing the complaint 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 reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is granted.

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). Although the plaintiff alleged that she sustained certain injuries to the cervical region of her spine and her right shoulder as a result of the subject accident, the defendants submitted competent medical evidence establishing, prima facie, that those alleged injuries did not constitute serious injuries within the meaning of Insurance Law § 5102(d) (*see Rodriguez v Huerfano*, 46 AD3d 794,

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795). In addition, although the plaintiff alleged that she sustained certain injuries to the lumbar region of her spine as a result of the subject accident, the defendants submitted competent medical evidence establishing, prima facie, that those alleged injuries did not constitute a serious injury within the meaning of Insurance Law § 5102(d) (*see Rodriguez v Huerfano*, 46 AD3d at 795), and, in any event, were not caused by the subject accident (*see Jilani v Palmer*, 83 AD3d 786, 787). Finally, although the plaintiff alleged that she sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d) as a result of the subject accident, the defendants submitted evidence establishing, prima facie, that she did not sustain such an injury (*cf. Geliga v Karibian, Inc.*, 56 AD3d 518, 519).

In opposition, the plaintiff failed to raise a triable issue of fact because the opinion of her chiropractor, on which she relied, was not submitted in the form of an affidavit (*see Vejselovski v McErlean*, 87 AD3d 1062, 1063). Accordingly, the Supreme Court should have granted the defendants' motion for summary judgment dismissing the complaint.

DILLON, J.P., BALKIN, BELEN and AUSTIN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court