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

D33995
Y/prt

_____AD3d_____ Submitted - February 1, 2012

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
CHERYL E. CHAMBERS
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

2011-03960 DECISION & ORDER

Steven Kliche, appellant, v All Island Truck and Leasing, defendant, DJS Transport, Inc., et al., respondents.

(Index No. 27263/08)

Sullivan and Sullivan, LLP, Garden City, N.Y. (James M. Sheridan, Jr., of counsel), for appellant.

Picciano & Scahill, P.C., Westbury, N.Y. (Francis J. Scahill and Andrea E. Ferrucci of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Weiss, J.), dated February 28, 2011, which granted the motion of the defendants DJS Transport, Inc., and David J. Watson for summary judgment dismissing the complaint insofar as asserted against them 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 motion of the defendants DJS Transport, Inc., and David J. Watson for summary judgment dismissing the complaint insofar as asserted against them is denied.

The defendants DJS Transport, Inc., and David J. Watson (hereinafter together 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 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 Staff v Yshua*, 59 AD3d 614). Although the defendants also attempted to establish, prima facie, that those alleged injuries were not caused by the accident, contrary to the determination of the Supreme Court, the defendants failed to do so.

In opposition, 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 and/or significant limitation of use categories of Insurance Law § 5102(d) (*see Perl v Meher*, 18 NY3d 208, 217). Accordingly, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the complaint insofar as asserted against them.

RIVERA, J.P., ENG, CHAMBERS, SGROI and MILLER, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court