

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

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Submitted - May 2, 2012

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
SHERI S. ROMAN
JEFFREY A. COHEN, JJ.

2011-07376

DECISION & ORDER

Zethroy Wedderburn, appellant, v Askia A. Simmons,
respondent.

(Index No. 15785/09)

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

James G. Bilello & Associates, Westbury, N.Y. (Patricia McDonagh of counsel), for
respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Martin, J.), dated May 25, 2011, which granted the defendant's 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) as a result of the subject accident.

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is denied.

The defendant failed to meet 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 Eyler*, 79 NY2d 955, 956-957). Although the defendant asserted that the alleged injuries to the cervical region of the plaintiff's spine did not constitute a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d at 352; *Gaddy v Eyler*, 79 NY2d at 955-956), the defendant's examining

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orthopedist recounted, in his affirmed report submitted in support of the motion, that the range-of-motion testing he performed during his examination revealed the existence of a significant limitation in the region (*see Cues v Tavarone*, 85 AD3d 846; *Fields v Hildago*, 74 AD3d 740). In addition, although the defendant asserted that the alleged injuries to the region were not caused by the subject accident (*see Pommells v Perez*, 4 NY3d 566, 579), he provided no competent medical evidence supporting that argument (*see Cues v Tavarone*, 85 AD3d at 846; *Hightower v Ghio*, 82 AD3d 934, 935).

Since the defendant failed to meet his prima facie burden, the Supreme Court should have denied the defendant's motion for summary judgment and it is unnecessary to consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see Fields v Hildago*, 74 AD3d at 740).

SKELOS, J.P., DICKERSON, HALL, ROMAN and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court