

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

D35402
C/kmb

_____AD3d_____

Submitted - May 23, 2012

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

2011-08335

DECISION & ORDER

Leon J. Stepnoski, respondent, v Jose Brito,
et al., appellants.

(Index No. 29469/08)

Kim, Patterson & Sciarrino, LLP, Bayside, N.Y. (Stephen E. Kwan of counsel), for
appellants.

In an action to recover damages for personal injuries, the defendants appeal from an
order of the Supreme Court, Queens County (Grays, J.), dated June 29, 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 affirmed, without costs or disbursements.

We affirm the order denying the defendants' motion for summary judgment
dismissing the complaint, but do so on a ground different from that relied upon by the Supreme
Court.

The defendants failed to meet 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 failed to adequately address the plaintiff's claim that he sustained a
medically-determined injury or impairment of a nonpermanent nature which prevented him from
performing substantially all of the material acts which constituted his usual and customary daily
activities for not less than 90 days during the 180 days immediately following the subject accident

(see *Aujour v Singh*, 90 AD3d 686, 686-687; *Bangar v Man Sing Wong*, 89 AD3d 1048, 1049).

Accordingly, the defendants' motion for summary judgment dismissing the complaint was properly denied, without regard to the sufficiency of the papers submitted by the plaintiff in opposition (see *Aujour v Singh*, 90 AD3d at 687; *Bangar v Man Sing Wong*, 89 AD3d at 1049).

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

ENTER:


Aprilanne Agostino
Clerk of the Court