

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

D35675  
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Submitted - June 20, 2012

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

2011-08999

DECISION & ORDER

Michael India, appellant, v Eugene O'Connor,  
et al., respondents.

(Index No. 23564/09)

Steven Cohn, P.C., Carle Place, N.Y. (Mitchell R. Goldklang of counsel), for  
appellant.

Martyn, Toher & Martyn (Bello & Larkin, Hauppauge, N.Y. [John C. Meszaros], of  
counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an  
order of the Supreme Court, Suffolk County (Mayer, J.), dated August 23, 2011, which granted the  
defendants' 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 denied.

Contrary to the Supreme Court's determination, 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 contended, inter alia, that the  
alleged injuries to the lumbar region of the plaintiff's spine did not constitute serious injuries within  
the meaning of Insurance Law § 5102(d). However, the defendants' examining orthopedic surgeon  
recounted, in an affirmed report submitted in support of the defendants' motion for summary

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judgment dismissing the complaint, that range-of-motion testing performed during the examination revealed a significant limitation of motion in the lumbar region of the plaintiff's spine (*see Scott v Gresio*, 90 AD3d 736, 737; *Nelms v Khokhar*, 12 AD3d 426, 427). Further, the defendants' orthopedic surgeon failed to adequately explain and substantiate his belief that the limitation of motion in the lumbar region of the plaintiff's spine was self-imposed (*cf. Perl v Meher*, 18 NY3d 208, 219; *Gonzales v Fiallo*, 47 AD3d 760).

Since the defendants failed to meet their prima facie burden of demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Cues v Tavarone*, 85 AD3d 846, 846-847).

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

ENTER:

  
Aprilanne Agostino  
Clerk of the Court