

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

D36282
T/kmb

_____AD3d_____

Submitted - May 25, 2011

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
ARIEL E. BELEN
JEFFREY A. COHEN, JJ.

2010-01798

DECISION & ORDER

Santos Marquez, appellant, v Peter J. Brower, et al.,
respondents, et al., defendants.

(Index No. 14129/05)

The Goodman Law Firm, Melville, N.Y. (Peter J. Goodman of counsel), for appellant.

Rivkin Radler LLP, Uniondale, N.Y. (Evan H. Krinick, Cheryl F. Korman, and
Melissa M. Murphy of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Brandveen, J.), dated December 15, 2009, as granted that branch of the motion of the defendants Peter J. Brower, the Town of Hempstead, and the Town of Hempstead Sanitation Department which was 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) as a result of the subject accident.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendants Peter J. Brower, the Town of Hempstead, and the Town of Hempstead Sanitation Department which was for summary judgment dismissing the complaint insofar as asserted against them is denied.

The defendants Peter J. Brower, the Town of Hempstead, and the Town of Hempstead Sanitation Department (hereinafter collectively the Town 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;

October 17, 2012

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Gaddy v Eyer, 79 NY2d 955, 956-957). The papers submitted by the Town defendants failed to adequately address the plaintiff's claim, set forth in the bill of particulars, that the plaintiff 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 *Mugno v Juran*, 81 AD3d 908).

Since the Town defendants did not sustain their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*id.* at 909).

Accordingly, the Supreme Court should have denied the Town defendants' motion for summary judgment dismissing the complaint insofar as asserted against them.

MASTRO, J.P., FLORIO, LEVENTHAL, BELEN and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court