

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

D36283
T/kmb

_____AD3d_____

Submitted - June 8, 2011

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

2010-11839

DECISION & ORDER

Munawar Hussain, respondent, v Juan B. Tejada,
et al., appellants.

(Index No. 19172/09)

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Stacy R. Seldin of counsel), for appellants.

Michael A. Cervini, Jackson Heights, N.Y. (Robin Mary Heaney of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Solomon, J.), dated November 4, 2010, 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) as a result of the subject accident.

ORDERED that the order is affirmed, with costs.

While we affirm the order appealed from, we 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 papers submitted by the defendants failed to adequately address the plaintiff's claim, set forth in the bill of particulars, 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

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during the 180 days immediately following the subject accident (*see Takaroff v A.M. USA, Inc.*, 63 AD3d 1142, 1143).

Since the 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 1144).

Accordingly, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint.

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

ENTER:


Aprilanne Agostino
Clerk of the Court