

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

D36602
T/kmb

_____AD3d_____

Submitted - October 24, 2012

DANIEL D. ANGIOLILLO, J.P.
RUTH C. BALKIN
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2012-02862

DECISION & ORDER

Mabel Lopez, respondent, v Kelly A. Kelleher,
et al., appellants.

(Index No. 41407/08)

Richard T. Lau, Jericho, N.Y. (Linda Meisler of counsel), for appellants.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Suffolk County (Rebolini, J.), dated February 28, 2012, 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, without costs or disbursements.

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) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350; *Gaddy v Eyler*, 79 NY2d 955, 956-957). The defendants' motion papers failed to adequately address the plaintiff's claim, set forth in the bill of particulars, that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*cf. Tinsley v Bah*, 50 AD3d 1019, 1019-1020).

Since the defendants failed to meet 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 (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

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

ANGIOLILLO, J.P., BALKIN, AUSTIN and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court