

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

251

CA 10-01700

PRESENT: SCUDDER, P.J., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

CRYSTAL M. GONYOU AND SCOTT A. GONYOU,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

ROBERTA D. MCLAUGHLIN, DEFENDANT,
JUSTIN M. SANMARTIN AND ROBERT F. NOVAK,
DEFENDANTS-RESPONDENTS.

RIVETTE & RIVETTE, P.C., SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

LEVENE GOULDIN & THOMPSON, LLP, BINGHAMTON (SARAH E. NUFFER OF
COUNSEL), FOR DEFENDANT-RESPONDENT JUSTIN M. SANMARTIN.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (GARY H. COLLISON OF
COUNSEL), FOR DEFENDANT-RESPONDENT ROBERT F. NOVAK.

Appeal from an order and judgment (one paper) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered April 30, 2010 in a personal injury action. The order and judgment granted the motions of defendants Justin M. Sanmartin and Robert F. Novak for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motions are denied and the complaint is reinstated against defendants Justin M. Sanmartin and Robert F. Novak, and the matter is remitted to Supreme Court, Cayuga County, for further proceedings in accordance with the following Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Crystal M. Gonyou (plaintiff) while she was operating a vehicle that was involved in a multi-vehicle accident. Supreme Court erred in granting the motions of Justin M. Sanmartin and Robert F. Novak (defendants) seeking summary judgment dismissing the complaint against them. "On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Howard v Espinosa*, 70 AD3d 1091, 1091-1092 [internal quotation marks omitted]). Here, defendants failed to meet that burden inasmuch as, by their own submissions in support of their motions, they raised triable issues of fact whether plaintiff sustained a serious injury within the meaning of the statute (*see Phoung Le Nguyen v Wilson*, 8

AD3d 1036). Because defendants failed to meet their initial burden, we do not consider the sufficiency of plaintiffs' opposing papers (see *Swartz v Kalson*, 78 AD3d 1553, 1554). We note, however, that the court in its order determined that plaintiffs' cross motion was moot in light of the dismissal of the complaint against defendants. Because we are reinstating the complaint against defendants, we remit the matter to Supreme Court to determine plaintiffs' cross motion.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court