

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

D54760
N/htr

_____AD3d_____

Argued - November 16, 2017

REINALDO E. RIVERA, J.P.
JEFFREY A. COHEN
ROBERT J. MILLER
BETSY BARROS, JJ.

2015-11408
2016-02590

DECISION & ORDER

Philip E. Fortuna, appellant, v Steve Daskawisz, etc.,
et al., respondents.

(Index No. 11312/11)

P.M. Bernstein P.C., Garden City, NY (Philip M. Bernstein of counsel), for appellant.

Roe & Associates, Garden City, NY (Patrick B. McKeown of counsel), for respondent Steve Daskawisz.

Ciarelli & Dempsey P.C., Riverhead, NY (John L. Ciarelli of counsel), for respondents Long Island Yellow Cab Corp., Long Island Yellow Airport Service, Inc., Long Island Yellow Transit, Inc., Erl Management Corp., and Wolley Service Corp.

Long Tuminello, LLP, Bay Shore, NY (Karen S. Svendsen of counsel), for respondent Keith Kaufman.

In an action to recover damages for personal injuries, the plaintiff appeals (1) from an order of the Supreme Court, Nassau County (Margaret C. Reilly, J.), dated August 7, 2015, which granted the motion of the defendant Steve Daskawisz for summary judgment dismissing the complaint insofar as asserted against him 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, and (2) from so much of an order of the same court dated December 11, 2015, as, upon renewal, adhered to the original determination.

ORDERED that the appeal from the order dated August 7, 2015, is dismissed, as that order was superseded by the order dated December 11, 2015, made upon renewal; and it is further,


ORDERED that the order dated December 11, 2015, is reversed insofar as appealed from, on the law, and, upon renewal, the order dated August 7, 2015, is vacated, and the motion of the defendant Steve Daskawisz for summary judgment dismissing the complaint insofar as asserted against him is denied; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff, payable by the respondents appearing separately and filing separate briefs.

Contrary to the Supreme Court's determination, the plaintiff, in opposition to the defendant Steve Daskawisz's motion for summary judgment, raised a triable issue as to whether he sustained a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyer*, 79 NY2d 955, 956-957). Accordingly, upon renewal, the court should have denied the defendant Steve Daskawisz's motion for summary judgment dismissing the complaint insofar as asserted against him.

RIVERA, J.P., COHEN, MILLER and BARROS, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court