

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

D55738  
T/htr

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Submitted - May 16, 2018

RUTH C. BALKIN, J.P.  
CHERYL E. CHAMBERS  
SHERI S. ROMAN  
JOSEPH J. MALTESE  
FRANCESCA E. CONNOLLY, JJ.

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2017-03997

DECISION & ORDER

Jeffrey Alperin, appellant, v Theodore Herwerth,  
respondent.

(Index No. 7463/14)

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Leo Tekiel (Mitchell Dranow, Sea Cliff, NY, of counsel), for appellant.

David J. Sobel, P.C., Smithtown, NY, for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (W. Gerard Asher, J.), dated March 10, 2017. The order granted the defendant's 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 reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is denied.

The plaintiff commenced this action to recover damages for personal injuries he allegedly sustained when a vehicle he was driving was struck by a vehicle driven by the defendant. The defendant moved 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. The Supreme Court granted the defendant's motion. The plaintiff appeals.

The defendant failed to meet his 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).

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The papers submitted by the defendant failed to adequately address the plaintiff's claim, set forth in the bill of particulars, that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d) (*see Che Hong Kim v Kossoff*, 90 AD3d 969; *Rouach v Betts*, 71 AD3d 977). Since the defendant failed to meet his prima facie burden, it is unnecessary to determine whether the papers submitted in opposition were sufficient to raise a triable issue of fact (*see Che Hong Kim v Kossoff*, 90 AD3d at 969).

Accordingly, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint.

BALKIN, J.P., CHAMBERS, ROMAN, MALTESE and CONNOLLY, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino  
Clerk of the Court