

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

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Submitted - June 13, 2018

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

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2017-00675

DECISION & ORDER

Alfredo Divarza Alvarez, appellant, v Barbara L.  
Bradman, et al., respondents.

(Index No. 15330/14)

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Subin Associates, LLP, New York, NY (Robert J. Eisen and Julie T. Mark of counsel), for appellant.

The Law Office of David S. Klausner, PLLC, White Plains, NY (Stephen Slater of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Lisa S. Ottley, J.), dated December 2, 2016. The order granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is denied.

The plaintiff commenced this action to recover damages for personal injuries he allegedly sustained when he was riding his bicycle and was struck by a vehicle in Brooklyn. The defendants 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 motion, and the plaintiff appeals.

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 eliminate triable issues of fact regarding the plaintiff's claim, set forth in his 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 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 Che Hong Kim v Kossoff*, 90 AD3d at 969).

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

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

ENTER:



Aprilanne Agostino  
Clerk of the Court