

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT**

Torres v. Rettaliata

2019 NY Slip Op 02578 (N.Y. Ct. App. 2019) · No. 2017-05014 · Decided April 3, 2019

OPINION

Torres v. Rettaliata 2019 NY Slip Op 2578

PER CURIAM.

Torres v Rettaliata (2019 NY Slip Op 02578) Torres v Rettaliata 2019 NY Slip Op 02578 Decided on April 3, 2019 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on April 3, 2019

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Second Judicial Department ALAN D. SCHEINKMAN, P.J.

JOHN M. LEVENTHAL

FRANCESCA E. CONNOLLY

VALERIE BRATHWAITE NELSON, JJ. 2017-05014

(Index No. 35579/12) [*1]Carmen Torres, respondent, vPeter D. Rettaliata, et al., appellants. The Law Office of David S. Klausner PLLC, White Plains, NY (Stephen Slater of counsel), for appellants. DECISION & ORDER In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Suffolk County (Peter H. Mayer, J.), dated March 10, 2017. The order, insofar as appealed from, denied the defendants' 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 insofar as appealed from, without costs or disbursements. The plaintiff commenced this action to recover damages for personal injuries that she allegedly sustained in a motor vehicle accident. 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 accident. The Supreme Court, inter alia, denied the defendants' motion. The defendants appeal from so much of the order as denied their motion for summary judgment dismissing the complaint. The defendants met 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 accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955, 956-957). They submitted competent medical evidence establishing, prima facie, that the alleged injuries to the plaintiff's right shoulder and the cervical and lumbar regions of the plaintiff's spine did not constitute serious injuries under the permanent consequential limitation of

use and significant limitation of use categories of Insurance Law § 5102(d) (see *Staff v Yshua*, 59 AD3d 614). In opposition, however, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury to her right shoulder and the cervical and lumbar regions of her spine under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102(d) (see *Perl v Meher*, 18 NY3d 208, 218-219). As the defendants failed to establish, prima facie, a lack of causation (see *Sanclemente v MTA Bus Co.*, 116 AD3d 688, 689; *Rodgers v Duffy*, 95 AD3d 864, 866), the burden did not shift to the plaintiff to raise a triable issue of fact regarding causation or to explain any gap in treatment (see *Pommells v Perez*, 4 NY3d 566, 572; *Lambropoulos v Gomez*, 166 AD3d 952). Accordingly, we agree with the Supreme Court's determination denying the defendants' motion for summary judgment dismissing the complaint. SCHEINKMAN, P.J., LEVENTHAL, CONNOLLY and BRATHWAITE NELSON, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court