

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

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_____AD3d_____

Submitted - November 15, 2006

ANITA R. FLORIO, J.P.
DAVID S. RITTER
GLORIA GOLDSTEIN
JOSEPH COVELLO, JJ.

2005-11427

DECISION & ORDER

Jodiann Russo, appellant, v Thomas D. Cooke,
et al., respondents.

(Index No. 04-8100)

Martino & Weiss, Mount Vernon, N.Y. (Louis J. Martino of counsel), for appellant.

Wilson, Bave, Conboy, Cozza & Couzens, P.C., White Plains, N.Y. (Lynn M. Dukette of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Westchester County (LaCava, J.), entered November 10, 2005, which granted the defendants' motion for summary judgment dismissing the complaint on the ground that she did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

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

The plaintiff claims that she injured her lower back in the subject accident and a magnetic resonance imaging scan indicated a disc herniation at L4-5. However, the affirmed medical report of the defendants' examining neurologist did not reflect that he ever tested the range of motion of that region of the plaintiff's body, although he did test the range of motion of the plaintiff's cervical spine (*see DeJesus v Tanenbaum*, 29 AD3d 852; *Beyel v Console*, 25 AD3d 636; *Edwards v New York City Tr. Auth.*, 17 AD3d 628). Under the circumstances, the defendants failed to establish, prima facie, their entitlement to judgment as a matter of law. In view of the foregoing, it is not necessary to consider whether the plaintiff's papers in opposition to the defendants' motion were

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sufficient to raise a triable issue of fact (*see DeJesus v Tanenbaum, supra; Beyel v Console, supra; Edwards v New York City Tr. Auth., supra; Coscia v 938 Trading Corp., 283 AD2d 538*).

FLORIO, J.P., RITTER, GOLDSTEIN and COVELLO, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial "J".

James Edward Pelzer
Clerk of the Court