

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

D15877
W/hu

_____AD3d_____

Argued - June 11, 2007

HOWARD MILLER, J.P.
GLORIA GOLDSTEIN
STEVEN W. FISHER
JOSEPH COVELLO, JJ.

2006-01474

DECISION & ORDER

Francine Bentivegna, respondent, v Brian
Stein, appellant, et al., defendants
(and third-party actions).

(Index No. 51347/02)

Quirk and Bakalor, P.C., New York, N.Y. (Dara L. Rosenbaum of counsel), for
appellant.

Subin Associates, LLP (Pollack, Pollack, Isaac & De Cicco, New York, N.Y. [Brian
J. Isaac and Julie T. Mark] of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant Brian Stein
appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County
(Bayne, J.), dated January 10, 2006, as denied his motion 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), and granted that branch of the plaintiff's cross
motion which was for summary judgment on the issue of liability insofar as asserted against him.

ORDERED that the order is modified, on the law, by deleting the provision thereof
granting that branch of the plaintiff's cross motion which was for summary judgment on the issue of
liability insofar as asserted against the defendant Brian Stein, and substituting therefor a provision
denying that branch of the cross motion; as so modified, the order is affirmed insofar as appealed
from, without costs or disbursements.

The appellant failed to make a prima facie showing that the plaintiff did not sustain

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a serious injury within the meaning of Insurance Law § 5102(d) (*see Tchjevskaiia v Chase*, 15 AD3d 389). The affirmed medical reports prepared by the appellant's examining orthopedist and neurologist disclosed that they found limitations in the plaintiff's cervical and lumbar ranges of motion, respectively.

The evidence submitted by the plaintiff in support of that branch of her cross motion which was for summary judgment on the issue of liability insofar as asserted against the appellant failed to establish a prima facie case (*see CPLR 3212[b]*) that the subject motor vehicle accident was proximately caused by negligence on the part of the appellant.

Under these circumstances, it is unnecessary for us to consider the sufficiency of the evidence submitted in opposition to the motion and the relevant branch of the cross motion (*see Chaplin v Taylor*, 273 AD2d 188).

MILLER, J.P., GOLDSTEIN, FISHER and COVELLO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court