

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

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Submitted - November 12, 2008

ROBERT A. SPOLZINO, J.P.  
FRED T. SANTUCCI  
HOWARD MILLER  
THOMAS A. DICKERSON  
RANDALL T. ENG, JJ.

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2007-08077

DECISION & ORDER

Daniel Gould, appellant, v Concetta Ombrellino,  
respondent.

(Index No. 18323/05)

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Shaevitz & Shaevitz, Jamaica, N.Y. (Dimitri Kotzamanis of counsel), for appellant.

Saretsky Katz Dranoff & Glass, LLP, New York, N.Y. (Robert Yodowitz of  
counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Queens County (Nelson, J.), entered July 3, 2007, as granted those branches of the defendant's motion which were for summary judgment dismissing so much of the plaintiff's complaint as alleged that she sustained a serious injury under the fracture, permanent consequential limitation of use, and/or significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the defendant's motion which was for summary judgment dismissing so much of the plaintiff's complaint as alleged a serious injury under the fracture category of Insurance Law § 5102(d), and substituting therefor a provision denying that branch of the defendant's motion; as so modified, the order is affirmed insofar as appealed from, with costs to the plaintiff.

The Supreme Court correctly determined that the defendant met her prima facie burden of showing that the plaintiff did not sustain a serious injury under the fracture, permanent

December 9, 2008

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consequential limitation of use, and/or significant limitation of use categories 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 Eyster*, 79 NY2d 955). Contrary to the determination of the Supreme Court, in opposition, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the fracture category of Insurance Law § 5102(d) as a result of the subject accident. The plaintiff relied upon, inter alia, the affirmation of his treating physician, Dr. Gracia Mayard. In that affirmation, Dr. Mayard diagnosed the plaintiff with a fracture of his left ninth rib as a result of the subject accident. That diagnosis was based on Dr. Mayard's review of the properly-submitted medical records/reports of the plaintiff, which revealed the existence of a fracture of his left ninth rib, as well as Dr. Mayard's examinations of the plaintiff.

Contrary to the plaintiff's arguments on appeal, the affirmation of Dr. Mayard did not raise a triable issue of fact as to whether he sustained a serious injury under the permanent consequential limitation of use or the significant limitation of use categories of Insurance Law § 5102(d). While Dr. Mayard set forth range of motion test results which were based on a recent examination of the plaintiff that revealed the existence of significant limitations in the plaintiff's lumbar spine, the plaintiff did not proffer competent medical evidence that showed the existence of similar range of motion limitations in the plaintiff's lumbar spine that were contemporaneous with the subject accident (*see Leeber v Ward*, 55 AD3d 563; *Ferraro v Ridge Car Serv.*, 49 AD3d 498; *D'Onofrio v Floton, Inc.*, 45 AD3d 525).

SPOLZINO, J.P., SANTUCCI, MILLER, DICKERSON and ENG, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court