

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

D21649
X/kmg

_____AD3d_____

Submitted - December 3, 2008

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
WILLIAM E. McCARTHY
CHERYL E. CHAMBERS, JJ.

2007-09120

DECISION & ORDER

Austin R. Thompson, appellant,
v Juanita A. Saunders, respondent.

(Index No. 12013/06)

Peter M. Zirbes, Esq. & Assoc., P.C., Forest Hills, N.Y. (Jason Stern of counsel), for appellant.

Boeggeman, George & Corde, P.C., White Plains, N.Y. (Cynthia Dolan of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Rosengarten, J.), dated August 22, 2007, which granted the defendant's cross motion for summary judgment dismissing the complaint on the ground that he did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and denied, as academic, his motion for summary judgment on the issue of liability.

ORDERED that the order is affirmed, with costs.

The defendant made a prima facie 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), shifting the burden to the plaintiff to produce sufficient evidence to raise a triable issue of fact.

In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff failed to produce competent medical evidence of restrictions in range of motion roughly contemporaneous

December 30, 2008

THOMPSON v SAUNDERS

Page 1.

with the subject accident (*see LaFerlita v Seagull 2000, Inc.*, 54 AD3d 905). Since the defendant's doctor referred to the results of magnetic resonance imaging examinations demonstrating bulging and herniated discs, those results were properly before the court (*see Zarate v McDonald*, 31 AD3d 632; *Ayzen v Melendez*, 299 AD2d 381). However, the mere existence of bulging or herniated discs is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting therefrom (*see LaFerlita v Seagull 2000, Inc.*, 54 AD3d at 906; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 50). Further, the plaintiff admitted that he continued working after the accident, and failed to submit competent medical evidence that he was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days subsequent to the subject accident (*see LaFerlita v Seagull 2000, Inc.*, 54 AD3d at 906).

In light of the foregoing, we need not reach the plaintiff's remaining contention.

RIVERA, J.P., FLORIO, ANGIOLILLO, McCARTHY and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court