

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

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Submitted - January 7, 2009

PETER B. SKELOS, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
CHERYL E. CHAMBERS, JJ.

2008-02149

DECISION & ORDER

Kenneth E. Cohen, appellant, v
Irene M. Monteleone, respondent.

(Index No. 6099/06)

Robert S. Fader, Lake Success, N.Y., for appellant.

Lewis Johs Avallone Aviles, LLP, Melville, N.Y. (Mara E. Cella and Michael G. Kruzynski of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiff appeals from an order of the Supreme Court, Nassau County (Spinola, J.), dated January 30, 2008, which granted the defendant's 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).

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment is denied.

The Supreme Court erred in concluding that the defendant met her prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955, 956-957). In support of her motion, the defendant relied upon, inter alia, the affirmed medical report of her examining orthopedic surgeon. In his report he noted, upon his examination of the plaintiff, the existence of significant limitations in the range of motion of the plaintiff's lumbar spine (*see Hurtte v Budget Roadside Care*, 54 AD3d 362; *Jenkins v Miled Hacking Corp.*, 43 AD3d 393; *Bentivegna*

February 3, 2009

COHEN v MONTELEONE

Page 1.

v Stein, 42 AD3d 555; *Zamaniyan v Vrabeck*, 41 AD3d 472). Under the circumstances, it is unnecessary to consider the sufficiency of the plaintiff's opposition papers (see *Hurtte v Budget Roadside Care*, 54 AD3d 362; *Coscia v 938 Trading Corp.*, 283 AD2d 538).

SKELOS, J.P., SANTUCCI, ANGIOLILLO, DICKERSON and CHAMBERS, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court