

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

D23091  
O/kmg

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Submitted - April 1, 2009

REINALDO E. RIVERA, J.P.  
MARK C. DILLON  
JOSEPH COVELLO  
RANDALL T. ENG  
L. PRISCILLA HALL, JJ.

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2008-03381

DECISION & ORDER

Tamika Nicholson, respondent, v Rudolph Allen,  
appellant, et al., defendant.

(Index No. 26211/05)

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Cheven, Keely & Hatzis, New York, N.Y. (William B. Stock of counsel), for  
appellant.

Kenneth M. Mollins, Melville, N.Y. (Leo Bevolas of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant Rudolph Allen  
appeals from an order of the Supreme Court, Kings County (Martin, J.), dated March 17, 2008,  
which 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).

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

The defendant Rudolph Allen (hereinafter the defendant) established, prima facie, that  
the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result  
of the subject accident through the affirmed medical reports of his examining neurologist, orthopedist,  
and radiologist (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 345; *Staff*  
*v Yshua*, 59 AD3d 614; *Geliga v Karibian, Inc.*, 56 AD3d 518; *O'Shea v Johnson*, 49 AD3d 614;  
*Kivelowitz v Calia*, 43 AD3d 1111; *Porto v Blum*, 39 AD3d 614 ). Contrary to the Supreme Court's  
determination, the plaintiff failed to raise a triable issue of fact. The affidavit of the plaintiff's treating  
chiropractor was based upon examinations of the plaintiff he made nearly four years prior to the

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motion for summary judgment, and not upon any recent examination (*see Diaz v Lopresti*, 57 AD3d 832; *Sapienza v Ruggiero*, 57 AD3d 643; *Carrillo v DiPaola*, 56 AD3d 712; *Cornelius v Cintas Corp.*, 50 AD3d 1085; *Wright v Rodriguez*, 49 AD3d 532). The affidavit also failed to address the findings of the defendant's examining radiologist that the magnetic resonance images of the plaintiff's lumbar spine, taken three months after the accident, did not reveal any post-traumatic changes, but only long-standing degenerative conditions (*see Ciordia v Luchian*, 54 AD3d 708; *Roman v Fast Lane Car Serv., Inc.*, 46 AD3d 535; *Khan v Finchler*, 33 AD3d 966), and failed to acknowledge the fact that the plaintiff had been injured in two prior automobile accidents (*see Cornelius v Cintas Corp.*, 50 AD3d 1085; *Laurent v McIntosh*, 49 AD3d 820; *Wright v Rodriguez*, 49 AD3d 532; *Luciano v Luchsinger*, 46 AD3d 634; *Vidor v Davila*, 37 AD3d 826). Furthermore, the plaintiff failed to proffer competent medical evidence that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the subject accident (*see Leeber v Ward*, 55 AD3d 563; *Kurin v Zyuz*, 54 AD3d 902; *Jones v Gooding*, 50 AD3d 968; *Amato v Fast Repair Inc.*, 42 AD3d 477).

RIVERA, J.P., DILLON, COVELLO, ENG and HALL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court