

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

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Submitted - March 11, 2009

ROBERT A. SPOLZINO, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL, JJ.

2008-04181

DECISION & ORDER

Addie P. Robinson, appellant, v Bruce M. Yeager,
respondent.

(Index No. 9128/06)

James J. Killerlane, P.C. (David Samel, New York, N.Y., of counsel), for appellant.

Nesci-Keane PLLC, Hawthorne, N.Y. (Thomas J. Keane of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Westchester County (Smith, J.), dated April 14, 2008, which granted the defendant's motion for summary judgment dismissing the complaint on the ground that she 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 dismissing the complaint is denied.

The defendant failed to meet his prima facie burden of 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; *Gaddy v Eyler*, 79 NY2d 955, 956-957). In support of his motion, the defendant relied upon, inter alia, the affirmed medical reports of Dr. Ralph Purcell and Dr. Rene Elkin. In those reports, Dr. Elkin noted significant limitation in the plaintiff's cervical spine, and Dr. Purcell noted significant limitation in the plaintiff's right shoulder (*see Giacomaro v Wilson*, 58 AD3d 802; *Hurtte v Budget Roadside Care*, 54 AD3d 362; *Jenkins v Miled Hacking Corp.*, 43 AD3d 393; *Bentivegna v Stein*, 42 AD3d 555; *Zamaniyan v Vrabeck*, 41 AD3d 472). Since the defendant failed to meet his prima facie burden, it is unnecessary to decide

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whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Giacomaro v Wilson*, 58 AD3d 802; *Coscia v 938 Trading Corp.*, 283 AD2d 538).

SPOLZINO, J.P., SANTUCCI, ANGIOLILLO and LEVENTHAL, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, sweeping initial "J".

James Edward Pelzer
Clerk of the Court