

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

D24483
H/kmg

_____AD3d_____

Submitted - September 9, 2009

STEVEN W. FISHER, J.P.
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
RANDALL T. ENG
SHERI S. ROMAN, JJ.

2009-04265

DECISION & ORDER

Aleksandor Nisanov, respondent, v Viktor V.
Kiriyyenko, appellant.

(Index No. 2431/07)

Marjorie E. Bornes, New York, N.Y., for appellant.

Asher & Associates, P.C., New York, N.Y. (Robert J. Poblete of counsel), for respondent.

In an action, inter alia, to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Starkey, J.), dated March 18, 2009, which denied his motion for summary judgment dismissing the complaint 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 affirmed, with costs.

In support of his motion, the defendant met 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 Eycler*, 79 NY2d 955, 956-957). In opposition, the plaintiff raised a triable issue of fact through the affirmation of his treating physician, Dr. Mikhail Bernshteyn, as to whether he sustained a serious injury to the cervical and lumbar regions of his spine, under the significant limitation of use and/or permanent consequential limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (*see Yun v Barber*, 63 AD3d 1140; *Pearson v Guapisaca*, 61 AD3d 833; *Williams v Clark*, 54 AD3d 942;

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Casey v Mas Transp., Inc., 48 AD3d 610; *Acosta v Rubin*, 2 AD3d 657). Dr. Bernshteyn stated that he had conducted both contemporaneous and recent examinations of the plaintiff, which revealed significant limitations in both the plaintiff's cervical and lumbar regions, and that he had reviewed the plaintiff's MRI reports, which showed, inter alia, bulging discs at C5-6 and L5-S1. Dr. Bernshteyn concluded that the injuries to the cervical and lumbar regions of the plaintiff's spine, and range-of-motion limitations observed during examinations, were permanent and causally related to the subject accident. Dr. Bernshteyn further concluded that the plaintiff's injuries amounted to a permanent consequential limitation of use of the cervical and lumbar regions of his spine and/or a significant limitation of use of the function of those regions.

Contrary to the defendant's assertions on appeal, the plaintiff adequately explained, in his affidavit, the reason for the gap in his treatment history between February 2, 2004, and November 6, 2008 (*see Black v Robinson*, 305 AD2d 438, 439-440; *see also Gaviria v Alvarado*, 65 AD3d 567).

Accordingly, the Supreme Court properly denied the defendant's motion for summary judgment dismissing the complaint.

FISHER, J.P., FLORIO, ANGIOLILLO, ENG and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court