

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

D25060  
C/kmg

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Submitted - October 28, 2009

REINALDO E. RIVERA, J.P.  
JOSEPH COVELLO  
DANIEL D. ANGIOLILLO  
JOHN M. LEVENTHAL  
SHERI S. ROMAN, JJ.

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2009-02564

DECISION & ORDER

Loxley Modeste, respondent, v Jean B. Mercier,  
appellant, et al., defendants.

(Index No. 11642/05)

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Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Stacy R. Seldin of counsel), for appellant.

Morrison & Wagner, LLP, New York, N.Y. (Eric Morrison of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant Jean B. Mercier appeals from an order of the Supreme Court, Kings County (Ambrosio, J.), dated December 8, 2008, which denied her motion for summary judgment dismissing the complaint insofar as asserted against her 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.

The appellant 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; *Gaddy v Eyler*, 79 NY2d 955, 956-957; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49-50). In opposition, the plaintiff submitted, inter alia, affirmations from one of his treating physicians, his treating orthopedic surgeon, and a radiologist. These submissions raised a triable issue of fact as to whether he sustained a serious injury to the cervical and/or lumbar regions of his spine as a result of the subject accident under the permanent

consequential limitation of use category and/or the significant limitation of use category of Insurance Law § 5102(d) (see *Wagenstein v Haoli*, 64 AD3d 584; *Su Gil Yun v Barber*, 63 AD3d 1140; *Pearson v Guapisaca*, 61 AD3d 833; *Williams v Clark*, 54 AD3d 942; *Casey v Mas Transp., Inc.*, 48 AD3d 610; *Acosta v Rubin*, 2 AD3d 657).

Contrary to the appellant's contention on appeal, the plaintiff, via his submissions in opposition, addressed and refuted the findings of the appellant's radiologist concerning the issue of degeneration.

RIVERA, J.P., COVELLO, ANGIOLILLO, LEVENTHAL and ROMAN, JJ., concur.

ENTER:

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

James Edward Pelzer  
Clerk of the Court