

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

D25723
Y/prt

_____AD3d_____

Submitted - December 2, 2009

MARK C. DILLON, J.P.
HOWARD MILLER
RANDALL T. ENG
L. PRISCILLA HALL
SANDRA L. SGROI, JJ.

2008-09937

DECISION & ORDER

Elaine Iovino, appellant, v William H. Scholl, et al.,
defendants third-party plaintiffs-respondents; Carmine
Iovino, third-party defendant-respondent.

(Index No. 13550/06)

Weiss & Rosenbloom, P.C., New York, N.Y. (Andrea Krugman Tessler and Barry
D. Weiss of counsel), for appellant.

Epstein, Frankini & Grammatico, Woodbury, N.Y. (Michele A. Musarra of counsel),
for third-party defendant-respondent.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Queens County (Weiss, J.), dated September 10, 2008, as granted that branch of the third-party defendant's motion which was 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 insofar as appealed from, with costs payable by the appellant to the third-party defendant.

The third-party defendant, Carmine Iovino, 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 Eyler*, 79 NY2d

955, 956-967).

In opposition to the motion, the plaintiff failed to raise a triable issue of fact. Of the submissions which were in admissible evidentiary form, the affirmed medical reports of John Vlattos, M.D., and Panagiotis Zenetos, M.D., as well as chiropractor Angelo Ippolito, were insufficient to raise a triable issue of fact because they did not address the finding of the third-party defendant's radiologist that the condition of the plaintiff's cervical and lumbar spines was the result of preexisting degeneration and was not caused by the subject accident (*see Shmerkovich v Sitar Corp.*, 61 AD3d 843; *Pamphile v Bastien*, 61 AD3d 659, 660; *Levine v Deposits Only, Inc.*, 58 AD3d 697, 698; *Marrache v Akron Taxi Corp.*, 50 AD3d 973, 974). Furthermore, the affirmed medical report of orthopedic surgeon Dr. Enrico Fazzi failed to acknowledge that the plaintiff had been involved in at least one prior automobile accident. In light of this omission, Dr. Fazzi's findings that the subject accident exacerbated the plaintiff's preexisting cervical disc herniations and caused permanent cervical radiculopathy, are speculative (*see Vickers v Francis*, 63 AD3d 1150, 1151; *Su Gil Yun v Barber*, 63 AD3d 1140, 1142; *Donadino v Doukhnych*, 55 AD3d 532, 533; *Rabolt v Park*, 50 AD3d 995, 996).

The plaintiff also failed to submit competent medical evidence that the injuries she allegedly sustained in the subject accident rendered her unable to perform substantially all of her usual and customary activities for not less than 90 days of the first 180 days subsequent to the accident (*see Shmerkovich v Sitar Corp.*, 61 AD3d at 844; *Roman v Fast Lane Care Serv., Inc.*, 46 AD3d 535, 536; *Sainte-Aime v Ho*, 274 AD2d 569).

DILLON, J.P., MILLER, ENG, HALL and SGROI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court