

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

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_____AD3d_____

Submitted - December 2, 2009

PETER B. SKELOS, J.P.
ANITA R. FLORIO
RUTH C. BALKIN
ARIEL E. BELEN
LEONARD B. AUSTIN, JJ.

2008-09761

DECISION & ORDER

Stephanie Belarge, appellant, v Mark Kardas,
respondent, et al., defendants.

(Index No. 1778/07)

Joshua Annenberg, New York, N.Y. (Mead, Hecht, Conklin & Gallagher of counsel),
for appellant.

Hanson & Fishbein, Albany, N.Y. (Richard J. Fishbein of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Dutchess County (Pagones, J.), dated September 17, 2008, as granted the motion of the defendant Mark Kardas for summary judgment dismissing the complaint insofar as asserted against him 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 insofar as appealed from, on the law, with costs, and the motion of the defendant Mark Kardas 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) is denied.

Contrary to the Supreme Court's determination, the defendant Mark Kardas (hereinafter the respondent) 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).

January 19, 2010

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In support of his motion, the respondent relied on, inter alia, the affirmed medical report of Dr. Marc Bergeron, the orthopedic surgeon who examined the plaintiff on February 16, 2007. In that report Dr. Bergeron noted a limitation in the plaintiff's lumbar spine range of motion which was not sufficiently quantified or qualified to establish the absence of a significant limitation of motion (*see Letts v Bleichner*, 56 AD3d 619; *Kaminsky v Waldner*, 19 AD3d 370). Since the respondent failed to meet his prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Kaminsky v Waldner*, 19 AD3d 370; *Coscia v 938 Trading Corp.*, 283 AD2d 538).

SKELOS, J.P., FLORIO, BALKIN, BELEN and AUSTIN, 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