

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

D25925
C/kmg

_____AD3d_____

Submitted - December 16, 2009

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

2009-05848

DECISION & ORDER

Luis A. Rogers, respondent, v Elio Aquino,
appellant.

(Index No. 39554/07)

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

Alexander Bespechny, Brooklyn, N.Y. (Louis A. Badolato of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Schmidt, J.), dated May 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.

The defendant established, *prima facie*, through the affirmed reports of his expert orthopedist and expert radiologist and the plaintiff's deposition testimony, 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 Richards v Tyson*, 64 AD3d 760; *Berson v Rosada Cab Corp.*, 62 AD3d 636; *Byrd v J.R.R. Limo*, 61 AD3d 801). However, the affirmation of the plaintiff's treating physician was

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sufficient to raise a triable issue of fact. Accordingly, the Supreme Court properly denied the defendant's motion for summary judgment dismissing the complaint.

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