

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

D27234
Y/hu

_____AD3d_____

Submitted - April 21, 2010

STEVEN W. FISHER, J.P.
JOSEPH COVELLO
RUTH C. BALKIN
JOHN M. LEVENTHAL
PLUMMER E. LOTT, JJ.

2009-07767

DECISION & ORDER

Daniel Zokou Gnahore, appellant, v Maria I. Gonzalez,
respondent.

(Index No. 44856/07)

Ornstein & Ornstein, P.C. (Alexander J. Wulwick, New York, N.Y.), for appellant.

James G. Bilello, Westbury, N.Y. (Patricia McDonagh of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Knipel, J.), dated June 24, 2009, which granted the defendant's motion for summary judgment dismissing the complaint on the ground that the plaintiff had not sustained a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is affirmed, with costs.

The defendant established her prima facie entitlement to summary judgment dismissing the complaint by submitting the report of her expert orthopedist and the plaintiff's own deposition testimony, which together established that the plaintiff had not sustained 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, 352; *Gaddy v Eyler*, 79 NY2d 955, 956-957; *Richards v Tyson*, 64 AD3d 760, 761; *Berson v Rosada Cab Corp.*, 62 AD3d 636, 636-637; *Byrd v J.R.R. Limo*, 61 AD3d 801, 802). On appeal, the plaintiff argues that the affirmation of the defendant's expert orthopedist was not in proper form. By not raising that argument in the Supreme Court, however, the plaintiff waived it (*see Kibler v Gillard Constr., Inc.*, 53 AD3d 1040, 1042; *Christopherson v Queens-Long Is. Med. Group*,

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P.C., 17 AD3d 393, 394; *Scudera v Mahbubur*, 299 AD2d 535). The plaintiff's submissions in opposition to the motion were insufficient to raise a triable issue of fact. Among other things, the plaintiff submitted unaffirmed and uncertified medical reports and records, and failed to adequately explain the lapse in time between the cessation of his medical treatments and the re-examination for the purposes of opposing the defendant's summary judgment motion (see *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712, 714; *Ponciano v Schaefer*, 59 AD3d 605, 606-607; *Gastaldi v Chen*, 56 AD3d 420, 420-421).

FISHER, J.P., COVELLO, BALKIN, LEVENTHAL and LOTT, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court