

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1075

CA 15-00355

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

THOMAS P. CLARK, JR., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

KIMBERLY M. BOORMAN, DEFENDANT-APPELLANT.

HAGELIN KENT LLC, BUFFALO (MEGAN FURRER OF COUNSEL), FOR
DEFENDANT-APPELLANT.

SHAW & SHAW, P.C., HAMBURG (CHRISTOPHER M. PANNOZZO OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered May 16, 2014. The order granted the motion of plaintiff for partial summary judgment on the issue of serious injury under the category of significant limitation of use of a body function or system.

It is hereby ORDERED that said appeal is unanimously dismissed in part, and the order is otherwise affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident. Defendant conceded that she was negligent, and plaintiff sought partial summary judgment on the issue of serious injury (see Insurance Law § 5102 [d]). Supreme Court granted plaintiff's motion only insofar as he alleged that he sustained a significant limitation of use of a body function or system. We therefore dismiss defendant's appeal to the extent that she raises contentions with respect to the permanent consequential limitation of use and 90/180-day categories of serious injury inasmuch as she is not aggrieved by the court's order with respect to those categories (see *Seneca One Realty, LLC v City of Buffalo*, 93 AD3d 1226, 1227; see generally CPLR 5511).

Plaintiff alleged that he sustained qualifying injuries to, inter alia, his cervical and lumbar spine. Contrary to defendant's contention, we conclude that plaintiff met his initial burden of establishing that he had a significant limitation of use of his cervical and lumbar spine, and defendant failed to raise an issue of fact sufficient to defeat the motion (see *Ellithorpe v Marion* [appeal No. 2], 34 AD3d 1195, 1196-1197). Plaintiff submitted the affidavit and report of a physician who interpreted the MRI studies of his cervical and lumbar spine and opined that plaintiff has anterior disc herniations at C4-5, C5-6 and L5-S1. Plaintiff also submitted the

records of a physician who both reviewed the MRI studies and examined plaintiff. That physician agreed with the above interpretation and opined that there was a "relative indication" for spinal surgery but that surgery was not an option because of the nature of plaintiff's diabetic condition, and that the injuries were caused by the motor vehicle accident (see *id.* at 1196-1197).

It is well established that proof of a herniated disc, without additional objective evidence, is not sufficient to establish a serious injury (see *Pommells v Perez*, 4 NY3d 566, 574). Plaintiff also submitted, however, the certified records of his treating chiropractor, as well as the report of the physician who conducted an independent medical examination (IME) for defendant two years later, and those documents quantify significant limitations in the range of motion in plaintiff's cervical and lumbar spine. Plaintiff therefore established the " 'extent or degree of the limitation . . . [and] its duration' " (*Lively v Fernandez*, 85 AD3d 981, 982; see *Gates v Longden*, 120 AD3d 980, 981-982; see generally *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350). Defendant failed to raise an issue of fact sufficient to defeat the motion with the conclusory opinion of the IME physician that the MRI studies were "unremarkable." Indeed, the IME physician recorded that plaintiff's range of motion "remains impaired" and furthermore, as noted above, the measurements set forth in his own report specifically quantify significant limitations in plaintiff's range of motion.