

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

1263

CA 15-00642

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

JASON T. AUGHTMON, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RAYMOND T. WARD AND TAMMEY M. WARD,
DEFENDANTS-RESPONDENTS.

STEVE BOYD, P.C., WILLIAMSVILLE (STEPHEN BOYD OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (KRISTEN B. DEGNAN OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 5, 2014. The order, insofar as appealed from, denied plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when a vehicle owned by defendant Tammey M. Ward and driven by defendant Raymond T. Ward collided with the vehicle driven by plaintiff. Following discovery, plaintiff moved for partial summary judgment on the issue whether he sustained a serious injury under the 90/180-day category of serious injury (see Insurance Law § 5102 [d]). Supreme Court properly denied the motion. Contrary to plaintiff's contention, he failed to meet his initial burden with respect to the 90/180-day category inasmuch as he failed to submit evidence establishing as a matter of law that he sustained "a medically determined injury or impairment of a non-permanent nature" that was causally related to the subject accident (*id.*; see *Heatter v Dmowski*, 115 AD3d 1325, 1326; see also *Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400). In support of his motion, plaintiff submitted, inter alia, the affirmed report of a physician who examined plaintiff on behalf of defendants. The physician concluded, based on all of plaintiff's medical reports, as well as the imaging studies conducted since the date of the accident (*cf. Quinones v Ksieniewicz*, 80 AD3d 506, 506-507), that plaintiff had "extensive congenital variation and degenerative disease of the lumbar spine that was not caused by the accident of record" and that plaintiff's injuries were caused by those preexisting "anatomical elements." We thus conclude that plaintiff failed to meet his burden of establishing, as a matter of law, that his alleged pain and injuries were caused by the subject accident (see

generally Carrasco v Mendez, 4 NY3d 566, 580).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court