

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

D16660  
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Submitted - October 3, 2007

FRED T. SANTUCCI, J.P.  
GLORIA GOLDSTEIN  
MARK C. DILLON  
DANIEL D. ANGIOLILLO, JJ.

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2007-02452

DECISION & ORDER

Lawrence Friedman, respondent, v Pashaj Albert,  
et al., appellants.

(Index No. 29879/05)

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

Bruce Montague & Partners, Bayside, N.Y. (Joseph D. Levy of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Kramer, J.), entered January 29, 2007, which denied their 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.

While we affirm the order appealed from, we do so on a ground other than the one relied upon by the Supreme Court. Contrary to the court's determination, the defendants failed to establish, *prima facie*, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955). In support of their motion, the defendants relied on the affirmed medical report of their examining neurologist, which described significant limitations in the plaintiff's cervical and lumbar spine range of motion (*see Jenkins v Miled Hacking Corp.*, 43 AD3d 393; *Bentivegna v Stein*, 42 AD3d 555; *Zamaniyan v Vrabeck*, 41 AD3d 472; *Brown v Motor Veh. Acc. Indem. Corp.*, 33 AD3d 832).

October 23, 2007

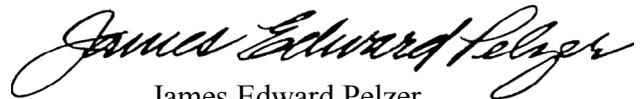
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Since the defendants failed to satisfy their prima facie burden, it is unnecessary to consider whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact (*see Jenkins v Miled Hacking Corp.*, 43 AD3d 393; *Coscia v 938 Trading Corp.*, 283 AD2d 538).

SANTUCCI, J.P., GOLDSTEIN, DILLON and ANGIOLILLO, 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