

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

D16670
G/kmg

_____AD3d_____

Argued - June 15, 2007

ROBERT W. SCHMIDT, J.P.
FRED T. SANTUCCI
GABRIEL M. KRAUSMAN
WILLIAM E. McCARTHY, JJ.

2006-04623

DECISION & ORDER

100 Motor Parkway Associates, LLC, et al.,
appellants, v American Motorists Insurance Company,
et al., respondents, et al., defendant.

(Index No. 24130/04)

Clifton Budd & DeMaria, LLP, New York, N.Y. (Robert J. Tracy, Daniel W. Morris,
and Diane M. Pietraszewski of counsel), for appellants.

Curtis, Vasile, Devine & McElhenny, LLP, Merrick, N.Y. (Michael J. Dorry of
counsel), for respondents.

In an action for a judgment declaring that the defendants American Motorists Insurance Company and Lumbermens Mutual Casualty Company are obligated to defend and indemnify the plaintiffs as additional insureds in an underlying action entitled *Payne v 100 Motor Parkway Associates, LLC*, pending in the Supreme Court, Suffolk County, under Index No. 03-22469, the plaintiffs appeal from an order of the Supreme Court, Suffolk County (Spinner, J.), dated April 3, 2006, which denied their motion for summary judgment.

ORDERED that the order is affirmed, with costs.

Summary judgment should only be granted if the pleadings, together with the affidavits, show that there are no triable issues of fact (*see* CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Alvarez v Prospect Hosp.*, 68 NY2d 320). Failure to tender sufficient evidence to eliminate any triable issues of fact requires denial of the motion, regardless of the

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sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

Here, contrary to the appellants' contention, triable issues of fact exist, inter alia, as to the timeliness of the "their" notice of the claim to the respondents (*see White v City of New York* 81 NY2d 955; *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584).

SCHMIDT, J.P., SANTUCCI, KRAUSMAN and McCARTHY, 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