

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

D17209
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_____AD3d_____

Submitted - November 14, 2007

STEPHEN G. CRANE, J.P.
DAVID S. RITTER
STEVEN W. FISHER
JOSEPH COVELLO
THOMAS A. DICKERSON, JJ.

2007-04140

DECISION & ORDER

Wilkie Joissaint, respondent, v Starrett-1
Inc., et al., appellants, et al., defendant.

(Index No. 9686/05)

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Holly E. Peck of
counsel), for appellants.

Stephen H. Frankel, Woodbury, N.Y. (Nicholas E. Tzaneteas of counsel), for
respondent.

In an action to recover damages for personal injuries, the defendants Starrett-1 Inc.,
and Eddie Harris appeal from an order of the Supreme Court, Kings County (Saitta, J.), dated April
12, 2007, which denied their motion for summary judgment dismissing the complaint insofar as
asserted against them 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.

The defendants Starrett-1 Inc., and Eddie Harris (hereinafter the appellants) failed to
satisfy their prima facie burden by establishing that the plaintiff did not sustain 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; *Gaddy v Eyler*, 79 NY2d 955, 956-957). Among the medical submissions
relied upon by the appellants was the affirmed medical report of their examining orthopedist. In his
report, the examining orthopedist identified significant limitations in the ranges of motion of the

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plaintiff's cervical and lumbar spines based upon his examination of the plaintiff, which took place almost two years after the subject accident (*see Zamaniyan v Vrabek*, 41 AD3d 472, 473; *Smith v Delcore*, 29 AD3d 890; *Sano v Gorelik*, 24 AD3d 747). Since the appellants failed to meet their initial burden, it is unnecessary to consider whether the plaintiff's papers, submitted in opposition, were sufficient to raise a triable issue of fact (*see Coscia v 938 Trading Corp.*, 283 AD2d 538).

CRANE, J.P., RITTER, FISHER, COVELLO and DICKERSON, 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