

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

D21871
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_____AD3d_____

Argued - December 9, 2008

STEVEN W. FISHER, J.P.
HOWARD MILLER
EDWARD D. CARNI
RUTH C. BALKIN, JJ.

2008-03496

DECISION & ORDER

Harriet Levine, respondent,
v Deposits Only, Inc., et al., appellants.

(Index No. 9019/05)

Cheven, Keely & Hatzis, New York, N.Y. (William B. Stock of counsel), for appellants.

Geller & Siegel, LLP (Pollack, Pollack, Isaac & De Cicco, New York, N.Y. [Brian J. Isaac and Jillian Rosen], of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Nassau County (Parga, J.), dated March 20, 2008, 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), and granted the plaintiff's cross motion for summary judgment on the issue of liability.

ORDERED that the order is reversed, on the law, with costs, the defendants' motion for summary judgment dismissing the complaint is granted, and the plaintiff's cross motion is denied as academic.

This action arises from a collision involving a motor vehicle operated by the plaintiff and a truck owned by the defendant Deposits Only, Inc., and operated by the defendant Robert Kellett.

January 20, 2009

Page 1.

LEVINE v DEPOSITS ONLY, INC.

The defendants made a prima facie showing 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, 352; *Gaddy v Eyler*, 79 NY2d 955, 956-957; *D'Alba v Yong-Ae Choi*, 33 AD3d 650). In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff's medical submissions failed to address the finding of the defendants' examining radiologist that the condition of the plaintiff's cervical and lumbar spines and right shoulder resulted from pre-existing degeneration and was not caused by the subject accident (*see Larkin v Goldstar Limo Corp.*, 46 AD3d 631). Accordingly, the Supreme Court should have granted the defendants' motion and denied the plaintiff's cross motion as academic.

FISHER, J.P., MILLER, CARNI and BALKIN, 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