

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

**745**

**CA 10-00242**

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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PAUL KENT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, DEFENDANT,  
AND NEW YORK CENTRAL MUTUAL FIRE INSURANCE  
COMPANY, DEFENDANT-APPELLANT.

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BROWN & KELLY, LLP, BUFFALO (CAROLYN M. HENRY OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

LAW OFFICE OF CRAIG Z. SMALL, BUFFALO (CRAIG Z. SMALL OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 3, 2009. The order, insofar as appealed from, granted that part of plaintiff's motion for summary judgment on the complaint against defendant New York Central Mutual Fire Insurance Company and directed that defendant to pay a certain sum to plaintiff under an automobile insurance policy.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part and the fourth ordering paragraph is vacated.

Memorandum: Plaintiff commenced this action seeking, inter alia, supplementary uninsured/underinsured motorist (SUM) coverage under an automobile insurance policy issued by New York Central Mutual Fire Insurance Company (defendant) to plaintiff's father. Plaintiff was a passenger on a moped that was operated by Stephen Spaziale, and he sustained injuries when the moped was rear-ended by a vehicle driven by Donald Boss. Sixteen months after the accident, plaintiff notified defendant of the potential SUM claim, and defendant disclaimed coverage based, inter alia, on the alleged lack of timely notice of the potential SUM claim. Plaintiff subsequently obtained a judgment in excess of \$800,000 against the Spaziales and settled his claims against Boss for \$10,000. Plaintiff then commenced this action against defendant and Allstate Insurance Company, which insured the Spaziales, seeking SUM coverage under both policies. Supreme Court granted plaintiff's motion for summary judgment on the complaint and, inter alia, ordered defendant to pay plaintiff SUM coverage in the amount of \$25,000. We reverse the order insofar as appealed from because plaintiff did not meet his burden of establishing his entitlement to judgment as a matter of law from defendant (see

*generally Zuckerman v City of New York, 49 NY2d 557, 562).*

Entered: July 9, 2010

Patricia L. Morgan  
Clerk of the Court