

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

D23599
C/kmg

_____AD3d_____

Submitted - May 20, 2009

REINALDO E. RIVERA, J.P.
MARK C. DILLON
JOSEPH COVELLO
RANDALL T. ENG
L. PRISCILLA HALL, JJ.

2008-05680

DECISION & ORDER

Joan Catalano, appellant,
v City of New York, et al., respondents.

(Index No. 11712/01)

Bamundo, Zwal & Schermerhorn, LLP, New York, N.Y. (Kenneth M. Dalton of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Pamela Seider Dolgow and Fay Ng of counsel), for respondent City of New York.

In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Richmond County (Mega, J.), entered May 7, 2008, which, upon an order of the same court dated June 25, 2004, granting the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of the Insurance Law § 5102(d), dismissed the complaint.

ORDERED that the appeal is dismissed, with costs.

As a general rule, we do not consider any issue raised on a subsequent appeal that was raised, or could have been raised, in an earlier appeal that was dismissed for lack of prosecution, although we have the inherent jurisdiction to do so (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750; *Bray v Cox*, 38 NY2d 350). Here, the plaintiff appealed from the order dated June 25, 2004, which granted the defendants' motion for summary judgment dismissing the complaint on the ground that she did not sustain a serious injury within the meaning of Insurance Law § 5102(d). That appeal (Appellate Division Docket No. 2004-07627) was dismissed by decision and order on motion

June 23, 2009

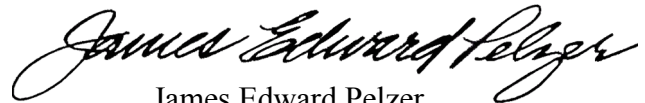
Page 1.

CATALANO v CITY OF NEW YORK

of this Court dated May 10, 2005, for failure to prosecute. The dismissal for lack of prosecution is ground for dismissal of the instant appeal, which raised issues which were or could have been raised on the prior appeal (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750; *Bray v Cox*, 38 NY2d 350; *Utility Audit Group v Apple Mac & R Corp.*, 59 AD3d 707).

RIVERA, J.P., DILLON, COVELLO, ENG and HALL, JJ., concur.

ENTER:

A handwritten signature in cursive script that reads "James Edward Pelzer".

James Edward Pelzer
Clerk of the Court