

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

D24219
G/kmg

_____AD3d_____

Submitted - June 17, 2009

ROBERT A. SPOLZINO, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL
PLUMMER E. LOTT, JJ.

2009-01893

DECISION & ORDER

Robert Kiernan, appellant, et al., plaintiff,
v DaimlerChrysler Corp., et al., respondents.

(Index No. 41280/07)

Everett J. Petersson, P.C., Brooklyn, N.Y., for appellant.

Murphy & Lambiase, Goshen, N.Y. (Laura Freeman of counsel), for respondent
DaimlerChrysler Corp.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville, N.Y. (Michael T. Reagan of
counsel), for respondent Kevin Bourne.

In an action to recover damages for personal injuries, etc., the plaintiff Robert Kiernan
appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County
(Solomon, J.), dated January 8, 2009, as denied his motion for summary judgment on the issue of
whether he sustained a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is modified, on the law, by adding thereto a provision that
the denial of the motion is with leave to renew upon the completion of discovery; as so modified, the
order is affirmed insofar as appealed from, without costs or disbursements.

The Supreme Court properly denied the motion of the plaintiff Robert Kiernan for
summary judgment. When Kiernan made his motion, discovery, including the exchange of X ray
materials that were the basis of this plaintiff's claims, was still outstanding (*see* CPLR 3212[f]; *Destin*

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v New York City Tr. Auth., 303 AD2d 713; *Morris v Hochman*, 296 AD2d 481). However, the motion should have been denied with leave to renew upon the completion of discovery.

SPOLZINO, J.P., SANTUCCI, ANGIOLILLO, LEVENTHAL and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial 'J'.

James Edward Pelzer
Clerk of the Court