

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

D22390
G/prt

_____AD3d_____

Submitted - January 21, 2009

REINALDO E. RIVERA, J.P.
MARK C. DILLON
HOWARD MILLER
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2008-02777

DECISION & ORDER

Julio Lopez, respondent, v
Lester V. Felton, Jr., et al.,
appellants.

(Index No. 960/06)

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne, N.Y. (Christopher Russo of counsel), for appellants.

Dall Vechia & Kraft, LLP, Kingston, N.Y. (John T. Dall Vechia of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Dutchess County (Brands, J.), dated February 14, 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).

ORDERED that the order is affirmed, with costs.

While we affirm the order appealed from, we do so on grounds different from those relied upon by the Supreme Court. The defendants failed to meet their prima facie burden of 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; *Gaddy v Eyer*, 79 NY2d 955, 956-957). In support of their motion, the defendants relied upon, inter alia, the affirmed medical report of Dr. Michael R. Miller, their examining orthopedic surgeon. While Dr. Miller set forth range of motion findings for the plaintiff's left knee in his report, he failed to compare those

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findings to what is considered normal (*see Perez v Fugon*, 52 AD3d 668; *Page v Belmonte*, 45 AD3d 825, 825-826; *Fleury v Benitez*, 44 AD3d 996, 997). Furthermore, the defendants never proffered a report from any doctor who examined the plaintiff's right knee, which he alleged he injured as a result of the subject accident in his supplemental bill of particulars (*see Sajid v Murzin*, 52 AD3d 493; *Monkhouse v Maven Limo, Inc.*, 44 AD3d 630; *O'Neal v Bronopolsky*, 41 AD3d 452; *Hughes v Cai*, 31 AD3d 385; *Loadholt v New York City Tr. Auth.*, 12 AD3d 352).

Since the defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Sajid v Murzin*, 52 AD3d 493).

RIVERA, J.P., DILLON, MILLER, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court