

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

D28861
C/hu

_____AD3d_____

Submitted - October 20, 2010

REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
RANDALL T. ENG
JOHN M. LEVENTHAL
LEONARD B. AUSTIN, JJ.

2010-01362

DECISION & ORDER

Dorothy Frasca-Nathans, respondent, v
Courtney Nugent, et al., appellants.

(Index No. 19515/08)

The Law Office of Christopher P. DiGiulio, P.C., New York, N.Y. (William Thymius of counsel), for appellants.

Nicholas Panzini, P.C., Amityville, N.Y., for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Westchester County (Loehr, J.), entered January 5, 2010, 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.

Although we affirm the order appealed from, we do so on grounds other than those relied upon by the Supreme Court. Contrary to the Supreme Court's determination, the defendants failed to make a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyles*, 79 NY2d 955). While the affirmed medical report of the defendants' examining orthopedic surgeon set forth the range of motion of the plaintiff's right knee, he failed to compare that finding to what was normal (*see Chiara v Dernago*, 70 AD3d 746; *Page v Belmonte*, 45 AD3d 825, 826). Since the defendants failed to meet their prima facie burden, it is unnecessary to consider whether the

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papers submitted by the plaintiff were sufficient to raise a triable issue of fact (*see Mannix v Lisi's Towing Serv., Inc.*, 67 AD3d 977).

The defendants' remaining contentions are without merit.

RIVERA, J.P., COVELLO, ENG, LEVENTHAL and AUSTIN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court