

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

D31224
C/kmb

_____AD3d_____

Submitted - April 27, 2011

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2010-07980

DECISION & ORDER

Louis Herzberg, et al., respondents, v Orange &
Rockland Utilities, Inc., appellant.

(Index No. 6191/08)

MacCartney, MacCartney, Kerrigan & MacCartney, Nyack, N.Y. (Harold Y. MacCartney, Jr., of counsel), for appellant.

Robert C. Lipsky (Powers & Santola, LLP, Albany, N.Y. [Michael J. Hutter], of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Rockland County (Walsh II, J.), entered July 26, 2010, as denied its cross motion for summary judgment dismissing the complaint on the ground that the plaintiff Louis Herzberg did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is affirmed insofar as appealed from, with costs.

While we affirm the order appealed from, we do so on a ground different from that relied upon by the Supreme Court. The Supreme Court erred in concluding that the defendant met its prima facie burden of showing that the plaintiff Louis Herzberg (hereinafter the injured plaintiff), who allegedly sustained injuries to, inter alia, his temporomandibular joints (hereinafter TMJs) as a result of the subject accident, 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*

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v Eyer, 79 NY2d 955, 955-956). The defendant's submissions did not establish, prima facie, that the alleged injuries did not constitute a serious injury within the meaning of Insurance Law § 5102(d) (*cf. Scotti v Boutureira*, 8 AD3d 652), or that the injuries were not caused by the subject accident.

Since the defendant failed to establish its prima facie entitlement to judgment as a matter of law, it is unnecessary to consider the sufficiency of the plaintiffs' opposition papers (*see Coscia v 938 Trading Corp.*, 283 AD2d 538).

SKELOS, J.P., DICKERSON, HALL, AUSTIN and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court