

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

D17018
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_____AD3d_____

Argued - November 5, 2007

ROBERT A. SPOLZINO, J.P.
MARK C. DILLON
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON, JJ.

2007-02236

DECISION & ORDER

Adan Gomez, etc., respondent, v Robert G.
Hilfiger, appellant.

(Index No. 5094/05)

MacCartney, MacCartney, Kerrigan & MacCartney, Nyack, N.Y. (Catherine H. Friesen of counsel), for appellant.

Jacobowitz & Gubits, LLP, Walden, N.Y. (Peter R. Eriksen of counsel), for respondent.

In an action, inter alia, to recover damages for wrongful death, the defendant appeals from an order of the Supreme Court, Orange County (Horowitz, J.), dated January 22, 2007, which denied his motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The defendant satisfied his prima facie burden of establishing entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In opposition thereto, by submitting the affidavits of the investigating officer and the accident investigator, the plaintiff raised triable issues of fact as to whether the defendant exercised due care and observed traffic conditions before his vehicle proceeded into and through the intersection (*see Bolta v Lohan*, 242 AD2d 356; *Olsen v Baker*, 112 AD2d 510), and whether the defendant failed to see that which through the proper use of his senses he should have seen (*see Weigand v United Traction Co.*, 221 NY 39, 42; *Baker v Nassau County Police Activity League*, 265 AD2d 515, 516; *Bolta v Lohan*, 242 AD2d at 356; *see also Mascia v Cho Ho Leung*, 282 AD2d 580).

November 20, 2007

Page 1.

GOMEZ v HILFIGER

The defendant's remaining contention is without merit.

SPOLZINO, J.P., DILLON, ANGIOLILLO and DICKERSON, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court