

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

D25203
W/prt

_____AD3d_____

Argued - November 5, 2009

WILLIAM F. MASTRO, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
LEONARD B. AUSTIN, JJ.

2009-04778

DECISION & ORDER

Giovanni Cali, et al., respondents, v
Izeddin Mustafa, et al., appellants.

(Index No. 9542/08)

Robert P. Tusa (Sweetbaum & Sweetbaum, Lake Success, N.Y. [Marshall D. Sweetbaum], of counsel), for appellants.

Daniel P. Buttafuoco & Associates, PLLC, Woodbury, N.Y. (Ellen Buchholz of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendants appeal from an order of the Supreme Court, Queens County (Golia, J.), dated April 8, 2009, which granted the plaintiffs' motion for summary judgment on the issue of liability.

ORDERED that the order is reversed, on the law, with costs, and the plaintiffs' motion for summary judgment on the issue of liability is denied.

Contrary to the Supreme Court's determination, the plaintiff Giovanni Cali (hereinafter Giovanni) failed to satisfy his prima facie burden of establishing his entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320). Viewing the evidence submitted in support of the plaintiffs' motion in the light most favorable to the nonmoving party (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106; *Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610), there is a triable issue of fact as to whether comparative negligence on Giovanni's part contributed to the subject motor vehicle accident (*see Eastmond v Wen Po Wong*, 300 AD2d 344). Although the defendant's direction of travel was

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controlled by a stop sign at the intersection where the accident occurred, Giovanni's affidavit, submitted in support of the motion, did not establish, as a matter of law, that Giovanni was free from comparative negligence (*see Sale v Lee*, 49 AD3d 854; *Scibelli v Hopchick*, 27 AD3d 720; *Hernandez v Bestway Beer & Soda Distrib.*, 301 AD2d 381; *Eastmond v Wen Po Wong*, 300 AD2d 344; *Millus v Milford*, 289 AD2d 543; *King v Washburn*, 273 AD2d 725).

Since the plaintiffs failed to meet their burden as the movants, we need not review the sufficiency of the defendants' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851; *Valore v McIntosh*, 8 AD3d 662).

Accordingly, the plaintiffs' motion for summary judgment on the issue of liability should have been denied.

MASTRO, J.P., BELEN, HALL and AUSTIN, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court