

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

D25476
Y/prt

_____AD3d_____

Argued - November 12, 2009

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2008-07836
2009-01122

DECISION & ORDER

Mehrban Khan, respondent, v Lionel Nelson,
et al., appellants, et al., defendants.

(Index No. 46153/07)

Silverman Sclar Shin & Byrne, PLLC, New York, N.Y. (Mikhail Ratner of counsel),
for appellants.

A. Ali Yusaf, New York, N.Y. (Stephen A. Skor of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants Lionel Nelson and Aspurity Transportation Corp. appeal, as limited by their brief, (1) from so much of an order of the Supreme Court, Kings County (Starkey, J.), dated June 25, 2008, as granted the plaintiff's motion for summary judgment on the issue of liability as against them, and (2) from so much of an order of the same court dated October 22, 2008, as, upon reargument, adhered to its prior determination and, in effect, denied that branch of their motion which was for leave to renew.

ORDERED that the appeal from the order dated June 25, 2008, is dismissed, as that order was superseded by the order dated October 22, 2008, made upon reargument; and it is further,

ORDERED that the order dated October 22, 2008, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

December 22, 2009

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The plaintiff allegedly sustained personal injuries when the vehicle in which he was a passenger collided at an intersection in Queens County with a vehicle operated by the defendant Lionel Nelson and owned by the defendant Aspiry Transportation Corp. (hereinafter Aspiry). Only the road in which the Nelson vehicle was traveling as it approached the intersection was governed by a stop sign.

The plaintiff established his entitlement to judgment as a matter of law by demonstrating, prima facie, that Nelson was negligent in failing to yield the right of way (see Vehicle and Traffic Law § 1142[a]; *Jaramillo v Torres*, 60 AD3d 734, 735; *Maliza v Puerto-Rican Transp. Corp.*, 50 AD3d 650, 651). In opposition, Nelson and Aspiry failed to submit evidence sufficient to raise a triable issue of fact (see *Gorelik v Laidlaw Tr. Inc.*, 50 AD3d 739). “The question of whether [Nelson] stopped at the stop sign is not dispositive, since the evidence established that he failed to yield even if he did stop” (*McCain v Larosa*, 41 AD3d 792, 793; see *Marcel v Chief Energy Corp.*, 38 AD3d 502, 503; *Morgan v Hachmann*, 9 AD3d 400). Additionally, the contention of Nelson and Aspiry that the driver of the vehicle in which the plaintiff was a passenger was speeding was speculative (see *Yelder v Walters*, 64 AD3d 762, 765; *Batts v Page*, 51 AD3d 833, 834; *Meliarenne v Prisco*, 9 AD3d 353, 354). Therefore, the Supreme Court properly granted the plaintiff’s motion for summary judgment on the issue of liability as against Nelson and Aspiry and, upon reargument, properly adhered to that determination.

A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination” (CPLR 2221[e][2]) and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221[e][3]; see *Barnett v Smith*, 64 AD3d 669, 670; *Chernysheva v Pinchuck*, 57 AD3d 936, 937; *Dinten-Quiros v Brown*, 49 AD3d 588, 589; *Madison v Tahir*, 45 AD3d 744). The Supreme Court properly denied that branch of motion of Nelson and Aspiry which was for leave to renew since the new evidence would not have warranted denial of the plaintiff’s motion (see *Gentileia v Board of Educ. of Wantagh Union Free School Dist.*, 60 AD3d 629, 630; *Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021).

MASTRO, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court