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

D25552
C/kmg

_____AD3d_____ Argued - December 3, 2009

JOSEPH COVELLO, J.P.
DANIEL D. ANGIOLILLO
PLUMMER E. LOTT
SHERI S. ROMAN, JJ.

2008-10296 DECISION & ORDER

Pedro Veras, et al., appellants, v Dominick J. Vezza,
et al., respondents.

(Index No. 18939/06)

Michael S. Lamonsoff, PLLC (Arnold E. DiJoseph, P.C., New York, N.Y. [Arnold E. DiJoseph III], of counsel), for appellants.

Richard T. Lau, Jericho, N.Y. (Nancy S. Goodman of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Queens County (Taylor, J.), entered August 15, 2008, which, sua sponte, vacated a prior order of the same court dated August 4, 2008, denying the defendants' motion for summary judgment dismissing the complaint, and thereupon granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that on the Court's own motion, the notice of appeal from so much of the order as was issued sua sponte is deemed to be an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order entered August 15, 2008, is reversed, on the law, with costs, and the order dated August 4, 2008, is reinstated.

The plaintiff Pedro Veras (hereinafter the plaintiff) allegedly was injured when he was struck by a motor vehicle owned by the defendant Dominick J. Vezza and operated by the defendant Kenneth Foti. After the plaintiffs commenced this action, the defendants moved for summary judgment dismissing the complaint on the ground that the accident was not proximately caused by

any negligence on their part.

The plaintiff's deposition testimony, a transcript of which the defendants submitted in support of their motion, raised a triable issue of fact (*see* CPLR 3212[b]) as to whether the defendant-driver was operating his vehicle at an excessive rate of speed immediately prior to the occurrence, in violation of Vehicle and Traffic Law § 1180, and, if so, whether that violation of the law was a proximate cause of the accident. Under these circumstances, it is unnecessary to address the sufficiency of the plaintiffs' opposition papers (*see Alvarez v Prospect Hosp*., 68 AD2d 320, 324). Accordingly, the Supreme Court should not have vacated its original order denying the defendants' motion for summary judgment dismissing the complaint.

COVELLO, J.P., ANGIOLILLO, LOTT and ROMAN, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court