

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

D25677
Y/prt

_____AD3d_____

Argued - December 7, 2009

FRED T. SANTUCCI, J.P.
RUTH C. BALKIN
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2008-11703

DECISION & ORDER

Shmuel Mermelstein, appellant, v Able Bus, Inc., et al.,
respondents, et al., defendants.

(Index No. 6807/07)

Allen L. Rothenberg (Marc J. Rothenberg and Pollack, Pollack, Isaac & De Cicco,
New York, N.Y. [Brian J. Isaac and Michael H. Zhu], of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick of counsel),
for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an
order of the Supreme Court, Kings County (Bunyan, J.), dated November 19, 2008, which denied
his motion for summary judgment on the issue of liability as against the defendants Able Bus, Inc.,
and Jorge M. Vega.

ORDERED that the order is affirmed, with costs.

A vehicle operated by the defendant Jorge M. Vega and owned by the defendant Able
Bus, Inc. (hereinafter Able), collided with a vehicle owned and operated by the plaintiff at the
intersection of Avenue J and East 3rd Street in Brooklyn. The defendant driver was traveling on East
3rd Street, which is governed by a stop sign at its intersection with Avenue J. The plaintiff was
traveling on Avenue J, which is not governed by a traffic control signal at its intersection with East
3rd Street.

The plaintiff failed to submit evidence sufficient to establish his entitlement to

judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Although the defendant driver's direction of travel was governed by a stop sign, a triable issue of fact exists as to whether the plaintiff was free from negligence (*see Virzi v Fraser*, 51 AD3d 784; *Campbell-Lopez v Cruz*, 31 AD3d 475; *Hernandez v Bestway Beer & Soda Distrib.*, 301 AD2d 381). Accordingly, the Supreme Court properly denied the plaintiff's motion for summary judgment on the issue of liability against Able and the defendant driver.

SANTUCCI, J.P., BALKIN, ENG and CHAMBERS, 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