

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

D26248  
H/kmg

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - January 15, 2010

REINALDO E. RIVERA, J.P.  
THOMAS A. DICKERSON  
CHERYL E. CHAMBERS  
L. PRISCILLA HALL, JJ.

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2009-08022

DECISION & ORDER

Yuen Lum, respondent, v Norma Iris Wallace,  
appellant.

(Index No. 969/08)

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Harvey Gladstein & Partners, LLC, New York, N.Y. (Anthony J. Spiga and Jan B. Rothman of counsel), for appellant.

Morelli Ratner P.C., New York, N.Y. (David S. Ratner of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Ruchelsman, J.), dated June 22, 2009, which granted the plaintiff's motion for summary judgment on the issue of liability.

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

Under the circumstances of this case, the plaintiff failed to establish, as a matter of law, that he was free from comparative negligence, as he failed to state in his initial affidavit that he entered the crosswalk where the accident occurred with reasonable care (*see Thoma v Ronai*, 82 NY2d 736, 737; *Lopez v Garcia*, 67 AD3d 558; *Sale v Lee*, 49 AD3d 854; *Cator v Filipe*, 47 AD3d 664; *Schmidt v Flickinger Co.*, 88 AD2d 1068, 1068-1069). The Supreme Court erred in considering the plaintiff's reply affidavit in which he stated that prior to crossing he looked left and right, and saw no vehicle coming (*see David v Bryon*, 56 AD3d 413, 414-415; *Barrera v MTA Long Is. Bus*, 52 AD3d 446). The plaintiff's failure to make a prima facie showing required the denial of the motion, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64

February 23, 2010

Page 1.

LUM v WALLACE

NY2d 851, 853).

In light of our determination, we need not reach the defendant's remaining contentions.

RIVERA, J.P., DICKERSON, CHAMBERS and HALL, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court