

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

D28138
O/kmg

_____AD3d_____

Argued - June 22, 2010

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
PLUMMER E. LOTT
LEONARD B. AUSTIN, JJ.

2009-10206

DECISION & ORDER

Robert Davis, plaintiff-respondent, v City of New York, et al., defendants-respondents, Gary A. Emmanuel, appellant.

(Index No. 15531/07)

Frenkel Lambert Weiss Weisman & Gordon, LLP, Bay Shore, N.Y. (Robert I. Meyers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Francis F. Caputo and Elizabeth I. Freedman of counsel), for defendants-respondents.

In an action to recover damages for personal injuries, the defendant Gary A. Emmanuel appeals, as limited by his brief, from so much of an amended order of the Supreme Court, Kings County (Velasquez, J.), dated September 11, 2009, as denied his motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him.

ORDERED that the amended order is affirmed insofar as appealed from, with costs.

The deposition testimony submitted in support of the appellant's motion for summary judgment established the negligence of the defendant police officer Deidra Defrities in driving her patrol car into an intersection against a red traffic signal in a nonemergency situation, where it collided with the appellant's vehicle. However, since Defrities gave deposition testimony that she activated the emergency lights and siren on her vehicle before proceeding into the intersection, a triable issue of fact exists as to whether the appellant contributed to the happening of the accident by failing to yield the right of way to Defrities' vehicle (*see* Vehicle and Traffic Law § 1144[a]; *Franco v Rizzo*, 61 AD3d 818; *Tobacco v North Babylon Fire Dept.*, 251 AD2d 398; *Plowden v Manganiello*, 138 AD2d 243; *cf. Felice v Gershkon*, 34 AD2d 1008). Accordingly, the appellant

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failed to establish his prima facie entitlement to judgment as a matter of law, and his motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him was properly denied.

DILLON, J.P., DICKERSON, LOTT and AUSTIN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, looping initial "J".

James Edward Pelzer
Clerk of the Court