

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

D33141
G/prt

_____AD3d_____

Argued - November 10, 2011

WILLIAM F. MASTRO, A.P.J.
CHERYL E. CHAMBERS
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2011-06315

DECISION & ORDER

Perry Marchigiani, et al., respondents, v
Supertrans NY, Inc., et al., appellants.

(Index No. 1812/09)

Jeffrey Samel, New York, N.Y. (David Samel and Robert Spevack of counsel), for appellants.

Hach & Rose, LLP, New York, N.Y. (Robert F. Garnsey and Michael A. Rose of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendants appeal from an order of the Supreme Court, Westchester County (Liebowitz, J.), entered June 7, 2011, which denied their motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff Perry Marchigiani (hereinafter the injured plaintiff) allegedly was struck by a small school bus owned by the defendant Supertrans NY, Inc., and operated by the defendant Gail Utley, while on Alexander Street, in Yonkers. The injured plaintiff and his wife, suing derivatively, commenced this action to recover damages for the injuries he allegedly sustained in the accident. The Supreme Court denied the defendants' motion for summary judgment dismissing the complaint, and the defendants appeal. We affirm.

In opposition to the defendants' prima facie showing of their entitlement to judgment as a matter of law, the plaintiffs raised a triable issue of fact. Contrary to the defendants' contention,

January 24, 2012

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an affidavit of a witness submitted by the plaintiffs in opposition to the defendants' motion did not constitute an attempt to create a feigned issue of fact designed to avoid the consequences of the injured plaintiff's prior deposition testimony (*see Franklin v Omni Sagamore Hotel*, 5 AD3d 348, 349; *see also Kievman v Philip*, 84 AD3d 1031, 1033; *Gleason v City of New York*, 68 AD3d 1054, 1056; *Tesa v Transit Auth. of City of N.Y.*, 184 AD2d 421; *compare Hodgson-Romain v Hunter*, 72 AD3d 741, 741; *Stancil v Supermarkets Gen.*, 16 AD3d 402, 402-403).

MASTRO, A.P.J., CHAMBERS, AUSTIN and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court