

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

D25595

H/hu

_____AD3d_____

Argued - November 6, 2009

PETER B. SKELOS, J.P.
RANDALL T. ENG
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS, JJ.

2009-03014

DECISION & ORDER

Christian Diaz, etc., et al., plaintiffs-respondents,
v Ajibola Sopade, appellant, Mary Whetstone,
defendant-respondent.

(Index No. 38834/07)

Marjorie E. Bornes, New York, N.Y., for appellant.

Michael A. Cervini, Jackson Heights, N.Y., for plaintiffs-respondents.

In an action to recover damages for personal injuries, etc., the defendant Ajibola Sopade appeals from an order of the Supreme Court, Kings County (Kramer, J.), entered February 24, 2009, which denied his motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him.

ORDERED that the order is affirmed, with costs.

According to the appellant's deposition testimony, while in the course of his employment as a car service driver, a passenger armed with a metal rod demanded the appellant's money and then struck him in the head with the instrument, rendering him unconscious. The vehicle subsequently went out of control, struck another vehicle operated by the defendant Mary Whetstone, and mounted a sidewalk, striking the infant plaintiff, who was on his bicycle at the time. The plaintiffs commenced the present action, alleging, inter alia, that the accident was proximately caused by negligence on the appellant's part. The appellant moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against him on the ground that the accident resulted

from an unforeseeable criminal assault, which caused him to lose consciousness and rendered him unable to avoid colliding with the other vehicle and the infant plaintiff.

The appellant established his prima facie entitlement to judgment as a matter of law by demonstrating that the underlying accident was caused as a result of an onset of a sudden emergency (*see Hernandez v Ricci*, 15 AD3d 351). In opposition, the plaintiffs submitted, inter alia, an affidavit sworn to by Sebastian Diaz, the father of the infant plaintiff, attesting that the appellant apologized and stated that he had "tried to speed up [his] car and hit the other car because [he] thought that would knock [his assailant] out." This was sufficient to raise a triable issue of fact as to whether negligence on the part of the appellant contributed to the occurrence (*see CPLR 3212[b]*). Therefore, the Supreme Court properly denied the appellant's motion for summary judgment.

SKELOS, J.P., ENG, LEVENTHAL 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