

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

D33840
Y/prt

_____AD3d_____

Argued - November 10, 2011

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

2010-11717

DECISION & ORDER

Charles H. Balducci, et al., respondents-appellants, v
George Velasquez, et al., appellants-respondents.

(Index No. 101529/08)

Gallo, Vitucci & Klar, New York, N.Y. (Yolanda Ayala and Kimberly A. Ricciardi of counsel), for appellant-respondent George Velasquez.

Connors & Connors, P.C., Staten Island, N.Y. (Leonard A. Robusto of counsel), for appellants-respondents Abbas Behnambakhsh and Roxana Behnambakhsh.

Verrill & Goodstein, Jericho, N.Y. (Thomas Torto, Jason Levine, and Crafa & Sofield [Thomas R. Sofield], of counsel), for appellant-respondent Marie Decanio.

Louis Grandelli, P.C., New York, N.Y. (Ari Lieberman and Leigh David Eskenasi of counsel), for respondents-appellants.

In an action to recover damages for personal injuries, etc., the defendant George Velasquez appeals from so much of an order of the Supreme Court, Richmond County (McMahon, J.), dated November 5, 2010, as denied his motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him on the ground that the plaintiff Charles H. Balducci did not sustain a serious injury within the meaning of Insurance Law § 5102(d), the defendants Abbas Behnambakhsh and Roxana Behnambakhsh separately appeal, and the defendant Marie Decanio separately appeals, from so much of the same order as denied their respective cross motions for summary judgment dismissing the complaint insofar as asserted against them on the ground that the plaintiff Charles H. Balducci did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and the plaintiffs cross-appeal from so much of the same order as denied their cross motion for summary judgment on the issue of liability.

ORDERED that the order is affirmed insofar as appealed from; and it is further,

February 7, 2012

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ORDERED that the order is reversed insofar as cross-appealed from, on the law, and the plaintiffs' cross motion for summary judgment on the issue of liability is granted; and it is further,

ORDERED that one bill of costs is awarded to the plaintiffs, payable by the defendants appearing separately and filing separate briefs.

This action arises out of three separate car accidents on Staten Island which each allegedly caused the plaintiff Charles H. Balducci (hereinafter the injured plaintiff) to sustain serious injuries within the meaning of Insurance Law § 5102(d). The first accident occurred on August 20, 2005, on Targee Street at or near its intersection with Narrows Road North, when the injured plaintiff was stopped at a red light and a vehicle owned and operated by the defendant George Velasquez struck the injured plaintiff's vehicle from behind. The second accident occurred on May 25, 2007, on Amboy Road at its intersection with Chesterton Avenue, when a vehicle operated by the defendant Roxana Behnambakhsh and co-owned by the defendant Abbas Behnambakhsh (hereinafter together the Behnambakhshes), rear-ended the injured plaintiff's vehicle. The third accident occurred on October 23, 2007, on Forest Avenue at its intersection with Richmond Hill Road, when a vehicle owned and operated by the defendant Marie Decanio rear-ended the injured plaintiff's vehicle as it was stopped at a red light.

Although we affirm so much of the order as denied the motion and cross motions of the respective defendants for summary judgment dismissing the complaint, we do so on grounds other than those relied upon by the Supreme Court. Contrary to the holding of the Supreme Court, the respective defendants failed to meet their prima facie burdens of showing that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accidents (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eycler*, 79 NY2d 955, 956-957).

As to the first accident, Velasquez moved for summary judgment and relied upon, inter alia, the affirmed medical report of Dr. Robert Israel, Velasquez's examining orthopedic surgeon. Dr. Israel examined the injured plaintiff on December 3, 2009, and during cervical spine testing reported finding significant limitations. Accordingly, Velasquez failed to sustain his prima facie burden of showing that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see Taylor v Taylor*, 87 AD3d 1129; *Astudillo v MV Transp., Inc.*, 84 AD3d 1289; *Rhodes v Stoddard*, 79 AD3d 997; *Kharzis v PV Holding Corp.*, 78 AD3d 1122). Moreover, while Dr. Israel opined that the injured plaintiff's disability was causally related to the subsequent accidents and not to the first one, he provided no foundation for that conclusion (*see Franchini v Palmieri*, 1 NY3d 536; *Bengaly v Singh*, 68 AD3d 1030; *Buono v Sarnes*, 66 AD3d 809; *see also Borrás v Lewis*, 79 AD3d 1084; *Landman v Sarcona*, 63 AD3d 690; *Powell v Prego*, 59 AD3d 417). Since Velasquez failed to establish his prima facie entitlement to judgment as a matter of law, it is unnecessary to consider the sufficiency of the plaintiffs' opposition papers, and the Supreme Court properly denied his motion (*see Coscia v 938 Trading Corp.*, 283 AD2d 538).

The Supreme Court also properly denied the separate cross motions of the Behnambakhshes and Decanio. The medical report of Dr. George V. DiGiacinto, submitted by the Behnambakhshes, was unaffirmed and, thus, in inadmissible form (*see Grasso v Angerami*, 79 NY2d 813; *Lively v Fernandez*, 85 AD3d 981; *Pierson v Edwards*, 77 AD3d 642; *Vasquez v John Doe #1*,

73 AD3d 1033). Furthermore, the admissible evidence relied upon by the Behnambakhshes did not eliminate all material issues of fact as to whether the injured plaintiff sustained a serious injury as a result of the second accident, and the evidence relied upon by Decanio similarly did not eliminate all material issues of fact as to whether the injured plaintiff sustained a serious injury as a result of the third accident (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Olic v Pappas*, 47 AD3d 780). Since the Behnambakhshes and Decanio failed to establish their prima facie entitlement to judgment as a matter of law, it is unnecessary to consider whether the plaintiffs' opposition papers were sufficient to raise a triable issue of fact (*see Coscia v 938 Trading Corp.*, 283 AD2d 538).

As a general matter, the operator of a motor vehicle has a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (*see Filippazzo v Santiago*, 277 AD2d 419; *Johnson v Phillips*, 261 AD2d 269). The operator of a motor vehicle approaching another motor vehicle from the rear is obligated to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see Power v Hupart*, 260 AD2d 458; *see also* Vehicle and Traffic Law § 1129[a]). However, a driver also has the duty "to not stop suddenly or slow down without proper signaling so as to avoid a collision" (*Drake v Drakoulis*, 304 AD2d 522, 523; *see Purcell v Axelsen*, 286 AD2d 379, 380; *Colonna v Suarez*, 278 AD2d 355; *see also* Vehicle and Traffic Law § 1163).

"A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Volpe v Limoncelli*, 74 AD3d 795, 795 [internal quotation marks omitted]; *see Parra v Hughes*, 79 AD3d 1113; *DeLouise v S.K.I. Wholesale Beer Corp.*, 75 AD3d 489, 490; *Staton v Ilic*, 69 AD3d 606; *Lampkin v Chan*, 68 AD3d 727; *Klopchin v Masri*, 45 AD3d 737, 737). Here, in support of the plaintiffs' cross motion for summary judgment on the issue of liability, they established their prima facie entitlement to judgment as a matter of law on the issue of liability by submitting the deposition testimony of the injured plaintiff which established, with respect to each of the three accidents, that his vehicle was stopped when the defendants' respective vehicles struck his vehicle from the rear (*see Cortes v Whelan*, 83 AD3d 763, 763-764; *Gross v Marc*, 2 AD3d 681).

Velasquez did not oppose the plaintiffs' cross motion, and Decanio and the Behnambakhshes merely relied on the contention that in relation to their respective accidents with the injured plaintiff, they did not recall seeing brake lights or any other illumination on his vehicle before the collisions. These submissions were insufficient to raise a triable issue of fact (*see Cortes v Whelan*, 83 AD3d at 764; *Macauley v Elrac, Inc.*, 6 AD3d 584, 585; *Gross v Marc*, 2 AD3d 681; *Waters v City of New York*, 278 AD2d 408, 409; *Barile v Lazzarini*, 222 AD2d 635). Accordingly, the Supreme Court erred in denying the plaintiffs' cross motion for summary judgment on the issue of liability.

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

ENTER:


Aprilanne Agostino
Clerk of the Court