

Balducci v Velasquez

2010 NY Slip Op 33159(U)

November 5, 2010

Supreme Court, Richmond County

Docket Number: 101529/2008

Judge: Judith N. McMahon

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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CHARLES H. BALDUCCI and SABRINA BALDUCCI,

DCM PART 5

Plaintiff(s),

**Present:
HON. JUDITH N. McMAHON**

- against-

DECISION AND ORDER

**GEORGE VELASQUEZ, ABBAS BEHNAMBAKSH,
ROXANA BEHNAMBAKSH, and MARIE DECANIO,**

**Index No. 101529/2008
Motion Nos. 002, 003, 004, 005**

Defendant(s).

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The following papers numbered 1 to 12 were used on this motion this 12th day of October, 2010:

[002]Notice of Motion (Defendant Velasquez)(Affirmation in Support)-----	1
[003]Notice of Motion (Defendant DeCanio)(Affirmation in Support) -----	2
[004]Notice of Motion (Plaintiff)(Affirmation in Support) -----	3
[005]Notice of Motion (Defendant Behnambakhsh)(Affirmation in Support) -----	4
Affirmation in Opposition (Behnambakhah) -----	5
Affirmation in Opposition (DeCanio) -----	6
Affirmation in Opposition (Plaintiff) -----	7
Reply Affirmation (Plaintiff) -----	8
Reply Affirmation (Plaintiff) -----	9
Reply Affirmation (Behnambakhsh) -----	10
Reply Affirmation (Velasquez) -----	11
Reply Affirmation (DeCanio) -----	12

This action was commenced on or about March 20, 2008, against the defendants after the plaintiff, Charles Balducci, was involved in three separate motor vehicle accidents and allegedly sustained serious injuries as a result. The first accident occurred on August 20, 2005, on Targee Street at or near the intersection of Narrows Road North in Staten Island, New York. Plaintiff contends he was stopped at a red light when the vehicle owned and operated by defendant George Velasquez struck his vehicle from behind. The second accident occurred almost two years later on May 25, 2007. This accident occurred on Amboy Road at the intersection with Chesterton Avenue in Staten Island, New York. Defendant Roxana

Behnambakhsh was operating the vehicle that allegedly struck the plaintiff's vehicle in the rear. The vehicle was owned by co-defendant Abbas Behnambakhsh. The third accident occurred approximately five months later on October 23, 2007, on Forest Hill Road at the intersection with Richmond Hill Road in Staten Island, New York. The vehicle owned and operated by defendant Marie Decanio's vehicle allegedly struck plaintiff in the rear after it was stopped at a red light.

Presently, discovery is complete and the defendants are each separately moving for summary judgment contending that the plaintiff did not sustain serious injuries as defined under Insurance Law § 5102(d). Plaintiff is also moving for summary judgment on liability alleging that the defendants each violated New York State Vehicle and Traffic Law § 1129(a).

It is well settled that a "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, "the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact" (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In this regard, the court is enjoined to accept the evidence tendered by the opposing party as true, and "must deny the motion if there is even arguably any doubt as to the existence of a triable issue" (Fleming v. Graham, 34 AD3d 525 [2d Dept 2006] quoting Barker v. Briarcliff School Dist., 205 AD2d 652, 653 [2d Dept 1994] [internal quotation marks omitted]).

Vehicle and Traffic Law § 1129[a][states that “[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway”]; Levine v. Taylor, 268 AD2d 566, 566 [2d Dept., 2000]; Macauley v. ELRAC, Inc., 6 AD3d 584, 585 [2d Dept., 2004]; Vavoulis v. Adler, 43 AD3d 1154, 1155 [2d Dept., 2007]). It is well settled that “[a] rear-end collision is sufficient to create a prima facie case of liability and imposes a duty of explanation with respect to the operator of the offending vehicle” (Levine v. Taylor, 268 AD2d at 566; Vavoulis v. Adler, 43 AD3d at 1155; Insinga v. F.C. Gen. Contr., 33 AD3d 963, 964 [2d Dept., 2006]).

Here, the plaintiff has established his entitlement to summary judgment as a matter of law by providing sufficient evidence that each of the defendants vehicles struck the plaintiff in the rear (Vavoulis v. Adler, 43 AD3d at 1155; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). In opposition however, under the circumstances of this case, the defendants have successfully raised triable issues of fact through their collective testimony and evidence presented. The defendants each separately contend that the plaintiff’s rear brake lights were not illuminated at the time of their respective accidents. While conclusory allegations do not rebut the inference of negligence from a rear-end collision, here, there are three separate, unrelated accidents, the defendant’s of which all contend that the plaintiff’s rear brake lights were not illuminated (Macauley v. ELRAC, 6 AD3d 584, 584-585 [2d Dept., 2004][finding defendants self serving allegations of no brake lights in his opposition papers unavailing to rebut the inference of negligence]; Waters v. City of New York, 278 AD2d 408, 409 [2d Dept., 2000]). Further, not only do the defendant’s contend the plaintiff’s rear brake

lights were not illuminated in their opposition papers but they testified to such at their respective examinations before trial and it was also indicated in the police reports, made at the time of the accident. As such, considering the volume of evidence which raises legitimate issues of fact as to whether plaintiff's rear brake lights were operating at the time of each accident and thus, whether this contributed to the accidents, summary judgment on liability is inappropriate (*id.*).

With respect to defendant's motions contending that the plaintiff did not suffer a serious injury, each defendant has successfully established a prima facie showing of entitlement to summary judgment by submitting evidence in admissible form demonstrating that the plaintiff did not sustain a serious injury, as defined by Insurance Law § 5102(d) (Toure v. Avis Rent A Car Sys, 98 NY2d 345 [2002]; Chou v. Welsh, 15 AD3d 622 [2d Dept. 2005]). In opposition, the plaintiff submitted the report of Drs. Shiau, DeMarco and Diamond who opined that the plaintiff suffered permanent injuries that were causally related to the multiple accidents. Specifically, the doctors submitted that plaintiff has a decreased range of motion, disc bulging, and disc herniations. Thus, the plaintiff has, *inter alia*, established numerous triable issues of fact which preclude granting summary judgment (Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Mauro v. Gold Star Limo Corp., 8 AD3d 352 [2d. Dept. 2004]; Fabiano v. Kirkorian, 306 AD2d 373 [2d Dept. 2003]).

Accordingly, it is,

ORDERED that the defendants' motions for summary judgment are all hereby denied and it is further,

ORDERED that plaintiff's motion for summary judgment on liability is hereby denied
and it is further

ORDERED that any and all additional relief requested is hereby denied.

THIS IS THE ORDER OF THIS COURT.

E N T E R,

Dated: November 5, 2010

Hon. Judith N. McMahon
Justice of the Supreme Court