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| <b>Baquero v Angosto</b>                                                                                                                                                                                                         |
| 2012 NY Slip Op 32319(U)                                                                                                                                                                                                         |
| September 4, 2012                                                                                                                                                                                                                |
| Sup Ct, Queens County                                                                                                                                                                                                            |
| Docket Number: 19882/2009                                                                                                                                                                                                        |
| Judge: Robert J. McDonald                                                                                                                                                                                                        |
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

- - - - - x

PHILLIP BAQUERO, Index No.: 19882/2009  
Plaintiff, Motion Date: 07/26/12  
- against - Motion No.: 3  
Motion Seq.: 4

UBALDO ANGOSTO, LUCIA ANGOSTO, C.  
THEODORATOS A/K/A CONSTANTINE  
THEODORATOS, CAB EAST LLC, JOHN T.  
CAMIDGE, FREDDIES SERVICE INC. and MD  
ABDUS SALAM,  
Defendants.

- - - - - x

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

- - - - - x

JOHN CAMIDGE, INDEX NO.: 3088/2010  
Plaintiff,  
- against -

UBALDO ANGOSTO and C. THEODORATOS a/k/a  
CONSTANTINE THEODORATOS,  
Defendants.

- - - - - x

The following papers numbered 1 to 24 were read on this motion by  
defendants FREDDIES SERVICE INC. and MD ABDUS SALEM for an order  
pursuant to CPLR 3212(b) granting summary judgment and dismissing  
plaintiff's complaint and all cross-claims against them on the  
ground that they are not liable for the causation of the  
accident:

Papers  
Numbered

|                                                         |               |
|---------------------------------------------------------|---------------|
| Freddies Notice of Motion.....                          | 1 - 10        |
| Co-Defendant Theodoratos Affirmation in Opposition..... | 11 - 13       |
| Plaintiff Baquero's Affirmation in Opposition.....      | 14 - 19       |
| Freddies's Reply Affirmations (2).....                  | 20 - 24       |
| Defendants Cab East LLC and John T. Camidge.....        | No Opposition |

In this action for negligence, the plaintiff, Philip Baquero, seeks to recover damages for personal injuries he sustained as a result of a motor vehicle accident that occurred on November 1, 2007. The three-car, chain reaction accident, took place in the vicinity of 8<sup>th</sup> Avenue and 49<sup>th</sup> and 50<sup>th</sup> Streets in New York County, New York.

Defendants Freddie's Service Inc. and Md Abdus Salam, move for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing the plaintiff's complaint and all cross-claims against them. Salam contends that his vehicle, the first in the chain, was making a right turn from 8<sup>th</sup> Avenue onto 50<sup>th</sup> Street when it was struck in the rear by the second vehicle in the chain owned by Cab East LLC and operated by defendant John Camidge. The Camidge vehicle was initially struck the rear by the vehicle operated by Constantine Theodoratos propelling it into the Salam vehicle. The Salam defendants move for summary judgment dismissing the plaintiff's complaint against them and all cross claims on the ground that their vehicle, the first in the chain, was lawfully making a right turn onto 50<sup>th</sup> Street when it was struck in the rear by the vehicle owned by Cab East and operated by Camidge. Salam asserts that he has no liability for the injuries sustained by the plaintiff who was a passenger in the third vehicle in the chain which initiated the accident.

In support of the instant motion for summary judgment, defendant Salam submits an affirmation from counsel, Nishi Rajan, Esq., a copy of the pleadings; a copy of plaintiff's second supplemental verified bill of particulars; and copies of the transcripts of the examinations before trial of the plaintiff and the three drivers involved in the accident, John Camidge, MD Abdus Salam and Constantine Theodoratos.

In his examination before trial, taken on August 24, 2010, plaintiff, age 30, testified that he is employed as a retail sales associate at Bloomingdales. He stated that the accident in question occurred at approximately 4:00 a.m. on November 1, 2007, on 50<sup>th</sup> Street and 8<sup>th</sup> Avenue in Manhattan. He stated that he was a

rear seat passenger in the black Honda being driven by his friend Constantine Theodoratos. He did not have a seat belt on. His friend Andres Agnosto was seated in the front passenger seat. The vehicle was owned by Andres' parents, Lucia Agnosto and Ubaldo Agnosto. Baquero testified that prior to the accident they were all at a bar known as "Splash" on 18<sup>th</sup> Street between 5<sup>th</sup> and 6<sup>th</sup> Avenue. The friends were in Manhattan to celebrate Halloween and were dressed in costumes. He testified that all three of them had alcoholic beverages at Splash. The plaintiff stated that his vehicle, operated by Constantine Theodoratos, was traveling on 8<sup>th</sup> Avenue in the right lane. He stated that Constantine and the front seat passenger, Andres Angosto, were conversing. The plaintiff testified that as the driver, Theodoratos, was looking down at his phone and texting, he felt a heavy impact when his vehicle struck the white vehicle in front of it. His face was thrown into the seat in front of him. His lip was cut and he lost a tooth. He left the scene in an ambulance and was taken to the emergency room at St. Luke's Roosevelt Hospital where he received stitches to his lip and was treated for cracked and missing teeth.

The driver of plaintiff's vehicle, Constantine Theodoratos, was examined on December 14, 2010. He testified that the vehicle he was operating was owned by Lucia Angosto, the mother of his friend, Andres, who was the front seat passenger. He had never operated the vehicle before. He stated that on the night of the accident he and his friends had been going to bars. He had one beer at a bar in Chelsea. At a second bar he did not have a drink. At the end of the night, approximately 4:00 a.m. they entered the automobile, which was parked on 25<sup>th</sup> Street and 8<sup>th</sup> Avenue and proceeded down Eighth Avenue towards their destination in Queens. He observed that the traffic signal at 8<sup>th</sup> Avenue and 50<sup>th</sup> Street was green. As he was proceeding in the right lane, approaching the intersection of 50<sup>th</sup> Avenue, his vehicle came into contact with a white sedan in front of his which was stopped at the time of the impact. He testified that just prior to striking the white vehicle in the rear, he turned his head and took his eyes off the road because he was conversing with Andres Angosto. He stated that after a couple of seconds he turned his head to look at the road ahead and observed a car at a dead stop only inches in front of his. He attempted to brake his vehicle but he did not have time to press the brake pedal before his car rear-ended the vehicle in front. He stated that he learned after the accident that the car in front of his stopped short because it had been cut off by a cab. He stated that he did not, however, see the vehicle in front being cutoff.

The driver of the first car in the chain, a yellow taxi cab, MD Abdus Salam, testified on February 8, 2011. He stated that on the date of the accident he leased the yellow cab from Freddie's Service Incorporated on a weekly basis. At the time of the accident he had a passenger in his vehicle who he had picked up on Eighth Avenue and 49<sup>th</sup> Street. He had been traveling west on 49<sup>th</sup> Street and made a right turn onto 8<sup>th</sup> Avenue. After the passengers got in, they told him to make a right turn onto 50<sup>th</sup> Street. While on Eighth Avenue he observed that the light at 50<sup>th</sup> Street was green. He began to make the right turn onto 50<sup>th</sup> Street and was partially in the intersection when his vehicle was struck in the rear by the middle vehicle in the chain which was operated by John Camidge. Camidge told him that his vehicle had been struck in the rear and was propelled into the yellow cab. When the police came to the scene, Salam told the officers that as he was making a right turn, his vehicle was rear-ended by the Camidge vehicle.

John Camidge, the driver of the middle vehicle, was deposed on February 7, 2011. He testified that he is a resident of Belmar, New Jersey. He was operating a 2005 Ford leased from Cab East. He stated that at the time of the accident he was going to his job as a parking garage manager from his home in New Jersey. He made a left onto eighth Avenue from 42<sup>nd</sup> Street and proceeded uptown on 8<sup>th</sup> Avenue in the right lane. He was with another employee at the time of the accident. He intended to turn right on 50<sup>th</sup> Street. He stated when he approached the intersection of 50<sup>th</sup> Street, his vehicle was stopped at the red light. He stated that he first saw Salam's cab on 50<sup>th</sup> Street picking up a fare. When the light turned green he had to wait to make a right turn because the cab was stopped waiting to pick up passengers and blocking his ability to make the right turn onto 50<sup>th</sup>. After being stopped for approximately one minute his vehicle was struck in the rear by the vehicle operated by Theodoratos. The impact caused his vehicle to be propelled 20 feet into the Salam cab in front of him. He testified that his foot was on the brake at all times.

Counsel for defendant Salam contends that the evidence submitted in support of his motion for summary judgment demonstrates that the Salam vehicle, the first vehicle of the three cars, was lawfully making a right turn at a green traffic signal onto 50<sup>th</sup> Street when his car was rear-ended by the Camidge vehicle. Counsel contends that summary judgment should be awarded to Salam, dismissing the plaintiff's complaint and all cross-claims against him because the evidence showed that Salam taxi cab was two cars in front of the plaintiff's vehicle making

a right turn at the time of the accident and the sole proximate cause of the accident was the negligence of Theodoratos in rear-ending the Camidge vehicle and further, there is no evidence in the record that Salam was negligent in any manner. As Salam, in the first vehicle, was struck in the rear, counsel contends that the proof submitted shows that the complaint should be dismissed against Salam as Salam could not be liable for any of the injuries claimed by the plaintiff Baquero (see Plummer v Nourddine, 82 AD3d 1069 {2d Dept. 2011}; Parra v Hughes, 79 AD3d 1113 [2d Dept. 2011]; Ferguson v Honda, 34 AD3d 356 [1<sup>st</sup> Dept. 2006]; Mustafaj v Driscoll, 5 AD3d 139 [1<sup>st</sup> Dept. 2004]; McNulty v DePetro, 298 AD2d 566 [2d Dept. 2002]; Harris v Ryder, 292 AD2d 499 [2d Dept. 2002]; Cerda v Paisley, 273 AD2d 339 [2d Dept. 2000]).

Further, Salam contends that Theodoratos, in the moving vehicle, was negligent and started the chain reaction accident because he admittedly turn his eyes away from the road immediately prior to the accident and failed to maintain a proper lookout, failed to maintain a proper speed and failed to maintain a safe distance from the vehicle in front of him in Violation of VTL § 1129(a).

Bruce S. Reznick, Esq., counsel for the plaintiff, Philip Baquero, opposes the motion for summary judgment stating that the deposition testimony submitted by the defendants are inconsistent and raise questions of fact as to how the accident occurred. In addition, counsel contends that the moving papers contain no evidence in admissible form to support the motion. Counsel maintains that the deposition transcripts were not signed by the respective parties and therefore are not in admissible form.

Counsel for defendants, Ubaldo Angosto, Lucia Angosto and Constantine Theodoratos, opposes the motion on the ground that there are material issues of fact as to how the accident occurred. Specifically, counsel points to the deposition testimony of Theodoratos, the driver of the last vehicle, who testified that he learned after the accident, based upon information that either plaintiff or Angosto told him, that a cab cut off the second vehicle driven by Camidge causing the Camidge vehicle to stop short. He also testified that he personally never saw the cab that was the lead vehicle in the chain and he never saw the car in front of him stop short.

Co-defendants, CAB EAST LLC, JOHN T. CAMIDGE, have not opposed Salam's motion for summary judgment.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

It is well established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Reed v New York City Transit Authority, 299 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004]).

Here, Camidge testified that his vehicle was at a complete stop when Theodoratos' vehicle struck his car in the rear causing the chain reaction accident. "The rearmost driver in a chain-reaction collision bears a presumption of responsibility" (Ferguson v Honda Lease Trust, 34 AD3d 356 [1<sup>st</sup> Dept. 2006], quoting De La Cruz v Ock Wee Leong, 16 AD3d 199[1<sup>st</sup> Dept. 2005]). Evidence that a vehicle was rear-ended and propelled into the stopped vehicle in front of it may provide a sufficient non-negligent explanation (see Franco v. Breceus, 70 AD3d 767 [2d Dept. 2010]; Katz v Masada II Car & Limo Serv., Inc., 43 AD3d 876 [2d Dept. 2007]). In multiple-car, chain-reaction accidents the courts have recognized that the operator of a vehicle which has come to a complete stop and is propelled into the vehicle in front of it as a result of being struck from behind is not negligent inasmuch as the operator's actions cannot be said to be the proximate cause of the injuries resulting from the collision (see Mohamed v Town of Niskayuna, 267 AD2d 909 [3<sup>rd</sup> Dept. 1999]). Here, Camidge whose vehicle was stopped at the time of the impact and Salam whose vehicle was making a lawful right turn onto 50<sup>th</sup> Street when Camidge's vehicle was propelled into it, demonstrated that their conduct was not a proximate cause of the rear-end collision between their vehicles and the plaintiff's vehicle in front of them (see Abrahamian v Tak Chan, 33 AD3d 947 [2d Dept. 2006]; Calabrese v Kennedy, 8 AD3d 505 [2d Dept. 2006]; Ratner v Petruso, 274 AD2d 566 [2d Dept. 2000]).

Theodoratos testified that he looked away from the road to talk to the front seat passenger and when he turned around ten seconds later he did not have time to apply his brakes or to avoid the rear end collision with the Camidge vehicle which was stopped

in front of him. Theodoratos admitted the Camidge vehicle was at a complete stop at the time of the impact. Thus, the movant made a prima facie showing that Theodoratos failed to keep a safe distance, failed to maintain safe speed and to observe what was there to be seen. Salam satisfied his prima facie burden of establishing entitlement to judgment as a matter of law by demonstrating that his vehicle, the first in the chain, was making a lawful turn at the time his vehicle was struck in the rear in a chain reaction which was commenced by defendant Theodoratos.

Having made the requisite prima facie showing of their entitlement to summary judgment, the burden then shifted to the plaintiff to raise a non-negligent explanation for the rear end collision or a triable issue of fact as to whether Salam or Camidge were also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]).

In opposition to Salam's motion neither plaintiff Baquero nor co-defendants Ubaldo Angosto, Lucia Angosto and Constantine Theodoratos submitted evidence sufficient to raise a triable issue of fact as to negligence on the part of Salam (see Arias v Rosario, 52 AD3d 551 [2d Dept. 2008]; Smith v Seskin, 49 AD3d 628 [2d Dept. 2008]; Campbell v City of Yonkers, 37 AD3d 750 [2d Dept. 2007]). Further, neither the plaintiff nor co-defendants submitted any evidence which would tend to provide a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]). If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the occupants and owner of the stationary vehicle are entitled to summary judgment on the issue of liability (see Kimyagarov v. Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]). The evidence demonstrated that Salam operated his vehicle in a nonnegligent manner, and no evidence was presented to show that he contributed to the happening of the injury-producing event (see Aikens-Hobson v. Bruno, 2012 NY Slip Op 5604 [2d Dept. 2012]; Daramboukas v Samlidis, 84 AD3d 719 [2d Dept. 2011]; Franco v Breceus, 70 AD3d 767 [2d Dept. 2010]; Shirman v Lawal, 69 AD3d 838 [2d Dept. 2010]; Katz v Masada II Car & Limo Serv., Inc., 43 AD3d 876 [2d Dept. 2007]).

Co-defendants contention that Theodoratos was told by a third party that the Camidge vehicle was cut off by the cab causing him to stop short is unavailing. First, the plaintiff's statement is hearsay as he specifically stated that he did not see the Camidge vehicle cut off. Secondly, a claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to

rebut the presumption of negligence" see Belitsis v Airborne Express Frgt. Corp., 306 AD2d 507 [2d Dept. 2003]; Dickie v Pei Xiang Shi, 304 AD2d 786 [2d Dept. 2003]). The co-defendants' claim that the second car was cut off by Salam and stopped short did not provide a nonnegligent explanation for Theodoratos' actions (see Carhuayano v. J&R Hacking, 28 AD3d 413 [2d Dept. 2006]; Ayach v Ghazal, 25 AD3d 742 [2d Dept. 2006][claim that the lead vehicle was cutoff by a third party does not provide a nonnegligent explanation]).

The contention of the plaintiff raised in opposition to the motion that the deposition transcripts are not in evidentiary form is without merit. Although the depositions were unsigned, the transcripts were certified by the court reporter and the respective parties did not raise any challenges to their accuracy. Thus, the transcripts qualified as admissible evidence for purposes of the motion for summary judgment (see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Zalot v Zieba, 81 AD3d 935 [2d Dept. 2011]). The deposition transcript of Salam is admissible as it was certified and is also admissible under CPLR 3116(a) since his transcript was submitted by the party deponent himself and therefore was adopted as accurate (see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Ashif v Won Ok Lee, 57 AD3d 700 [2d Dept. 2008]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendants, FREDDIES SERVICE, INC. and MD ABDUS SALAM for summary judgment dismissing the plaintiff's complaint and all cross-claims against them is granted, and it is further

ORDERED that the Clerk of Court is authorized to enter judgment accordingly.

Dated: September 4, 2012  
Long Island City, N.Y.

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ROBERT J. MCDONALD  
J.S.C.