

**Damiao v Becker**

2015 NY Slip Op 30253(U)

February 23, 2015

Supreme Court, Queens County

Docket Number: 703116/2013

Judge: McDonald

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - 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 Action No. 1  
KYLE DAMIAO and KENNETH DAMIAO, by Index No.: 703116/2013  
their Mother and Natural Guardian,  
ROCELIE DAMIAO and ROCELIE DAMIAO Motion Date: 01/06/15  
Individually, Motion No.: 52  
Plaintiffs, Motion Seq.: 6  
- against -

TAYLOR R. BECKER and KEITH J. BECKER,  
Defendants.

- - - - - x  
TAYLOR R. BECKER AND KEITH J. BECKER,  
Third-Party Plaintiffs,  
-against -

LUCKY M. DAMIAO,  
Third-Party Defendant,

-----x  
LUCKY M. DAMIAO, Action No. 2  
Plaintiff, Index No. 18803/2013  
-against-

TAYLOR R. BECKER and KEITH J. BECKER,  
Defendants.  
-----x

The following papers numbered 1 to 15 were read on this motion by third-party defendant in Action No 1, LUCKY M. DAMIAO, for an order pursuant to CPLR 3212(a) granting summary judgment dismissing the third-party complaint and all cross-claims against him on the issue of liability:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Defendant/Third-Party Plaintiff's Affirmation in Opposition.....	6 - 8
Plaintiff's Affirmation in Support.....	9 - 11
Reply Affirmations(2).....	12 - 15

In this negligence action, the plaintiffs, Kyle Damiao, Kenneth Damiao and Rocelie Damiao seek to recover damages for personal injuries they each allegedly sustained as a result of a three-car motor vehicle accident that occurred on December 16, 2012, on the eastbound left lane of the Grand Central Parkway near the intersection with Union Turnpike, Queens County, New York. The plaintiffs in Action No. 1 were all passengers in the vehicle owned and operated by Lucky Damiao which was allegedly moving in traffic on the Grand Central Parkway when it was struck in the rear by the vehicle owned by Keith Becker and operated by Taylor R. Becker. Plaintiffs allege that as a result of the collision they each sustained serious personal injuries. Lucky Damiao, who was also allegedly injured in the accident, brought a separate action against the Becker defendants.

The plaintiffs, commenced this action against the Becker defendants by filing a summons and complaint on August 1, 2013. The Beckers joined issue by serving a verified answer dated August 12, 2013. The Becker defendants subsequently commenced a third-party action against Lucky Damiao, the driver of the plaintiffs' vehicle on August 15, 2013, alleging that if the jury finds Taylor Becker liable for injuries to the plaintiffs, third-party defendant, Lucky Damiao, must contribute to the damages because Mr. Damiao was negligent and his actions were alleged to be a proximate cause of the accident. A Note of Issue was filed in Action No. 1 on August 15, 2014.

Lucky Damiao commenced a separate action for damages for personal injuries he sustained against the Becker defendants by filing a summons and complaint under Index No. 18803/2013 on October 9, 2013. A Note of Issue was filed in Action No. 2 on November 3, 2014. The two actions were consolidated for joint trial by order of Justice Strauss dated December 5, 2013.

Plaintiffs/passengers initially moved for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability as against the Becker defendants. By decision and order dated October 6, 2014, Justice Strauss, granted the plaintiff/passengers' motion for summary judgment finding no culpable conduct or comparative negligence on the part of plaintiffs, as innocent passengers. The Court also found that the Becker defendants "have not raised an issue of fact and have failed to submit any evidence in opposition to the motion to rebut the presumption of negligence or defeat the summary judgment motion on the issue of liability as it relates to the plaintiffs as passengers."

In support of the instant motion for summary judgment dismissing the third-party complaint, Lucky Damiao submits an affirmation from counsel, Matthew Rego, Esq. in which he contends that the third-party complaint must be dismissed because Lucky Damiao, whose vehicle was struck in the rear by the Becker vehicle, bears no liability for the occurrence of the incident. Counsel submits a copy of the pleadings, a copy of the police accident report, and the sworn deposition testimony of plaintiff Lucky Damiao.

In his examination before trial taken on July 8, 2014, Lucky Damiao, age 44, a self-employed civil engineer, testified that he was involved in a motor vehicle accident on December 16, 2012, at approximately 2:30 p.m. He stated that he was operating a Toyota Land Cruiser SUV with his wife, Rocelie and their three children. His wife was seated in the front passenger seat and the three children were rear seat passengers. He stated that traffic was moving well when he first entered the Parkway at the 168<sup>th</sup> Street entrance but then changed to stop and go traffic. As he was proceeding in the left lane in slow moving traffic his vehicle was struck in the rear by a green Jeep Laredo operated by Taylor Becker. He stated that as a result of the heavy impact his vehicle was propelled forward five to six feet causing it to strike a white SUV in front of his vehicle. After the accident, the drivers exited their vehicles. The driver of the first car, the white SUV, did not see any damage to his vehicle and left the scene. Mr. Damiao and his wife and children left the scene in ambulances and were transported to the emergency room at North Shore Hospital in Manhasset. He was interviewed by the police at the hospital. He told them that he was struck in the rear and his vehicle was pushed into the vehicle in front of his.

The court record also contains a copy of the deposition of Taylor R. Becker, age 25, which was taken on April 29, 2014. She stated that on the date of the accident, she was operating a 2008

Jeep Laredo owned by her father Keith Becker. Her brother Logan was a front seat passenger. She was traveling eastbound coming from Roosevelt Island she and entered the Grand central Parkway from the Long Island Expressway. She stated that the traffic was moderate and she was proceeding at a rate of 40 - 50 miles per hour. She stated that she had been following the plaintiffs' Toyota in the left lane for about two or three miles. When she was three and half to four car lengths away, she saw the brake lights of the vehicle in front of her and then she saw that vehicle had come to a stop. She then she saw the driver's side door of the plaintiffs' vehicle begin to open. Three seconds later she struck the plaintiffs' car in the rear. She stated that when she first saw the brake lights she applied her brakes hard, she did not skid but she could not stop in time to avoid the collision. When the police arrived on the scene she told the officer that the vehicle in front of hers, the Toyota, hit the vehicle in front of him and because he stopped after hitting the white vehicle in front of hers, she struck his vehicle.

The third-party defendant, Lucky Damiao, contends that the third-party-plaintiff was negligent in the operation of her vehicle in striking the vehicle in front of her vehicle in the rear causing it to be pushed into the non-party vehicle in front of it. Damiao's counsel contends that the accident was caused solely by the negligence of the Becker vehicle in that her vehicle was traveling too closely in violation of VTL § 1129(a) and the driver failed to safely stop her vehicle prior to rear-ending the vehicle in front of hers. Counsel contends that the evidence indicates that Damiao's vehicle was lawfully proceeding in stop and go traffic on the Grand Central Parkway when it was struck from behind in a chain reaction accident initiated by Taylor Becker. Counsel contends, therefore, that the Damiao is entitled to summary judgment on the issue of liability dismissing the third-party complaint because Ms. Becker did not stop her vehicle in time. Damiao alleges that Becker was solely responsible for causing the accident while Damiao was lawfully proceeding in stop and go traffic and was free from culpable conduct.

Thomas J. Cicillini, Esq., attorney for the plaintiffs, submits an affirmation joining in Lucky Damiao's motion for an order dismissing the third-party complaint. Counsel asserts that Justice Strauss has already made a finding on his motion for summary judgment on behalf of the passengers, that defendant Taylor R. Becker failed to rebut the inference of negligence which arose upon her striking the Damiao vehicle in the rear and as a result he contends that finding is the law of the case.

In opposition, Becker's counsel Peter Maiorino, Esq., asserts that the prior decision of Justice Strauss dealt only with the liability of the passengers in the Damiano vehicle and not the negligence of Lucky Damiao himself.

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]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound 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" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision 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 Hearn v Manzolillo, 103 AD3d 689[2d Dept 2013]; Taing v Drewery, 100 AD3d 740; Balducci v Velasquez, 92 A.D.3d 626 [2d Dept. 2012]; Kastritsios v Marcello, 84 AD3d 1174[2d Dept. 2011]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Firstly, this Court finds that Justice Strauss granted the plaintiff/passengers' motion for summary judgment only to the extent of finding no culpable conduct or comparative negligence on the part of plaintiffs/innocent passengers on the issue of liability (see Brabham v City of New York, 105 AD3d 881 [2d Dept. 2013]; Mello v Narco Cab Corp., 105 AD3d 634 [2d Dept. 2013]). Justice Strauss' decision states that plaintiffs in the prior motion only sought a determination for the limited purpose of establishing that the plaintiffs were innocent passengers. In that regard the courts have held that the right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (see CPLR 3212 [g]; Anzel v Pistorino, 105 AD3d 784 [2d Dept. 2013]).

Second, this Court finds that the evidence show that there are issues raised by the pre-trial depositions as to the comparative negligence of the respective drivers herein which precludes granting summary judgment dismissing the third-party complaint.

Damiao testified that his vehicle was proceeding lawfully on the Grand Central Parkway when it was struck from behind by the Becker vehicle causing it to be pushed into a third vehicle which left the scene of the accident. However, Ms. Becker, proffered a differing version, testifying that the Damiao vehicle was involved in a prior accident with the vehicle in front of it and was stopped in the left lane. Becker testified that she struck Damiao's vehicle while he was in the process of exiting his vehicle to observe the damage from the first accident. The courts have consistently held that where there is conflicting evidence as to how a three-vehicle, rear-end, chain-reaction collision occurred, including evidence suggesting that there were multiple impacts, the movant has not met his prima facie burden (see Polanco-Espinal v City of New York, 84 AD3d 914 [2d Dept. 2011]; Thoman v Rivera, 16 AD3d 667 [2d Dept. 2005]). Based on Ms. Becker's testimony there is a question of fact as to whether Damiao's vehicle first struck the non-party vehicle prior to being rear-ended, and a question of fact as to whether the negligence of Damiao in striking the non-party vehicle was a proximate cause of the plaintiffs' injuries or whether there were concurrent causes (see Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007])[in a multiple-vehicle accident, where, as here, there is a question of fact as to the sequence of the collisions, it cannot be said as a matter of law that the negligence of the operator of the last vehicle in the line of vehicles was a proximate cause of the injuries to an occupant of the lead vehicle]).

Accordingly, as the third-party defendant failed to demonstrate, prima facie, that the third-party plaintiff's negligence was the sole proximate cause of the plaintiffs' injuries, the third-party defendant's motion for partial summary judgment on the issue of liability is denied (see Malak v. Wynder, 56 AD3d 622 [2nd Dept. 2008]).

Dated: February 23, 2015  
Long Island City, N.Y.

---

ROBERT J. MCDONALD  
J.S.C.