

<b>Michel v Fay</b>
2015 NY Slip Op 31268(U)
June 30, 2015
Supreme Court, Kings County
Docket Number: 501531/12
Judge: Bernard J. Graham
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: Part 36**

KEVIN MICHEL,

Plaintiff(s),

-against-

GEORGETTE A. FAY, KELLIE A. FAY,  
CHRISTOPHER CHERY and DAVID PAT LAGUERRE,

Defendant(s).

Index No.: 501531/12  
Motion Calendar No.  
Motion Sequence No.

**DECISION / ORDER**

Present:

**Hon. Judge Bernard J. Graham**  
Supreme Court Justice

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment on the issue of liability pursuant to CPLR § 3212**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	____ 1-2 ____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	____ 3,4 ____
Replying Affidavits.....	____ 5 ____
Exhibits.....	_____
Other:.....	_____

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Defendants, Georgette A. Fay and Kellie A. Fay (“Fay”), have moved for summary judgment on the issue of liability, pursuant to CPLR § 3212, on the basis that there are no material issues of fact regarding the liability of these defendants in the within action.

Defendants, Christopher Chery (“Mr. Chery”) and David Pat Laguerre (“Mr. Laguerre”), as well as the plaintiff, Kevin Michel (“Mr. Michel”), each oppose the motion to dismiss the action as to defendants, Fay, upon several grounds, which include the fact that the contact between the defendants’ vehicles occurred as a result of a sideswipe and not due to a rear-end collision.

These parties also maintain that there are triable issues of fact with respect to the manner in which this incident occurred and the percentage of liability, if any, that may be attributable to each of the defendants, including Georgette A. Fay and Kellie A. Fay.

Background:

This action arose as a result of a motor vehicle accident on June 23, 2010, at the intersection of Ocean Parkway and Avenue N, in the County of Kings, City and State of New York, when a vehicle operated by Georgette Fay was involved in a collision with a vehicle operated by co-defendant, Christopher Chery. The plaintiff was a back seat passenger in the vehicle operated by Mr. Chery. Plaintiff commenced this action by filing a Summons and Verified Complaint on or about June 14, 2012. Issue was joined with respect to defendants, Georgette A. Fay and Kellie A. Fay, by the filing and service of an answer on or about July 17, 2012. Issue was joined with respect to the defendants, Christopher Chery and David Pat Laguerre, by the filing and service of an answer on or about August 22, 2012. On March 7, 2014, the plaintiff, Kevin Michel, appeared for a deposition and on June 2, 2014, the defendant, Georgette A. Fay, likewise submitted to a deposition. Defendants Christopher Chery and David Pat Laguerre failed to appear for their depositions and they were precluded from offering evidence at the time of trial, pursuant to an Order dated November 18, 2015, by J.H.O. Hon. Martin Schneier.

Defendants contention (Georgette A. Fay and Kellie A. Fay):

In support of their motion to dismiss the complaint, defendants, Georgette A. Fay and Kellie A. Fay contend that the evidence in this matter shows that Ms. Fay was traveling in the designated left turn lane on Ocean Parkway when she brought her vehicle to a stop due to a red light at its intersection with Avenue N. Ms. Fay testified that she observed the vehicle operated by Mr. Chery come to a stop directly behind her in the designated left turn lane on Ocean Parkway. It was further contended that when the light at the intersection of Ocean Parkway and

Avenue N changed from red to a green arrow, Ms. Fay began her left hand turn onto Avenue N. She testified that she turned from the left turn lane of Ocean Parkway into the left lane of Avenue N and never changed lanes (see Fay EBT p. 16). When she made her left turn from Ocean Parkway onto Avenue N, Mr. Chery's vehicle which had been stopped directly behind her at the red light, struck the passenger side of her vehicle toward the rear (see Fay EBT p. 15).

Counsel for Fay maintains that there has been no evidence offered to contradict Ms. Fay's version of the events. The plaintiff testified at his E.B.T. that he was a rear seat passenger in a vehicle being operated by defendant, Christopher Chery and could not recall which lane the vehicle in which he was traveling as a passenger was situated when there was contact between the two vehicles.

Counsel for Fay further contends that no explanation has been given to justify the cause of the accident. Mr. Chery, who never appeared for his deposition, has been precluded from offering evidence at the time of trial.

Counsel asserts that when a driver of an automobile approaches another vehicle from the rear, he or she is bound to maintain a reasonable and safe distance, rate of speed and control over his or her vehicle and to exercise reasonable care in avoiding the collision (see Power v. Hupart, 260 AD2d 458, 688 NYS2d 194 [2<sup>nd</sup> Dept. 1999]; Hart v. Town of North Castle, 305 AD2d 543, 759 NYS2d185 [2<sup>nd</sup> Dept.1995]). Counsel maintains that Vehicle and Traffic Law § 1129 (a) is applicable as the 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 vehicle and the traffic upon and the condition of the highway.

Plaintiff's contention:

In opposing defendant Fay's motion for summary judgment, plaintiff asserts that the collision between the two vehicles did not occur in the manner in which defendant Fay contends as it did not involve the front end of the Chery vehicle and rear end of the Fay vehicle.

Plaintiff contends that nowhere in the police report does Ms. Fay claim to have been “hit in the rear”, as any contact between the vehicles would have been a sideswipe. Pursuant to the police report, the points of impact on the Chery vehicle are left front driver’s side area, the left front fender and the side doors on the driver’s side. Plaintiff asserts that the two photographs submitted of the damage to the Chery vehicle, are indicative of a sideswipe accident and not a rear end accident (see Exhibit “2” annexed to the affirmation in opposition). Counsel asserts that the points of impact based upon the collision damage document and the police report are the front right fender over the wheel, the two passenger side doors and the right rear fender over the right rear wheel. The plaintiff further states that when she exited the Chery vehicle after the incident, the Fay vehicle was partially in the Chery vehicle’s lane and that the Fay vehicle had crossed over into the Chery vehicle’s lane of travel and struck that vehicle on the passenger side door. Plaintiff further asserts that at no point during the course of this incident did she ever feel an impact to the front of the Chery vehicle.

Thus, it is plaintiff’s opinion that they have submitted evidence in admissible form which establish that there are issues of fact as to the happening of the accident and the liability of each driver. In determining whether a triable issue of fact exists, the evidence must be reviewed in the light most favorable to the party opposing the motion (see Stukas v. Streiter, 83 AD3d 18, 918 NYS2d 176 [2<sup>nd</sup> Dept. 2011]).

Defendants contention (Chery & Laguerre):

Defendants, Chery & Laguerre contend that the assertion made by co-defendants, Fay, that this is a simple rear end collision is not supported by any established facts or testimony. Since the testimony of Ms. Fay, that her vehicle was impacted on the front and rear passenger side doors, and that there was no damage to the rear fender, it is unlikely that the Fay vehicle was rear ended. Instead, defendant contends that any contact between the vehicles would be characterized as a sideswipe and not a rear-end collision.

Discussion:

This Court has carefully considered the arguments raised by the respective attorneys for the parties in determining whether summary judgment and a dismissal of the action against defendants, Georgette and Kellie Fay, is appropriate.

The moving party in a motion for summary judgment bears the initial burden of demonstrating a prima facie case of entitlement to judgment as a matter of law by submitting sufficient evidence to demonstrate the absence of any material issue of fact (Drago v. King, 283 AD2d 603, 725 NYS2d 859 [2<sup>nd</sup> Dept. 2001]).

Here, the E.B.T. testimony of the defendant, Kellie A. Fay indicates that she was traveling in the designated left turn lane on Ocean Parkway when she brought her vehicle to a stop due to a red light at the intersection of Avenue N and Ocean Parkway. Ms. Fay testified that she was the first vehicle at the light in the designated left turn lane and observed a vehicle (Mr. Chery) stopped behind her at the red light. Ms. Fay further testified that when the light turned green she proceeded to turn onto Avenue N and at all times remained in the left lane. It was while turning onto Avenue N then she was sideswiped by the vehicle that had been stopped behind her at the red light (see Fay E.B.T. pg. 14-16 annexed as Exhibit 4 to the Notice of Motion).

The plaintiff made a sufficient showing to demonstrate their entitlement to summary judgment and the burden shifts to the other party to proffer a non-negligent explanation for the accident (see Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition to the motion, the plaintiff asserts that this was not a rear end collision but a sideswipe. In addition, the plaintiff who was a passenger in the Chery vehicle recalls that after the impact the Fay vehicle was no longer in the left lane. However, a review of the EBT testimony of Mr. Michel indicates that he observed little or nothing at or around the time of the accident. Mr. Michel did not recall if there was a traffic light at the intersection of Ocean Parkway and Avenue N, which lane the Chery vehicle was in when it was making a left turn, if he could see the roadway from his passenger seat or whether he could see the Fay vehicle prior to impact (see

Michel EBT pg. 37, 40-41 annexed as Exhibit "4" to the Notice of Motion). In essence, Mr. Michel offers nothing to refute the account of the incident by Ms. Fay, who was the lead vehicle in the only designated left turn lane and had remained in the left lane as she turned onto Avenue N from Ocean Parkway. Since defendants, Christopher Chery and David Pat Laguerre did not submit to a deposition, they were unable to offer any testimony to refute the account of the incident by Ms. Fay.

Here, it is uncontroverted that Mr. Chery's vehicle was situated behind the vehicle driven by Ms. Fay in the designated turning lane. The driver of the Chery vehicle was under a duty to maintain a safe distance between his vehicle and the Fay vehicle pursuant to VTL §1129(a). The failure to do so constitutes negligence as a matter of law in the absence of an adequate non-negligent explanation (see Lifshits v. Variety Poly Bags, 278 AD2d 372, 717 NYS2d 630 [2<sup>nd</sup> Dept. 2000]).

In addition, a hearsay affirmation by an attorney without personal knowledge as to how the accident occurred is without evidentiary value and thus unavailing (see S. J. Capelin Associates, Inc. Globe Manufacturing Corp., 34 NY2d 338, 357 NYS2d 478 [1974]).

It is well settled that a motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law to direct judgment in favor of any party. Buller v. Giorno, 28 A.D. 3d 258, 813 N.Y.S.2d 394 [2003].

Defendants, Christopher Chery and David Pat Laguerre, as well as the plaintiff Kevin Michel, have failed to come forward with a non-negligent or reasonable explanation for the happening of the accident. The Court concludes that both the plaintiff and defendants, Mr. Chery and Mr. Laguerre, have failed to raise any triable issue of fact which would preclude summary judgment on the issue of liability.

Conclusion:

Defendants, Georgette A. Fay and Kellie A. Fay, are awarded summary judgment on the issue of liability and a dismissal of the action against these defendants.

This shall constitute the decision and order of the Court.

Dated: June 30, 2015  
Brooklyn, New York



Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

**HON. BERNARD J. GRAHAM**



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