

**Brown v Francois**

2018 NY Slip Op 34303(U)

July 26, 2018

Supreme Court, Rockland County

Docket Number: Index No. 032019/2016

Judge: Thomas E. Walsh II

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

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ALICIA CHAMBERS BROWN,

Plaintiff(s),

-against-

**DECISION & ORDER**

Index No. 032019/2016

Motion #1 - MD

Motion #2 - MD

DC - N

Adj: 9/5/18

RODOLPHE FRANCOIS and JOSHUA FRANCOIS,  
Defendant(s).

-----X  
**Hon. Thomas E. Walsh, II, J.S.C.**

The following papers numbered 1- 5 were considered in connection with Plaintiff's Notice of Motion (Motion #1) for an Order pursuant to *Civil Practice Law and Rules* §§ 3212 and 3211 granting the Plaintiff summary judgment on the issue of liability, together with such other and further relief as this Court may deem just and proper; and is also considered in connection with Defendant's Notice of Motion (Motion #2) for an Order granting Defendants Summary Judgment pursuant to *Civil Practice Law and Rules* § 3212 and dismissing the Plaintiff's Complaint and for such other and further relief as this Court deems just and proper:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion for Summary Judgment (Motion #1)/Affirmation of Patrice M. Coleman, Esq./Exhibits (A-H)	1
Affirmation of Rose Harper, Esq. in Opposition (Motion #1)	2
Notice of Motion for Summary Judgment (Motion #2)/Affirmation of Rose Harper, Esq./Exhibits (A-K)	3
Reply Affirmation of Patrice M. Coleman, Esq. (Motion #2)/Exhibit A	4
Reply Affirmation of Rose Harper, Esq. (Motion #2)	5

The instant action is a negligence action to recover for personal injuries sustained by the Plaintiff due to a rear end motor vehicle accident that occurred on November 4, 2014 on Viola Road in New Hempstead, New York.

The Plaintiff commenced the instant action with the filing of a Summons and Complaint on September 5, 2016. Issue was joined by served of an Answer dated July 26, 2016. Plaintiff filed a Note of Issue and Certificate of Readiness on March 28, 2018. Subsequently, on April 24, 2018 Plaintiff filed the instant motion for summary judgment on liability only (Motion #1). On May 25, 2018 Defendant filed a motion for summary judgment on the grounds that Plaintiff did not sustain a "serious injury" as defined under New York Insurance Law § 5102(d).

The parties were instructed at the court appearance on March 23, 2018 to file a Note fo Issue by April 6, 2018 and all dispositive motions were to be made by May 11, 2018 with a return date of June 1, 2018. Plaintiff filed the Note of Issue timely and filed their dispositive motion (Motion #1) timely with a return date of June 1, 2018. Defendant filed opposition to Plaintiff's motion for summary judgment on May 25, 2018 along with a motion for summary judgment (Motion #2). The opposition filed by Defendant was timely, but the motion for summary judgment was not timely, as it was filed after May 11, 2018. Therefore, the Defendant's opposition to Plaintiff's motion for summary judgment will be considered, but Defendant's motion for summary judgment will not be considered by the Court due to its untimeliness.

In support of his application for summary judgment Plaintiff submits the Examination Before Trial (hereinafter EBT) of Plaintiff (conducted on October 30, 2017), the EBT of Defendant (conducted on January 3, 2018), a copy of the Police Accident Report and a black and white photograph of the Plaintiff's vehicle after the accident<sup>1</sup>.

Plaintiff's counsel contends that based upon Plaintiff's EBT testimony her vehicle was stopped at the intersection twenty (20) feet west of South Gate Drive on Viola Road, City of New Hempstead, New York when her vehicle was struck in the rear by Defendant's vehicle causing the Plaintiff's vehicle to be pushed into the stopped vehicle in front of hers. According to the

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<sup>1</sup>Plaintiff states that photograph is in color, but the Court reviewed the item listed as Exhibit G (Doc. #33) and it is not in color.

Police Accident Report (hereinafter PAR) the driver of the vehicle was Joshua Francois and the owner of the vehicle is Rodolphe Francois. As to the EBT testimony of Joshua Francois, the Plaintiff contends that he stated he had traveled on Viola Road for approximately fifty (50) or sixty (60) feet before the accident occurred reaching a maximum speed of twenty (20) miles per hour.

According to Joshua's EBT he stated that the Plaintiff's vehicle was "moving, starting to slow down, slowly slowing down." The Defendant testified when he first saw the Plaintiff's car he saw brake lights and at that time he was traveling "like ten fifteen miles per hour. According to Defendant he observed Plaintiff's vehicle come to a full stop when he was twenty (20) feet away and he began "preparing my vehicle to stop. That's when I realized my brakes wasn't working, that caused me to crash into the car in front of me." The Defendant continued indicating that he applied his brakes, his vehicle slowed down slowly, "but it didn't come to a full stop, because my brakes were no good." According to the Defendant he attempted to engage the emergency brake, but never turned the ignition off or put the car in park. As to inspection, the Defendant testified that he did not recall when his vehicle was last inspected prior to the accident, but stated that it was regularly inspected including an oil change and maintenance of the car at Schaefer's Garage in Spring Valley, New York. The Defendant guessed that the last time the brakes were worked on was about three (3) to four(4) months before the accident since the brakes "weren't good" and were slowly fading. Further, Defendant in his EBT admitted he knew the brakes were bad, that it was a constant thing with the car and that when they would "get bad, we'd get it checked out." Defendant continued with little clarity as to which brakes were changed or whether the brakes were changed at all. According to the Defendant he did not notice any problems with the brakes before the accident and he had stopped the car before the accident.

Defendant's counsel in opposition contends that brake failure is a non-negligent explanation, but the Defendant must show the brake problem is unanticipated and that reasonable care was exercised to keep the brakes in good working order. Based upon Defendant Joshua Francois's EBT testimony, Defendant's counsel contends that the failure of the brakes was unanticipated and that he maintained the brakes through regular maintenance of the vehicle at Shaefer Garage including brake work done approximately four (4) months prior to the accident.

Further, Defendant contends the actions of Defendant Joshua Francois in pulling the emergency brake and explaining why he did not swerve or turn off the ignition are sufficient to demonstrate a non-negligent explanation for the unanticipated brake failure, rebutting the presumption of negligence.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case and to warrant a court to direct judgment in its favor, as a matter of law, [*Civil Practice Law and Rules* § 3212(b); *Giuffrida v. Citibank Corp., et al*, 100 NY2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)]. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. [*Winegrad v. New York University Medical Center*, 64 N.Y. 2d 851 (1985)].

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 non-negligent explanation for the collision. [*Klopchin v Masri*, 45 A.D.3d 737 (2d Dept., 2007)]. On the other hand a claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence in a hit in the rear collision. [*Lundy v. Llatin*, 51 Ad3d 877 (2d Dept 2008); and *Russ v Investech*, 6 A.D.3d 602 (2d Dept., 2004), citing *Dickie v Pei Xiang Shi*, 304 AD2d 786 (2003); *Vecchio v Hildebrand*, 304 AD2d 749 (2003); *McGregor v Manzo*, 295 AD2d 487 (2002); *Levine v Taylor*, 268 AD2d 566 (2000)]. Even where the frontmost driver operates his vehicle in a negligent manner the issue of comparative negligence is for a jury to decide. [*John v Leyba*, 38 A.D.3d 496 (2d Dept. 2007)]. The apportionment of fault among defendants is generally an issue of fact for the jury. [*Sydnor v Home Depot U.S.A., Inc.*, 74 AD3d 1185, 1187 (2d Dept 2010); *Donahue v Smorto*, 240 AD2d 464, 465 (2d dept 1997); *Rhoden v Montalbo*, 127 AD2d 645, 646 (2d Dept 1987)].

The Court finds that based on the fact that Defendant Joshua Francois testified regarding the regular maintenance of the brakes and brake maintenance done within four (4) months of the accident, there are genuine/material issues of fact as to Defendant's negligence precluding

summary judgment in Plaintiff's favor or that require a trial for resolution. Therefore Plaintiff's summary judgment motion is denied in its entirety. As stated earlier, Defendant's motion for summary judgment is denied as untimely.

Accordingly, it is here

**ORDERED** that the Plaintiff's Notice of Motion (Motion #1) for Summary Judgment is denied in its entirety; and it is further

**ORDERED** that Defendant's Notice of Motion (Motion #2) for Summary Judgment is denied as untimely; and it is further

**ORDERED** that the parties are to appear in **WEDNESDAY SEPTEMBER 5, 2018 at 9:30 .am. in TAP before the Honorable William Sherwood, J.H.O.**

The foregoing constitutes the Decision and Order of the Court on Motions #1 and #2.

Dated: New City, New York  
July 26, 2018



**Hon. Thomas E. Walsh II, J.S.C.**

To:

PATRICE M. COLEMAN, ESQ.  
PILLINGER MILLER TARALLO, LLP  
Attorney for Plaintiff  
(via e-file)

ROSE M. HARPER, ESQ.  
BURKE CONWAY & DILLON  
Attorney for Defendants  
(via e-file)