

**Franco v Schombs**

2022 NY Slip Op 35011(U)

December 23, 2022

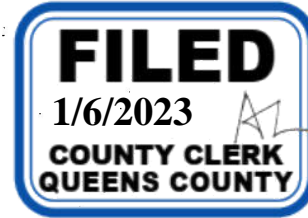
Supreme Court, Queens County

Docket Number: Index No. 705558/20

Judge: Carmen R. Velasquez

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SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

CARLOS FRANCO, ET AL.,

Index No. 705558/20

Plaintiff,

Motion

Date: October 24, 2022

-against-

M# 5, 6, 7 and 8

DAVID SCHOMBS, ET AL.,

Defendants.

The following papers numbered EF 107-160 read on this motion by the second third party defendant Karla A. Villacreses Villalta for summary judgment dismissing the second third party complaint as against her (Sequence No. 5); separate motion by plaintiff on the counterclaim Onyinyechi Ekpecham for summary judgment dismissing the counterclaim (Sequence No. 6); separate motion by the plaintiffs for an order striking the Answer of second third party defendant Mubasher Javaid as a result of his failure to appear for a deposition (Sequence No. 7); and separate motion by the defendants/third party plaintiffs Chadwhyck Stephenson and Yvonne Stephenson for an order vacating the note of issue and extending the time to move for summary judgment. (Sequence No. 8).

PAPERS NUMBERED

Motion Seq. No. 5

Table with 2 columns: Description and Paper Number. Includes rows for Notice of Motion - Affidavits- Exhibits (EF 107-125), Affirmation in Opposition - Exhibits (EF 126, 130), and Replying Affirmation (EF 133).

Motion Seq. No. 6

Table with 2 columns: Description and Paper Number. Includes rows for Notice of Motion - Affidavits Exhibits (EF 127-129) and Affirmations in Opposition - Exhibits (EF 131-132).

	EF 140-141
Replying Affirmations.....	EF 158-159
<u>Motion Seq. No. 7</u>	
Notice of Motion - Affidavits- Exhibits.....	EF 134-137
Affirmation in Opposition.....	EF 143-144
<u>Motion Seq. No. 8</u>	
Notice of Motion - Affidavits- Exhibits.....	EF 145-155
Affirmation in Opposition.....	EF 156
Replying Affirmation.....	EF 160

Upon the foregoing papers it is ordered that this motion by the second third party defendant Karla A. Villacreses Villalta for summary judgment dismissing the second third party complaint as against her (Sequence No. 5); separate motion by plaintiff on the counterclaim Onyinyechi Ekpecham for summary judgment dismissing the counterclaim (Sequence No. 6); separate motion by the plaintiffs for an order striking the Answer of second third party defendant Mubasher Javaid as a result of his failure to appear for a deposition (Sequence No. 7); and separate motion by the defendants/third party plaintiffs Chadwhyck Stephenson and Yvonne Stephenson for an order vacating the note of issue and extending the time to move for summary judgment. (Sequence No. 8) are jointly decided as follows:

This action arises out of a multi-vehicle accident on July 9, 2019 on the eastbound Belt Parkway in Queens County. Plaintiff Franco was a passenger in the vehicle operated by plaintiff Onyinyechi Ekpecham. Plaintiffs commenced the instant action to recover damages for negligence. Defendants interposed a counterclaim against plaintiff on the counterclaim Onyinyechi Ekpecham. These motions for summary judgment and for discovery ensued.

The 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. (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue.

(*Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005].)

It is well established that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to come forward with an adequate, non-negligent explanation for the accident. (see *Finney v Morton*, 127 AD3d 1134, 1134 [2d Dept 2015]; *Foti v Fleetwood Ride, Inc.*, 57 AD3d 724, 724 [2d Dept 2008]; *Ahmad v Grimaldi*, 40 AD3d 786, 787 [2d Dept 2007]; *Emil Norsic & Son, Inc. v L.P. Transp., Inc.*, 30 AD3d 368, 368 [2d Dept 2006].) If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the operator of the stationary vehicle is entitled to summary judgment. (see *Dileo v Greenstein*, 281 AD2d 586, 586 [2d Dept 2001]; *Lopez v Minot*, 258 AD2d 564, 564 [2d Dept 1999].)

Second third party defendant Karla A. Villacreses Villalta alleges that the plaintiffs' vehicle was struck in the rear by the vehicle of defendant David Schombs as well as a vehicle operated by defendant/third party plaintiff/second third party plaintiff Chadwhyck Stephenson. Defendant Schombs testified at his deposition that his vehicle, a Chevy, was struck twice in the rear and, as a result, struck the plaintiffs' vehicle. He stated that he moved his vehicle sharply to the left to avoid further contact. He stated that the plaintiffs' vehicle as well as the vehicle in front of the plaintiffs stopped short. Defendant Chadwhyck Stephenson testified that he saw the vehicle in front of him strike the plaintiffs' vehicle (a BMW). After the vehicle in front of him swerved, his vehicle made contact with the BMW. At her deposition, second third party defendant Villacreses Villalta testified that as she traveled on the Belt Parkway, the vehicle in front of her suddenly stopped. She stopped her vehicle then felt three or four impacts to the rear of her vehicle. Second third party defendant Javaid avers in an affidavit that while driving his taxi on the Belt Parkway, the vehicle in front of him stopped suddenly. He was able to stop and did not make any contact with any adverse vehicle. He further avers that while he was stopped, another vehicle struck him in the rear.

At bar, there are triable issues of fact which preclude summary judgment on the issue of liability. The deposition testimony raises questions as to the order of impacts and the number of impacts to the rear of some of the vehicles in this six vehicle collision. (see *Passos v MTA Bus Co.*, 129 AD3d 481, 482

[1<sup>st</sup> Dept 2015].) This court, thus, cannot conclusively determine liability as a matter of law on the record before it.

With respect to the motion by the plaintiffs for an order striking the Answer of second third party defendant Mubasher Javaid, the court notes that pursuant to an order dated August 23, 2022, defendant Mubasher Javaid's motion for summary judgment was granted. Therefore, defendant Javaid is no longer a party to this action and must be served with a subpoena if any party wishes to have him deposed. (CPLR 3106[b].)

Defendants/third party plaintiffs/second third party plaintiffs Yvonne and Chadwhyck Stephenson seek to vacate the note of issue on the ground that plaintiff Onyinyechi Ekpecham has failed to appear for a medical examination and second third party defendant Karla A. Villacreses Villalta failed to respond to post-deposition discovery demands. Such discovery is material and necessary to the issues in this case.

Accordingly, this motion by the second third party defendant Karla A. Villacreses Villalta for summary judgment dismissing the second third party complaint as against her is denied. (Sequence No. 5).

The motion by plaintiff on the counterclaim Onyinyechi Ekpecham for summary judgment dismissing the counterclaim is denied. (Sequence No. 6).

The motion by the plaintiffs for an order striking the Answer of second third party defendant Mubasher Javaid is denied as moot. (Sequence No. 7).

The branch of the motion by the defendants/third party plaintiffs/second third party plaintiffs Chadwhyck Stephenson and Yvonne Stephenson for an order vacating the note of issue is denied. (Sequence No. 8). Discovery, however, shall proceed as follows, and it is:

**ORDERED**, that second third party defendant Karla A. Villacreses Villalta shall furnish complete responses to all outstanding notices and demands within 30 days after service of a copy of this order with notice of entry, and it is further

**ORDERED**, that within ten (10) days after service of a copy of this order with notice of entry, defendant/third party plaintiffs/second third party plaintiffs Yvonne and Chadwhyck Stephenson shall designate physician(s) to conduct a physical

examination of plaintiff Onyinyechi Ekpecham, and it is further,

**ORDERED**, that plaintiff Onyinyechi Ekpecham shall appear for such physical examination(s) within thirty (30) days thereafter, and it is further

**ORDERED**, that all motions for summary judgment, by any party who has not previously moved for summary judgment, shall be made returnable on a Monday no later than March 27, 2023.

Dated: December 23, 2022

  
CARMEN R. VELASQUEZ, J.S.C.