

<b>Xue Chen v Lockett</b>
2019 NY Slip Op 30490(U)
February 27, 2019
Supreme Court, New York County
Docket Number: 152243/2014
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ADAM SILVERA PART IAS MOTION 22**

*Justice*

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XUE CHEN,

Plaintiff,

- v -

ANITA LOCKETT, TIAN CHEN

Defendant.

INDEX NO. 152243/2014

MOTION DATE 01/09/2019

MOTION SEQ. NO. 006

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that defendant’s motion is denied in part and granted in part for the reasons set forth below. Before the court is defendant Tian Shou Chen’s motion, Motion Sequence 006, for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant Tian Shou Chen on the issue of liability and to dismiss the Complaint of plaintiff Xue Ping Chen on the grounds that the injuries allegedly sustained by plaintiff do not satisfy the “serious injury” requirement as defined by Insurance Law § 5102(d).

**BACKGROUND**

The suit at bar stems from a motor vehicle accident which occurred on November 13, 2012, on Newport Avenue at the intersection of 118<sup>th</sup> Street in the County of Queens, City and State of New York, when a vehicle operated by defendant Tian Shou Chen was struck by a vehicle operated by co-defendant Anita Lockett who allegedly did not stop for a stop sign on 188<sup>th</sup> street. The accident allegedly led to the serious injury of plaintiff Zue Ping Chen, passenger of the vehicle operated by defendant Tian Shou Chen.

**DISCUSSION**

### Summary Judgment (Serious Injury)

The branch of defendant's motion for summary judgment, pursuant to CPLR 3212, against plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is denied. "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 eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

Defendant alleges that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. In support of his motion, defendant submits the February 20, 2018 report conducted by Dr. Gregory Galano (Mot, Exh 5). Dr. Galano examined the plaintiff at the request of defendant and reviewed plaintiff's medical records. Upon examination of the plaintiff, Dr. Galano recorded a decrease in the range of motion to plaintiff's cervical spine, thoracic spine, lumbar spine and left shoulder (*id.*). Dr. Galano listed the normal range of motion compared to that of plaintiff and concluded that the

“injuries to the cervical spine, thoracic spine, lumbar spine and left shoulder are causally related to the accident on 11/13/2012 (*id.*).

Defendant’s motion contains evidence of a restriction in plaintiff’s range of motion. A defendant fails to meet its initial burden when one of its examining physicians finds a limited range of motion (*Servones v Toribio*, 20 AD3d 330 [1st Dep’t 2005] citing *McDowall v Abreu*, 11 Ad3d 590 [2d Dep’t 2004] [finding that “defendants’ examining doctor found that the plaintiff continued to have restrictions in motion of her lower back ... in light of this finding by the defendants’ expert, the defendants did not meet their initial burdens”]). Thus, defendant has failed to satisfy its burden and defendant’s motion for an order to dismiss the Complaint of plaintiff Xue Ping Chen on the grounds that the injuries allegedly sustained by plaintiff do not satisfy the “serious injury” requirement as defined by Insurance Law § 5102(d) is denied.

#### **Summary Judgment (Liability)**

The branch of defendant’s motion for summary judgment on the issue of liability as against co-defendant Anita Lockett is granted. “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 eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]).

Defendant alleges that co-defendant Anita Lockett drove through a stop sign on 118<sup>th</sup> Street and caused the accident. In support of their motion, defendant cites to New York State Vehicle and Traffic Law (VTL) 1110: Obedience to and required traffic-control devices, VTL 1142: Vehicle entering stop or yield intersection, and VTL 1172: Stop signs and yield signs. VTL 1110 states that:

(a) Every person shall obey the instructions of any official traffic-control device applicable to him placed in accordance with the provisions of this chapter, unless otherwise directed by a traffic or police officer, subject to the exceptions granted the driver of an authorized emergency vehicle in this title.

VTL 1142 states that:

(a) Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

VTL 1172 states that:

(a) Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the

intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two.

In support of the argument that defendant cannot be found negligent for plaintiff's injuries, defendant submits the testimony of plaintiff (Mot, Exh 6). Plaintiff testified that defendant Chen's vehicle was driving on Newport Avenue which had no traffic devices and that traffic on 118<sup>th</sup> Street had a stop sign (*id.*, at 22-24). Plaintiff further testified that defendant Chen was not distracted as he was operating his vehicle when it entered the intersection of 118<sup>th</sup> street and was struck by co-defendant Anita Lockett's vehicle (*id.*, at 25-26). Plaintiff testified that co-defendant Anita Lockett drove through a stop sign causing the accident (*id.*). Thus, defendant has demonstrated that co-defendant violated the VTL and has made a prima facie showing of negligence. Defendant Chen has met its burden for summary judgment on the issue of liability and the burden shifts to plaintiff to raise an issue of fact.

In opposition, plaintiff claims both defendant and co-defendant Anita Lockett were negligent and careless in the ownership, operation and control of their respective vehicles. However, plaintiff offers no evidence in admissible form to refute the finding of this Court that co-defendant Anita Lockett is negligent per se for violation of the VTL. Further, plaintiff has provided no evidence demonstrating defendant Chen's negligence. Thus, the branch of defendant Tian Shou Chen's motion for summary judgment on the issue of liability in favor of defendant Chen and against defendant Anita Lockett is granted.

Accordingly, it is

ORDERED that the branch of defendant Tian Shou Chen's motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant and to dismiss the Complaint

of plaintiff for failure to satisfy the "serious injury" requirement as defined by Insurance Law § 5102(d) is denied; and it is further

ORDERED that the branch of defendant Tian Shou Chen's motion on the issue of liability against co-defendant Anita Lockett, for an order that defendant Tian Shou Chen bears no liability for the alleged occurrence is granted; and it is further

ORDERED that the complaint is dismissed in its entirety against defendant Tian Shou Chen, with costs and disbursement to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant;

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption read as follows:

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XUE PING CHEN,  
Plaintiff,  
-against- Index No. 152243/2014  
ANITA LOCKETT,  
Defendant  
-----X

and it is further;

ORDERED that within 30 days of entry, counsel for defendant Tian Shou Chen shall serve a copy of this decision/order upon all parties with notice of entry.

This Constitutes the Decision/Order of the Court.

2/27/2019

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE