

Gallipoli v Wen Wei Chen
2022 NY Slip Op 32685(U)
August 8, 2022
Supreme Court, Kings County
Docket Number: Index No. 504463/2020
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on 8th the day of August, 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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JOHN GALLIPOLI and DALILA MAZZIO,

Plaintiffs,

Index No. 504463/2020

-against-

DECISION AND ORDER

WEN WEI CHEN, ZHUO BIN CHEN and CHERIE A. ALZATE,

MS 2

Defendants.

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The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	22-23
Answering Affidavit (Affirmation) _____	36, 44
Reply Affidavit (Affirmation) _____	
Supplemental Affidavit (Affirmation)	
Pleadings – Exhibits _____	24-28, 37-40
Stipulations – Minutes _____	
Filed Papers _____	

This action involves a motor vehicle accident in which the vehicle operated by Defendant CHERIE A. ALZATE (Defendant ALZATE) collided with the vehicle owned by Defendant WEN WEI CHEN (Defendant WEI CHEN) and operated by Defendant ZHUO BIN CHEN (Defendant BIN CHEN). Plaintiffs were passengers in Defendant ALZATE’s vehicle.

Plaintiffs move for an Order (1) granting summary judgment on the issue of liability against all Defendants; and (2) striking the comparative negligence, assumption of risk, emergency situation and failure to wear a seat belt Affirmative Defenses.

The accident occurred on December 6, 2018, at the intersection of 14th Avenue and 62nd Street in Kings County. At this location, 14th Avenue is a two-way street with double yellow lines dividing two directions of travel with parking on both sides of the street, and 62nd Street is a one-way street with a stop sign at the intersection with 14th Avenue.

At the time of the accident, Defendant BIN CHEN was stopped at the stop sign on 62nd Street at its intersection with 14th Avenue. After stopping, Defendant BIN CHEN allowed pedestrians to cross in front of her vehicle then inched out past the parked vehicles on 14th Avenue, to observe oncoming traffic on 14th Avenue two different times each time coming to a stop to look for oncoming traffic. Defendant ALZATE, traveling on 14th Avenue, collided with Defendant BIN CHEN.

Here, Plaintiffs rely on their own affidavits which state that Defendant BIN CHEN failed to yield the right-of-way in violation of Vehicle and Traffic Law § 1142(a). There is an inconsistency between the affidavits of Plaintiffs GALLIPOLI and MAZZIO. GALLIPOLI says Defendant ALZATE struck Defendant BIN CHEN while MAZZIO states that Defendant ALZATE was struck by Defendant BIN CHEN.

In opposition, Defendant BIN CHIN stated that she was at a complete stop when the accident happened and that the vehicle that hit her was traveling at a high rate of speed. She stated that she had to pull her vehicle slightly forward so she could see oncoming traffic on 14th Avenue because there were vehicles parked on the side of 14th Avenue obstructing her view.

Defendants WEI CHEN and BIN CHEN also submit the Police Accident Report, video footage of the accident, and Defendant BIN CHEN's affidavit, which demonstrate a conflicting account of the accident.

The Police Accident Report and video footage corroborate that Defendant BIN CHEN was stopped when she was struck by Defendant ALZATE. The Police Accident Report states that Defendant ALZATE stated that she struck Defendant BIN CHEN's vehicle which was stationary at the stop sign. The video footage further demonstrates that Defendant BIN CHEN inched forward two different times after coming to complete stops each time to observe oncoming traffic and was stopped at the time she was struck by Defendant ALZATE.

Defendant BIN CHEN further stated, and is also demonstrated in the video footage, that just before the accident, another vehicle traveling southbound on 14th Avenue was able to pass in front of her stopped vehicle. The testimony of Defendant BIN CHEN together with the video and the Police Accident Report are sufficient to raise a question of fact as to whether Defendant BIN CHEN failed to yield the right of way in the intersection in violation of VTL §1142(a). Although the Plaintiffs' motion also sought summary judgment against Defendant ALZATE, they did not submit any evidence to support their claim that Defendant ALZATE was negligent.

While Plaintiffs' have failed to sustain their burden for summary judgment against either ALZATE or the CHEN Defendants, they are entitled to summary judgment dismissing the Affirmative Defenses. They have demonstrated as passengers they bore no responsibility for the happening of the accident,

“Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence, the issue of a plaintiff's comparative negligence may be decided

in the context of a summary judgment motion where ... the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence” (*Wray v. Galella*, 172 AD3d at 1447).

WHEREFORE, it is ORDERED that that portion of Plaintiffs’ motion for summary judgment as to liability against Defendants WEN WEI CHEN and ZHUO BIN CHEN is DENIED; and it is further

ORDERED that that portion of Plaintiffs’ motion for summary judgment as to liability against Defendant ALZATE is DENIED; and it is further

ORDERED that that portion of Plaintiffs’ motion for summary judgment dismissing the CHEN Defendants’ Affirmative Defenses of comparative negligence, assumption of risk, emergency situation and failure to wear a seat belt; and Defendant ALZATE’s Affirmative Defenses of comparative negligence and failure to wear a seat belt, is GRANTED.

This constitutes the decision and order of the Court.

ENTER,



J.S.C.