

**Tavor v Boampong**

2016 NY Slip Op 31059(U)

June 8, 2016

Supreme Court, New York County

Docket Number: 152609/14

Judge: Leticia M. Ramirez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 22

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ARIEL TAVOR and JUDY TAVOR,

Index #: 152609/14  
Mot. Seq: 01

Plaintiff(s),

-against-

DECISION/ORDER

HON. LETICIA M. RAMIREZ

CHARLES J. BOAMPONG and OTOLIZZ HACKING,

Defendant(s).

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Defendants' motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff Ariel Tavor ("plaintiff") did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) is denied.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of triable issues of fact or if there is even arguably such an issue. *Hourigan v. McGarry*, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The function of a court in deciding a summary judgment motion is to determine whether any issues of fact exist which preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler*, 40 Misc3d 1230A (Sup. Ct. N.Y. 2013); *Menzel v. Plotnick*, 202 A.D.2d 558 (2nd Dept. 1994). Furthermore, in deciding motions for summary judgment, the Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad*, 237 A.D.2d 123 (1st Dept. 1997); *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989); *Menzel v. Plotnick*, *supra*.

In this action, there remains triable issues of fact as to whether plaintiff sustained a non-displaced fracture of the distal acromion of the right shoulder, a partial thickness rotator cuff tear of the right shoulder and/or disc herniations at C4-5 and L4-5 as a result of the subject accident of December 13, 2012 and whether he sustained a "significant" or "permanent consequential" limitation of his right shoulder, cervical spine and/or lumbar spine as a result of the subject accident. *Assaf v Ropog Cab Corp.*, *supra*.; *Zuckerman v City of New York*, 49 N.Y.2d 557

(1980); *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 (1986).

In support of their motion, defendants submitted, *inter alia*, the affirmed report of orthopedist, Dr. Lisa Nason, who examined plaintiff on August 6, 2015. Upon examination, Dr. Nason found that plaintiff had full ranges of motion of the right shoulder and cervical and lumbar spine. She diagnosed plaintiff with, *inter alia*, resolved alleged injuries to the right shoulder and cervical and lumbar spine with no orthopedic disability. Although Dr. Nason, in stating the plaintiff's history, noted that it was reported to her that emergency room x-rays revealed a non-displaced fracture of the right distal acromion, she neither stated an opinion as to whether plaintiff sustained a right shoulder fracture nor otherwise specified in her diagnoses the type of injuries that were allegedly resolved.

In addition, defendants submitted plaintiff's emergency room records from Weill Cornell Medical Center, where plaintiff received treatment directly after the accident. The records noted that plaintiff complained of, *inter alia*, right shoulder pain. X-rays of the right shoulder did not reveal any evidence of dislocation, fracture or osseous or articular abnormalities. Nevertheless, upon discharge, plaintiff's diagnosis remained, *inter alia*, "shoulder dislocation". He was given a sling and pain medication upon discharge.

Defendants also submitted the affirmed report of neurologist, Dr. Vladimir Zlatnik, who examined plaintiff on September 8, 2015. Upon examination, Dr. Zlatnik detected muscle spasms in the cervical and lumbar spine and found restrictions in plaintiff's cervical and lumbar spine ranges of motion. Dr. Zlatnik opined that plaintiff's ranges of motion "were at least partially self-restricted." Thereby, raising a triable issue of fact as to whether the plaintiff's cervical and lumbar spine limitations of motion were subjective, particularly since Dr. Zlatnik detected muscle spasms. Detection of spasm on palpation is objective medical evidence of a "serious injury." *Toure v Avis Rent-A-Car Systems, Inc.*, 98 N.Y.2d 345 (2002); *Vidal v Maldonado*, 23 Mic.3d 186 (Sup. Ct. Bronx 2008); *Martin v Fitzpatrick*, 19 A.D.3d 954 (3<sup>rd</sup> Dept. 2005); *Pugh v DeSantis*, 37 A.D.3d 1026 (3<sup>rd</sup> Dept. 2007). Dr. Zlatnik diagnosed plaintiff with, *inter alia*, resolved alleged injuries to the cervical and lumbar spine. He did not specify the types of injuries were alleged resolved. Despite his findings of spasms and range of motion

limitations, Dr. Zlatnik opined that plaintiff's neurological examination was normal and that the plaintiff did not have a neurological disability as a result of the subject accident.

In light of the foregoing, defendants' submissions, alone, raise triable issues of fact that preclude the grant of summary judgment to defendants.

Notwithstanding, plaintiff also raised triable issues of fact sufficient to warrant denial of defendants' motion. In opposition to defendants' motion, plaintiff submitted, *inter alia*, the affirmation of radiologist, Dr. Anthony Italiano, who interpreted the MRI films of plaintiff's right shoulder and cervical and lumbar spine. According to Dr. Italiano, plaintiff's right shoulder MRI conducted on December 27, 2012 revealed "findings presumably [of a] stress reaction/non-displaced fracture at [the] distal acromion [and] equivocal fraying/partial-thickness tearing of the rotator cuff" ("tearing at the attachment of the supraspinatus and infraspinatus tendons on the greater tuberosity"). Furthermore, his cervical spine MRI conducted on January 17, 2013 revealed a disc herniation at C4-5 that contacts the spinal cord on the right and loss of lordosis likely due to spasm; and his lumbar spine MRI conducted on January 17, 2013 revealed a broad-based disc herniation at L4-5 eccentric towards the left contacting the L4 nerve root.

In addition, plaintiff submitted the affirmed report of physiatrist, Dr. Joyce Goldenberg, who first treated plaintiff on January 9, 2013. During her most recent examination of the plaintiff on November 17, 2015, the plaintiff had spasms and tenderness on palpation of the cervical and lumbar spine as well as tenderness on palpation of the right shoulder. Dr. Goldenberg also found limitations in the ranges of motion of plaintiff's cervical spine, lumbar spine, right shoulder and right hip. More specifically, plaintiff's cervical spine demonstrated restrictions ranging from 2% to 33%; his lumbar spine demonstrated restrictions ranging from 26% to 36%; and his right shoulder demonstrated restrictions ranging from 10% to 20%. Dr. Goldenberg further noted that she reviewed plaintiff's right shoulder and cervical and lumbar spine MRI films and concurred with the findings of Dr. Italiano. She diagnosed plaintiff with, *inter alia*, a cervical disc herniation at C4-5; a lumbar disc herniation at L4-5; cervical and lumbar myofascial pain syndrome/muscle spasms; a right shoulder distal acromion fracture; and tears of the supraspinatus and infraspinatus tendons. She causally related her diagnoses to the subject accident.

In viewing the evidence in the light most favorable to the plaintiff, as the non-moving

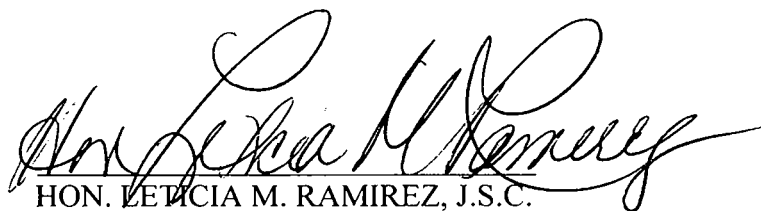
party, this Court finds that there remains triable issues of fact, as to whether plaintiff sustained a non-displaced fracture of the distal acromion of the right shoulder, a partial thickness rotator cuff tear of the right shoulder and/or disc herniations at C4-5 and L4-5 as a result of the subject accident of December 13, 2012 and whether he sustained a “significant” or “permanent consequential” limitation of his right shoulder, cervical spine and/or lumbar spine as a result of the subject accident, that preclude the grant of summary judgment to defendants.

It is well settled that the finder of fact must resolve conflicts in expert medical opinions. *Ugarriza v. Schmider*, 46 N.Y.2d 471 (1979); *Andre v. Pomeroy*, *supra*.

Accordingly, defendants’ summary judgment motion is denied, in its entirety.

This constitutes the Decision/Order of the Court.

Dated: June 8, 2016  
New York, New York



HON. LETICIA M. RAMIREZ, J.S.C.