

**Dudziak v Sheik**

2017 NY Slip Op 33125(U)

May 15, 2017

Supreme Court, Erie County

Docket Number: 801317/2014

Judge: Diane Y. Devlin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**State of New York  
Supreme Court : County of Erie**

---

**John A. Dudziak and Susan Dudziak**

Plaintiff

vs.

**Tejan Sheik and Slavik's Mgt Inc.**

Defendants

---

**DECISION  
INDEX NO.  
801317/2014**

Charles Desmond III, Esq.  
Attorney for Plaintiff  
Gibson, McAskill & Crosby, LLP  
69 Delaware Avenue, Suite 900  
Buffalo, NY 14202

Joseph R. Bergen, Esq.  
Attorney for Defendants  
Bergen & Schiffmacher, LLP  
403 Main Street, Suite 715  
Buffalo, NY 14203

---

Plaintiff John A. Dudziak was involved in a motor vehicle accident on February 12, 2012 on Genesee Street at or near its intersection with Springer Street in the City of Buffalo. Thereafter Mr. Dudziak commenced the instant action against defendants, and his wife commenced a derivative claim.

According to the records contained in the motion, the plaintiff was treating for injuries and disabilities stemming in whole or in part from a 2005 motor vehicle accident. The plaintiff was not working and out on disability at the time of the accident.

Discovery is complete and defendants filed a motion for summary judgment on the theory that the plaintiff did not sustain a threshold injury pursuant to Insurance Law 5102(d). In response to defendants' motion, the plaintiffs filed a cross motion for summary judgment on the theory that the plaintiff

sustained a serious injury under the fracture category of Insurance Law 5102(d).

A motion for summary judgment will be granted in whole or in part if the cause of action or defense is established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. With limited exceptions, a motion for summary judgment will be denied if any party shows facts sufficient to require a trial of any issue of fact.

The court has considered the following papers: Defendants Notice of Motion dated February 14, 2017; the attorney affirmation of Joseph R. Bergen, affirmed on February 14, 2017 with annexed exhibits A-X; including the Moreland physician affirmation; the Notice of Cross Motion dated March 30, 2017; the attorney affirmation of Charles S. Desmond II, Esq. in support of the cross motion and in opposition to defendants' motion sworn to on March 30, 2017 with annexed exhibits A-F, including Dunleavy affirmation; the affirmation of William N. Capicotto, M.D. affirmed on March 30, 2017; and the Bergen affirmation in reply, affirmed on April 18, 2017 with annexed A-C, including affirmation of Douglas Moreland, M.D.

In their moving papers, defendants include plaintiff's Bill of Particulars and in which plaintiff alleges that he sustained a serious injury under the following categories: permanent consequential limitation; significant limitation, and 90/180 claim. Plaintiff also claims that he sustained an aggravation of a pre-existing cervical spine condition and an aggravation and exacerbation of a pre-existing, asymptomatic, degenerative lumbar and thoracic spine condition. The plaintiff had cervical surgery on May 14, 2014.

As part of their argument, defendants reveal in their moving papers that the plaintiff had been involved in a 2005 motor vehicle accident in which he had a discectomy and fusion surgery at levels cervical 5/6 and 6/7 and whose medical practitioners had deemed the plaintiff to be permanently disabled from injuries stemming from the 2005 accident. (David Conschafter, D.C. and Dr. William Capicotto). Furthermore, defendants

explain that Dr. Capicotto opined in an October 2009 report that the plaintiff would need future cervical surgery. The plaintiff treated with Dr. Matteliano (pain management) at various times after the 2005 motor vehicle accident, including on February 14, 2012, three days before the motor vehicle accident at issue in the instant litigation and during which he remarked that the plaintiff had a marked, partial, permanent disability.

### **Defendant's Motion**

#### ***Permanent Consequential and Significant Limitation Categories***

The plaintiff began treating with Dr. Capicotto on May 7, 2012 following the motor vehicle accident. He had a treating relationship with him from prior injuries and accidents. Dr. Capicotto. At this visit and subsequent ones (6/6/12, 9/5/12, 12/5/12, 2/11/14, 8/9/14, 9/21/15, 3/23/16, 9/28/16, and 10/27/16). Dr. Capicotto revealed that the plaintiff had limited AROM, but he did not describe the amount of percentage of reduced range of motion as required by *Toure v Avis*, 98 NY 2d 345. Rather, he reports cervical flexion and extension in centimeters and rotation in degrees without showing what range is normal and the reduction thereof. Despite a claim of thoracic herniations, the records do not show any limits or reductions to that part of the spine. The last date of his treatment, Dr. Capicotto opines that there was a new injury from the 2005 motor vehicle accident, but he does not indicate that the new injury is permanent.

In his affirmation submitted in opposition Dr. Capicotto indicates that the plaintiff has permanent and chronic injuries, but he does not explain the difference between the permanent disability he opined in his April 9, 2009 report related to the 2005 motor vehicle accident and the permanent injuries he relates to the accident at issue, and he did not provide a basis for the extent of any exacerbation or previous injuries. *Ehlers v. Byrnes*, 147 AD3d 1465 (4<sup>th</sup> Dept. 2017). Furthermore, in the April 9, 2009 report he found cervical left and right rotation to be 45 degrees whereas in his affirmation he indicates that in May 2012 left rotation was 50 degrees, which is an increase from 2009.

In paragraph 46 of his affirmation, Dr. Capicotto opines that the injuries from the motor vehicle accident at issue resulted in a “permanent loss of use of his neck and back” and a significant limitation of use of his neck and back. The records do not show that plaintiff sustained a total loss of use of his neck and back. *Oberly v Bangs Ambulance*, 96 NY2d 295.

However, the plaintiff’s certified chiropractic records indicate that during a visit on February 6, 2013 the plaintiff had cervical ranges of motion that were reduced by 60% and that lumbar flexion and extension were reduced by 50%.

**90/180**

The plaintiff was on disability for an unrelated shoulder injury at the time of the motor vehicle accident on February 17, 2012. As of April 26, 2012 he was able to bathe and dress himself and drive a motor vehicle, less than 2 ½ months from the accident, according to his testimony.

The court grants the defendants’ motion as to the permanent consequential and 90/180 categories. The court finds an issue of fact as to whether the plaintiff sustained a significant limitation of use of a body function or system.

**Plaintiff’s Cross Motion**

P files a cross motion on serious injury by claiming that the plaintiff suffered a fracture at T11. Defendants oppose the cross motion procedurally because fracture was not alleged in response to a demand on the Bill of Particulars for the serious injuries categories. It was, however, listed as injuries in the Bill of Particulars. Plaintiff can move to amend or supplement the Bill of Particulars to fix the deficiency.

The court finds an issue of fact as to whether the plaintiff suffered a fracture as a result of the motor vehicle accident. Plaintiff submits a narrative of Dr. Dunleavy who opines that there was a T11 fracture (X-ray report is not attached). Dr. Capicotto performed thoracic X-rays in his

office on May 7, 2012—initial examination as to the accident at issue—and referenced “what appears to be compression fractures at T9, T10, and T11.” Thoracic X-rays were repeated on June 6, 2012 and fractures were not indicated in those studies. As such, Dr. Capicotto does not definitively find compression fractures nor does he casually relate them to the motor vehicle accident at issue in this report or in subsequent ones. He does not list fractures in his assessments at the end of his reports. In his affirmation, Dr. Capicotto does not discuss his review of thoracic X-rays that were conducted in his office. Despite Dr. Dunleavy’s opinion of a T11 fracture, Dr. Moreland (defense expert) specifically reviewed several sets of thoracic X-rays and opined that there were no thoracic fractures. Instead, he explained that the abnormalities were Schmorl’s nodes rather than fractures.

Therefore, there are issues of fact as to whether there are thoracic fractures as demonstrated by differing opinions of Dr. Moreland and Dunleavy, and the cross motion for serious injury on the fracture category is denied.

Submit Order accordingly.



**Hon. Diane Y. Devlin**  
Justice of the Supreme Court

DATED: May 15, 2017  
Buffalo, New York