

**Peck v Tavarez**

2008 NY Slip Op 31802(U)

June 18, 2008

Supreme Court, Nassau County

Docket Number: 0949-06/

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

DEBORAH PECK and RICHARD PECK,

TRIAL/IAS PART 9

Plaintiff(s),

INDEX NO. 20949/06

- against -

MOTION SEQUENCE  
NO. 1

CONRADO TAVAREZ and CARMEN TAVAREZ,

MOTION SUBMISSION  
DATE: April 16, 2008

Defendant(s).

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by defendants for an Order granting the defendants, Conrado Tavarez and Carmen Tavarez summary judgment pursuant to CPLR 3212 dismissing the complaint on the basis that the plaintiff, Deborah Peck, did not sustain a "serious injury" under §5102(d) of the Insurance Law, is determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on March 8, 2006 at approximately 1:40 pm approximately 20 feet from telephone pole #10 in the East Campus Parking Lot behind building "A" off of Charles Lindbergh Boulevard at Nassau Community College, Garden City, NY.

Amongst other things, the plaintiffs' Verified Bill of Particulars sets forth:

"6. Plaintiff, DEBORAH PECK, sustained the following injuries:

- Post concussion syndrome with post traumatic vertigo
- Cervical and lumbar radiculopathy
- Lumbar disc protrusion at L4-5
- Herniated discs at levels C4 through C6

7. The herniated discs, and disc protrusion, constitute a permanent condition resulting in variations of pain from moderate to severe and radical and substantial diminution and limitation of physical activity with concomitant loss of enjoyment of life. Additionally, plaintiff suffers from headaches and

positional problems.

Plaintiff was not confined to bed."

The defendants in support of the defendants' application submit, amongst other things, the July 24, 2007 deposition transcript of the plaintiff Deborah Peck; an affirmed letter report dated October 4, 2007 of Professional Evaluation Group PC by Alan J. Zimmerman, MD an orthopedist of an orthopedic examination of the plaintiff Deborah Peck conducted on October 4, 2007 and an affirmed letter report dated October 4, 2007 of Professional Evaluation Group PC by CM Sharma, MD, a neurologist of a neurological examination of the plaintiff conducted on October 4, 2007.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994)**:

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but 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 (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (see **Licaro v. Elliot, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; Palmer v. Amaker, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; Tipping-Cestari v. Kilhenny, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991**).

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) (see, **Zoldas v. Louise Cab Corp., 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; Wright v. Melendez, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988**).

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(d) 'Serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such

person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

The Court initially notes that as to the neurological examination of Dr. Sharma, Dr. Sharma states:

**MENTAL STATUS:**

The attention and affect are appropriate. The questions are understood clearly and the answers are coherent. The speech, awareness, memory and recall are normal. There is no evidence of through disorder or psychomotor abnormality.

**DIAGNOSIS:**

Subjective cervical and lumbar pain.  
Normal neurological examination.

**COMMENT:**

On examination there are no causally related neurological problems. There is no neurological disability.

There is no need for neurological treatment or testing.

There are no neurological limitations to usual work and activities.

I was asked to comment on the test performed on the claimant. It is my opinion, that the MRIs of the cervical spine and lumbar spine and the electrodiagnostic studies of upper and lower NCV/EMG and ENT were all unnecessary. The results of these tests did not contribute towards the treatment and management of these problems."

A review of Dr. Sharma's submission sets forth that said physician has failed to set forth any of the objective test or tests that were performed to support said physician's conclusion. As such, the submission of Dr. Sharma does not establish that the plaintiff did not suffer a serious injury pursuant to §5102 of the Insurance Law (see, **Faun Thai v Butt**, 34 AD3d 447, 824 NYS2d 131 (Second Dept., 2006).

In pertinent part, the report of Dr. Zimmerman provides:

**"PHYSICAL EXAMINATION**

The claimant is a 51 year old right handed female who stands 5'7 <sup>3</sup>/<sub>4</sub>" tall and weighs 125 pounds. She has blond hair and blue eyes. She uses no braces or supports and walks without a limp.

Examination of the cervical spine: The claimant turns her head freely to speak to me during this interview and shakes it up and down in response to my questions. Examination of the cervical spine reveals normal muscle

contours without spasm or atrophy. There is tenderness over the right trapezius but none over the left nor over the paravertebral muscles.

Soto-Hall test - for evaluation of vertebral bony pathology and injury Negative  
Tenderness Paraspinals Negative  
Tenderness Suprascapular Negative

CERVICAL SPINE - Range of motion:

	<u>Observed</u>	<u>Normal</u>
Flexion	45°	45°
Extension	45°	45°
Lateral Flexion ®	30°	30°
Lateral Flexion (L)	30°	30°
Rotation ®	60°	60°
Rotation (L)	60°	60°

Examination of the thoracic spine was performed. There is no tenderness or spasm on examination of the thoracic spine. The thoracic curvature is normal without spasm.

Examination of the lumbar spine: The claimant walks with a normal gait and without a limp. The claimant can walk on toes and heels. The claimant gets on and off the examining table, lies down, sits up and turns from side to side without any apparent distress. Straight leg raising is negative to 90° in both the seated and supine positions.

LUMBAR SPINE - Range of motion:

	<u>Observed</u>	<u>Normal</u>
Flexion	100°	100°
Extension	30°	30°
Lateral Flexion ®	30°	30°
Lateral Flexion (L)	30°	30°
Rotation ®	30°	30°
Rotation (L)	30°	30°

Supine Straight Leg Raise - For evaluation of sciatic nerve inflammation and radiculopathy Negative

Reverse Seated Straight Leg Raise - For evaluation of sciatic nerve and Inflammation and radiculopathy Negative

Lasegue Sign - For evaluation of sciatic nerve inflammation and Radiculopathy Negative

Neurological examination was performed. Motor strength is symmetrical in all groups tested. Deep tendon reflexes are symmetrical in the upper and

lower extremities. No specific sensory loss pattern can be elicited. Tinel sign and Phalen sign negative at both wrists.

IMPRESSSION:

Cervical sprain, resolved. Pre-existing cervical injury/condition.  
Lumbar sprain, resolved.

There is no disability. There is no permanency."

A review of the plaintiff Deborah Peck's deposition transcript sets forth subjective complaints of pain which are insufficient to establish a serious injury pursuant to the Insurance Law (see, **Scheer v Koubek**, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309).

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical Center**, 64 NY2d 851, 853; **Pagano v. Kingsbury**, supra at 694) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (see **Gaddy v. Eyler**, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; **Jean-Meku v. Berbec**, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; **Horan v. Mirando**, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995).

In opposition to the defendants' requested relief, the plaintiffs submit an affirmation of Bruce R. Ross, MD, an orthopedist who is a treating physician of the plaintiff Deborah Peck and an affirmation from Joseph L. Zito, MD, a radiologist regarding a March 23, 2006 MRI of Deborah Peck's lumbosacral spine.

The Court initially observes that the affirmation of Dr. Zito does not causally relate the conditions found in the March 23, 2006 MRI of the plaintiff to the accident in issue (see, **Ukonu v Velazquez** 213 AD2d 628, 624 NYS2d 195 (Second Dept., 1995).

As to the submission of Dr. Ross, the Court observes that although Dr. Ross sets forth certain alleged limitations in the plaintiff's range of motion, Dr. Ross does not set forth the tests performed nor does Dr. Ross compare the alleged limitations to the normal range of motion of the plaintiff (see, **Fiorillo v Arriaza** \_\_\_AD3d\_\_\_, \_\_\_NYS2d\_\_\_ 2008 WL 2298027 (Second Dept., 2008). As to the EMG studies and the MRI of the plaintiff Deborah Peck's cervical and lumbar spine, Dr. Ross does not set forth that he personally reviewed the tests (see, **Wagman v Bradshaw**, 292 AD2d 84, 739 NYS2d 421 (Second Dept., 2002).

Based upon all of the foregoing, the defendants application for an Order granting the defendants, Conrado Tavarez and Carmen Tavarez summary judgment pursuant to CPLR 3212 dismissing the complaint on the basis that the plaintiff, Deborah Peck, did not sustain a "serious injury" under §5102(d) of the Insurance Law, is **granted**.

SO ORDERED.

DATED: 6/18/2008

**ENTERED**

*Ray S. Walker*

J.S.C.

JUN 23 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**