

SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 10  
NASSAU COUNTY

VEREAK TOL and CAROLINA TOL,

Plaintiff(s),

-against-

LINDA KUCHMEISTER and "JOHN/JANE DOE",

Defendant(s).

ORIGINAL RETURN DATE:08/22/05  
SUBMISSION DATE: 11/22/05  
INDEX No.: 010797/04

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	3
Reply.....	4
Defendant's Brief.....	2

By notice of motion dated July 20, 2005, defendant Linda Kuchmeister moves for an order pursuant to CPLR 3212 granting her summary judgment dismissing the complaint on the grounds that plaintiff Vereak Tol did not sustain a serious injury within the meaning of Insurance Law §5102(d).

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Vereak Tol in a motor vehicle accident on October 22, 2002. The claim by plaintiff Carolina Tol is derivative in nature.

Plaintiff alleges in his bill of particulars that he sustained various injuries, including, inter alia, fractured vertebra at C-6, herniated discs at C3-4, C4-5 and C5-6 and bulging disc at L4-5, L5-S1 and T9-10.

As the proponent of a motion for summary judgment, defendant has the burden of establishing as a matter of law that plaintiff did not sustain a serious injury as defined by Insurance Law §5102(d). (See Gaddy v Eyler, 79 NY2d 955; Chaplin v Taylor, 273 AD2d 188.) Unless defendant makes such a prima facie showing, defendant is not entitled to summary judgment (see, Lesser v. Smart Cab Corp., 283 AD2d 273; Asta v. Eivers, 280 AD2d 565) without regard to the sufficiency of plaintiff's opposing papers (Ervin v. Helfant, 303 AD2d 716; Kruse v. Arancio, 289 AD2d 536; Derival v. New York City Transit Auth., 289 AD2d 281; West v. Rivera, 286 AD2d 327).

In moving for summary judgment, defendant acknowledges the diagnosis by plaintiff's treating chiropractor that plaintiff sustained "an avulsion fracture of the C6 spinous process".

As defined in the American Heritage Stedman's Medical Dictionary, an avulsion fracture is "[a] fracture occurring when a joint capsule, ligament, tendon, or muscle is pulled from a bone taking with it a fragment of the bone to which it was attached".

Since defendant does not otherwise demonstrate the absence of an avulsion fracture, she fails to make out a prima facie case for summary judgment and defendant's motion must be denied without regard to the sufficiency of plaintiffs' opposing papers.

In addition, defendant in support of summary judgment submits, inter alia, the affirmed report of its examining neurologist James B. Sarno who refers to MRI reports dated November 14, 2002, November 21, 2002 and December 2, 2002 showing disc herniations at C3-4, C4-5, C5-6 and disc bulges at L4-5, L5-S1 and T9-10. Dr. Sarno further finds various limitations in motion, to wit, cervical flexion 20/45 degrees, extension 40/45, lateral rotation left and right 70/90 degrees, lateral bending left and right 30/45 degrees as well as lumbar forward flex 45/90 degrees and mild spasm of the neck. Characterizing the foregoing as sprains of the cervical and lumbar spine, Dr. Sarno finds them causally related to the October 22, 2002 accident but concludes without explanation or elaboration that the cervical and lumbar sprains are "resolved".

As defendant's own moving papers include evidence of both herniated and bulging discs with loss of motion causally related to the accident, defendant failed to establish a prima facie showing of entitlement to summary judgment on this basis as well (see, Moiseau v. Dumas-Williams, 291 AD2d 535; Klimis v. Lopez, 290 AD2d 538; Jimenez v. Darden, 290 AD2d 419; Volozhinetz v. DeHaven, 286 AD2d 437; Asta v. Eivers, 280 AD2d 565; cf. Kearse v. New York City Tr. Auth., 16 AD3d 45).

This decision constitutes the order of the court.

Dated: 12-13-05

HON THOMAS P. PHELAN  
*Thomas P. Phelan*

**ENTERED** I.S.C.

DEC 19 2005

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

Feraru & Aljourny, P.C.  
Attorneys for Plaintiffs  
320 Old Country Road, Suite 205  
Garden City, NY 11530

Shapiro, Beilly, Rosenberg, et al.  
Attorneys for Defendant Kuchmeister  
225 Broadway, 13th Floor  
New York, NY 10007