SHORT FORM ORDER

INDEX No. 05-18993
CAL. No. 06-01627-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-2-06
Mot. Seq. # 001- MG; CASEDISP

GREGORY A. SERRA,	:	FELDMAN, KRAMER & MONACO, P.C.
	:	Attorneys for Plaintiff
Plaintiff,	:	330 Vanderbilt Motor Parkway
	:	Hauppauge, New York 11788
- against -	:	
TRACIE A. CINQUEMANI and DAVID CINQUEMANI.	:	JAMES P. NUNEMAKER, JR. & ASSOCS.
	:	Attorneys for Defendants
	:	P.O. Box 9347
Defendants.	:	Uniondale, New York 11553-9347

Upon the following papers numbered 1 to 20 read on this motion for summary judgment dismissing the complaint; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and support_____; Answering Affidavits and supporting papers 11-18; Replying Affidavits and supporting papers 19-20; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted.

This action arose from a vehicular accident, occurring on October 2, 2004 in which the plaintiff allegedly sustained serious personal injuries. The defendants move for summary judgment dismissing the complaint pursuant to Insurance Law §5102(d). The plaintiff opposes the motion and defendants have submitted a reply affirmation in rebuttal to that opposition.

Under the Insurance Law "'[s]erious 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" (Insurance Law §5102[d]).

In the context of the plaintiff's claims, the term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use" (***Licari v Elliott,*** 57 NY2d 230, 455 NYS2d 570 [1982]). For this purpose, the plaintiff must demonstrate not only the extent or degree of the

limitation but also its duration (***Beckett v Conte,*** 176 AD2d 774, 575 NYS2d 102 [1991], app. den. 79 NY2d 753, 581 NYS2d 281). The duration of the injury must be more than "fleeting" (***Partlow v Meehan,*** 155 AD2d 647, 548 NYS2d 239 [1989]). The term "consequential" means important or significant (***Kordana v Pomellito,*** 121 AD2d 783, 503 NYS2d 198 [1986], app. dis. 68 NY2d 848, 508 NYS2d 425). A "permanent loss" of use of a body organ, member, function or system must be total (***Oberly v Bangs Ambulance, Inc.,*** 96 NY2d 295, 727 NYS2d 378 [2001]). In order to prove the extent or degree of physical limitation, an expert can designate a numeric percentage of a plaintiff's loss of range of motion or give a "qualitative assessment of a plaintiff's condition...provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (***Toure v Avis Rent A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865, 868 [2002]; rearg. den. ***Manzano v O'Neil,*** 98 NY2d 728, 749 NYS2d 478).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law §5102(d), the initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.,*** 171 AD2d 588, 567 NYS2d 454, 455 [1991]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [1990]).

The defendants submit in support of their motion, inter alia, the affirmation of their attorney, the verified complaint and answer, the verified bill of particulars, the plaintiff's deposition testimony of February 16, 2006, the unsworn report of one of the plaintiff's treating physicians, Dr. Paul R. Alongi (Dr. Alongi) dated January 19, 2005 and the affirmed reports of their experts, Dr. Joseph P. Stubel (Dr. Stubel), dated March 13, 2006 and Dr. Melissa Sapan Cohn (Dr. Cohn), dated April 10, 2006. The plaintiff alleges in his complaint that the subject accident occurred on October 2, 2004 and that he sustained serious injuries and economic loss greater than basic economic loss as a result of the accident.

The plaintiff avers in his bill of particulars that he sustained as a result of the accident, inter alia, symmetric enlargement of the left submandibular gland, right asymmetric disc bulging at C5-C6 and C6-C7, neural foraminal narrowing on the right at C5-C6 and C6-C7, a slight curvature of the cervical spine with mild straightening of the normal lordosis, a herniated nucleus pulposus at C5-C6 and C6-C7 and severe sprains or strains in the cervical and thoracic spines. The plaintiff alleges that after the accident he did not receive treatment at the hospital, he was not confined to bed and was not incapacitated from employment. At the time of the accident he was not a student and, except for approximately one day, he was not confined to home after the accident. The plaintiff incurred special damages consisting of expenses for physicians' services and for x-rays and MRIs. The plaintiff also avers that as a result of the accident he sustained economic loss in excess of basic economic loss and personal injuries in the serious injury categories of permanent loss, permanent consequential limitation, significant limitation and non-permanent injury.

The plaintiff testified in his deposition that following the accident he did not receive medical attention from ambulance personnel and drove his car home. He did not seek medical assistance at the Good Samaritan Hospital where his wife was taken after the accident. Although during the accident his body did not strike anything in the car, on the day after the accident he felt pain in his neck and right

shoulder. The next day he was treated by Dr. Mary Flanigan, a physician in the office of his general practitioner. He complained to Dr. Flanigan of tightness and pain in the back of his neck which extended into his right shoulder. Dr. Flanigan prescribed two medications one of which was a muscle relaxant. Dr. Flanigan referred him to Dr. Finnolli, an orthopedic specialist. He was seen by Dr. Finnolli two or three times with the first visit occurring approximately one month after the accident. He complained to Dr. Finnolli of tightness in his neck and pain in the right shoulder blade. Dr Finnolli ordered x-rays of his upper neck, shoulder and chest. Although the medication prescribed by Dr. Finnolli helped his condition, Dr. Finnolli referred him to Dr Alongi, another orthopedist who was also a spinal specialist. Dr. Alongi examined him briefly and ordered an MRI of his chest, right shoulder area and neck. Dr. Finnolli told him that the MRI showed that he had a slight bulging of the spinal cord at C5 to C7.

The plaintiff further testified that he started physical therapy shortly after his visits with Dr. Finnolli ended. He received physical therapy twice each week for a period of six weeks. He continued to receive physical therapy but less frequently because he did not receive relief from the treatments and because he started treatment with Dr. Semente, a chiropractor. He was treated by Dr. Semente two to three times each week for approximately six weeks. The treatments were reduced to the point where currently he receives treatment only once every two weeks. Dr. Semente treated the right part of his neck, the right shoulder blade and upper back. Dr. Semente also treated the plaintiff's lower back although his lower back was not injured in the accident.

The plaintiff also testified that as a result of the accident he missed only one day of work. He lost no wages because of the accident and sustained $60 to $80 of out of pocket expenses for co-payments for prescription medications. Prior to or since the accident he has not injured his neck or right shoulder. Since the accident he is restricted in that he cannot do heavier work around the house such as moving laundry and washing dishes and is more restricted in doing chores. He still has a slight to moderate pain in his right neck which extends into his right shoulder and shoulder blade. The duration of his pain can vary from a few hours to a full day depending on his activities. Since the accident he drove to Texas to visit some friends and he is doing the same duties at work that he did before the accident. The plaintiff further testified that prior to the accident his work duties involved installing computers as well as moving and maintaining computer systems

Dr. Alongi, an orthopedist, stated in his report dated January 19, 2005 that he examined the plaintiff on the same date. The plaintiff complained of pain in his neck which radiated into his right shoulder and he told Dr. Alongi that, although the pain was persistent, it had improved. The plaintiff also informed Dr. Alongi that occasionally he had numbness in his right arm and hand. The plaintiff also told Dr. Alongi that he was working full time. Dr. Alongi upon examination of the plaintiff's neck observed mild tenderness on palpation and a slightly limited range of motion. Dr. Alongi also noted that there was good painless range of motion about the shoulders for the left and right upper extremities and that the plaintiff had good range of motion in his back. Dr. Alongi's review of the MRI of the plaintiff's cervical spine revealed posterior disc herniations at C5-6 and C6-7.

Dr. Stubel, an orthopedist, stated in his report dated March 13, 2006 that he examined the plaintiff on the same date. The plaintiff complained of neck and upper back pain and informed him that he missed one day of work. Dr. Stubel also averred that he performed a physical examination of the plaintiff's cervical spine and found no surgical scars, swelling, erythema or ecchymosis. On his probe of the cervical nerve roots there were no symptoms down the plaintiff's arms bilaterally. On range of motion testing for the cervical spine Dr. Stubel stated his findings for extension, flexion, rotation and lateral

flexion and after comparison found them to be normal ranges. His diagnosis was that the plaintiff had sustained sprains of the neck and upper back. Dr. Stubel opined that the subject accident had a causal relationship to the plaintiff's injuries, that the plaintiff exhibited no objective signs of any disability with reference to the subject accident and that the plaintiff could perform his usual activities of daily living and his usual work.

Dr. Cohn, a radiologist, states in her report dated April 10, 2006 that she reviewed the MRI performed on the plaintiff's cervical spine. Dr Cohn observed "There is mild disc desiccation at both the C5-C6 and C6-C7 levels. Disc desiccation indicates that the disc [sic] are drying out and beginning to lose their normal water content. This is the commencement of degenerative disc disease. There is somewhat asymmetric disc bulging at both levels which is slightly asymmetric towards the right. This is just touching the spinal cord and contributing to narrowing of the right neural foramen at both levels. Disc bulging is unrelated to trauma. Disc bulging occurs as the outer fibers of the disc, also known as the annulus fibrosis, lose their normal elasticity. This allows the central, more gelatinous portion of the disc to bulge circumferentially. This is the commencement of degenerative disc disease" (Motion, Exhibit G, page 2). Dr. Cohn opined that the plaintiff did have disc bulging and mild degenerative changes at C5-C6 and C6-C7 and that there was no evidence of a trauma related injury on the MRI of the plaintiff's cervical spine.

Defendants' submissions are sufficient to demonstrate, prima facie, that the plaintiff did not sustain economic loss in excess of basic economic loss. The plaintiff's bill of particulars and his deposition testimony indicate that he lost no more than one day of employment. Although the plaintiff avers in the bill of particulars that he incurred medical expenses in excess of $6,400, he testified in his deposition that his out of pocket expenses were $60 to $80 (***Moran v Palmer,*** 234 AD2d 526, 651 NYS2d 195 [1996]; *see*, ***Ventra v United States,*** 121 F. Supp. 2d 326, 332, 2000 U.S. Dist. LEXIS 16214 [S.D.N.Y., 2000]). Furthermore, the plaintiff's claims in the bill of particulars that he sustained sprains or strains in the cervical and thoracic spines do not constitute evidence of a serious injury (***Harrison v City of New York,*** 2 AD3d 682, 770 NYS2d 90 [2003]).

Turning to the plaintiff's claim of non-permanent injury, he alleges in his bill of particulars that following the accident he was not confined to bed and was not incapacitated from employment. He testified in his deposition that he did not seek medical attention immediately after the accident, that he was able to drive his car home from the accident, that he missed only one day of work and lost no wages, that he is limited only in performing some household chores such as moving laundry and washing dishes, and that following the accident he was able to drive to Texas to visit friends and continues to perform the same duties at work as he did before the accident. Dr. Alongi, who treated and examined the plaintiff less than four months after the subject accident, was informed by the plaintiff that he was currently working full time. Dr Stubel, stated in his report that the plaintiff informed him that he had missed only one day of work. These submissions are sufficient to demonstrate, prima facie, that the plaintiff did not sustain a non-permanent injury (***Schultz v Von Voight,*** 216 AD2d 451, 628 NYS2d 388 [1995], aff. 86 NY2d 865, 635 NYS2d 167).

Turning to the plaintiff's claimed serious injury categories of permanent loss, permanent consequential limitation and significant limitation, the plaintiff testified at his deposition that he was informed by Dr. Finnolli, one of his treating physicians, that the MRI of his cervical spine showed only slight bulging at C5 to C7. Dr. Alongi stated in his report that, after reviewing the cervical MRI, he found disc herniations at C5-C6 and C6-C7. However, Dr. Alongi also found, after examination, that the

plaintiff's range of motion for his neck was only slightly limited and that there was good range of motion for the plaintiff's shoulders and back. Dr. Stubel also stated in his report that on the basis of objective testing, including normal range of motion findings, the plaintiff had sustained, as a result of the accident, sprains of the neck and upper back. He also found that the plaintiff could perform his usual activities of daily living. Dr. Cohn stated in her report that, upon reviewing the MRI of the plaintiff's cervical spine, she found disc bulging and mild disc desiccation at the C5-C6 and C6-C7 levels which she attributed to the commencement of degenerative disc disease. She also found no evidence on the MRI of a trauma related injury.

This proof is sufficient to demonstrate, prima facie, that the plaintiff did not sustain a permanent consequential limitation or significant limitation (***Grossman v Wright,*** 268 AD2d 79, 707 NYS2d 233 [2000]; ***McCleary v Hefter,*** 194 AD2d 594, 599 NYS2d 81 [1993]; ***Fuseymore v Country-Wide Insurance Company,*** 2002 WL 32001233, 2002 N.Y. Slip Op. 50589[U], [App. Term]). Contrary to the plaintiff's contention, the fact that the defendants' experts differed in their opinion as to whether the plaintiff's alleged injuries were accident related, does not require a different result (***Grossman v Wright,*** supra; ***Tajudeen v Kuczera,*** 2003 WL 21361759, 2003 NY Slip Op. 50997[U], [App. Term]). The plaintiff's contention that Dr. Alongi's report, which indicated the existence of herniated discs, raises a triable issue of fact is also without merit (*see*, ***Pierre v Nanton,*** 279 AD2d 621, 719 NYS2d 706 [2001]). This proof is also sufficient to demonstrate, prima facie, that the plaintiff did not sustain an injury in the category of permanent loss (***Oberly v Bangs Ambulance, Inc.,*** supra).

The plaintiff submits in opposition to the motion, inter alia, the affirmation of his attorney, the unsworn MRI report of Dr. Steve Sharon, dated December 23, 2004, the unsworn reports of Dr. Semente dated February 28, 2005 and June 14, 2006, the unsworn miscellaneous office records of Dr. Semente, Dr. Semente's sworn report of October 17, 2006, and the unsworn physical therapy records of the plaintiff. The plaintiff also submits in opposition to the motion the same report of Dr. Alongi, dated January 19, 2005, as submitted by the defendants in support of the motion.

Dr. Sharon's MRI report, although unsworn, is admissible since it was initially referred to by Dr. Stubel in his report submitted in support of the motion (***Kearse v N. Y. City Transit Auth.,*** 16 AD3d 45, 789 NYS2d 281 [2005]). Since Dr. Semente has averred in his report of October 17, 2006 that his records are incorporated by reference, the reports of Dr. Semente dated February 28, 2005 and June 14, 2006 and his miscellaneous office records are not rendered inadmissible on the ground that they are not sworn (see, **Pagano *v Kingsbury,***, supra). However, Dr. Semente's office records are rendered inadmissible on the grounds that they are undated and/or irrelevant and/or unsigned and/or illegible (***Tornatore v Haggerty,*** 307 AD2d 522, 763 NYS2d 344 [2003]; ***Pagan v Gondola Cab Corp.,*** supra). The physical therapy records of the plaintiff are inadmissible since they are unsworn and are not competent evidence on the issue of the existence of serious injury (***Tornatore v Haggerty,*** supra; ***Pagano v Kingsbury,*** supra).

Dr Sharon states in his report dated December 23, 2004 that an MRI of the plaintiff's cervical spine revealed an "asymmetric enlargement of the left submandibular gland" of "uncertain clinical significance" for which he recommended a cat scan for further evaluation (Affirmation in Opposition, Exhibit A). He also observed disc bulging and neural foraminal narrowing at C5-C6 and C6-C7. He noted that the clinical indication was "neck pain" (Affirmation in Opposition, Exhibit A). Dr. Alongi, as previously noted, indicated the presence of posterior disc herniations at C5-C6 and C6-C7.

Dr. Semente, a chiropractor, states in his report dated February 28, 2005 that the plaintiff presented himself on that day for an initial examination and evaluation. The plaintiff complained of neck pain radiating into his right shoulder and arm pit. Dr. Semente noticed an antalgic spine tilt when the plaintiff was standing. Dr. Semente found upon conducting range of motion studies of the cervical spine that flexion was 20 degrees with a normal range of 50, extension of 50 degrees with a normal of 60 degrees, left lateral flexion of 30 degrees and right lateral flexion of 5 degrees with a normal of 45 degrees and left rotation of 70 degrees and right rotation of 30 degrees with a normal range of 80 degrees. He noted that this testing caused pain and spasms. Dr. Semente stated that this his diagnosis was "723.3 radiating the right upper extremity 847.1" and concluded that the plaintiff was partially disabled as a result of the subject motor vehicle accident.

Dr. Semente states in his report dated June 14, 2006 that he noted disc bulging at C5-C6 and C6-C7 and "chronic" radiculopathy at C6-C7. He also noted the existence of bilateral Carpal Tunnel Syndrome and Double Crush Syndrome. Dr. Semente found upon conducting range of motion studies of the cervical spine that flexion was 40 degrees with a normal range of 50, extension of 30 degrees with a normal of 60 degrees, left lateral flexion of 30 degrees and right lateral flexion of 15 degrees with a normal of 45 degrees and left rotation of 75 degrees and right rotation of 45 degrees with a normal range of 80 degrees. He noted that this testing caused pain and spasms. Dr. Semente stated that his diagnosis was "723.3 with Carpal Tunnel Syndrome in the right upper extremity" and concluded that the plaintiff was partially disabled as a result of the subject motor vehicle accident. He opined that the plaintiff's inability to extend his neck past 30 to 35 degrees interferes with the plaintiff's ability to drive and to participate in sports and that abduction of the plaintiff's right arm over his head interferes with his sleep.

Dr. Semente, avers in his report dated October 17, 2006 that he began treating the plaintiff on February 25, 2005.[1] His initial testing conducted during the first month of treatment showed "the lateral flexors 20 degree (sic), neck rotations 70 & 30 degree (sic), extensions 50 degree (sic)" (Affirmation in Opposition, Exhibit E). Dr. Semente indicated that "[t]hese were defects anywhere from 20% -60%" (Affirmation in Opposition, Exhibit E). Dr. Semente, based on testing performed on September 21, 2005, noted "chronic" C6-C7 radiculopathy. Dr. Semente reiterated his range of motion studies of June 14, 2006 with respect to the plaintiff's thoracic and lumbar spine. He also performed various orthopedic tests which he found to be "positive" and reviewed MRI films and report as well as x-ray films and the "objective studies of the EMG/NCV examinations". Dr. Semente concluded that as a result of the subject accident the plaintiff has sustained a partial permanent disability in that he will be limited in daily activities of living such as taking out the trash or involving such activities as raising his arms or placing objects on shelves. Dr. Semente also concluded that the plaintiff's injuries included bilateral Carpal Tunnel Syndrome, cervical bulges at C3-C4 and C4-C5 and damage at C5-C6 and that the bulges indicated "dessication or the beginning of degenerative disc disease" (Affirmation in Opposition, Exhibit E).

With regard to the category of non-permanent injury, Dr. Semente states in his report dated February 28, 2005 that he found significant deficiencies in the range of motion testing for the plaintiff's cervical spine. This report was prepared when Dr. Semente's treatment began approximately five months after the

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[1] With regard to the issue of gap in treatment, the plaintiff testified at his deposition on February 16, 2006 that Dr. Semente was continuing to treat him although on a reduced schedule.

accident occurred and has no bearing on that period (*see*, ***Tuna v Babendererde,*** 32 AD3d 574, 819 NYS2d 613 [2006]). These deficiencies notwithstanding, Dr. Semente did not place any restrictions on the plaintiff's activities (*see*, ***Clements v Lasher,*** 15 AD3d 712, 788 NYS2d 707 [2005]; ***Beaubrun v N. Y. City Transit Auth.,*** 9 AD3d 258, 779 NYS2d 201 [2004]). Dr. Semente's report is also deficient in that he does not explain the basis for his conclusion that the range of motion deficits were the result of the accident (***Bonilla v Romero,*** 14 Misc3d 1213(A), 2006 N.Y. Slip Op. 52526(U) [2006]) and does not explain how these deficits could have caused the plaintiff's alleged partial disability or would have prevented the plaintiff from performing substantially all of the material acts constituting his usual and customary daily activities (***Atkinson v Oliver,*** 36 AD3d 552, 830 NYS2d 30 [2007]; ***Manrique v Warshaw Woolen Assocs.,*** 297 AD2d 519, 747 NYS2d 451 [2002]). Considering that the plaintiff has admitted in his deposition that he has not missed more than one day of work and, upon return to work, continued to perform his pre-accident duties, Dr. Semente's findings are insufficient to raise a triable issue of fact with respect to this category (***Toure v Avis Rent A Car Sys.,*** supra, pages 357-358, 873).

With regard to the remaining serious injury categories of permanent loss, permanent consequential limitation and significant limitation, while Dr. Sharon's report dated December 23, 2004 shows the existence of cervical disc bulging and Dr. Alongi's report of January 19, 2005 shows the existence of cervical disc herniations, they were not recent reports and have no bearing on the duration of these conditions (***Burgos v Vargas,*** 33 AD3d 579, 822 NYS2d 297 [2006]). Moreover, Dr. Sharon and Dr. Alongi fail to relate their observations of cervical disc bulges or herniations to the subject accident (***Shinn v Cantanzaro,*** 1 AD3d 195, 767 NYS2d 88 [2003]).

Dr. Semente's reports of June 14, 2006 and October 17, 2006 both refer to the existence of "chronic" cervical radiculopathy. Dr. Semente not only failed to address Dr Cohn's findings of degenerative disc disease (*see*, ***Gomez v Epstein,*** 29 Ad3d 950, 818 NYS2d 101 [2006]), but also conceded in his October 17th report that there was disc dessication and the beginning of degenerative disc disease.[2] These findings, and Dr. Semente's failure to explain any other basis for the cause of the limitations of the range of motion, vitiated Dr. Semente's conclusion that the plaintiff's injuries were caused by the subject accident (***Pommells v Perez,*** 4 NY3d 566, 580, 797 NYS2d 380, 389 [2005]). Furthermore, Dr. Semente's cervical range of motion findings in his report of June 14, 2006 were not supported by range of motion restrictions contemporaneous with accident (***Earl v Chapple,*** 830 NYS2d 275, 2007 NY Slip Op 1243). His range of motion findings in his report of February 28, 2005, were not contemporaneous with the accident since they were made approximately five months after the accident[3] and, although Dr. Semente stated in his report of October 17, 2006 that he also found significant cervical range of motion deficiencies in the first month of treatment, these findings lacked comparison with normal ranges and were speculative (***Bent v Jackson,*** 15 AD3d 46, 788 NYS2d 56 [2005]). Finally, Dr. Semente's conclusions were not based on objective medical evidence in that he fails to explain the relevance of the "positive" findings on the orthopedic tests and of the results of the"EMG/NCV" examinations with regard to the plaintiff's alleged

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[2] Although Dr. Semente refers to the "beginning" of degenerative disc disease he does not state when the disc dessication began or that it is attributable to the subject accident.

[3] A contemporaneous report has been construed as one prepared during the period starting from shortly after the accident to approximately two months after the accident (***Silva v Vizcarrondo,*** 31 AD3d 292, 819 NYS2d 246 [2006]; ***Levi v Kiska Corp.,*** 14 Misc3d 1224[A], 2007 Slip Op. 50160[U]; ***Saha v Sanandres,*** 10 Misc3d 1072[A], 814 NYS2d 565 [2005]; ***Martinez v McKenzie,*** 10 Misc3d 1054[A], 809 NYS2d 482 [2005]; ***Asante v Lewis,*** 9 Misc3d 1110[A], 806 NYS2d 443 [2005], aff. 13 Misc3d 132[A], 2006 N.Y. Slip Op. 51889U)

bulging discs at C3-C4 and C4-C5, to state the dates of the tests and films reviewed and to provide a sworn copy of the MRI report relied on (***Merisca v Alford,*** 243 AD2d 613, 663 NYS2d 853 [1997]; ***Evans v Ali Mohammad,*** 243 AD2d 604, 663 NYS2d 273 [1997]).

The plaintiff's claim that he has tendered sufficient qualitative proof pursuant to ***Toure v Avis Rent A Car Sys.*** is also without merit. In ***Toure*** the Court of Appeals held that "[i]n order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (citations omitted)" (***Toure v Avis Rent A Car Sys.***, supra, pages 350, 868 [bracketed material added]). The Court also held that plaintiffs could raise a material triable issue of fact with respect to the serious injury categories of permanent consequential limitation or significant limitation by submitting the report of their medical expert who sufficiently described the qualitative nature of the plaintiff's limitations based on the normal function of the body part affected and who supported the qualitative assessment with objective medical evidence (***Toure v Avis Rent A Car Sys.***, supra, pages 353, 870).

Dr. Semente states in his reports dated June 14, 2006 and October 17, 2006 that the plaintiff's diminished ability to extend his neck has interfered with his driving, participation in sports and sleeping and that the plaintiff can no longer take out the trash or do activities involving raising his arms such as placing objects on shelves. However, the plaintiff has testified in his deposition that following the accident he was able to drive home and then, subsequently, to drive to Texas. Although the plaintiff testified that following the accident, he could not do heavier work around the house, he also testified that a day after the accident he was able to resume his normal work duties which included installing computers and moving computer systems. Dr. Semente did not note in his reports that the plaintiff complained of difficulty driving, sleeping or engaging in sports. Furthermore, there is insufficient objective medical evidence to support Dr. Semente's qualitative analysis.

The Court finds that the evidence tendered by the plaintiff also fails to raise a triable issue of fact as to the serious injury categories of permanent loss, permanent consequential limitation and significant limitation (***Beutel v Guild,*** 28 AD3d 1192, 813 NYS2d 342 [2006]; ***Jimenez v Rojas,*** 26 AD3d 256, 810 NYS2d 449 [2006]). Furthermore, the plaintiff failed to submit evidence raising a triable issue of fact with respect to whether the plaintiff sustained economic loss greater than basic economic loss (***Rulison v Zanella,*** 119 AD2d 957, 501 NYS2d 487 [1986]). Accordingly, the defendants' motion for summary judgment dismissing the complaint is granted.

Dated: APR 16 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION