

**Roberts v Kwaitkowskia**

2007 NY Slip Op 31123(U)

April 20, 2007

Supreme Court, Kings County

Docket Number: 0019565/2004

Judge: Gloria M. Dabiri

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20<sup>th</sup> day of April 2007.

P R E S E N T:

HON. GLORIA M. DABIRI

Justice.

-----X

ELSIE ROBERTS, QUELMI ROBERTS AND INA JOHNSON,

Plaintiffs,

- against -

Index No. 19565/04

ANDRZEJ KWAITKOWSKI AND JOSE D. ATILES,

Defendants.

-----X

The following papers numbered to read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed_____	_____
Opposing Affidavits (Affirmations)_____	_____
Reply Affidavits (Affirmations)_____	_____
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

By Notice of Motion defendant Jose D. Atilos (“Atilos”) seeks an order dismissing the complaint of Ina Johnson (“Johnson”) (CPLR 3212), on the grounds that she did not sustain a “serious injury” (Ins. L. 5102[d]) in the automobile accident of November 7, 2003.

By Notice of Motion plaintiff on the counterclaim, Elsie Roberts (“Roberts”), seeks summary judgment as to liability in her favor, dismissing all claims against her.

By Notice of Cross Motion defendant Andrzej Kwaitkowski also seeks dismissal of all claims against him on the grounds that he has no liability in the happening of the accident, and dismissal of Johnson’s complaint upon the grounds that she cannot establish a “serious injury” (CPLR 3212; Insurance Law 5102[d]).

### ***Background***

This personal injury action stems from a November 17, 2003 three-car, chain-collision accident which occurred at about 12:50 PM at or near the intersection of 3<sup>rd</sup> Avenue and 48<sup>th</sup> Street in Brooklyn. It is alleged that a vehicle operated by plaintiff Roberts, and in which plaintiff Johnson was a passenger, was stopped for several seconds when it was rear-ended by the defendant Kwaitkowski’s vehicle, after that vehicle was rear-ended by a vehicle operated by defendant Atilas. Plaintiffs commenced this action in June of 2004 and each defendant answered, interposing cross- and counter-claims.<sup>1</sup> Defendant Kwaitkowski also filed an action against defendant Atilas (*Kwaitkowski v Atilas*, Kings County Clerk’s Index No. 4569/06) which, by order of May 12, 2006, was joined with the instant matter for discovery and trial. A note of issue was filed on August 1, 2006.

In her Bill of Particulars Ina Johnson alleges that she sustained, *inter alia*, the following injuries in the November 17, 2003 accident: cervical acceleration-deceleration

---

<sup>1</sup>Defendant Atilas interposed a counterclaim against plaintiff Elsie Roberts and Kwaitkowski asserted a counterclaim against Quelmi Roberts.

injury and strain; left brachial neuritis; lumbar sprain and right flexion malposition at L5 and segmental dysfunction of the cervical and lumbar vertebrae. Johnson alleges that as a result of her injuries she was confined to her home for two weeks.

By Order of July 14, 2006 the court denied, as premature, summary judgment motions by plaintiffs and Elsie Roberts on the counterclaim. By order of March 23, 2007 the court addressed a motion by Kwaitkowski to disqualify plaintiff. The parties now renew their motions for summary judgment relief.

Johnson, who was a nursing student at Coppin State University when deposed on March 23, 2006, testified that she was a front-seat passenger in a vehicle driven by Roberts. According to Johnson, the vehicle was on Third Avenue when it was struck in the rear by another vehicle. At the time of the impact the vehicle in which she was riding was stopped, while Roberts waited to merge into the lane of traffic to their left. Upon impact Roberts vehicle moved forward “a little.” The weather conditions were dry and the area of Third Avenue was straight and level. Traffic was bumper-to-bumper. Johnson testified that prior to the impact she heard the sound of “[s]creeching tires and [a] crash.”

Johnson testified that as a result of the accident the back of her head and neck struck the seat, and her lower back and neck hurt. She was removed by ambulance to Lutheran Medical Center where X-rays were taken and she was released. The following day she began treatment with Dr. Abrams, a chiropractor, for “whiplash.” She treated for approximately three and one-half months during which she received massages and re-alignment. She also treated with an acupuncturist, Dr. Kim. As a result of these treatments her symptoms

“improved.” Johnson testified that due to her injuries she missed one day from school. When deposed on March 23, 2006, she indicated that she was exercising at her school’s gym about three times per week, for one hour on the treadmill and weight training for her arms. On May 30, 1993, prior to the instant accident, Johnson and her mother were involved in an automobile accident in Ohio, as a result of which Johnson injured her back and neck. According to Johnson, she had recovered from those injuries prior to the November 2003 accident.

Elsie Roberts was deposed on February 23, 2006. She testified that November 17<sup>th</sup> was a clear, “nice” day. Her car was stopped in traffic on Third Avenue for “between five and ten seconds,” waiting for the traffic light to turn green and for an opportunity to move into the middle lane. According to Roberts, an obstruction in the right lane of traffic, which was marked-off with cones, required that she merge left into the center lane. Her turning signal was activated and there were no vehicles ahead of her in the right lane. Behind her vehicle was a beige or champagne color car which was also stopped. According to Roberts, she felt a “big bang” to the back of her vehicle and her neck, back, shoulder and hips shook, coming into contact with various portions of her vehicle.

Andrzej Kwaitkowski testified that on the date of the accident he was driving a Murano SUV, northbound on Third Avenue, when the vehicle ahead “very slowly” stopped. He then stopped behind that vehicle in the right lane of traffic. According to Kwaitkowski, a truck ahead was unloading, causing an obstruction, and construction cones had been placed in the roadway. After being stopped for four or five seconds, his SUV was struck from

behind by the Atilés' vehicle. The force of the impact pushed his SUV into Roberts' Mazda which was stopped ahead.

Jose D. Atilés, when deposed on November 21, 2006, testified that he was the driver of a Chevy Blazer traveling northbound on Third Avenue in heavy, "stop and go" traffic. Atilés was in the left lane following approximately 30 feet behind a tractor-trailer. Between 50<sup>th</sup> and 49<sup>th</sup> Streets he activated his right turn signal. As he approached 48<sup>th</sup> Street he observed that the traffic light at the intersection was green. Atilés then merged into the middle lane in preparation for making a right-hand turn into 46<sup>th</sup> Street. When he merged into the center lane it was behind a moving tractor trailer and in front of a commercial truck. After traveling about fifty feet, he proceeded to move into the right lane. According to Atilés, the right lane was clear of traffic, except for a vehicle in the right lane about 30 feet behind him at the intersection with 49<sup>th</sup> Street. As he moved into the right lane, the front passenger corner of Atilés' vehicle struck the Murano which was stopped ahead in the right lane. According to Atilés, when he noticed the stopped SUV he applied the brakes and his car skidded about twelve feet. Atilés testified that the brake lights on the SUV were "off." Atilés also observed red cones ahead in the right lane and that the lane was closed. To his knowledge only his car and the Murano SUV were involved in the accident.

### ***Liability***

Both Elsie Roberts, plaintiff on the counterclaim, and Andrzej Kwaitkowski, a defendant, seek dismissal of all claims against them.

The three drivers and sole passenger involved in this three-car, chain-reaction collision, all of whom are parties to the action, submitted to depositions. Their testimony reveals that Roberts stopped in the right lane of travel and that Kwaitkowski had stopped behind her. It also is undisputed that Atiles, while maneuvering from the center to the right lane, struck Kwaitkowski's SUV in the rear, pushing the SUV into the rear of the Roberts vehicle.

On a motion for summary judgment, the movant must make a *prima facie* showing that the cause of action or defense is established, such that there is no question of fact, and that judgment is warranted in favor of that party as a matter of law (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]). Once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a triable issue of fact (*Zuckerman*, 49 NY2d at 562; *Alvarez v. Prospect Hospital*, 68 NY2d 320, 325 [1986]).

It is well settled that a rear-end collision with a stopped vehicle is *prima facie* evidence of negligence on the part of the driver of the rear-most vehicle, placing a duty upon that driver to come forward with a non-negligent explanation for the accident (*Eybers v. Silverman*, 37 AD3d 403 [2007]; *Martinez v. Mendon Leasing Corp.*, 295 AD2d 408, 409 [2002]; *Leal v. Wolff*, 224 AD2d 392, 393-394 [1996]; *Barile v. Lazzarini*, 222 AD2d 635, 636 [1995]). “[W]hen the driver of an automobile approaches another vehicle from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle. and to exercise reasonable care to avoid colliding with other vehicles” (*Chepel v.*

*Meyers*, 306 AD2d 235, 236 [2003]; *see also*, *Benyarko v. Avis Rent-A-Car System, Inc.*, 162 AD2d 572, 573 [1995]; *Young v. City of New York*, 113 AD2d 833, 834 [1985]; *Abramowicz v. Roberto*, 200 AD2d 374, 375 [1995]).

Here, the explanation for the accident offered by Atilis is that his entry into the right lane was blocked by Kwaitkowski's SUV, causing him to crash into the rear of that vehicle. This is insufficient to rebut the inference of negligence created by the collision (*see Mead v. Marino*, 205 AD2d 669 [1994]; *see also*, *Pappas v. Ortiz*, 262 AD2d 471 [1999]). Atilis was under an obligation to see what was there to be seen and to use reasonable care under the existing traffic and road conditions (*Duffy v. Chautaugua*, 225 AD2d 261, 266 [1996]).

While Atilis indicated that the brake lights on the Kwaitkowski vehicle were not activated, he also testified that he observed the SUV prior to the accident, and that just prior to the accident, the SUV "was stopped." Thus, Atilis fails to raise an issue of fact as to whether the claimed absence of brake lights was a proximate cause of this rear-end collision (*see Filippazzo v. Santiago*, 227 AD2d 419, 420 [2000]; *see also*, *Gross v. Marc*, 2 AD3d 681 [2003]; *Lopez v. Minot*, 258 AD2d 564 [1999]).

Moreover, nothing in the parties' deposition testimony, or in their submissions, raises an issue of fact as to whether Roberts, the driver of the lead vehicle, was at fault, or could have done anything to avoid the collision (*see Gregson v. Terry*, 35 AD3d 358, 361 [2006]; *Lestingi v. Holland*, 297 AD2d 627, 628-629 [2002]; *Power v. Hupert*, 260 AD2d 458 [1999]).

### ***Serious Injury***

Atiles moves and Kwaitkowski cross-moves for summary judgment dismissing the complaint of Ina Johnson on the ground that she did not sustain a “serious injury” (Insurance Law §5102[d]) in the accident of November 17, 2003.

In a Bill of Particulars of September 7, 2004, Johnson alleges that she sustained, *inter alia*: cervical acceleration-deceleration injury; cervical strain; segmental dysfunction of cervical vertebrae; reversal of cervical lordosis with Apex at C4; left brachial neuritis; lumbar strain; segmental dysfunction of lumbar vertebrae; and Right flexion malposition at L5.

In support of their motions defendants supply the affirmed report of Dr. Anthony Spataro, an orthopedic surgeon who examined Johnson on May 30, 2006, Johnson’s Bill of Particulars and the transcript of Johnson’s deposition testimony.

As a result of his examination, Dr. Spataro found that Johnson “ambulates with a normal heel/toe gate,” “can touch the toes without bending the knees” and “can stand on toes and on heels normally without pain.” Plaintiff had “no palpable spasm or tenderness in [her] entire spine,” “no Kyphoscoliosis or abnormal curvature” and could mount and dismount the examination table without assistance. Range of motion in the cervical spine was on flexion 45° (45° normal), extension 45° (45° normal), lateral flexion 45°, bilaterally, (30-45° normal), and rotation 60°, bilaterally, (60° normal). Range of motion in the lumbar spine was on flexion 90° (90° normal), extension 30° (30° normal), lateral flexion 30°, bilaterally, (30° normal) and rotation 30°, bilaterally, (30° normal). Straight leg raise testing was

“negative” in both the supine and seated positions, as was Laseque Sign. In the extremities, motor function was normal at 5/5, there was no atrophy or change in muscle tone, and no spasticity, clonus or tremor. Reflexes were normal. Dr. Spataro concluded that plaintiff was “[s]tatus post sprain cervical and lumbar spine” and had no orthopedic disability.

During her examination before trial in March of 2006, Johnson testified that as a result of the impact her head, neck and back hurt. Johnson testified that she was removed from the scene to a hospital where she was treated and released. According to Johnson, X-rays taken at the hospital revealed nothing. The following day she began a course of physical therapy for a period of three and one-half months. She also treated with an acupuncturist for approximately two months. She was not confined to bed or to her home, and missed one day of school following the accident. When Johnson testified in March of 2006 she was working-out at a gym, approximately three times per week. Her exercise routine including use of the treadmill, aerobic exercise and weight-training for her arms.

In opposition to the motion, plaintiff Ina Johnson supplies: her affidavit of November 22, 2006; the affidavit of John P. Piazza, a doctor of chiropractic medicine; uncertified medical records of Doctors Abrams and Piazza; and unaffirmed reports of MRI studies of her cervical and lumbar spine, dated January 22 and 27, 2004.

Dr. Piazza affirms that “Johnson was examined on November 18, 2003, treated . . . until February 17, 2004 and . . . re-examined on November 21, 2006.” At her initial examination Ms. Johnson complained of cervical, left upper extremity and lower back pain. Examination of her lumbar spine revealed flexion at 70° (80°+ normal), extension 20° (30°+

normal), and lateral bending 25°, bilaterally, (30°+ normal). Straight leg raising was positive (at 70°), as were Adams, Kemp, Lindners and Toe Walking tests. Range of motion in the cervical spine was on flexion 35° (45°+ normal), extension 40° (45°+ normal), lateral bending, left 45° (45°+ normal), lateral bending, right 40° (45°+ normal), left rotation 50° (60°+ normal) and right rotation 55° (60°+ normal). Cervical Compression, Jackson and Soto Hall tests were positive. In the shoulders, spasm of the right trapezius and left Rhomboid muscles were found. It was noted that plaintiff stood with a left high shoulder and a right head tilt.

Upon re-examination on November 21, 2006, range of motion in the lumbar spine was normal on flexion at 60° (60°+ normal), extension 25° (25°+ normal) and lateral bending 25°, bilaterally, (25°+ normal). In the cervical spine flexion was 60° (60°+ normal), extension 45° (50°+ normal), left lateral bending 40° and right lateral bending 45° (45°+ normal), and rotation 75°, bilaterally, (80°+ normal).

Dr. Piazza concluded based upon the “history, examinations and treatment performed by [him] and available medical and lab data,” that Johnson suffered the following conditions which “prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities” following the accident: cervical acceleration-deceleration injury; cervical strain injury; left brachial neuritis; lumbar strain injury; segmental dysfunction of cervical vertebrae; segmental dysfunction of lumbar vertebrae; right flexion malposition at L5; and reversal of cervical lordosis with Apex at C4.” Dr. Piazza opines that these injuries were caused by the subject accident.

In her affidavit Ms. Johnson avers that since the accident she has experienced cervical and lumbar pain which limits movement, which prevents her from getting dressed, cooking, washing dishes, making the beds, vacuuming, lifting, twisting and bending. As a result of her injuries, she cannot stand or sit for more than 20 minutes, or walk for more than 15 minutes. She affirms that her lapse in treatment was due to the denial of no-fault benefits and her inability to pay for such treatment out-of-pocket.

To succeed on their motions and cross-motions for summary judgment on this issue, movants must meet the initial burden of showing that plaintiffs did not, as a result of the automobile accident, “sustain a serious” injury as defined by section 5102[d] of the Insurance Law (*Gaddy v. Eyley*, 79 NY2d 955 [1992]; *Ocasio v. Henry*, 276 AD2d 611 [2000]; *Grossman v. Wright*, 268 AD2d 79 [2000]). A defendant can sustain this initial burden by “submitting the affidavits or affirmations of medical experts who examined the plaintiff and concluded that no objective findings support the plaintiff’s claim” (*Grossman*, 268 AD2d at 83-84), as well as addressing a plaintiff’s claim that she was prevented from performing substantially all of the material acts constituting her usual and customary daily activities, during the requisite period, as a result of a medically determined condition caused by the accident (*see Talabi v. Diallo*, 32 AD3d 1014 [2006]). The burden then shifts to the plaintiff to “come forward with admissible proof to raise a triable question of fact” (*Napoli v. Cunningham*, 273 AD2d 366 [2000]). If the plaintiff is unable to meet this burden, summary judgment will be granted to the defendant (*see e.g. Ginty v. MacNamara*, 300 AD2d 624, 625 [2002]; *Attanasio v. Lashley*, 223 AD2d 614, 614-615 [1996]; *Sotirhos v. Pinetto*, 209 AD2d

687, 687-688 [1994]).

“A defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d)” (*Kearse v. New York City Transit Authority*, 16 AD3d 45, 49 [2005]; *see also, Kerzhner v. N.Y. Ubu Taxi Corp.*, 17 AD3d 410, 410 [2005], [“The affirmation of the defendants’ examining physician stating that the results of the plaintiff’s neurological testing were normal, and that the plaintiff had a full range of motion in his cervical and lumbar spines, was sufficient to establish a *prima facie* case that the plaintiff did not sustain a serious injury”]; *Howell v. Reupke*, 16 AD3d 377, 377 [2005] [defendant made a *prima facie* showing that plaintiff did not sustain a serious injury where he submitted proof that plaintiff had a full range of motion in her cervical and lumbar spines, had no ongoing orthopedic or neurological disabilities, and was capable of fully performing her normal daily work and living activities]; *Sieradzki v. US Express Leasing*, 13 AD3d 608, 609 [2004], [defendants made *prima facie* case where they “submitted the affirmed medical reports of an orthopedist and a neurologist both of whom examined the plaintiff nearly two years after the accident, and determined that he had full range of motion in his cervical and lumbosacral spines and his shoulders, and that he had no permanent injury, disability, restriction, or limitation”]; *Salawudeen v. Barrone*, 11 AD3d 444, 444 [2004], [“defendants made a *prima facie* showing that plaintiff did not sustain a serious injury through the affirmation of their examining physician who found, *inter alia*, that the plaintiff had a full

range of motion in his cervical and lumbosacral spine and shoulders, and concluded that the plaintiff was not disabled”]). The objective testing performed and findings made by Dr. Spataro, along with plaintiff’s own deposition testimony were sufficient to establish movants’ *prima facie* case. Dr. Spataro’s examination revealed that Johnson’s neck, lower back and arms functioned normally and that she had no disability. Moreover, plaintiff, a college student, testified that following the accident she was confined to neither bed nor home and missed one day from work, and that her condition had improved.

The burden, therefore, shifts to plaintiff to “come forward with admissible proof [sufficient] to raise a triable question of fact” (*Napoli*, 273 AD2d at 366). In this regard, plaintiff must submit objective findings, in addition to opinions, as to the significance of her injuries (*see Grossman*, 268 AD2d at 84). In order to establish that she suffered a permanent loss of a body organ, member or function, such loss must be total (*Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 299, 297 [2001]). To establish that she has suffered a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of body function or system, plaintiff must show more than “a mild, minor or slight limitation of use” and are required to provide objective evidence in addition to opinions of the extent or degree of the limitation and its duration (*see Grossman*, 268 AD2d at 83, *Booker v. Miller*, 258 AD2d 783, 784 [1999]; *Burnett v. Miller*, 255 AD2d 541 [1998]; *King v. Johnston*, 211 AD2d 907 [1995]). Resolution of the issue of whether a serious injury was sustained under these categories involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part

(see *Toure v. Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345, 353 [2002]). In the alternative, plaintiff must prove that she sustained a medically determined injury which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for 90 of the 180 days immediately following the accident (see *Gaddy*, 79 NY2d at 958; *Licari*, 57 NY2d 236).

Significantly, during his examination in November 2006, Dr. Piazza found that the range of motion in Johnson's lumbar spine was normal. Range of motion in the cervical spine was also normal, except for a 7 percent loss in rotation, bilaterally, and a 10 percent loss in extension. Thus, plaintiff fails to raise a material issue of fact as to whether she currently suffers from a "permanent consequential limitation" or a "significant limitation" (see *Toure v. Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345, 350-351 [2002]; *Licari v. Elliot*, 57 NY2d 230, 236 [1982]; *Waldman v. Dong Kook Chang*, 175 AD2d 204, 204 [1991], [15 percent limitation not significant where plaintiff's own deposition testimony and records fail to show any limitation]; see also, *Bandoian v. Bernstein*, 254 AD2d 205 [1998], [ten percent restriction of cervical extension and/or rotation not "significant"]; *Trotter v. Hart*, 285 AD2d 772, 773 [2001], [20 percent loss of use in cervical spine and 10 percent loss in lumber not significant]; *Ibragimov v. Hutchins*, 8 AD3d 235 [2004], [15 percent limitation insignificant]; *Cabri v. Park*, 260 AD2d 525 [1999], [12.5 percent loss in arm]).

Moreover, to the extent that plaintiff relies upon unaffirmed and uncertified medical records and MRI reports, they are of no probative value (*Grasso v. Angerami*, 79 NY2d 813 [1991]; *Nelson v. Distant*, 308 AD2d 338; *Gaddy v. Eyler*, 79 NY2d 955, 959 [1992]; *Mirro*

*v. Elite Car & Limo*; 236 AD2d 451 [1997]). Nor does Dr. Piazza affirm the accuracy and authenticity of the medical records supplied or that he did anything other than took plaintiff's word for the fact that her prior injuries were insignificant.

In addition, while Dr. Piazza identifies restrictions in plaintiff's spine upon examination shortly after the accident, there is nothing in Dr. Piazza's affidavit which indicates that he reviewed any of the medical records from plaintiff's prior accident in which plaintiff claims to have also injured her back and neck<sup>2</sup> (*see Vidor v. Davila*, 37 AD3d 826 [2007]). This renders completely speculative Dr. Piazza's opinion that the spinal injuries identified, and the resulting limitations in plaintiff's range of motion were caused by the subject accident (*id.*; *see also, Cervino v. Gladysz-Steliga*, 36 AD3d 774, \_\_\_\_ [2007]; *Bennett v. Genas*, 27 AD3d 601 [2006]). Moreover, cervical and lumbar sprains and strains, by themselves, do not rise to the level of serious injury (*see Keena v. Trappen*, 294 AD2d 405 [2002]).

In addition, with respect to the 90 out of 180 days category of "serious injury," plaintiff testified that she was never restricted to bed or to her home as a result of her injuries and that she missed only one day from school. Thus, plaintiff has not established an inability to perform "substantially all" of the material acts constituting her usual and customary activities during the requisite period (*Gaddy v. Eyler*, 79 NY2d 952, 959 [1992]; *O'Casio v. Henry*, 276 AD2d 611 [2000]; *Baker v. Zelem*, 202 AD2d 617 [1994]; *see also, Vitez v. Shelton*, 6 AD3d 1180 [2004]; *Crespo v. Kramer*, 295 AD2d 467 [2002]). In this regard, the

---

<sup>2</sup>An uncertified medical report by Dr. Abrams, dated June 9, 2004, indicates that the "patient reported no significant medical history. The patient noted a prior motor vehicle accident in 1993."

medical conclusion of Dr. Piazza was tailored to meet the statutory requirement (*Harney v. Tombstone Pizza Corp.*, 279 AD2d 609 [2001]). In the absence of admissible objective evidence of a medically determined injury or impairment, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*see Olson v. Russell*, 35 AD3d 684 [2006]; *Mejia v. DeRose*, 35 AD3d 407 [2006]).

Finally, it is noted that unaffirmed reports of MRI studies of Johnson's cervical and lumbar spine, performed in January of 2004, revealed no abnormalities, except for lordotic curvature of the cervical spine. A November 21, 2006 note in the records of Doctors Abrams and Piazza indicates: "currently — no neck pain noted, mild low pack pain (intermittent only). Low back provoked by prolong sitting, bookbag. No left shoulder pain noted at present." Accordingly, it is

ORDERED, that the motion of Roberts on the counterclaim and that portion of the cross-motion of Kwaitkowski as seek summary judgment as to liability in their favor, are granted, and all claims are dismissed against them; and it is further

ORDERED, that the motion of Atiles and portion of the cross-motion of Kwaitkowski as seek summary judgment dismissal of the complaint as to Ina Johnson, is granted.

E N T E R,

A handwritten signature in blue ink, appearing to be 'J.S.C.', is written over a horizontal line. The signature is stylized and extends to the right.

J.S.C.