SHORT FORM ORDER

INDEX No. 04-11764
CAL. No. 07-01218-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 9-28-07
ADJ. DATE 12-10-07
Mot. Seq. # 002 - MD
003 - XMD

ARTHUR T. FRANCIS and MICHELE FRANCIS, Plaintiffs, - against - CONSTANCE C. ONORATO, ETEM BIZATI and HERREN ENTERPRISES, INC. d/b/a MEDFORD GULF, Defendants.	STANTON & GUZMAN, LLP Attorneys for Plaintiffs 585 Stewart Avenue, Suite 410 Garden City, New York 11530 EPSTEIN & GRAMMATICO Attorneys for Defendant Onorato 1393 Veterans Memorial Highway, Suite 414 Hauppauge, New York 11788 O'CONNOR REDD, LLP Attorneys for Defendant Herren Enterprises 200 Mamaroneck Avenue White Plains, New York 10601

Upon the following papers numbered 1 to 43 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers 34 - 36; Answering Affidavits and supporting papers 27 - 31; 37 - 41; Replying Affidavits and supporting papers 32 - 33; 42 - 43; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Etem Bizati and Herren Enterprises, Inc. d/b/a Medford Gulf for an order pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims as against them on the grounds that said defendants were not liable for the subject accident or, in the alternative, on the grounds that plaintiff Arthur Francis did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that this cross motion by defendant Constance C. Onorato for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the complaint and all cross claims as against her on the grounds that plaintiff Arthur Francis did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained on June 23, 2003 by the then 46 year old plaintiff Arthur Francis, a pedestrian, when he was struck by a

vehicle operated by defendant Constance C. Onorato (Onorato), then 71 years old, at a Gulf gas station, where both were patrons, located at 3179 Route 112, in Medford, New York. Defendant Onorato's vehicle had instantaneously accelerated forward from the gas pump and struck plaintiff as he was standing in the gas pump island roadway next to the booth paying a gas station attendant.

By their complaint, plaintiffs allege a first cause of action on behalf of plaintiff as against defendant Onorato based on negligence in her operation of her vehicle resulting in plaintiff sustaining serious injuries as defined in Insurance Law § 5102 (d); a second cause of action on behalf of plaintiff as against defendants Etem Bizati and Herren Enterprises, Inc. d/b/a Medford Gulf (Bizati and Herren) based on negligence in, among other things, failing to provide plaintiff with a safe and proper ingress and egress on the premises, causing or allowing a condition constituting a trap, and failing to timely warn of said condition; and a third, derivative, cause of action on behalf of plaintiff Michele Francis as against all the defendants for loss of services. In their respective answers, defendant Onorato and defendants Bizati and Herren assert cross claims as against each other for contribution and/or indemnification.

Defendants Bizati and Herren now move for summary judgment dismissing the complaint and all cross claims as against them on the grounds that they were not negligent in the operation of the gas station and did not proximately cause plaintiff's injuries. Defendants Bizati and Herren point out that gas station patrons generally exit their vehicles, whether to pump their own gas, go to the convenience store, use the vacuum, use an air pump or go to the restrooms, and must traverse some area of the gas station where vehicles are actively pulling in and out. They assert that they owed plaintiff no duty as a patron of the gas station to protect him from vehicular traffic, particularly an out of control vehicle, inasmuch as it would be impossible to design a structure where gas station patrons are completely insulated from vehicular traffic when outside of their vehicles. Defendants Bizati and Herren further assert that even if they did owe plaintiff a duty, it was not breached by the sudden, unexpected and unforeseeable hazard of defendant Onorato's forward accelerating vehicle, which was the sole proximate cause of plaintiff's injuries. In support of their motion, defendants Bizati and Herren submit, among other things, the summons and complaint; the answer of defendant Onorato, their answer and amended answer with cross claim; their answer to cross claim; plaintiffs' bill of particulars; and the deposition transcripts of non-party witness Robert Prestopino, plaintiff, defendant Onorato, and Farhan Karamat on behalf of defendants Bizati and Herren.

A party seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach was a proximate cause of the plaintiff's injury (*see*, ***Pulka v Edelman***, 40 NY2d 781, 782, 390 NYS2d 393 [1976]; ***Vetrone v Ha Di Corp.***, 22 AD3d 835, 837, 803 NYS2d 156 [2d Dept 2005]). Owners and lessees are under a duty to maintain their property in a reasonably safe condition in view of the existing circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the

risk (*see*, ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]; *see also*, ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 519 -520, 824 NYS2d 166 [2d Dept 2006]).

The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court (*see*, ***DiPonzio v Riordan***, 89 NY2d 578, 583, 657 NYS2d 377 [1997]). Regardless of a plaintiff's status, the scope of duty owed by a defendant is defined by the risk of harm reasonably to be perceived (*see*, ***Sanchez v State of New York***, 99 NY2d 247, 252, 754 NYS2d 621 [2002]; ***Basso v Miller***, 40 NY2d at 241, 386 NYS2d 564; ***Palsgraf v Long Island R.R. Co.***, 248 NY 339, 344, 162 NE 99 [1928]). Foreseeability does not define duty; it merely determines the scope of the duty once a duty is found to exist (*see*, ***Pulka v Edelman***, 40 NY2d at 785, 390 NYS2d 393). Courts traditionally fix the duty point by balancing several factors including the reasonable expectations of the parties and society generally, the proliferation of claims, and the likelihood of unlimited or insurer-like liability (*see*, ***Matter of New York City Asbestos Litig.***, 5 NY3d 486, 493, 806 NYS2d 146 [2005]).

The duty of a landowner or other tort defendant is not limitless (*see*, ***DiPonzio v Riordan***, *supra*). In analyzing questions regarding the scope of an individual actor's duty, the courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm and whether the accident was within the reasonably foreseeable risks (*see*, *id.*). An individual who assumes a duty may be held liable for a breach of that duty if the individual's conduct placed the injured party in a more vulnerable position than if the obligation had not been assumed (*see*, ***Mirza v Metropolitan Life Ins. Co.***, 2 AD3d 808, 809, 770 NYS2d 384 [2d Dept 2003]; ***Gauthier v Super Hair***, 306 AD2d 850, 851, 762 NYS2d 736 [4th Dept 2003]; ***Cohen v Heritage Motor Tours***, 205 AD2d 105, 106, 618 NYS2d 387 [2d Dept 1994]; *see also*, ***Demshick v Community Hous. Mgt. Corp.***, *supra*).

Like duty, proximate causation is a legal concept which stems from policy considerations intended to place manageable limits upon the liability that flows from negligent conduct (*see*, ***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 314, 434 NYS2d 166 [1980]; ***Thomas v United States Soccer Fedn.***, 236 AD2d 600, 653 NYS2d 958 [2d Dept 1997]). Where the acts of third persons intervene between the defendants' conduct and the plaintiff's injury, liability turns on whether the intervening act is a normal or foreseeable consequence of the situation created by the defendants' negligence (*see*, ***Derdiarian v Felix Contr. Corp.***, *supra* at 315, 434 NYS2d 166; ***Parvi v City of Kingston***, 41 NY2d 553, 560, 394 NYS2d 161[1977]; ***Smith v County of Nassau***, 232 AD2d 474, 648 NYS2d 343 [2d Dept 1996]). If the intervening act is extraordinary under the circumstances, unforeseeable in the normal course of events, or independent of the defendants' conduct, it may be a superseding act which breaks the causal nexus (*see*, ***Di Ponzio v Riordan***, *supra*; ***Derdiarian v Felix Contr. Corp.***, *supra*). Moreover, while proximate causation generally presents an issue of fact for a jury's determination (*see*, ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989]), where only one conclusion may be drawn from the established facts, proximate causation may be determined as a matter of law (*see*, ***Derdiarian v Felix Contr. Corp.***, *supra*; ***Gomez v City of New York***, 249 AD2d 362, 671 NYS2d 108 [2d Dept 1998]; ***Wright v New York City Tr. Auth.***, 221 AD2d 431, 633 NYS2d 393 [2d Dept 1995]; *see also*, ***Megally v LaPorta***, 253 AD2d 35, 679 NYS2d 649 [2d Dept 1998]).

Plaintiff testified at his deposition that he is self-employed in construction and that on the morning of the incident, at about 10 a.m., he drove one of his dump trucks to the subject full service gas station to obtain diesel fuel. In addition, plaintiff testified that he drove his truck up to the island for trucks to fill up gas and pumped his gas, then went to the building with a concession stand where the employee calculated his cash discount, and said employee then directed him to go to the island for cars which has a booth to pay for the gas. Plaintiff also testified that he went to the door of said booth, which is in the roadway where the vehicles drive in and out, and that he stood in the roadway to pay because the booth was too small for him to enter. According to plaintiff, an employee came "a little bit" out of the booth and while plaintiff was paying him, there was a vehicle to his left that had just finished getting gas and a vehicle to his right that was getting gas. Plaintiff explained that both vehicles were on the east side of the two islands and both were facing north. Plaintiff further testified that he then heard an engine start and the engine sounded like it was "floored" and before plaintiff knew it, in about a second, the vehicle to his left came up on him and his face went down and hit the vehicle's windshield. Plaintiff described the area of the booth as being two parallel gas pump islands on curbs between which was a booth that was on ground level, with no step up, and that the distance between the pumps and booth is minimal, 10 to 15 feet at most. At the time he was hit, plaintiff was only a few feet outside of the booth.

At her deposition, defendant Onorato testified that when she arrived at the subject gas station on the date of the incident between 10:30 a.m. and 11 a.m., she drove her 1995 Cirrus Chrysler up to the first pump on the side closest to Route 112 and that said pump was located in a vertical line with the attendant booth and another pump. In addition, defendant Onorato testified that at the time that she was waiting for the attendant to come, there was a black van in front of her vehicle on the same side of the pump as her vehicle. According to defendant Onorato, after the attendant who pumped her gas returned her credit card, she put her window up and as she was putting her credit card back into her wallet, the same attendant knocked on her driver's side window and motioned to her to move her vehicle, because there was a vehicle behind her, and repeated said actions. Defendant Onorato testified that after the first knocking at the window she shook her head at the attendant, put her wallet and belongings on the seat next to her and proceeded to put her seat belt on and when the attendant knocked at the window the second time she jumped again, put her key into the ignition and started her vehicle and put it in drive. Defendant Onorato also testified that she could not recall where her right foot was at the time, whether on the gas pedal or the brake; that prior to the attendant knocking on her window she was aware that plaintiff was standing at most five feet away in front of her vehicle and parallel to the booth talking to someone; and that after she put her key in the ignition, her vehicle sped forward and she saw plaintiff on the hood of her vehicle. Defendant Onorato further testified that her vehicle stopped at the cement platform where the pumps were, the wheels were still spinning, and someone was yelling at her turn her ignition off.

The non-party witness, Robert Prestopino, testified at his deposition that the subject gas station is a full service gas station; that he drove his vehicle to the furthest southwesterly pump on the northwest island with his vehicle facing south; that when he arrived at the pump, he did not see any attendants at said island; and that defendant Onorato's vehicle was stopped at the pump across from him to the left on the same island and defendant Onorato's vehicle was facing north. According to Mr. Prestopino, before exiting his vehicle, he heard the screeching of tires and saw smoke coming from his left. Mr. Prestopino described the sound as being akin to someone stepping on the gas full throttle with the tires having nowhere to go and just burning rubber. Mr. Prestopino stated that it was a clear day with no rain and the ground was dry in the area of defendant Onorato's vehicle. He also stated that he

did not observe or hear any attendant talking to defendant Onorato prior to the incident.

An employee of the subject gas station, Farhan Karamat testified at his deposition that on the date of said incident, the subject gas station was full service; that plaintiff was a regular customer who bought diesel for his truck by usually paying cash but sometimes paying by credit card; and that the weather was sunny and dry. In addition, he testified that on the date of the incident, plaintiff wanted to pay by credit card and that there was no credit card machine in the convenience store so customers who wanted to pay by credit card had go to the booth near the gas pumps for cars which had all the credit card machines. Mr. Karamat also testified that he had never seen defendant Onorato at the gas station prior to this incident; that he did not witness defendant Onorato's vehicle striking plaintiff; and that he first observed her vehicle after hearing the sound of wheels and plaintiff was lying on its hood. According to Mr. Karamat, when he heard the sound of wheels, he looked back and saw that the attendant who had pumped defendant Onorato's gas was in the booth.

Here, defendants Bizati and Herren failed to meet their initial burden of establishing their entitlement to summary judgment as a matter of law (*see*, ***Paul v Cooper***, 45 AD3d 1485, 845 NYS2d 905, 907 [4th Dept 2007]). Although counsel for defendants Bizati and Herren asserted that it was generally expected that gas station patrons would traverse the property for various services and that it would be impossible to design the property to insulate such patrons from vehicular traffic, said defendants did not submit an affidavit of an expert with respect to the design and safety of said area in support of counsel's statements (*compare*, ***Paul v Cooper***, *supra*; ***Phelan v Ferello***, 207 AD2d 874, 616 NYS2d 655 [2d Dept1994]). In addition, to the extent that defendants Bizati and Herren contended in support of their motion that the sole proximate cause of the subject accident was defendant Onorato's negligent driving and that the accident was not reasonably foreseeable, said defendants failed to meet their initial burden (*see*, ***Paul v Cooper***, *supra*). Inasmuch as defendant Onorato's vehicle was able to proceed unimpeded from the gas pump area to an adjacent booth area where gas station patrons were known and possibly directed to stand in order to pay and there was no curb or wheel blocks or other barriers to protect pedestrian patrons in said area, the proof proffered by defendants Bizati and Herren raises issues of fact as to whether it was foreseeable that a vehicle, that had just utilized the adjacent gas pumps, would strike a patron standing in the roadway next to the booth (*see*, ***Fuller v Marcello***, 17 AD3d 1017, 1018 - 1019, 794 NYS2d 218 [4th Dept 2005]; *see also*, ***Arena by Arena v Ostrin***, 134 AD2d 306, 520 NYS2d 785 [2d Dept 1987]). Moreover, it is true that defendants Bizati and Herren owed no duty to their patrons to direct traffic within the confines of their service station (*see*, ***Stone v Williams***, 97 AD2d 509, 510, 467 NYS2d 879 [2d Dept 1983]). However, the adduced evidence raises issues of fact as to whether the gas station attendant who pumped defendant Onorato's gas knocked on defendant Onorato's window and motioned her to leave and whether it was foreseeable that such actions would startle defendant Onorato and cause her to lose control of her vehicle. Therefore, that portion of the motion of defendants Bizati and Herren for summary judgment dismissing the second cause of action as against them must be denied, regardless of the sufficiency of the opposition papers (*see*, ***Winegrad v New York Univ. Med. Ctr.***, *supra*). .

In the alternative, defendants Bizati and Herren move for summary judgment dismissing the complaint as against them on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Defendants Bizati and Herren have no defense based on the "serious injury" threshold of Insurance Law § 5102 (d), inasmuch as the action as against them is not against "covered

person[s]" as defined in Insurance Law § 5102 (j), but is instead based on premises liability (*see*, ***Lee v Piers***, 11 AD3d 257, 782 NYS2d 712 [1st Dept 2004]; *see generally*, ***Hill v Metropolitan Suburban Bus Auth.***, 157 AD2d 93, 555 NYS2d 803 [2d Dept 1990]). Therefore, defendants Bizati and Herren cannot seek dismissal of the second cause of action against them on grounds appropriate for dismissal of the first cause of action against defendant Onorato. It so follows that the portion of the motion of defendants Bizati and Herren for summary judgment on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

Defendant Onorato now cross-moves for summary judgment in her favor dismissing the complaint and all cross claims as against her on the grounds that plaintiff Arthur Francis did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of her cross motion, defendant Onorato merely submits a notice of cross motion, the affirmation of her attorney, and the affidavit of service of the cross motion. For the sake of judicial economy and unnecessary duplication of exhibit materials, defendant Onorato's attorney seeks to adopt and incorporate by reference all of the factual statements and legal arguments of the attorney for co-defendants Bizati and Herren on their motion.

The cross motion must be denied as procedurally defective for failure to submit a complete copy of the pleadings, that is, the complaint and the answers of the defendants (*see*, CPLR 3212 [b]; ***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2d Dept 2005]; ***Gallagher v TDS Telecom***, 280 AD2d 991, 720 NYS2d 422 [4th Dept 2001]; ***Mathiesen v Mead***, 168 AD2d 736, 563 NYS2d 887 [3d Dept 1990]). The pleadings submitted with another party's motion or cross motion cannot be incorporated by reference (*see*, CPLR 3212 [b]). Nevertheless, the Court will search the record pursuant to CPLR 3212 (b) as to the issue of serious injury inasmuch as whether the plaintiff suffered a "serious injury" as defined by Insurance Law § 5102 (d) was clearly raised as an issue in the motion papers of defendants Bizati and Herren (*see*, ***Star v Badillo***, 225 AD2d 610, 638 NYS2d 791 [2d Dept 1996]).

By their bill of particulars, plaintiffs allege that as a result of the subject accident, plaintiff Arthur Francis sustained serious injuries including, cervical spine injuries involving a C6/7 disc herniation extending into the intervertebral foramina bilaterally, osteophytes, stenosis, crepitus and tenderness over the right and left paracervical muscles; injuries to the mouth and jaw in the form of a .5 centimeter upper lip laceration requiring sutures, fractures of veneers of teeth numbered 9 and 10, a widened periodontal ligament tooth number 9; post-traumatic stress disorder; lumbosacral sprain and strain; right wrist sprain; and bilateral hip pain. In addition, plaintiffs allege that following said accident, plaintiff was treated and released from Brookhaven Memorial Hospital and was thereafter confined to bed and home for approximately two days. Plaintiffs also allege that at the time of said accident, plaintiff was employed as a machine operator and was incapacitated from his employment for approximately two days. Plaintiffs further allege that plaintiff sustained a loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Defendants Bizati and Herren submitted with their motion papers plaintiff's Brookhaven Memorial Hospital emergency room records; records of plaintiff's treating orthopedic surgeon, Stuart B. Cherney, M.D.; an MRI report dated July 28, 2003 of plaintiff's cervical spine; records of plaintiff's treating orthopedic surgeon, Dr. Labiak; plaintiff's physical therapy records; the records of plaintiff's treating dentist, Dr. Graskemper; the affirmed report of defendants' examining dentist, Arthur W. Kupperman, D.M.D.; and the affirmed report of defendants' examining orthopedic surgeon, Arthur M.

Bernhang, M.D.

Insurance Law § 5102 (d) defines "serious injury" as "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see*, ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). 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 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

Here, defendants failed to establish, prima facie, that plaintiff Arthur Francis did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see*, ***Edwards v Sultan Transp., Inc.***, ___ NYS2d ___, 2008 WL 257572, 2008 NY Slip Op 00646 [2d Dept Jan 29, 2008]). Defendants' examining orthopedic surgeon, Dr. Bernhang, set forth range of motion findings concerning plaintiff's cervical spine, hips, knees and wrists but failed to compare those findings to what is normal (*see*, *id.*). Notably, most of plaintiff's observed ranges of motion were below the average range of joint motion (ARJM) that the examining orthopedic surgeon used as his comparison guide. However, absent a comparative quantification of those findings observed in his report as to what is normal, it cannot be concluded that the ranges of motion in plaintiff's cervical spine, hips, knees and wrists were normal, or that any limitations were mild, minor, or slight so as to be considered insignificant within the meaning of the no-fault statute (*see*, ***McLaughlin v Rizzo***, 38 AD3d 856, 832

NYS2d 666 [2d Dept 2007]; ***Harman v Busch***, 37 AD3d 537, 829 NYS2d 680 [2d Dept 2007]; ***Iles v Jonat***, 35 AD3d 537, 825 NYS2d 540 [2d Dept 2006]). In addition, although Dr. Bernhang attributed the loss of range of motion of plaintiff's cervical spine to degenerative changes noted in the July 28, 2003 cervical spine MRI report, Dr. Bernhang opined at the end of his report that there was a traumatic aggravation of pre-existing degenerative changes of the cervical spine with residual complaints as a result of the subject accident (*see*, ***McLaughlin v Rizzo***, *supra*). Thus, defendants failed to establish, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see*, ***Harman v Busch***, *supra* ; ***Cruz v Williams***, 34 AD3d 719, 825 NYS2d 510 [2d Dept 2006]).

Inasmuch as defendants failed to establish his prima facie entitlement to judgment as a matter of law based on whether plaintiff sustained a "serious injury," it is unnecessary to consider whether plaintiffs' opposition papers were sufficient to raise a triable issue of fact on that matter (*see*, ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; ***McDowall v Abreu***, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; ***Coscia v 938 Trading Corp.***, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]). Therefore, the cross motion is denied.

Accordingly, the motion and the cross motion are denied.

Dated: FEB 27 2008

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**