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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Steven J. Milim and Susan Milim,

Plaintiffs,

-against-

County of Suffolk, Suffolk County Police Department and Roger Chin,

Defendants.

Index No.: 6842/2005

Motion Sequence No.: 004; MG
Motion Date: 10/29/08
Submitted: 5/6/09

Motion Sequence No.: 005; MD
Motion Date: 12/10/09
Submitted: 5/6/09

Motion Sequence No.: 006; MD
Motion Date: 1/19/09
Submitted: 5/6/09

Attorneys [See Rider Annexed]

Clerk of the Court

Upon the following papers numbered 1 to 58 read on this motion and cross motions for summary judgment, discovery: Notice of Motion and supporting papers, (004) 1 - 11; Notice of Motion and supporting papers, (005) 12 - 25; (006) 26 - 43; Answering Affidavits and supporting papers, 44 - 47; 48 - 49; Replying Affidavits and supporting papers, 50 - 51; 52 - 53; 54 - 58.

This is an action for damages for personal injuries allegedly sustained by the plaintiffs, Susan Milim and Steven J. Milim, arising out of a motor vehicle accident which occurred on February 4, 2005 on New York Avenue at its intersection with 15th Street, Town of Huntington, County of Suffolk, State of New York, while stopped at a red light behind two other vehicles and wherein it is claimed that the plaintiff's vehicle was struck when the defendant's police car operated by Roger Chin spun out of control crossing from the southbound lane into the northbound lane in which the plaintiffs were traveling. Susan Milim was a passenger in the vehicle operated by her husband Steven J. Milim at the time of the occurrence.

In their answer, the defendants asserted a counterclaim against Steven J. Milim asserting that the injuries claimed by Susan Milim were caused by virtue of the carelessness, recklessness and negligence of Steven J. Milim.

In motion 004, the plaintiff Steven J. Milim claims entitlement to an order granting summary judgment dismissing the counterclaim on the issue of liability on the basis that he bears no liability for the accident in that his vehicle was stopped at a red light when the accident occurred.

In motion 006, the defendants, County of Suffolk, Suffolk County Police Department and Roger Chin, seek summary judgment dismissing the complaint on the basis of application of the "reckless disregard" standard of Vehicle and Traffic Law §1104(e) and based upon the sudden and unforeseen emergency not of the defendant's making.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (see, Sillman v. Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR §3212[b]; see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (see, Joseph P. Day Realty Corp. v. Aeroxon Prods., 148 AD2d 499 [2nd Dept., 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (see, Castro v. Liberty Bus Co., 79 AD2d 1014 [2nd Dept., 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (see, Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 [1979]).

In support of motion 004, the plaintiffs have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint; defendants' answer with the counterclaim and the reply; a copy of the verified bill of particulars; copies of the transcripts of the examinations before trial of Steven J. Milim, Susan Milim, and Roger Chin, dated April 12, 2006; and a copy of an uncertified MV104 Police Report with witness statements.

In support of motion 006, the defendants have submitted, inter alia, an attorney's affirmation; uncertified copies of the Police Field Report and MV 104 Police Report; affidavit of Sgt. Kevin McKeon; copies of the Notice of Claim, summons and complaint, defendants' answer with the counterclaim and the reply; copies of the transcripts of the hearings conducted pursuant to GML 50-h of Steven Milim dated April 1, 2005; four pages out of 67 pages of the transcript of the examination

before trial of Steven Milim dated April 12, 2006, and copies of the transcripts of the examinations before trial of Steven J. Milim dated April 12, 2006, and non-party witnesses Paula Rizzo dated June 13, 2003, Darren Huges dated April 4, 2006, Gay Bullock dated April 6, 2006; and uncertified copies of the witness statements of Paula Rizzo and Gay Bullock attached to the MV 104 Police Accident Report.

Initially, the Court notes that the copies of the uncertified MV 104 Police Report with annexed statements and the copy of the police field report constitute hearsay and are inadmissible, (see, Lacagnino v. Gonzalez, 306 AD2d 250 [2nd Dept., 2003]; Hegy v. Coller, 262 AD2d 606 [2nd Dept., 1999]).

Steven Milim testified that he is a physician licensed in the State of New York in the field of obstetrics and gynecology and is a partner in Long Island Women's Health Care. The accident occurred on February 4, 2005, which he described as a cold, wet day. He was driving and his wife was a passenger in the vehicle. He had been traveling northbound on New York Avenue, which he described as having two lanes, one northbound and one southbound, separated by a yellow line. He was stopped at a red traffic light at the intersection with 15th Street, Huntington, and there were no cars moving to his left which would have been traveling southbound. There were parked cars to the right of his travel lane. Just ahead of his vehicle was a left turn lane for northbound traffic, but his vehicle was stopped behind two other vehicles before that left turn lane began. When the light turned green, the two cars ahead of him began to move, but his vehicle was still stopped when his wife yelled "look out." He had been looking straight ahead and then looked towards the left when he saw a marked police car in the southbound travel lane with no lights, no siren, spinning counterclockwise out of control coming towards him. The police vehicle then crossed into the northbound travel lane and the passenger side of the police vehicle struck his vehicle by the front driver's side fender, pushing his hood and front end towards him. He did not see any southbound vehicles in front of the police car. He stated the police vehicle spun around a couple of times, full three sixty, spinning. He did not see the police car driving in a straight direction southbound at any time prior to the accident. He gave his best estimate that the police car was traveling between sixty and seventy miles per hour when he saw it spinning and moving towards him. He described the impact of the police vehicle with his vehicle as being "like an explosion went off inside" his car-"like a tremendous large force," causing his vehicle to be moved into an eastbound direction. He did not remember seeing any lights on the police vehicle and stated there were no sirens.

Susan Milim testified that when she first saw the police car in the southbound travel lane of New York Avenue, it was out of control spinning, at about seventy miles per hour, and that the passenger side of the police vehicle struck the front end of her vehicle which was stopped at the time. About five seconds (the blink of an eye) passed from when she yelled, "Look out" until the accident occurred.

Paula Rizzo testified that she witnessed the accident on February 4, 2005 while operating her vehicle. She described the day as sunny and mild and stated the roads were dry. She made a right onto New York Avenue from 13th Street and was traveling southbound on New York Avenue for about 600 feet when she came to a stop at the traffic light at the intersection with 15th Street as the light was red

for her direction. There was one car stopped at the light in front of her. At that intersection, 15th Street was to her left but there was no roadway to her right to turn, but one could travel south straight on New York Avenue. It was her intention to make a left at that intersection onto 15th Street so her vehicle was stopped in the southbound left turn lane on New York Avenue. While she was stopped at that light, she could see the police vehicle in her rear view mirror traveling southbound on New York Avenue, passing the intersection at about 13th Street behind her. She testified that it was the "engine sound of a car traveling very fast" which made her notice the police vehicle. She testified that it sounded like a race car. There were no lights and no siren activated on the police vehicle. She stated that at the time she thought the police vehicle was going too fast, that it was "flying" or going fast enough where it should have had lights and sirens on. She estimated its speed as about forty five to fifty miles per hour. She saw a car which was traveling northbound on New York Avenue making a left onto West 14th Street and observed the police vehicle swerve to avoid that turning car, but she did not know which direction he swerved in and stated the police vehicle did not strike that turning vehicle. The police vehicle then passed her on her right, went around the car in front of her, then began to spin. The police vehicle had the accident with the Milim vehicle about one second after the police vehicle passed her car. The first contact that she saw involving the police vehicle was at the intersection of 15th Street and New York Avenue when it came into contact with the Milim vehicle in the northbound lane of New York Avenue. Two seconds after striking the Milim vehicle, the police vehicle then moved northbound and to the right striking a small tree and a fence, and came to a stop facing in a northbound direction. She thought the police vehicle may have slowed down as it came to the intersection but she did not hear any screeching brakes.

Darren Hughes testified that he observed the accident of February 4, 2005. He was northbound on New York Avenue at 14th Street (described as the intersection without the light and that 15th Street had a light). He described the northbound traffic as basically crowded-stop and go, but stated the southbound traffic was regular. There was a car ahead of him. The car behind him and the southbound police car were involved in the accident. He was stopped when he first saw the police car when it was coming through the intersection in the southbound lane and to his left. He testified the police vehicle was "coming very fast," "flying," and was already starting to fishtail or to slide in his direction with the front of the police vehicle was coming towards him. The police vehicle had no lights or sirens on. He testified that he could tell it was sliding and out of control and he looked at it as it passed perpendicular to the car behind him. He then looked in his rearview mirror and saw the impact. He stated to the effect that the impact of the police car on the SUV sent the SUV spinning at least one revolution and it seemed to lift the SUV up and off the road causing it to fly backwards. He described the impact as severe. He also indicated that there was no parking on the side of the road where the accident occurred, but stated that further up there were spaces. He further testified that there was a car in the left turn lane which turned left crossing the southbound lane "before the cop car got there." He described the weather as mild, there was some melting snow on the ground, but he did not notice the roadway being wet or icy. His vehicle did not slide.

Gay Bullock testified that on February 4, 2005, the weather was sunny and nice, a beautiful day, and the snow on the grass was melting. She was leaving work and entered onto New York Avenue (Route 110) from 19th Street and traveled in a northerly direction. She described northbound traffic as crowded with cars lined up behind each other and moving slowly and southbound traffic as

clear. The Jeep involved in the accident was in front of her in the northbound lane. The police car involved in the accident was traveling southbound on New York Avenue. She did not see a traffic light and did not see a vehicle make a left turn. She described the accident as occurring in the northbound lane. She thought the Jeep was just starting to inch up. Just before the police car hit the Jeep, she thought the police car was traveling about thirty-five miles per hour. She also thought the contact was between the fronts of the two vehicles, and that the police car was coming on an angle, traveling sideways, and hit at an angle, rotating toward northbound New York Avenue. The contact caused the Jeep to spin to the right. The police car ended up on the side of the road on a tree on the northbound side. When she observed the police car prior to the accident it did not have on its lights or sirens. She heard no honking of horns.

Roger Chin testified to the effect that he has been a police officer employed by Suffolk County Police Department for approximately eleven years and was assigned to the Second Precinct, initially on foot patrol for three years and then assigned to Community Oriented Police Policing Enforcement (COPE) in 1995, located on Park Avenue, Huntington. During his time with COPE, he was on foot patrol for three years and then was given vehicle duty. He had several vehicles thereafter and used whatever vehicle was available, mostly a marked vehicle which he described as having the Suffolk County decals on the side and having an overhead siren and lights. He had passed an Emergency Vehicles Operations course. In February 2005, he was assigned to an 8 to 4 tour, and his call sign was COPE 25 which identifies who is responding on the radio for that tour. Being in the COPE Unit meant that he was not designated to a specific area and went where there were problems in the precinct. The vehicle has a radio attached to it and could receive communications from dispatch in the Second Precinct that were not directed to his vehicle. He did not remember receiving an emergency call from central dispatch on February 4, 2005 and only remembered waking up in the hospital after the accident and did not recall the incident. He could not remember if he engaged any sirens on his vehicle prior to the accident. He did not know what the weather conditions were that day. He believed the speed limit on the roadway of New York Avenue where the accident occurred was thirty miles per hour.

Sgt. Kevin McKeon set forth in his affidavit that on February 4, 2005 he was employed as a Sergeant in the Second Police Precinct and that there was a report of a robbery at the Dairy Barn Store located at the intersection of Route 110 and Holland Avenue, Melville, at approximately 3:12 p.m.. Officer Roger Chin responded to the radio dispatch call concerning the robbery when the accident occurred.

The adduced testimonies established that the Milim vehicle was stopped for a red light in the northbound travel lane of New York Avenue, or barely inching forward, when it was struck by the police vehicle. It further established that the police vehicle did not have lights or sirens on at the time it was traveling southbound on New York Avenue, and appeared to slide and spin out of control, striking the plaintiffs' vehicle within seconds from the time the plaintiffs first saw the police vehicle spinning toward them.

"While negligence actions do not generally lend themselves to resolution by motion for summary judgment, such a motion will be granted where no fault or culpable conduct can be attributed to the movant. ... Under New York law, there is no legal duty to protect against an

attributed to the movant. ... Under New York law, there is no legal duty to protect against an occurrence which is extraordinary in nature, and, as such, would not suggest itself to a reasonably careful and prudent person as one which should be guarded against.... More than a century ago, the Court of Appeals of New York first considered the reasonableness of an actor's conduct when confronted with a sudden emergency situation, and has since then articulated and applied the common-law emergency doctrine which recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternate courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context provided the actor has not created the emergency situation. A driver faced with an emergency situation is not obligated to exercise his or her best judgment, and an error in judgment is not sufficient to constitute negligence," (Raza v. Raza, 2005 NY Misc Lexis 3306 [Sup. Ct. Nassau County, 2005]).

In Pettica v. Williams, 223 AD2d 987 [3rd Dept., 1996] (citing Rivas v. Metropolitan Suburban Bus Auth., 203 AD2d 349 [2nd Dept., 1994]), it was instructed that when a driver is confronted with an emergency situation, he will not be held to the same standard of care that would be applied to a driver in a nonemergency situation. In Glick v. City of New York, 191 AD2d 677 [2nd Dept., 1993], it was set forth that if a party is confronted with an emergency not of his own making, reacts as a reasonable person would when faced with similar circumstances, no negligence will be found.

"[A]n emergency situation is defined as a sudden and unforeseen occurrence not of one's own making... summary resolution is possible ...when the driver presents sufficient evidence to establish the reasonableness of his or her actions and there is not opposing evidentiary showing sufficient to raise a legitimate question of fact on the issue" (Smith v. Brennan, 245 AD2d 596 [3rd Dept., 1996]).

The defendants have submitted no admissible evidence to raise a triable issue of fact to preclude summary judgment. Since the plaintiff driver was confronted with an emergency situation not of his making, any error in his judgment in responding to the emergency would be insufficient to preclude the motion for judgment as a matter of law. Except for conclusory assertions by counsel for the defendants, no negligence on the part of Steven Milim has been demonstrated. Upon this motion for summary judgment an issue of law only is presented. The question of law is whether, admitting all the facts presented, and giving to the plaintiff the advantage of every inference that can properly be drawn from the facts presented, an issue of fact is presented for the determination of the jury (see, Kraus v. Birnbaum, 200 NY130 [1910]). Here, there has been no admissible proof submitted which raises a legitimate factual issue to preclude summary judgment concerning whether the plaintiff acted unreasonably or imprudently in the emergency context under the circumstances or was negligent in causing injury to his passenger or liable in any way for the occurrence of the accident

Based upon the evidentiary submissions, the plaintiffs have established entitlement to summary judgment on the counterclaim and the defendants have raised no factual issue to preclude summary judgment. Accordingly, motion 004 for summary judgment on the counterclaim is granted and the counterclaim asserted by the defendants against the plaintiff Steven Milim is dismissed with prejudice.

Turning to motion 006, the defendants seek summary judgment on the issue that Officer Chin did not operate his motor vehicle in "reckless disregard" pursuant to New York Vehicle & Traffic Law §1104-b and on the alleged basis he was responding to an emergency situation. It is determined that the defendants have not demonstrated prima facie entitlement to dismissal of the complaint on those grounds.

Under New York Vehicle & Traffic Law ("VTL") §114-b, entitled "Emergency Operation", an emergency operation is one involving certain specified operations, including responding to a police call and alarm of fire, (see, Sims v. Town of Ramapo, 177 Misc.2d 302 [Sup. Ct. Rockland County, 1998]). An officer responding to a radio call concerning a burglary in progress is engaged in an emergency operation, (see, Sims v. Town of Ramapo, 177 Misc.2d 302 [Sup. Ct. Rockland County, 1998]). The uncontradicted averments of Sgt. Kevin McKeon (set forth in his affidavit) establish that there was a report of a robbery at the Dairy Barn Store located at the intersection of Route 110 and Holland Avenue, Melville, at approximately 3:12 p.m. and that Officer Roger Chin was responding to the radio dispatch call concerning the robbery when the accident occurred. Officer Chin could not recall the events prior to the accident or immediately thereafter. The plaintiff has submitted no evidentiary proof to raise a factual issue as to whether Officer Chin was responding to an emergency call at the time of the accident. It is therefore determined Officer Chin was engaged in an emergency operation of his police vehicle.

The operator of an "authorized emergency vehicle" (VTL §101) who is engaged in an "emergency operation" as defined by VTL §114-b, is afforded the benefits of VTL§1104, including protection from civil liability unless engaged in acts of reckless disregard (see, Gonyea v. County of Saratoga et. al., 23 AD3d 790, [3rd Dept., 2005]).

VTL §1104 subdivision (e) provides, in pertinent part, that the "provisions [(a) through (d)] shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others." When engaged in an emergency operation, an officer is subject to the reckless disregard standard under section 1104(b) of the Vehicle and Traffic Law, (see, Sims v. Town of Ramapo, 177 Misc.2d 302 [Sup. Ct. Rockland County, 1998]). The manner in which a police officer operates his or her vehicle in an emergency situation may not form the basis for civil liability to an injured third party unless the officer acted in reckless disregard for the safety of others; the "reckless disregard" standard requires proof that the officer intentionally committed an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and requires a showing of more than a momentary lapse in judgment, (see, Puntarich v. County of Suffolk, et. al., 47 AD3d 785 [2nd Dept., 2008]); see,

also, Badalamenti v. City of New York, et. al., 30 AD3d 452 [2nd Dept., 2006]; Worden v. Enser, 268 AD2d 582 [2nd Dept., 2000]). When an emergency vehicle, including a police vehicle, is involved in an emergency operation such as pursuing an actual or suspect violator of the law, the driver of the emergency vehicle is entitled to qualified immunity and is only liable for damages when the driver's conduct is found to be reckless (see, Saarinen v. Kerr, 84 NY2d 494 [1994]; see, VTL §§101, 114-b, 1104[a],[e]). This rule strikes a balance which allows police officers "to carry out their important responsibilities ...[which]... will inevitably increase the risk of harm to innocent motorists and pedestrians "(Saarinen v. Kerr, 84 NY2d 494 [1994]) while still protecting "the general public against disproportionate, overreactive conduct" (Campbell v. City of Elmira, 84 NY2d 505 [1994]; see, Flack, et al. v. State of New York, 57 AD3d 1199 [3rd Dept., 2008]).

VTL §1104(e) mandates a reasonably defined and precedentially developed standard of care. It requires the trier of fact not to second-guess a police officer's split-second weighing of choices but instead to determine whether the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome (see, Gonzales v. Iocovello, 93 NY2d 539 [1999]).

The statutory requirement of VTL §1104 that the operator of an emergency vehicle should have due regard for the safety of all persons and the imposition of responsibility for the consequences of his reckless disregard of the safety of others are not such as to require compliance with the generally accepted definition of negligence. The immunity afforded the driver of an emergency vehicle from the regulations governing speed and direction of travel can only be denied when there is evidence of an exercise of these privileges in excess of reasonableness, (see, Stanton v. State, 29 AD2d 612 [3rd Dept., 1967]).

A police officer is qualifiedly exempt from certain traffic laws in driving a vehicle in an emergency operation, and his or her conduct could not form the basis of civil liability to an injured third party unless the officer acted in reckless disregard for the safety of others (see, Turini v. County of Suffolk et. al., 8AD3d 260 [2nd Dept., 2004]). In Turini, the court set forth that, contrary to contentions, conduct which violated provisions of the New York Vehicle and Traffic Law relating to maximum rate of speed, lane-changing procedures, and other rules of the road did not, standing alone, render the operator of an emergency vehicle reckless or provide an independent basis for liability. It further stated that the reckless disregard standard for an action resulting from an automobile accident involving a police officer responding to an emergency requires evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome (see, also, Lorber v. Town of Hamburg, 225 AD2d 1062 [4th Dept., 1996], citing Saarinen v. Kerr, 84 NY2d 494 [1994]; see, also, Campbell v. City of Elmira, 84 NY2d 505 [1994]).

In considering the aforementioned admissible evidence, testimonies, statutes and case law, the Court determines that the defendants have not demonstrated entitlement to summary judgment.

There are factual issues concerning whether Officer Chin, the driver of the emergency vehicle, acted with due regard for the safety of all persons, whether the officer acted in reckless disregard of the safety of others in proceeding at the rate of speed he was traveling southbound on New York Avenue and in entering the intersection as the light was changing from red to green; what his rate of speed was as he entered the intersection and at the time of the accident; whether the officer endangered life or property of the plaintiff; whether the officer drove with caution; whether the emergency vehicle sufficiently stopped or slowed down prior to entering the intersection to observe traffic entering the intersection from any direction; whether the lights should have been flashed or the siren sounded prior to the officer approaching the intersection when the traffic light was changing; whether any vehicle failed to yield the right of way in the intersection; and whether the officer created an emergency situation. Whether the conduct of the operator of the vehicle demonstrated a reckless disregard for the safety of others is an issue of fact in the instant action (see, Molinari v. City of New York, 267 AD2d 436 [2nd Dept., 1999]). Thus, summary judgment is precluded.

Further, the defendants seek dismissal of the complaint on the basis that Officer Chin was confronted with an emergency not of his own making when the unknown vehicle made a left turn into the intersection and therefore he bears no liability for the accident. The defendants have not demonstrated prima facie entitlement to summary judgment on the basis he was confronted with an emergency situation not of his making. Here there are factual issues as set forth above concerning whether or not Officer Chin acted reasonably and prudently under the circumstances and whether he created the emergency situation, thus defendants have not established that the emergency situation was not of his making and summary judgment in favor of defendants is precluded.

Accordingly, motion 006 by the defendants for summary judgment dismissing the complaint on the basis that defendants did not act in reckless disregard of the safety of others, or on the basis that Officer Chin was faced with an emergency not of his own making, is denied.

In motion 005 the defendants seek an order compelling the plaintiff Steven Milim to provide a complete response to the Notice for Discovery and Inspection dated September 21, 2007 served by the defendant County of Suffolk relative to Milim's lost wage claim.

The Notices for Discovery and Inspection dated September 21, 2007 served by the defendants, with regard to Steven J. Milim, are actually subpoenas. Counsel for the defendant asserts that during the course of discovery, plaintiffs served a report from an economist, Lonnie K. Stevans, Ph.D who indicated in that report that he reviewed the tax returns of Dr. Milim and Susan Milim 1998-2005; The New Worklife Expectancy Tables, Revised 2002, by Gener, Level of Professional Attainment and Level of Work Disability, A.M. Gamboa, Jr, PhD, MBA, Vocational Econometrics; 2004 Health Care Survey of Long Island Business; and AON Spring 2006 Health Care Trend Survey. Counsel for the defendants contends that none of the aforementioned information has been provided by the plaintiffs. Counsel for the defendants also sets forth that full disclosure of all disability payments and disability insurance contracts remain outstanding.

In response thereto, the plaintiffs contend that they have provided a full and complete response, to the outstanding discovery pursuant to the demands of September 21, 2007 and defense counsel's subsequent demands by way of letters from the County of Suffolk dated May 21, 2008 and November 28, 2008. Plaintiffs contend that they have provided:

- the tax returns for the years 1998-2005;
- additional returns for 2006 and 2007;
- all W-2's are annexed to the tax returns;
- plaintiff did not receive any 1099 forms for the period of 1998-2007;
- copies of all disability policies;
- authorizations permitting the defendants to obtain premium cost, a disability payment schedule, correspondence and any information contained in the disability carrier's file;
- copies of the information relied upon by the plaintiff's expert used to calculate the plaintiff's economic loss; and
- authorizations permitting the defendants to obtain the tax returns for Steven Milim, MD Laser from 2000-2004-which did not conduct business after 2004.

The plaintiff further stated that he is not in possession of a legal file, privileged or otherwise, in the corporate dissolution proceeding of Long Island Women's Health Care, MD, PC, and that his current attorney did not represent him in that matter.

The plaintiffs have demonstrated compliance with the defendants' discovery demands and have provided those additional items set forth by counsel for the defendant in his supporting affidavit. The plaintiffs have provided authorizations for the defendants to obtain the disability information, including the files maintained by the carriers and the payments made. The plaintiff, Steven Milim, has previously disclosed that he does not possess the legal file concerning the dissolution of his corporation. It is further determined that the defendants have access to the legal documents filed in Nassau County under the index number provided concerning the dissolution matter and do not require an authorization to access those public records.

Accordingly, it is

ORDERED that the motion (004) by the plaintiff on the counterclaim, Steven J. Milim, pursuant to CPLR §3212 for summary judgment dismissing the counterclaim on the issue of negligence asserted against him on the counterclaim is granted and the counterclaim is dismissed with prejudice; and it is further

ORDERED that the motion (005) by the defendants, County of Suffolk, Suffolk County Police Department and Roger Chin, for an order compelling the plaintiffs to provide a complete response to the Notice for Discovery and Inspection dated September 21, 2007 served by the defendants, is considered as an application pursuant to CPLR §3124 and is denied; and it is further

ORDERED that the motion (006) by the defendants, County of Suffolk, Suffolk County Police Department and Roger Chin, pursuant to CPLR §3212 for summary judgment dismissing the complaint based on the application of the "reckless disregard" standard of VTL §1104(e) and based upon the doctrine of sudden and unforeseen emergency not of the defendants' making, is denied.

Dated: October 6, 2009

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

RIDER

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