Giangrasso v Callahan

2010 NY Slip Op 30218(U)

January 13, 2010

Supreme Court, Suffolk County

Docket Number: 01-12952

Judge: Peter Fox Cohalan

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SHORT FORM ORDER

INDEX No. 01-12952
CAL. No. 09-00081-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 5-12-09 (#001)
MOTION DATE 6-10-09 (#002)
ADJ. DATE 11-2-09
MNEMONIC: # 001 - MG
002 - MD

---X

PAUL GIANGRASSO,

Plaintiff,

- against -

MARTIN CALLAHAN, GELCO CORPORATION and H.O. PENN MACHINERY,

Defendants.

---X

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Upon the following papers numbered 1 to 37 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 9 ; Notice of Cross-Motion and supporting papers (002) 10-22 ; Answering Affidavits and supporting papers 23-26; 27-32 ; Replying Affidavits and supporting papers 33-34; 35-37 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by Paul Giangrasso (hereinafter plaintiff), pursuant to CPLR §3212 for summary judgment on the issue of liability, is granted; and it is further

ORDERED that this cross-motion (002) by the defendants, Martin Callahan, Gelco Corporation and H.O. Penn Machinery, pursuant to CPLR §3212 and Insurance Law §5102 for summary judgment dismissing the complaint because the plaintiff's alleged injuries fail to meet the serious injury threshold limits, is denied; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with Notice of Entry upon the defendants and the Clerk of the Calendar Department of the Supreme Court, County of Suffolk, within thirty days of the date of this order, and the Clerk is directed to place this matter at the head of the ready trial calendar for a trial on damages.

The plaintiff's complaint states that on March 8, 2000 he was operating his vehicle on the Route 110 southbound exit ramp of the Northern State Parkway, Huntington, New York, when it was struck in its rear by the vehicle operated by the defendant Martin Callahan (hereinafter Callahan). An answer, dated January 17, 2002, was served on behalf of Callahan and H.O. Penn Machinery (hereinafter H.O. Penn), and an answer, dated February 27, 2002, was served on behalf of Callahan and Gelco Corporation.

In motion (001) the plaintiff seeks summary judgment in his favor on the issue of liability because he bears no culpability for the happening of the accident.

In motion (002), Callahan, Gelco Corporation and H.O. Penn (hereinafter defendants) seek summary judgment dismissing the complaint because the plaintiff's injuries do not meet the serious injury threshold as defined by Insurance Law §5102 .

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 (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979] , ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) 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 (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted 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 (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (001), the plaintiff has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, amended summons and complaint and answers; copies of the transcripts of the examinations before trial (hereinafter EBT) of Callahan, dated May 18, 2005, and the plaintiff, dated September 18, 2005 and October 18, 2005; and an uncertified copy of the MV 104 Police Accident Report; and a copy of a decision from an unrelated action. In opposing this motion, the defendants have submitted, inter alia, an attorney's affirmation; a copy of the transcript of the continued EBT of the plaintiff, dated December 20, 2005; and an uncertified copy of the MV 104 Police Accident Report.

Initially, the Court notes that the unsworn MV-104 police accident reports constitute hearsay and are inadmissible (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

In support of motion (002), the defendants have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, the amended summons and complaint, a copy of the answer served on behalf of Callahan and H.O Penn, and plaintiff's verified bill of particulars; copies of the plaintiff's employee annual vacation form; a copy of the transcript of the EBT of the plaintiff, dated September 19, 2005; a copy of a prescription of John Buonocore, D.O. (hereinafter Buonocore) permitting the plaintiff to return to work on July 14, 2000; copies of the independent pain management examination report, dated March 29, 2000, of Jeffrey Perry,

D.O. (hereinafter Perry), the independent neurological examination report, dated October 20, 2008, of Stephen M. Neuman, M.D. (hereinafter Neuman), the independent orthopedic examination report, dated October 17, 2007, of Stuart N. Kandel, M.D. (hereinafter Kandel); and a copy of a letter, dated March 7, 2000, from Buonocore. In opposing this motion, the plaintiff has submitted an attorney's affirmation; a copy of the transcripts of the EBTs of the plaintiff, dated September 19, 2005 and October 18, 2005; the affidavit of the plaintiff; and the affirmation of Ali E. Guy, M.D. with copies of various tests results and records and miscellaneous correspondence from various doctors.

The function of a reply paper is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion (***In the Matter of the Application of Veronica Montgomery-Costa et al v*** **The City of New York et al,** 2009 NY Slip Op 29461, 2009 Misc Lexis 3116 [Supreme Court of New York, New York County 2009]). Accordingly, such miscellaneous correspondence of various doctors are not considered on this motion.

Callahan testified at his EBT that he had been a territorial sales representative for H.O. Penn for over twenty-two years selling heavy construction equipment. He was driving a 2000 black Explorer provided by H.O. Penn and owned by the Gelco Corporation. He had been using it for travel for about one year prior to the accident on March 8, 2000. It had an automatic transmission and power brakes. He did not recall having the brakes serviced and did not recall whether he had any problem with the brakes. The weather was sunny and clear and the roadway was dry. He had no independent recollection of the accident and stated that he was exiting the westbound lanes of Northern State Parkway to go onto Route 110 via the 110 south ramp when the accident occurred at 1:20 pm at the intersection of the ramp and Route 110 at the merging area. As he entered onto the ramp from Northern State Parkway, his view was unobstructed as far as he could see. He could see the area of the ramp where the accident occurred. He stated he was traveling about ten to twenty miles per hour when he first saw the plaintiff's vehicle about midway on the ramp or about one-eighth of a mile or fifteen car lengths in front of him. His right foot was on the brake at that time. The plaintiff's vehicle then stopped at the bottom of the ramp. When the plaintiff's vehicle traveled about ten feet to proceed onto Route 110, he looked away from the plaintiff's vehicle for about less than ten seconds and began to accelerate, reaching the end of the ramp. He looked left onto Route 110 to see if he could then proceed onto Route 110. He was still looking away from the plaintiff's vehicle when the contact occurred with the plaintiff's vehicle which was then on Route 110 in the right southbound lane. The right front of his vehicle's bumper came into contact with the right rear bumper of the plaintiff's vehicle. He then applied the brakes on his vehicle upon contact. He did not know if the plaintiff's vehicle was stopped when the contact occurred. While on the ramp prior to the accident, when the plaintiff's vehicle began to move, he took his foot off the brake, and when the plaintiff went onto Route 110, he looked away from the plaintiff's vehicle and did not realize the plaintiff was still there when he began to accelerate his vehicle. He then hit the brake hard when he hit the plaintiff's vehicle.

The plaintiff testified that on the date of the accident, March 8, 2000, at about 1 P.M. he was enroute to have his antique car, a 1970 Chevelle, restored. He traveled westbound on Northern State Parkway and entered the southbound ramp for Route 110. He brought his vehicle

to a stop three or four feet from the stop sign at the end of the off ramp and had been stopped for about eight to fifteen seconds, when his vehicle was struck in the rear causing his vehicle to be pushed onto the Route 110 right southbound lane. His right foot was on the brake at the time of impact and he applied both feet to the brake upon impact, but his vehicle did not stop until it traveled about six or seven feet. He heard no skidding, horns or warnings prior to impact. After the impact, his trunk could not open and the bumper was in a V-shape.

It is undisputed that the plaintiff's vehicle was stopped on the Northern State Parkway exit off ramp leading to the southbound travel lanes of Route 110 when it was struck in its rear by the defendants' vehicle. When a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]; *see also,* Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on a wet pavement or some other reasonable excuse (*see,* ***Rainford v Han,*** 18 AD3d 638; 795 NYS2d 645 [2005]; ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 [2005]; ***Power v Hupart,*** *supra*). The only inference that may be drawn from Callahan's EBT testimony is that he was careless in the operation of his vehicle and that he failed to exercise reasonable care in operating his vehicle when he struck the plaintiff's vehicle in the rear (see, generally***, Cacciato v Leatherman,*** 23 Misc 2d 550, 200 NYS2d 152, [Sup. Ct. Queens County 1960]). Callahan's lack of observation of the plaintiff's vehicle stopped in front of his vehicle before his vehicle struck the plaintiff's vehicle is evidence of his negligence (*see,* ***Rudorfer v Bei et al,*** 27 Misc2d 350, 210 NYS2d 176 [Sup. Ct. Kings County 1960]). Callahan has not presented a non-negligent explanation concerning how the collision occurred and he has not shown any negligence by the plaintiff.

Accordingly, motion (001) for summary judgment is granted to the plaintiff as a matter of law on the issue of liability.

As to whether the plaintiff sustained a serious injury within the definition of Insurance Law §5102, pursuant to Insurance Law § 5102(d), " '[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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570).

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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 plaintiff has no cause of action" (***Rodriquez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once 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 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]).

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 a specific percentage of the loss of range of motion must be ascribed 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott*** (supra).

The Court determines 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 defendants have the initial burden "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]).

In his verified bill of particulars, the plaintiff has claimed that he sustained injuries as a result of this motor vehicle accident consisting of, inter alia, a bulging disc at C6-7; recurrent central herniation and left sided herniation at L5-S1 involving the left neural foramen; left paracentral herniations of T 11-T12 and T12-L1; cervical radiculopathy, cervical myofascial pain syndrom, left shoulder derangement; chronic pain syndrome requiring drugs; chronic pain syndrome requiring physical therapy and massage therapy; trigger point injections; epidural steroid injections, Botox injections including peripheral nerve blocks into the left suprascapular and right T3 and T4 region with dexamethasone and bupivicaine; left sciatic nerve blocks and peripheral nerve blocks to the right L3-L4 region.

The plaintiff testified at his EBT that he was out of work after his accident for a period of about two and one-half months from his job at Underwriters Laboratory. He had been out on disability on about May 16, 2000, but had initially gone to work for a period of months after the accident. He first saw his family doctor after the accident and then Buonocore. Prior to this

accident, he was taking Baclofen and Neurontin and Tylenol as prescribed by Buonocore, his pain management specialist. He saw him about once a month. He is currently on long-term disability. In about July, 2001, he began employment with Soundcoat with an increase in salary and job title. After working with Soundcoat, he missed about a month from work. He was experiencing problems with walking, standing and bending and had "severe cervical problems." At the accident scene and within forty-five minutes of the accident or a day or two later, he experienced a headache and pain in his neck all the way up into his head and shoulder and right arm He felt a numbness in his right arm and pins and needles. He also felt a slight pain in his left arm. He started having twitching in his shoulder. At his continued EBT he testified to the effect that he was taking the prescribed medications, Miltown, Neurontin, and MS Contin, prior to the deposition. After the accident, he went to Underwriters Laboratory as he was extremely upset and needed to calm down so he spoke to his supervisor for about ten minutes. He was feeling very tender in his neck and back. He had recently had back surgery in January 1999. He saw his family doctor on March 10, 2000 as he was starting to feel the same pain that he had in his back before the back surgery.

Perry stated in his report, dated March 29, 2000, as to his independent pain management examination of the plaintiff on that date, that the plaintiff informed him that the plaintiff was in a motor vehicle accident on March 12, 1998, when the plaintiff was the driver of an automobile which was struck in its rear and that he thereafter developed low back pain extending into his left toes. He had "surgical repair" of his lumbar spine in January 1999 which worsened his pain. He was under the care of a pain management specialist and had received six epidural steroid injections which helped only for a few weeks. Caudal injections worsened the pain. Trigger point injections were helpful. Perry indicated that he reviewed an MRI scan report, dated May 5, 1999, which gave the impression of "Status post left-sided L5-S1 laminectomy; postoperative scarring on the left at L5-S1; possibility of herniated disc remaining on the left at L5-S1 is raised; there is also a smaller left-sided herniated disc at T12-L1." He further reviewed an MRI report, dated March 31, 1998, with the impression: "There is a herniated disc at L5-S1 on the left side and partially involving the left neural foramen; degenerative disc disease of L4-5 and L5-S1." On the date of the examination of March 29, 2000, Perry further stated that the plaintiff was involved in a motor vehicle accident three weeks prior and told Perry that he injured his neck and back when his vehicle was rear ended, and that plaintiff stated his low back pain was now 50% worse and his neck was 100% worse. Upon examination, Perry stated that cervical motion studies were within functional limits with pain at end ranges, and lumbar motion studies showed flexion to 70 degrees, extension to 30 degrees, bilateral rotation to 40 degrees and bilateral flexion to 30 degrees. Perry stated that the plaintiff was independent in activities of daily living and continued to work, and hence, there was no disability.

Neuman stated in his report of October 20, 2008 that he performed an independent neurological examination of the plaintiff on that date and that the plaintiff was involved in a motor vehicle accident on March 8, 2000 for which he saw his pain specialist Buonocore the day after the accident for low back pain, mid back pain and neck pain. The plaintiff informed Newman that he had a prior motor vehicle accident and that Raphael Davis, M.D. performed a laminectomy on him. After the March 8, 2000 accident, MRI's of the cervical spine, thoracic spine, and lumbar spine were performed. The plaintiff had been given Oxycontin and Soma for pain, and saw multiple physicians, including for a myelogram, discogram and other MRI scans.

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Electrodiagnostic studies were also administered. Straight leg raise was positive for low back pain at 30 degrees on the left while supine and was positive at 60 degrees on the right while supine. The normal values were not set forth. Cranial nerve examinations and motor examinations were conducted, but the method of examination was not set forth in the report. Based upon his examination, his impression was that the plaintiff had no objective abnormalities on his neurological examination and no neurological correlation between his reported complaints and his findings on examination and that he had no neurological disability.

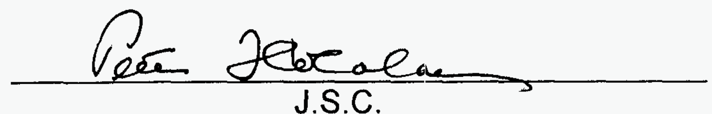
Kandel stated in his report, dated October 19, 2007, that he performed an independent orthopedic examination of the plaintiff on that date relative to the motor vehicle accident of March 8, 2000. He stated that there was a history of a prior motor vehicle accident on March 12, 1998. As a result of the March 8, 2000 accident herein, the plaintiff followed up with Buonocore and received treatments consisting of steroid injection, trigger point injections in the area of his cervical spine, thoracic spine and lumbar spine. Kandel had indicated the plaintiff had been treated with morphine sulfate, Soma, Lyrica and Welbutrin. The plaintiff complained of pain in his neck radiating to his right upper extremity, pain in his mid and lower back radiating to his left lower extremity which at times felt as if it was not there, and headaches. The plaintiff had been diagnosed with post-laminectomy syndrome after surgical lumbar laminectomy on January 19, 1999. Kandel reviewed, inter alia, an MRI study of the lumbar spine, dated April 6, 1998, which gave the impression by the radiologist of lumbar disc herniation at L5-S1 on the left side partially involving the left neural foramen; degenerative disc disease at L4-5 and L5-S1; an MRI study of the cervical spine, dated March 13, 2000, reported to show a bulging disc at C6-7 with no evidence of herniation; and an MRI report of the lumbar spine, dated June 30, 2004, reported by the radiologist to show persistent small left central and left paracentral herniation at L5-S1, and that the size of the disc may be slightly larger than the prior study of 2001. Kandel stated that upon physical examination of the claimant's cervical spine with an inclinometer, active range of motion revealed 40 degrees flexion; cervical extension 60 degrees; right and left lateral flexion 30 degrees bilaterally; and rotation 20 degrees bilaterally. Active range of motion of the thoracolumbar spine revealed flexion of 60 degrees; extension 20 degrees; right and left lateral flexion 10 degrees bilaterally; and mild weakness of dorsiflexion of the left foot. Examination of the right shoulder revealed 170 degrees abduction; 170 degrees anterior flexion; external rotation 90 degrees, and internal rotation 90 degrees. Kandel stated that there was no objective evidence of reflex sympathetic dystrophy, no evidence of muscle atrophy in the left lower extremity, and that while it was possible that the accident of March 8, 2000 may have resulted in a temporary exacerbation of the claimant's pre-existing symptoms, he had chronic pain syndrome and post-laminectomy syndrome prior to the accident of March 8, 2000. He stated that the current symptoms were due to the injuries he sustained in the prior motor vehicle accident of March 12, 1998.

Based upon the foregoing, the Court determines that the defendants have failed to establish prima facie entitlement to summary judgment on the issue of serious injury. None of the defendants' examining physicians have ruled out that the additional cervical disc bulges and thoracic herniations were not caused by the accident. Perry stated the plaintiff's pain had worsened, but did not indicate when the pain began to worsen. None of the defendants' examining physicians have set forth their findings upon range of motion examination with comparison to normal values. None of the defendants' examining physicians have ruled out that the herniated discs at T12-L1, the disc disease at L4-5, or the bulging disc at C6-7 were not

caused by the accident of March 8, 2000. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith,*** 294 AD2d 540; 742 NYS2d 876 [2nd Dept 2002]) and the defendants' examining physicians have not set forth their findings compared to those normal values to establish the plaintiff has not sustained a serious injury. The defendants have failed to satisfy their burden of establishing, prima facie, that the plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) (*see*, ***Agathe v Tun Chen Wang***, 3 AD3d 737, 822 NYS2d 766 [2nd Dept 2006]; *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]) as defendants' examining physicians either fail to provide specific range of motion measurements for the plaintiff or fail to compare those findings with normal ranges of motion (*see*, ***Hypolite v International Logistics Management, Inc.,*** 43 AD3d 461, 842 NYS2d 453 [2nd Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2nd Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2nd Dept 2006]), or set forth different values for the normal ranges of motion. By failing to compare the results that were reported to the normal range, or by failing to quantify their range of motion findings in degrees, the reports of defendants' examining physicians leave it to this Court to speculate as to whether the ranges of motion reported are normal or abnormal (*see*, ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Neuman stated that he had reviewed "voluminous records" but does not indicate what records were reviewed. He performed a physical examination of the neck but the report does not indicate what the examination consisted of and what the ranges of motions determined. In that the reports of the defendants' examining physicians do not exclude the possibility that the plaintiff suffered a serious injury in the accident, the defendants are not entitled to summary judgment (*see*, ***Peschanker v Loporto***, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]). Additionally, the defendants' examining physicians did not rule out that the plaintiff was able to perform his normal activities of daily living during the 90 out of 180 days following the accident and fail to comment on the extended period of time the plaintiff was out of work. Additionally, although the defendants' examining physicians have opined that the plaintiff does not suffer from a disability, none of the physicians have commented relative to the plaintiff testimony that he was out of work receiving disability. Thus, factual issues are raised in the defendants' moving papers as well.

Since the defendants failed to establish their entitlement to judgment as a matter of law, it is not necessary to consider whether the plaintiff's papers in opposition to the defendants' motions were sufficient to raise a triable issue of fact (*see*, ***Agathe v Tun Chen Wang***, supra; ***Walters v Papanastassiou***, supra).

Dated: January 13, 2010



J.S.C.