[* 1]

SHORT FORM ORDER

INDEX No. 10-44135
CAL No. 13-00931MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 9-9-13
ADJ. DATE 10-31-13
Mot. Seq. # 002 - MD

----------X

JARRED ROBERT SMITH,

Plaintiff,

- against -

BRENTWOOD LEGION SERVICE, INC., BRENTWOOD LEGION AMBULANCE SERVICE, INC., BRENTWOOD LEGION AMBULANCE BENEVOLENT ASSOCIATION, INC. and MARLON JAVIER CHAVARRIA,

Defendants.

----------X

WINKLER, KURTZ, WINKLER & KUHN, LLP
Attorney for Plaintiff
310 Hallock Avenue (Route 25A)
Port Jefferson Station, New York 11776

MINTZER, SAROWITZ, ZERIS, LEDVA & MEYERS, LLP
Attorney for Defendants
17 West John Street, Suite 200
Hicksville, New York 11801

Upon the following papers numbered 1 to 38 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-26; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 27-34; Replying Affidavits and supporting papers 35-38; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (seq. #002) by the defendants Brentwood Legion Ambulance Service and Marlon Javier Chavarria, pursuant to CPLR 3212, for an Order granting summary judgment dismissing the complaint as asserted against them as barred by Vehicle and Traffic Law §§ 1104 and 114-b, and on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law §§ 5102 (d) and 5104, is denied.

In this negligence action, the plaintiff, Jarred Robert Smith, seeks damages for personal injuries that he alleges he sustained on July 4, 2010, on Pine Aire Drive, at or near its intersection with Cecil Avenue, in Bay Shore, New York. It is claimed that the plaintiff's vehicle was struck in the rear and driver's side by the ambulance being driven by Marlon Javier Chavarria and owned by Brentwood Legion Ambulance Service. A passenger in plaintiff's vehicle died as a result of the injuries sustained in this accident.

Marlon Javier Chavarria and Brentwood Legion Ambulance Service seek summary judgment dismissing the complaint on the basis that they are immune from liability pursuant to Vehicle and Traffic Law §§ 1104 and 114-b. In addition, movants assert that the New York State Department of Motor Vehicle Administrative Adjudication Bureau hearing and decision is *res judicata* in this matter as it determined that the sole cause of the accident was the negligence of the plaintiff. Defendants also seek summary judgment on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law §§ 5102 (d) and 5104.

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 (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***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 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]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party 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 [2d Dept 1981]).

In support of this motion, the defendants have submitted an attorney' affirmation; copies of the pleadings; an uncertified copy of "Non-Appeal Transcript" dated January 26, 2011; Findings from the New York State Department of Motor Vehicles Safety Hearing Bureau; an uncertified copy of a MV-104 Police Accident Report which is deemed inadmissible hearsay (*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]); the transcript of the examination before trial of Jarred Robert Smith dated July 26, 2012, continued October 24, 2012, with proof of service; an unsigned but certified copy of the transcript of Marlon Chavarria dated March 1, 2013, which is considered by the Court (***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); an unsworn affidavit of Stephen N. Emolo which is not in admissible form; printout of "tweets"; uncertified copies of Good Samaritan Hospital record dated July 5, 2010, Long Island Neurology report, MRI report dated August 6, 2010 of plaintiff's lumbar and cervical spine, Eastern Island Medical Care records, Long Island Neuropsychological Services with report, Jennifer Serrentino, M.D. records, and Dermpath Diagnostics records; an unsigned copy of a letter dated July 24, 2010 to Geico Insurance; unsworn report of Christopher Ferrante, D.C. dated November 8, 2010; reports of Paul J. Miller, M.D. dated November 8, 2010 concerning his independent orthopedic examination of plaintiff, Isaac Cohen, M.D. dated January 24, 2013 concerning his independent orthopedic examination of the plaintiff, Howard Reiser, M.D. dated January 18, 2013 concerning his independent neurological examination of the plaintiff, and the unsigned report of Richard DeBenedetto, PhD concerning his independent psychological examination of the plaintiff on June 3, 2011, and his unsigned and uncertified letter to Support Claims Services which are not in admissible form.

COLLATERAL ESTOPPEL

The Order of this Court dated January 9, 2012, served with notice of entry upon counsel for defendants on March 26, 2012, denied defendants' prior motion for summary judgment dismissing the complaint of the instant action. Defendants claimed that this action is barred by collateral estoppel. Defendants argued then, as they do now, that because there had been a hearing at the New York State Department of Motor Vehicles Administrative Adjudication Bureau on January 26, 2011, and it was found that defendant Marlon Chavarria was neither grossly negligent nor in violation of any provision of the Vehicle and Traffic Law which contributed to or caused this accident, that the plaintiff's complaint must be dismissed. However, the aforementioned Order dated January 9, 2012, held that in order to invoke the doctrine of collateral estoppel, two well-settled requirements must be satisfied: "[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (citations omitted).

The January 9, 2012 Order set forth that collateral estoppel does not bar the instant action or the claims raised. It stated that a plaintiff is not estopped from litigating the issue of the liability and comparative fault of the defendants when a plaintiff did not have a full and fair opportunity to litigate that issue at an administrative hearing held before the New York State Department of Motor Vehicles. It was determined that although counsel appeared for the parties at the aforementioned administrative hearing, that the incentive to litigate was not as compelling at the hearing as it is for a civil trial, that Jarred Robert Smith indicated he was not given a full opportunity to cross examine defendant Marlon Chavarria, and that there were additional eyewitnesses to the accident who would be called to testify at trial. It was concluded by this Court that the plaintiff was not provided with a full and fair opportunity to litigate the issue of the defendants' culpability for the accident, and that this action was not barred by the doctrine of collateral estoppel. Defendants' application was accordingly denied then, as it is now, the same issue having been previously decided by this Court. Accordingly, it is the law of the case that the determinations made at the hearing by the New York State Department of Motor Vehicles do not collaterally estop the plaintiff from proceeding in this matter on the issue of whether the plaintiff is barred by Vehicle and Traffic Law §§ 1104 and 114-s from continuing this action.

LIABILITY

The plaintiff testified to the extent that the accident occurred on July 4, 2010, at about 11:30 p.m. He was operating his 1993 green Saturn, and had three passengers in the vehicle. They had been at the marina to watch fireworks, went to Taco Bell, then stopped at a bodega to meet up with some friends and to go to a party on Cecil Street, three blocks off of Pine Aire Drive. When he left the bodega, he made a left turn onto Wicks Road, toward Fifth Avenue, and entered onto Pine Aire Drive. He described Pine Aire Drive as a two-way street, with one travel lane in each direction, running east and west. His headlights were on. The stereo was on in the car, and it was a little hard to hear what his passengers, who were looking for Cecil Street, were saying. He concentrated on driving while they were looking. His friend Wilson was traveling behind him in another vehicle. He came to the T-intersection with Cecil Road, which was to his left. There were cars traveling ahead of him. He could not recall if there was oncoming traffic.

His highest rate of speed was about twenty miles per hour on Pine Aire Drive. He slowed his car as he approached Cecil Road and turned on his left turn signal. At the same time, he heard a siren. He brought his car to a complete stop on Pine Aire Drive at the beginning of the intersection with Cecil. He could hear the siren, which he described as loud, but stated that it was hard to hear where it was. He looked in his rearview and side view mirrors and saw nothing but cars behind him deep down Pine Aire. He stated that there were a lot of cars by the Fifth Avenue intersection. He saw no flashing lights. He looked ahead and there was nothing ahead and saw no oncoming vehicles with a siren. He also looked over his right shoulder and saw cars behind him, but he did not know how far back they were. From the time that he came to a complete stop until the accident occurred, about two or three seconds passed, until his vehicle started to move into his left turn. He was not sure whether he had taken his foot off the brake or if he had put his foot on the accelerator. The back part of his car was behind the yellow line, but the front of his car was over it. He was unsure if he continued to hear the sound of the siren, but did not observe any flashing lights at any time. He heard a loud smash and lost consciousness. When he woke up, he saw people and a yellow police tape. He saw the defendants' vehicle after the impact when he was taken from his car, but not before. He did not know the speed of the defendants' vehicle prior to impact. The plaintiff testified that he did not pull his car over to the right side of Pine Aire Drive prior to the accident.

Marlon Chavarria testified to the extent that at the time of the accident he was operating a white Ford Explorer, first responder vehicle owned by Brentwood Legion Ambulance, with whom he was a volunteer. He was dismissed by Brentwood Legion Ambulance in December 2011 for failing to follow their protocols by responding out of district at least twice. He was certified as an emergency medical technician in September 2009 by Suffolk County EMS. He completed training in an EVOC (emergency vehicle operator course) for the ambulance and as a first responder, consisting of a video on safety, distances, and traffic patterns, and New York City's law on emergency vehicles. There was also a driving course. During the first year, he was a probationary member and was only allowed in ambulances. After becoming a badge member, he was allowed to be in a responder as a passenger prior to being permitted to drive as a first responder. He had driven about sixty times as a first responder prior to the accident. While he was employed with Hunter Ambulance, he was also given training as well. He stated that a first responder vehicle is traditionally a vehicle that tries to make it first to the scene to divert traffic, and to assist with whatever the ambulance needs. At the time of the accident, he was on call, and was responding to a call. The vehicle was equipped with sirens. When the lights are engaged, there are buttons which are pressed to change from wailing, yelper or phaser signal, which sounds are to be changed by pressing the horn. The vehicle was equipped with lights operated by two switches, one to turn on the back lights, and the fully turned switch turns on all the lights. The lights have to be on for the sirens to activate.

Chavarria testified that he had been at a call for an overdose on Candlewood and Fifth, when he received a Delta (significant) call to respond to an accident at Sagtikos Parkway and Pine Aire Drive at the exit ramp. He made a call to radio communications to advise that he was on his way. He was alone. He was operating a first responder vehicle on Fifth Avenue. He had turned on his lights and siren before he began to move, and changed the siren about ten times prior to the subject accident by putting his hand on the horn. He then stated that while traveling fifteen blocks on Fifth Avenue, he changed the siren about seventeen to twenty times. When he reached the intersection with Pine Aire Drive, he came to a stop at the intersection as there were cars crossing his path as the light was red. He did not remember if the light turned green, but he made a left onto Pine Aire to travel in a westerly direction. He traveled on Pine Aire

Drive about one half mile before the accident occurred. He stated that there was one travel lane in each direction on Pine Aire Drive, with a small shoulder about two feet wide, marked by a white line, but the shoulder was not wide enough for a full vehicle. There was a curb also, and it was dark out.

Chavarria thought the speed limit was about thirty miles per hour, but stated that it could have been forty. He testified that he believed that he was traveling fifty miles per hour, maybe a little bit more, at the time of the accident. There was a car in front of him and the Smith car was about a block or two in front of that car. As he approached the car in front of him, he changed the sequence of the sirens. The car moved to the right, but, because there was not much of a shoulder, he crossed about halfway over the double yellow line into the eastbound lane to pass it, then got back into the right lane. The Smith vehicle was moving ahead in the westbound lane. He did not know the speed of the Smith vehicle, but indicated that the distance between them was closing. He stated the plaintiff's vehicle slowly moved to the right side when he was about a car length behind it. He could not say whether or not he saw the plaintiff's brake lights illuminate. The plaintiff's vehicle slowed. As he approached the Smith vehicle, he changed the sirens and pulled over a little bit to the left. As he went to the left to pass the Smith vehicle, from the corner of his eye he saw the plaintiff make a sharp turn directly into his vehicle. He stated that his vehicle was alongside the plaintiff's vehicle by the plaintiff's back window when this happened. He then testified that the plaintiff's vehicle started moving right first, and as he approached the plaintiff's back window, then he observed the plaintiff turn. His vehicle was more into the eastbound lane, so he put on his brakes. The impact occurred. He turned his wheel in the opposite direction back into the westbound lane. His vehicle came to a rest in the westbound travel lane and shoulder facing westbound. The plaintiff's vehicle came to rest across the street, behind him.

The defendants submitted the affidavit of Stephen N. Emolo, who stated that he is a certified and accredited traffic accident reconstructionist qualified as an expert witness. While Mr. Emolo has qualified himself as an expert witness, he has set forth no information concerning his education and training, or experience, and has not submitted a curriculum vitae. Emolo did not witness the accident, but opined that the plaintiff heard the siren of the emergency vehicle, pulled to the right side of the road as the responder approached his vehicle, then suddenly turned left across the path of travel of the defendants' emergency response vehicle. He stated that Chavarria reasonably believed that the plaintiff was going to yield the right of way to him because the plaintiff began to slow his vehicle, rendering Chavarria free from liability. It is determined that even if admissible, Emolo's opinions are conclusory, and merely echo Chavarria's testimony. He does not indicate the points of impact on the vehicles. Plaintiff alleges that his vehicle was struck in the rear and driver's side. Defendant testified that the side of plaintiff's vehicle was impacted. Photographs submitted demonstrate damage to the rear and driver's side of plaintiff's vehicle.

It is determined that the defendants have not established *prima facie* entitlement to summary judgment dismissing the complaint on the issue of liability, as the evidentiary submissions raise factual issues concerning the happening of the accident. While the plaintiff testified he turned on his left turn signal and began to slow down, the defendant stated that he did not observe the plaintiff's brake lights, although he noted the taillights were lit. There are factual issues concerning whether or not Chavarria was traveling at a safe speed in a residential area in the dark and whether his speed of fifty miles per hour or more contributed to the occurrence of the accident, and whether or not the defendant failed to observe plaintiff's left turn signal.

The plaintiff also submitted the witness statement of Ashley Buchanan which raises factual issues which preclude summary judgment from being granted to defendants. Ashley Buchanan averred that on July 4, 2010, she witnessed an automobile accident involving a green Saturn and an emergency motor vehicle in the eastbound lane of Pine Aire Drive, at or near its intersection with Cecil Avenue in Bay Shore. She stated that she was a front seat passenger in her friend's Nissan vehicle traveling westbound on Pine Aire Drive. There was a lot of traffic backed up in the westbound lane of Pine Aire Drive, and vehicles were traveling very slowly. There were several vehicles ahead of and behind her. While stuck in traffic, she heard sirens, looked behind her, and observed an emergency vehicle with its lights activated about three blocks behind at the intersection with Fifth Avenue. It was traveling west on Pine Aire Drive. It appeared that the emergency vehicle sped through the intersection without stopping or slowing down, and it appeared to be approaching at a very high rate of speed in the eastbound lane behind her, about three blocks away. Her friend who was driving, began to pull her vehicle over to the right side of the road. She observed the green Saturn ahead slow down. It appeared to be making a left turn onto Cecil. Just prior to the accident, the green Saturn had almost traveled completely across the eastbound lane of Pine Aire, with its mid-rear still in the eastbound lane of Pine Aire. The emergency vehicle, still traveling at a high rate of speed in the eastbound lane collided with the mid-rear driver's side of the Saturn before it was able to fully complete its turn. The emergency vehicle did not attempt to brake or take any evasive action. Prior to the accident, there was a clear path in the westbound lane of the area where the accident occurred for the emergency vehicle to continue traveling west. She continued that there was no apparent reason for the emergency vehicle to be traveling in the eastbound lane where the mid-rear portion of the Saturn was located. Buchanan stated that the Saturn did not suddenly turn in front of the emergency vehicle, as it clearly slowed and was preparing to turn left when the emergency vehicle was three blocks behind her.

The operator of an authorized emergency vehicle who is engaged in an emergency operation, as defined by Vehicle and Traffic Law § 114-b, is afforded the benefits of Vehicle and Traffic Law § 1104, including protection from civil liability unless engaged in acts of reckless disregard (***Gonyea v County of Saratoga***, 23 AD3d 790, 803 NYS2d 764 [3d Dept 2005]). Reckless disregard, which removes the protection from liability of an authorized emergency vehicle engaged in an emergency operation under Vehicle and Traffic Law § 1104, is described as the conscious or intentional doing of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow, and done with conscious indifference to the outcome (*see* ***Saarinen v Kerr***, 84 NY2d 494, 620 NYS2d 297 [1994]; ***Gonyea v County of Saratoga,*** *supra*; ***Hemingway v City of New York***, 81 AD3d 595, 916 NYS2d 167 [2d Dept 2011]; ***Puntarich v County of Suffolk***, 47 AD3d 785, 850 NYS2d 182 [2d Dept 2008]). The reckless disregard test, which requires a showing of more than a momentary judgment lapse, is better suited to the legislative goal of encouraging emergency personnel to act swiftly and resolutely while at the same time protecting the public's safety to the extent practicable (***Rusho v State of New York***, 24 Misc3d 752, 878 NYS2d 855 [Ct Cl 2009]). The manner in which a police officer operates his or her vehicle in responding to an emergency may form the basis of civil liability to an injured third party if the officer acts in reckless disregard for the safety of others (***Krulik v County of Suffolk***, 62 AD3d 669, 878 NYS2d 436 [2d Dept 2009]). Reckless disregard for the safety of others requires more than a showing of lack of due care (***Saarien v Kerr***, 84 NY2d 494, 620 NYS2d 297 [1994]).

In the instant action, factual issues have been raised, supported by evidentiary submissions rather than speculation, concerning whether Chavarria operated the emergency vehicle in reckless disregard of a

known or obvious risk to make it highly probable that harm would follow. There are factual issues concerning whether defendant's intentional passing of the plaintiff to the plaintiff's left, when the plaintiff was engaging in the left turn, was unreasonable, and whether defendant disregarded the plaintiff's left turn signal and the plaintiff's position on the roadway, creating a risk. There are factual issues concerning whether or not the plaintiff pulled over to the right, and whether the defendant failed to observe that the plaintiff was turning. Thus, it cannot be determined as a matter of law that the moving defendants are afforded the benefits of Vehicle and Traffic Law §§ 1104 and 114-b, and bear no civil liability for the occurrence.

Accordingly, that branch of the instant motion by defendants for summary judgment dismissing the complaint as barred by Vehicle and Traffic Law §§ 1104 and 114-b is denied.

SERIOUS INJURY

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 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."

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 [1982]).

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 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 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 [2d Dept 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 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a 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 plaintiff alleges in the bill of particulars that as a result of this accident, the following injuries were sustained: severe trauma to the head resulting in traumatic brain injury; laceration to the right scalp requiring staples; loss of consciousness; severe head pain; persistent and severe headaches; neuro-psychological deficits and decline in cognitive functioning, including but not limited to memory and attention deficits, concentration deficits, difficulties making decisions, difficulties processing information, decreased patience, increased appetite, difficulties with social interaction, frequent napping, sleeplessness, organizational difficulties, nervousness, difficulty and anxiety associated with school assignments and requirements; fatigue, increased irritability; severe anxiety, and nausea.

Upon review and consideration of the defendants' evidentiary submissions, it is determined that the defendants have not established *prima facie* entitlement to summary judgment dismissing the complaint on the basis that Jarred Smith did not sustain a serious injury as defined by Insurance Law § 5102 (d).

The electronically signed MRI reports by Vinodkumar Velayudhan, D.O. and stamped signatures of what is indicated to be a partial medical record of Christine Borelli, PhD submitted by the defendants are not admissible (***Jesa Medical Supply, Inc. v GEICO***, 25 Misc3d 1098, 887 NYS2d 482 [Civ Ct, Kings County 2009]). Copies of the uncertified medical records submitted by defendants are not in admissible form pursuant to CPLR 3212 and 4518.

The Court notes that 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 [2d Dept 2002]).

The report of Christopher Ferrante, D.C. submitted by defendants is not notarized and is not in admissible form. He stated that the plaintiff sustained injuries to his head, neck, low back, both shoulders, and both hips. He began chiropractic adjustments one week following the accident, three times a week, which were continued as of the date of Dr. Ferrante's examination on November 8, 2010. Dr. Ferrante noted that the plaintiff received injections to his lower back as a result of the accident and was to start receiving additional injections on November 12, 2010. The plaintiff complained of constant headaches and pain in his neck and low back. Upon examination, Dr. Ferrante found that the plaintiff was able to perform straight leg raising at 70 degrees bilaterally, however, he does not set forth the normal range of motion value, which is indicated by Dr. Paul Miller, M.D. and by Dr. Cohen to be 90 degrees, raising factual issues. Dr. Ferrante has omitted the range of motion finding for bilateral lumbar rotation, raising factual issues. Dr. Ferrante noted the cervical MRI report indicated mild disc bulge at C4-5 and C5-6 without significant stenosis. Dr. Ferrante found that upon the history presented, there is a probable causal relationship between the accident and the plaintiff's reported symptomology, thus, precluding summary judgment.

Dr. Paul Miller performed an independent orthopedic examination of the plaintiff on November 8, 2010. While he reported cervical and lumbar range of motion findings, Dr. Miller omitted bilateral lumbar rotation measurements, precluding summary judgment. Although Dr. Miller noted that plaintiff's cervical MRI revealed disc bulges at C4-5 and C5-6, he has not ruled out that such injuries are causally related to the accident. He does, however, state that there is probable causal relationship between the accident and plaintiff's symptomology, precluding summary judgment.

Dr. Isaac Cohen performed an independent orthopedic examination of the plaintiff on January 23, 2013, and reported range of motion findings upon examination of plaintiff's left shoulder, lumbar spine and cervical spine. While Dr. Cohen stated that the objective workup, including MRI examinations, was unremarkable, he failed to rule out that the bulging cervical discs demonstrated at C4-5 and C5-6 on the cervical MRI report of August 6, 2010, which he reviewed, were not caused by the subject accident. This raises factual issues precluding summary judgment. He does not address the injections received by the plaintiff to his lumbar area, and whether the need for those injections was related to the accident. Dr. Cohen stated that the bulk of treatment documented in the extensive medical records was related to physiological treatment which is beyond his area of expertise, and he did not comment upon the same.

It is noted that no examination by a physician for plaintiff's scar/head laceration site has been submitted to describe or note the extent and location of such laceration and whether or not there is scarring.

Howard B. Reiser has submitted a report concerning his independent neurological examination of the plaintiff on January 18, 2013. Dr. Reiser stated that the plaintiff reported that he continues to experience symptoms including low back pain which is greater on the left side, and occurs if he stands or sits in one position for too long. He reported pain in his left shoulder blade region which occurs spontaneously and intermittently. He reported frequent pressure headaches which vary in location and occur many times daily, and last fifteen minutes to an hour. Dr. Reiser, upon examining the plaintiff, did not take or report his range of motion evaluations of the plaintiff's cervical or lumbar spine, leaving this Court to speculate as to the lack of this objective evaluation, precluding summary judgment. Dr. Reiser indicated that the plaintiff is claiming traumatic brain injury, memory and attention deficits, concentration deficits, difficulty processing information, and cervical, thoracic, and lumbar nerve root injuries. Dr. Reiser does not exclude nerve root injuries in his report, precluding summary judgment.

The report by Richard P. DeBenedetto, PhD, dated June 3, 2011, is submitted concerning his independent psychological examination of the plaintiff. He set forth the materials and records reviewed, including the brain injury counseling notes of Christine Borelli, PhD, and the Behavioral Assessment of Brian K. Lebowitz, PhD. Dr. DeBenedetto reported that the plaintiff has no history of mental illness, alcohol or substance abuse, or dementia in any first-ranked relative. He stated that the plaintiff had a range of social interests, relationships, and activities prior to this accident that are consistent with his age, level of education, and cultural background. He described his relationship with his family and friends as generally close and supportive. Based upon his examination of the plaintiff, Dr. DeBenedetto rendered his opinion that the plaintiff met the criteria for a diagnosis of major depression, single episode, moderate; and R/O Post Traumatic Stress Disorder. He recommended individual therapy twice a week for three months, and reexamination in three months to determine his need, if any, for continued causally related psychological treatment. Dr. DeBenedetto set forth that there was no evidence to suggest that the observed and reported

symptoms, described in the report, reached a level of intensity so as to constitute a causally related psychological disability in relation to his ability to meet the demands of his work as a custodian. It is noted, however, that Dr. DeBenedetto has not addressed whether his observations and reported symptoms described in the report reach a level of intensity so as to constitute a causally related psychological disability in relation to the plaintiff's ability to meet the demands associated with daily living and his attending college. Dr. Reiser set forth in his report that the plaintiff was attending community college at the time of the accident, and subsequent to the accident, he withdrew, but then returned for "a period of time," then left, somewhat related to his symptoms. This raises factual issues which preclude summary judgment.

The defendants submitted the reports and records of Christine Borelli, PhD who indicated that the plaintiff was involved in the car accident with three others in the car. One passenger, a close friend since age 14, died as a result of the accident, and two other passengers were injured. Since the accident, he has experienced a range of cognitive, emotional and physiological changes, including severe difficulties with short-term memory and forgetfulness, depression, anger, and a sense of emotional dullness, with problems persisting. He continues to avoid driving when possible and intentionally avoids people who remind him or ask him about the accident. Dr. Borelli stated that while the plaintiff's memory functions were strong, the pattern of errors suggested a tendency to miss salient details of to-be-learned information when first presented. She observed subtle memory difficulties which reflected attentional variability. She stated that the plaintiff was of normal intelligence and was recovering from traumatic brain injury from July 4, 2010, with persisting cognitive and physiological complaints. She indicated on September 8, 2010, that the plaintiff was having increased neck and back pain, was more tired than usual, was having problems falling asleep, was having difficulty organizing himself to complete assignments in college, experienced anxiety in speaking in the classroom, and did not feel he was remembering information as well as he did prior to the accident.

While the plaintiff received treatment from a psychiatrist, Dr. Serrantino, who prescribed Zoloft and Prozac, no report from a psychiatrist who examined the plaintiff on behalf of the defendant has been submitted (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; ***Faber v Gaugler***, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]).

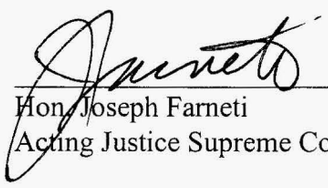
It is noted that the movant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering their physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the expert offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). The plaintiff testified that he still suffers from depression since the accident, but it is not as severe. He expressed a lack of interest, isolation from his family, and related that he does not participate in a lot of family events. He experiences anxiety attacks daily where his heart speeds up and he has nervous energy. When that happens, he tries to tune out, turn on

some music, and perform deep breathing. He has some problems still with attention span and concentration. He continues to experience back pain. He can no longer play full court basketball games although he used to participate in pickup games before the accident. He can now only participate in half court games. He gained weight since the accident and went from 160 to 205 pounds. He still experiences some fatigue and suffers from random nightmares.

Based upon careful consideration of defendants' evidentiary submissions, it is determined that factual issues raised in the defendants' moving papers preclude summary judgment as the defendants failed to satisfy the burden of establishing, *prima facie*, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties have failed to establish *prima facie* entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers are sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, this motion by the defendants Brentwood Legion Ambulance Service and Marlon Javier Chavarria for summary judgment dismissing the complaint as asserted against them is denied.

Dated: January 7, 2014



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION