At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District in the Broome County Courthouse, 92 Court Street, City of Binghamton, New York, on the 14th day of January, 2011.

PRESENT: HON. FERRIS D. LEBOUS
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

KATIE CONFESSORE,

Plaintiff,

-vs-

MARC A. MARTINEZ and
DAVID M. WILHELM,

Defendants.

DECISION AND ORDER

Index No. 2009-1207
RJI No. 2010-1354-C

APPEARANCES:

COUNSEL FOR PLAINTIFF:

ALEXANDER & CATALANO, LLC
BY: MATTHEW M. BECKER, ESQ., OF COUNSEL
115 EAST JEFFERSON STREET
SUITE 403
SYRACUSE, NY 13202

COUNSEL FOR DEFENDANTS:

LAW OFFICE OF MARY AUDI BJORK
BY: BARNEY F. BILELLO, ESQ., OF COUNSEL
5784 WIDEWATERS PARKWAY
DEWITT, NY 13214

FERRIS D. LEBOUS, J.S.C.

Plaintiff Katie Confessore commenced this action against defendants Marc A. Martinez and David M. Wilhelm seeking to recover for personal injuries suffered in a motor vehicle accident.[1]

This Decision & Order addresses the defendants' motion for summary judgment dismissing the complaint alleging plaintiff has failed to establish a serious injury pursuant to Insurance Law § 5102. Plaintiff opposes the motion.

The court heard oral argument from counsel on January 14th, 2011.

BACKGROUND

A. The Accident

This automobile accident occurred on May 25, 2006, at approximately 10:58 p.m., at the intersection of Clinton Street and Glenwood Avenue in Binghamton, New York. Plaintiff was operating a vehicle owned by a co-worker and was stopped at a red light waiting to take a right turn when she was hit from behind by a vehicle operated by defendant Martinez and owned by defendant Wilhelm.

This action was commenced upon the filing of a Summons and Complaint on May 20, 2009.

---

[1]Although called "Katie Confessore" in this action, in her deposition plaintiff identified herself as "Sharon Katie Confessore". Plaintiff stated that her legal first name is "Sharon" but that she is known as "Katie". Plaintiff also stated that she is now divorced from Mr. Confessore and has since remarried to one Mr. Solan.

B. Plaintiff's Medical Treatment

Plaintiff reports that although she started feeling pain in her neck several days after her accident, she did not seek medical treatment until one month after the accident. Ultimately, on June 23, 2006, plaintiff was examined by Darlene Denzien, D.O. who noted "[r]ange of motion of the cervical spine is limited. Flexion to about 15 degrees, extension to 5 degrees.... There is tenderness of the right trapezius muscle from it [*sic*] insertion of the occiput to the tip of the shoulder and down to her about T6 level" (Def Ex D). Dr. Denzien diagnosed plaintiff as suffering from "whiplash with right trapezius strain" (Def Ex D). Dr. Denzien prescribed Skelaxin (a muscle relaxant) and physical therapy.

On July 18, 2006, plaintiff began physical therapy which she attended through November 20, 2006.

On August 23, 2006, plaintiff had a follow-up examination with Dr. Denzien and reported that on May 26, 2006 she had been in a second minor motor vehicle accident. Dr. Denzien's physical examination revealed "tenderness across the trapezius muscles bilaterally" with a continuing diagnosis of whiplash (Def Ex D).

In a November 20, 2006 status report, the physical therapist reported that plaintiff had achieved maximum benefit and did not recommend continuing therapy (Def Ex D).

On November 21, 2006, plaintiff was again examined by Dr. Denzien and reported that she had experienced a recurrence of pain upon carrying some heavy items, but otherwise reported

that she was doing very well with her neck pain. Dr. Denzien's notes state plaintiff's "range of motion of the neck is fairly good. There is tightness of the trapezius muscles bilaterally and tenderness in the area as well" (Def Ex D). Dr. Denizen ordered a continuation of physical therapy.

A February 21, 2007 report from the physical therapist states that plaintiff "[p]resented sporadically to PT over the course of 5 months. Her effort during appts was minimal, and she appeared to lose interest when treatment shifted to strengthening. She last showed to PT 1/9/07, and is therefore discharged..." (Def Ex D).[2]

Plaintiff has not had any medical treatment and/or physical therapy in relation to these injuries since physical therapy in January 2007, over four years ago.

DISCUSSION

Plaintiff's pleadings contend that her injuries qualify as a "serious injury" as that term is defined in Insurance Law § 5102 under the following four categories: (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; (3) significant limitation of use of a body function or system; and (4) a medically determined injury or impairment of a non permanent nature under the so-called 90/180 day category (Plaintiff's Bill of Particulars, Def Ex C, ¶ 11). However, plaintiff's opposing papers address only the latter two categories and, as such, these will be the only two

[2] Plaintiff explains in her deposition that the demands of her job and family made keeping her physical therapist appointments very difficult.

categories addressed by the court.[3]

On a defense motion seeking summary judgment relative to the serious injury threshold, it is well-settled that defendant "[b]ears the initial burden of establishing the absence of a serious injury as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case [citations omitted]" (*McElroy v Sivasubramaniam*, 305 AD2d 944, 945 [3rd Dept 2003]). Assuming a defendant meets this initial burden, then the burden shifts "[t]o plaintiff to demonstrate the existence of a triable issue of fact, through competent medical evidence based on objective findings and diagnostic tests [citations omitted]" (*Armstrong v Morris*, 301 AD2d 931, 932 [3rd Dept 2003]).

1. <u>Significant limitation of use of a body function or system</u>

The Court of Appeals has explained that the "limitation of use" element may be established in one of two ways, namely by medical proof of a *quantitative* percentage (e.g., a numeric percentage of a loss of range of motion) or, in the alternative, medical proof of a functional impairment (excluding loss of range of motion) by way of a medical expert's *qualitative* assessment of plaintiff's current condition as compared to his normal function (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). The term "significant" means the "limitation" must be shown to be more than minor, mild or slight as established by expert medical proof (*Licari v Elliott,* 57 NY2d 230, 236 [1982]).

---

[3]Parenthetically, as set forth in defendants' moving papers, the court notes there is no proof that plaintiff suffered a permanent and/or total loss of use as required by these categories.

In support of their motion, defendants contend that "[p]laintiff did not have any objective tests such as an x-ray, CT scan or MRI to confirm her subjective symptoms" (Bilello Affirmation, ¶ 13). Plaintiff's medical records support this conclusion. A defendant may rely upon unsworn medical reports and uncertified records of an injured plaintiff's treating medical care providers in order to demonstrate, on summary judgment, the lack of serious injury within the meaning of the no-fault law (*Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878 [2nd Dept 2010]). In view of the foregoing, the court finds that defendants have established the absence of a serious injury as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case, thereby shifting the burden to plaintiff to demonstrate the existence of a triable issue of fact, through competent medical evidence based on objective findings and diagnostic tests.

Plaintiff argues that Dr. Denzien's findings of a limited range of motion defeat defendants' motion. The court finds that Dr. Denzien's findings are insufficient to meet plaintiff's burden. It is well-settled that "[a] diagnosis of loss of range of motion, because it is dependent on the patient's subjective expressions of pain, is insufficient to support an objective finding of a serious injury [citations omitted]" (*Gillick v Knightes*, 279 AD2d 752, 752 [3rd Dept 2001]; *Broderick v Spaeth*, 241 AD2d 898 [3rd Dept 1997], *lv denied* 91 NY2d 805 [1998]). Additionally, Dr. Denzien's references to tenderness and spasms are not accompanied by the identification of the tests used in diagnosis (*Carota v Wu*, 284 AD2d 614, 616 [3rd Dept 2001]). In sum, plaintiff has offered no objective medical testing to corroborate the range of motion findings (*Wiley v Bednar*, 261 AD2d 679 [3rd Dept 1999] [subjective complaints not corroborated by x-ray, MRI or other tests]).

Additionally, the court notes that Dr. Denzien's affirmation is stale in view of the four year gap between her last treatment of plaintiff in 2006 and the date of her affirmation in November 2010 (*Quezada v Luque*, 27 AD3d 205 [1st Dept 2006]). It is well-settled that "[t]he passage of time between the doctor's findings and her affirmation, with no indication of any further examination, follow-up or course of treatment, renders plaintiff's medical evidence stale and inadequate to establish a serious injury [citation omitted]" (*Medina-Santiago v Nojovits*, 5 AD3d 253 [1st Dept 2004]).

Finally, the court notes that plaintiff was involved in another motor vehicle accident on August 6, 2006, nearly three months after this accident. Plaintiff was unable to recall in her deposition whether she received any medical treatment following the subsequent accident (Plaintiff's Exhibit A, p 37). Dr. Denzien's affirmation fails to address this second accident, let alone distinguish plaintiff's injuries, if any, suffered as a result (*Pommells v Perez*, 4 NY3d 566, 572 [2005]).

Consequently, the court finds that defendants' motion for summary judgment on the significant limitation of use of a body function or system category must be granted.

2. <u>90/180 day category</u>

The 90/180 day serious injury category requires proof of a "[m]edically 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" (Insurance Law § 5102 [d]). The curtailment of plaintiff's usual and customary activities must rise to the level of "[a] great extent rather than some slight curtailment" based upon objective medical findings (*Licari*, 57 NY2d at 236).

The court finds defendants' reliance on plaintiff's deposition testimony and plaintiff's medical records sufficient to satisfy their burden in the first instance (*Tuna v Babendererde*, 32 AD3d 574 [3rd Dept 2006]). Additionally, plaintiff conceded during her deposition testimony that she missed only seven to ten days of work due to this accident (Pl Ex A, p 35). For the same reasons noted above, the court finds defendants' submissions meet their initial burden of establishing that plaintiff did not suffer a medically determined injury under this category.

In opposition, plaintiff did not submit an affidavit, but rather relies on her deposition testimony. The court has reviewed plaintiff's deposition testimony but finds it fails to adequately detail that substantially all of her usual and customary daily activities were curtailed for 90 out of the 180 days immediately following the accident (*Gaddy v Eyler*, 79 NY2d 955, 959 [1992]). For instance, plaintiff asserts that she was in pain and limited in her household activities for the requisite time period but does not itemize those activities (Pl Ex A, pp 19-20). Thereafter, plaintiff indicated her pain went away completely, although it would flare up if she lifted something heavy (Pl Ex A, pp 21 & 39). Plaintiff also stated that she is no longer able to water-ski as she did prior to this accident (Pl Ex A, pp 39-40). The court finds that plaintiff has failed to meet her burden of submitting competent medical evidence from the first 180 days indicating that she was medically prevented from performing substantially all of her usual and customary daily activities during the statutory time frame (*Monk v Dupuis*, 287 AD2d 187 [3rd Dept 2001]).

CONCLUSION

In view of the foregoing, defendants' motion for summary judgment dismissing the complaint is granted in its entirety and plaintiff's complaint is dismissed.

It is so ordered.

February 15, 2011
Binghamton, New York

s/ Ferris D. Lebous
Hon. Ferris D. Lebous
Justice, Supreme Court

ALL PAPERS SUBMITTED IN CONNECTION WITH THIS MOTION HAVE BEEN FILED, ALONG WITH THE ORIGINAL DECISION AND ORDER, WITH THE BROOME COUNTY CLERK