STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

ROSEMAY SMITH,

Plaintiff,

-against-

Index No.: 06-1399
RJI No.: 55-06-01163

TAMARA WINNE and
WAYNE L. MINER, II,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking recovery for injuries sustained as a result of an automobile accident that occurred on April 10, 2005. Plaintiff was the driver of a motor vehicle stopped at a yield sign when an automobile driven by defendant Wayne Miner and owned by defendant Tamara Winne collided with the rear end of her

vehicle.

Defendants have made a motion for summary judgment pursuant to CPLR 3212 on the ground that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102(d). Defendants rely upon an affirmation of an orthopedic surgeon, medical records from plaintiff's treating health care providers and the transcript of plaintiff's examination before trial in support of the motion.

The Court is mindful that summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue (Sternbach v Cornell University, 162 AD2d 922, 923 [Third Dept., 1990]). The focus should be on issue identification rather than issue determination (Sternbach v Cornell University, supra). 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 in admissible form to demonstrate the absence of any material issues of fact (see Zuckerman v City of NY, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Ayotte v Gervasio, 81 NY2d 1062 [1993]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of NY, supra; Alvarez v Prospect Hosp., supra; see also Wahila v Kerr, 204 AD2d 935, 936-937 [Third Dept., 1994]). The Court's function is to view the evidence in the light most favorable to the

party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact outstanding (see Simpson v Simpson, 222 AD2d 984, 986 [Third Dept., 1995]; Boyce v Vazquez, 249 AD2d 724, 725 [Third Dept., 1998]).

As the moving party, defendants, in the first instance, are required to present evidence in admissible form sufficient to establish that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 [d] (see Tankersley v Szesnat, 235 AD2d 1010, 1011[Third Dept., 1997]; Tompkins v Burtnick, 236 AD2d 708 [Third Dept., 1997]; Podwirny v De Caprio, 194 AD2d 1057 [Third Dept., 1993]; Weaver v Derr, 242 AD2d 823, 824 [Third Dept., 1997]; Kristel v Mitchell, 270 AD2d 598 [Third Dept., 2000]). It is only if such a showing is made that the burden shifts to plaintiff to proffer competent medical evidence based upon objective medical findings and diagnostic tests to support his claim (see Gaddy v Eyler, 79 NY2d 955, 957 [1992]; Eisen v Walter & Samuels, 215 AD2d 149, 150 [First Dept., 1995]; Tankersley v Szesnat, supra; Jordan v Baine, 241 AD2d 894, 895 [Third Dept., 1997]).

Under Insurance Law § 5102 (d) a serious injury is defined as:

> [A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The parties have failed to submit plaintiff's bill of particulars. As such, the Court can not ascertain which categories of serious injury are claimed. Under such circumstances, defendants must conclusively establish that plaintiff did not sustain a serious injury in any of statutory categories to meet their burden.

Defendants submitted an affirmation and medical report from Robert C. Hendler, M.D. Dr. Hendler conducted an examination of plaintiff on November 29, 2006, approximately one and one half years after the accident. He found normal range of motion in plaintiff's neck and shoulders with no evidence of either spasm or appreciable atrophy. However, Dr. Hendler did not set forth the nature of any objective testing he performed to sustain such conclusions (see Cedillo v Rivera, 39 AD3d 453 [Second Dept., 2007]; Schacker v County of Orange, 33 AD3d 903 [Second Dept., 2006]). Dr. Hendler also failed to offer any opinion with respect to the 90 out of 180 days category of injury and his examination was conducted long after the 180 day period had expired (see Lowell v Peters, 3 AD3d 778, 780 [Third Dept., 2004]; Scott v Roudellou, 291 AD2d 550 [Second Dept., 2002]; Connors v Center City, 291 AD2d 476 [Second Dept., 2002]). Dr. Hendler also summarily and conclusorily dismissed the abnormal results of EMG testing on the ground that he did not find any evidence of neurologic deficit. However, he failed to explain how such an objective test as an EMG could be abnormal without any significance (see Hubert v Tripaldi, 307 AD2d 692 [Third Dept., 2003]). Dr. Hendler's "conclusory statements do not constitute the prima facie evidentiary showing that is

required of the proponent of a summary judgment motion (see, Winegrad v New York Univ. Med. Ctr., supra, at 852-853)." (Christiana v Benedictine Hosp. 248 AD2d 910, 913 [Third Dept., 1998]).

Even if defendants had met their burden on the instant motion, plaintiff has submitted an affidavit from her treating chiropractor, Timothy Deschenes, D.C., in opposition to the motion. While some of his findings, such as decreased range of motion, lack a proper basis as they do not indicate the nature of the tests performed, his medical records contain numerous findings of spasm. As discussed above, the EMG study returned abnormal results for the cervical spine. Such findings clearly constitute objective evidence of injury. In addition, the records indicate that Dr. Deschenes determined that plaintiff was totally disabled for many months following the accident and instructed her not to return to work during such period. It is therefore clear that there exist numerous questions of fact as to whether plaintiff sustained a serious injury.

Accordingly, it is

ORDERED, that defendants' motion for summary judgment dismissing plaintiff's complaint is hereby denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for the plaintiff, who are directed to enter this Decision/Order without notice and to serve defendants' counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
June 8 ,2007

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Defendants' Notice of Motion, dated December 15, 2006; Affirmation of Edward P. Suoto, Esq., dated December 15, 2006 with Exhibits A-E annexed; Affirmation of Robert C. Hendler, M.D. dated November 30, 2006;

Affirmation of Derek J. Spada, Esq., dated February 21, 2007; Affidavit of Rosemay Smith sworn to February 21, 2007; Affidavit of Timothy Deschenes, D.C. with Exhibits A and B annexed.