At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of May, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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HENRIK GYULBUDAGHYAN,

Plaintiff,

- against -

SAIEF U. AHMED,

Defendants.

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Index No.: 521919/2017

DECISION AND ORDER

Motion Sequence #1

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2,
Opposing Affidavits (Affirmations).....	3,
Reply Affidavits (Affirmations).....	4,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle incident that occurred on March 21, 2017. The Plaintiff Henrik Gyulbudaghyan (hereinafter "the Plaintiff") was allegedly involved in a collision with a vehicle owned and operated by Defendant Saief U. Ahmed (hereinafter "the Defendant").

By way of a summons and verified complaint, the Plaintiff asserts a cause of action against the Defendant alleging the negligent operation of his vehicle. The incident allegedly occurred on or near the intersection of West 40th Street and 11th Avenue, New York County, New York State. The Plaintiff claims in his Verified Bill of Particulars (Defendants' Motion Exhibit B, Paragraph 11), that as a result of the incident he sustained a number of serious injuries,

including but not limited to, injuries to his left knee, cervical spine, and lumbar spine. The Plaintiff also alleges (Defendant's Motion Exhibit B, Paragraph 20) that he was prevented from "performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence."

The Defendant now moves (motion sequence #1) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d).

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d

166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Insurance Law § 5102(d)

The Defendant contends that the affirmed reports of Dr. Alan J. Zimmerman, Dr. Michael J. Carciente, Dr. Eric L. Santos, support his contention that Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). In making a motion for summary judgment on threshold grounds a defendant has the initial burden of demonstrating that the Plaintiff did not sustain a "serious injury" as that term is defined by Insurance Law § 5102.

The Defendant's Doctors' Reports

Dr. Alan J. Zimmerman, conducted an orthopedic medical examination of Plaintiff on November 6, 2018. In his report, which was duly affirmed on that day, Dr. Zimmerman detailed his findings based upon his review of Plaintiff's medical records, his personal observations and objective testing. Dr. Zimmerman did note that the Plaintiff had an operation involving a left knee meniscus repair, and received injections to the lower back. Dr. Zimmerman conducted range of motion examinations to the Plaintiff with the assistance of a goniometer and found normal ranges of motion in the cervical spine, lumbar spine, thoracic spine, and right and left knees. Dr. Zimmerman opined that "[t]he orthopedic examination is objectively normal, and indicates no findings which would result in orthopedic limitations in use of the body parts examined." (See Defendants' Motion, Examination of Dr. Alan J. Zimmerman, Annexed as Exhibit F).

Dr. Michael J. Carciente, conducted an neurologic examination of Plaintiff on October 10, 2018. Dr. Carciente also reviewed the MRI records related to examinations of the Plaintiff's left knee (05/01/17), cervical spine (05/08/17), and lumbar spine (05/08/17). For each of these reviews Dr. Carciente found that there was "no objective neurological findings." Dr. Carciente futher opined that "[t]oday's neurological examination does not support the presence of an ongoing neurological injury, disability or permanency." (See Defendants' Motion, Examination of Dr. Carciente, Annexed as Exhibit I).

Dr. Eric L. Cantos, a radiologist, did not conduct a medical examination but instead reviewed the MRI records related to examinations of the Plaintiff's left knee, lumbar spine, and cervical spine. In relation to these reviews, As to the left knee, Dr. Cantos opined that he did not "see evidence of an acute meniscal tear." As to the lumbar spine, Dr. Cantos opined that the Plaintiff had "an ongoing and pre-existent degenerative condition prior to the accident occurrence [sic]." As for the examination of the MRI related to the cervical spine, Dr. Cantos opined that "I see no evidence of a disc herniation or fracture that could be attributed to the accident occurrence [sic]."

Turning to the merits of the motion by the Defendant, the Court is of the opinion that the instant motion papers do not adequately address as a matter of law the Plaintiff's claim as set forth in the subject Verified Bill of Particulars (Defendant's Motion, Exhibit B, Paragraph 20). Plaintiff alleged that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. None of the Defendant's doctors reports examined the Plaintiff during this period and none make any reference to the Plaintiff's condition during this ninety day period. "The injured plaintiff was not examined by the defendants' examining

neurologist and orthopedist until more than one year after the accident, and both failed to relate their findings to the 90/180 category of serious injury for the period of time immediately following the accident." *Rouach v. Betts*, 71 A.D.3d 977, 977, 897 N.Y.S.2d 242, 243 [2nd Dept, 2010]; *see also Epstein v. MTA Long Island Bus*, 161 A.D.3d 821, 823, 75 N.Y.S.3d 532, 534 [2nd Dept, 2018]; *Stead v. Serrano*, 156 A.D.3d 836, 837, 67 N.Y.S.3d 244 [2nd Dept, 2017]; *Nembhard v. Delatorre*, 16 A.D.3d 390, 791 N.Y.S.2d 144 [2nd Dept, 2005]; *Peplow v. Murat*, 304 A.D.2d 633, 758 N.Y.S.2d 160, 161 [2nd Dept, 2003]; *Frier v. Teague,* 288 A.D.2d 177, 732 N.Y.S.2d 428 [2nd Dept, 2001]. "Since the defendants failed to meet their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact." *Trivedi v. Vural*, 90 A.D.3d 1031, 1032, 934 N.Y.S.2d 861 [2nd Dept, 2011].

Even assuming, *arguendo*, that the Defendant had met his *prima facie* burden, the Plaintiff's opposition to Defendant's motions raises issues of fact regarding the injuries allegedly sustained by the Plaintiff. The Plaintiff proffers the affirmation of Drs. Yvette Davidov and Victor Katz. Dr. Davidov examined the Plaintiff shortly after the alleged accident on March 27, 2017, April 10, 2017, April 25, 2017, June 21, 2017, July 10, 2017, July 24, 2017, August 29, 2017, September 25, 2017, and October 03, 2017. As part of her October 3, 2017 examination, Dr. Davidov found 65 percent temporary impairment and that while working the Plaintiff was working with restrictions.[1] Dr. Katz examined the Plaintiff on May 31, 2017. Dr. Katz noted in

[1] The Defendant, in reply, contends that Dr. Davidov's reports are inadmissible. However, a review of Dr. Davidov's reports reflect that they were signed under the penalty of perjury. Even assuming their inadmissibility, Dr. Katz' report is sufficient to raise a material issue of fact. Moreover, to the extent that the Defendant references/adopts Dr. Davidov's records in order to refute her findings, the Defendant does not achieve that goal. Dr. Davidov's findings support Plaintiff's contention that he sustained a serious injury as a result of the subject accident.

his report that he recommended the Plaintiff's arthroscopic surgery of his left knee and that it was his opinion that "the injuries suffered by Mr. Gyulbudaghyan were caused by the accident of March 21, 2017." Dr. Katz also referred to a number of medical records in support of his findings. Accordingly, the motion by the Defendant is denied.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant's motion (motion sequence #1) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.