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 6th day of December, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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TAMILIA AMIROVA,

Plaintiff,

- against -

JND TRANS INC., and OTABEK ABDAZIMOV,
Defendants.

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Index No.: 508101/2018

DECISION AND ORDER

Motions Sequence #2

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 a review of the foregoing papers and after oral argument, the Court determines as follows:

This lawsuit arises out of an alleged motor vehicle accident which occurred on December 27, 2017. The Plaintiff Tamilia Amirova (hereinafter "the Plaintiff") alleges in her Complaint that she suffered personal injuries while operating an automobile that was allegedly hit in the rear by a vehicle operated by Defendant Otabek Abdazimov (hereinafter "Defendant Driver" and "Defendant Abdazimov") and owned by Defendant JND Trans Inc. (hereinafter the "Defendant Owner" or "Defendant JND") (collectively "Defendants"). The alleged accident occurred near or at the intersection of Ocean Avenue and Dorchester Road, Brooklyn, New York.

The Plaintiff claims in her Verified Bill of Particulars (Defendants' Motion Exhibit C, Paragraph 20), that as a result of the accident she sustained a number of serious injuries including

but not limited to injuries to her cervical and lumbar spine and left shoulder. The Plaintiff also alleges, *inter alia* that she "has sustained a medically determined injury which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for at least ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury complained of."

Defendants move (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of the Plaintiff 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)

Defendants contend that the affirmed reports of Dr. Dana M. Mannor and Dr. Scott A. Springer support their 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.

Dr. Dana A. Mannor, an orthopedic surgeon, conducted a medical examination of Plaintiff on March 14, 2019[1]. Dr. Mannor conducted range of motion testing of the Plaintiff's cervical and lumbar spine and the Plaintiff's shoulders, using a goniometer, and found no limited range of motion. Dr. Mannor's diagnosis was that the Plaintiff "presents with a normal orthopedic examination on all objective testing; subjective complaints do not correlate with negative clinical test results. The orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined." (See Defendant's Motion, Examination by Dr. Mannor, Attached as Exhibit D).

Dr. Scott A. Springer, a radiologist, did not conduct a medical examination but instead reviewed MRIs of the cervical spine (1/22/2018), lumbar spine (2/15/2018) and left shoulder (1/9/2018). Dr. Springer opined in relation to the lumbar spine that there was "no fracture or subluxation. No posttraumatic changes causally related to the 12/27/2017 incident." In relation to the cervical spine, Dr. Springer opined that there was "no fracture or subluxation. No posttraumatic changes causally related to the 12/27/2017 incident." Additionally, in relation to the left shoulder Dr. Springer opined that there was "Mild narrowing, glenohumeral joint. No posttraumatic changes causally related to the 12/27/2017 incident." Further, he found "a moderate amount of fluid which distends the tendon sheath compatible with tendonosis, which is

[1]The body of the report states March 14, 2019, however the report is dated March 8, 2019.

chronic..." and could not be related to the accident. Moreover, as to the cervical and lumbar spine he stated that the condition was a product of degeneration over a long period of time and that the findings were "chronic in nature". (See Defendants' Motion, Reports of Dr. Springer, Attached as Exhibit E).

The Plaintiff alleged that she 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. "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]. However, where the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no, such claim, Defendant movant may utilize those factors in support of its motion. *See Master v. Boiakhtchion*, 122 A.D.3d 589, 590, 996 N.Y.S.2d 116, 117 [2nd Dept, 2014]; *Kuperberg v. Montalbano*, 72 A.D.3d 903, 904, 899 N.Y.S.2d 344, 345 [2nd Dept, 2010]; *Camacho v. Dwelle*, 54 A.D.3d 706, 863 N.Y.S.2d 754 [2nd Dept, 2008]. In this case the movant points to both the conclusory statements in the Plaintiff's Bill of Particulars and her deposition wherein Plaintiff states, *inter alia*, that she was confined to home and bed for approximately one month after the accident (Bill of Particulars, Page 6) and that she did not lose any time from work as a result of the alleged injuries. (Defendants' Motion, Exhibit "F", Deposition Page 23-24) As such, the Defendants have met their *prima facie* burden.

The Plaintiff must prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2nd Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2nd Dept, 1995]. In this regard, the Plaintiff must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff's injuries as defined by statute. *See Shamsoodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2nd Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2nd Dept, 2000].

In order to prove that the Plaintiff suffered a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, the Plaintiff has the burden to show more than "a mild, minor or slight limitation of use." The Plaintiff must provide objective medical evidence in addition to medical opinions of the extent or degree of the limitation alleged and its duration. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 A.D.3d 641, 642, 775 N.Y.S.2d 546, 547 [2nd Dept, 2004]; *Burnett v Miller*, 255 AD2d 541 [2nd Dept, 1998]; *Beckett v Conte*, 176 AD2d 774 [2nd Dept, 1991].

Turning to the merits of the opposition, Plaintiff has failed to raise a material issue of fact. Specifically, neither Dr. Davidov or Dr. Katz address the degenerative findings presented by the Defendants' Doctors in support of the Defendants' motion. *Pommells v. Perez*, 4 N.Y.S.3d 566, 830 N.E.2d 278 (2005). Therefore, their affirmations are speculative and conclusory in their failure to address alternative causations of the alleged injuries raised by the Defendants' Doctors. *Kallicharan v. Sooknanan*, 282 A.D.2d 573, 723 N.Y.S.2d 376 (2d Dept. 2001). Specifically, the Plaintiff's "treating orthopedist did not refute or address the findings of preexisting degeneration and lack of traumatic injury." *Franklin v. Garayu*, 29 N.Y.3d 925, 71 N.E.3d 1218 (2017) affirming *Franklin v. Garayu*, 136 A.D.3d 464, 24 N.Y.S.3d 304 (1st Dept. 2016). Even though the Plaintiff submitted affirmed medical reports that found a causal relationship to the alleged accident, those same medical reports failed to "address the findings of the moving defendants' expert that the injuries...were degenerative in nature." *Mnatcakanova v. Elliot*, 174 A.D.3d 798,

106 N.Y.S.3d 112 (2d Dept. 2019). *Cornelius v. Cintas Corp.*, 50 A.D.3d 1085, 875 N.Y.S.2d 637 (2d Dept. 2008). Moreover, the purported reports of Dr. Katz are not signed.

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

Defendants' motion for Summary Judgment (motion sequence #2) is granted and the action is dismissed.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.