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 2nd day of March, 2020.

P R E S E N T:
HON. CARL J. LANDICINO,

Justice.

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YORLYNA VARGAS,

Plaintiff,

- against -

DEBORAH CADANER, ZEV CADANER,

Defendants.

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Index No.: 510361/2017

DECISION AND ORDER

Motion 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, 4
Reply Affidavits (Affirmations)	5, 6,

After a review of the papers and oral argument the Court finds as follows:

Defendants, Deborah Cadaner and Zev Cadaner, (the "Defendants") move for summary judgment and dismissal of the complaint on the basis that the Plaintiff, Yorlyna Vargas, has failed to meet the serious injury threshold required pursuant to Insurance Law §5102(d).[1] This action concerns a motor vehicle accident that allegedly occurred on April 5, 2016 in Brooklyn, N.Y. Plaintiff opposes the motion. Plaintiff alleges in her Verified Bill of Particulars that as a consequence of the accident she sustained injuries, including injury to her left hip, cervical spine, lumbar spine. The Plaintiff also alleges that she was prevented "from performing substantially all of the material acts which constitute his [sic] usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the date of the occurrence."

[1] The Court finds that the Defendants have shown that there was discovery outstanding at the time the note of issue was filed and as a result there was sufficient cause to make the instant motion after the requisite period. *See Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431 [2004]; *Parker v. LIJMC-Satellite Dialysis Facility*, 92 A.D.3d 740, 742, 939 N.Y.S.2d 96, 98 [2nd Dept, 2012].

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].

In support of their motion the Defendants proffer affirmed medical reports from Edward Toriello, M.D. (orthopedist) and Marc J. Katzman, M.D. (radiologist). Dr. Toriello examined the Plaintiff on February 27, 2019 (two years and ten months after the accident) and conducted range of motion testing of the Plaintiff's cervical spine, right shoulder, left shoulder, right elbow, left elbow, left wrist & hand, right wrist & hand, lumbrosacral spine, right hip, and left hip. However, Dr. Toriello found limitations in range of motion in the cervical spine and lumbar spine and found

that "claimant reveals evidence of a resolved cervical strain, resolved low back strain and resolved left hip contusion." (Defendants' Motion, Exhibit K)

Dr. Katzman reviewed the MRI of the Plaintiff's left hip performed on April 26, 2016, the MRI of the cervical spine performed on May 3, 2016, and the MRI performed of the lumbar spine performed on May 10, 2016. As to the left hip Dr. Katzman states that there is no evidence of post traumatic injury. As to the cervical spine, Dr. Katzman states that there are minimal preexisting degenerative changes and no evidence of post-traumatic injury related to the motor vehicle accident. As to the lumbar spine, Dr. Katzman states that there is minimal chronic disc disease without evidence of post-traumatic injury. (Defendants' Motion, Exhibit L)

The Plaintiff sets forth in the subject verified Bill of Particulars 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. Generally, 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 her deposition, the Plaintiff states that she only missed two days of work from ConEdison after the accident (See Defendant's Motion, Exhibit M, Page 11). The Defendant also testified that she had to take ten minute walking breaks every two hours for about a month after the accident so she would not be sitting all the time (See Defendant's Motion, Exhibit M, Page 18).

While Dr. Toriello states that the Plaintiff's decreased ranges of motion were subjective, he "...failed to adequately explain and substantiate his belief that the limitation of motion" in the Plaintiff's cervical and lumbosacral spine, "...was self-imposed." *India v O'Connor,* 97 AD3d 796, N.Y.S.2d 678 [2nd Dept, 2012]; *Rivas v. Hill,* 162 AD3d 809, N.Y.S.3d 225 [2nd Dept, 2018]; *Mercado v. Mendoza,* 133 A.D.3d 833, 834, 19 N.Y.S.3d 757 [2nd Dept, 2015]; *Nash v. MRC Recovery, Inc.*, 172 A.D.3d 1213, 1215, 101 N.Y.S.3d 376 [2nd Dept, 2019]; *Castro v. Anthony,* 153 A.D.3d 655, 656, 57 N.Y.S.3d 895 [2nd Dept, 2017]; *Protonentis v. Battaglia,* 150 A.D.3d 1286, 52 N.Y.S.3d 888 [2nd Dept, 2017].

Even assuming, *arguendo*, that the Defendants had met their initial *prima facie* burden, the Plaintiff would be required to prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, as defined by Insurance Law §5102, in order to prevent the dismissal of the action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2nd Dept, 1994]; *Bryan v Brancato,* 213 AD2d 577 [2nd Dept, 1995]. In this regard, Plaintiff Vargas 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].

Plaintiff in opposition proffers medical records from Colin Clarke, M.D., Matthew Lefkowitz, M.D. and Alan B. Greenfield, M.D. Both Dr. Clarke and Dr. Lefkowitz found limited range of motion in the Plaintiff's lumbar and cervical spine. For example and more specifically, when examining the Plaintiff's lumbar spine, Dr. Lefkowitz found flexion at forty degrees (normal is ninety degrees), extension at ten degrees (normal is thirty degrees) and lateral bend at twenty five degrees (normal is forty degrees). Dr. Lefkowitz also found decreased range of motion of the cervical spine, with flexion at thirty degrees (normal is fifty degrees) extension is thirty degrees (normal is sixty degrees) and lateral flexion at twenty degrees (normal is fifty degrees) (See

Plaintiff's Affirmation in Opposition, Exhibit "D"). He further opined that the Plaintiff's condition was causally related to the subject motor vehicle accident. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; *see Dufel v. Green,* 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

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

The motion by the Defendants (motion sequence #2) is denied.
This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.

KINGS COUNTY CLERK
FILED
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