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 11th day of September, 2020.

PRESENT:

CARL J. LANDICINO, J.S.C.

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ORVILLE MUNROE and ONEIKA A. MUNROE,
Plaintiff,

Index No.: 506830/2018

-against-

DECISION AND ORDER

EVERTON R. SYLVESTER and AUDLEY G. SYLVESTER,
Defendant.

Motions Sequence #1, #2, #3

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	10-17, 18-21, 22-32
Opposing Affidavits (Affirmations)	34-35, 36-37,
Reply Affidavits (Affirmations)	39

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

This lawsuit arises out of a motor vehicle accident which apparently occurred on June 22, 2015. The Plaintiffs, Orville Munroe and Oneika A. Munroe (hereinafter "Orville" and "Oneika", respectively) allege in their Complaint that on that day they suffered personal injuries when the vehicle Orville operated, within which Oneika was a passenger, collided with a vehicle owned by Defendant Audley G. Sylvester and operated by Defendant Everton R. Sylvester (hereinafter "the Defendants"). The collision occurred on Nostrand Avenue, at or near its intersection with Snyder Avenue, in the County of Kings, State of New York. In their Verified Bill of Particulars, Oneika claims injuries to, *inter alia*, her back and her neck. Orville claims injuries to, *inter alia,* his back, neck, right leg, left leg, right knee and left knee. Both Plaintiffs also allege that they each suffered 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 Defendants now move (Motion Sequence #1) for an order pursuant to CPLR 3212 granting summary judgment and dismissal of the complaint relating to Oneika, on the basis that Oneika has failed to meet the serious injury threshold required pursuant to Insurance Law §5102(d). In support of this application, the Defendant relies on the deposition of Oneika and a report of Dr. Stephen L. Brenner. The Defendants also move (Motion Sequence #3) for an order pursuant to CPLR 3212 granting summary judgment and dismissal of the complaint relating to Orville, on the basis that Orville has also failed to meet the serious injury threshold required pursuant to Insurance Law §5102(d). In support of this application, the Defendants rely on the deposition of Orville and a report of Dr. Stephen L. Brenner.

The Plaintiffs oppose the motions and cross-move (Motion Sequence #2) for separate relief. The Plaintiffs contend that the Defendants have failed to meet their *prima facie* evidentiary showing, and that even assuming that the Defendants had, there are sufficient issues of fact raised by the reports of Doctor Irving Friedman, that each Plaintiff relies upon, to deny the summary judgment motions. The Plaintiffs also cross-move pursuant to CPLR 3212 for partial summary judgment on the issue of liability, in favor of the Plaintiffs. The Plaintiffs contend that their vehicle was stopped at the time of the accident, and that a rear-end collision with a stopped or stopping vehicle creates an inference that the rear vehicle was negligent and caused the collision. Further, the Plaintiffs contend that the Defendants cannot offer a non-negligent explanation for the accident at issue. In opposition, the Defendants represent that they do not oppose this motion in as much as liability is concerned, but they request the opportunity to continue to conduct discovery.

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 [2d 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 [2d 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 [2d 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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD 2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Oneika Munroe

In support of their motion (motion sequence #1) as against Oneika, the Defendants proffer an affirmed medical report from Stephen L. Brenner, M.D. Dr. Brenner examined Oneika on March 4, 2019, almost four years after the accident. Dr. Brenner conducted range of motion testing of Oneika's cervical spine and lumbar spine. Dr. Brenner found mostly normal ranges of motion[1] and opined that Oneika's cervical spine sprain/strain and her lumbar spine sprain/strain had resolved. Dr. Brenner also found that "[t]here is no need for household help, special transportation, durable medical equipment, or diagnostic tests." (See Defendants' Motion Sequence #1, Report of Dr. Brenner, Exhibit E).

Oneika sets forth in her 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. Where the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Mrs. Munroe does not support, or reflects that there is no, such claim, the Defendant movant may utilize those factors in support of its motion. *See Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2nd Dept

[1] As to her cervical spine, Dr. Brenner reported right and left lateral flexion at 40 degrees (45 degrees normal) and right and left rotation 70 degrees (80 degrees normal). As to the flexion reading it is a less than 12 percent reduction and as to the rotation reading, it is a 12.5 percent reduction. Courts have held that "'a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute.'" *Grossman v. Wright*, 268 A.D.2d 79, 83, 707 N.Y.S.2d 233, 236 [2d Dept 2000], *quoting Licari v. Elliott*, 57 N.Y.2d 230, 441 N.E.2d 1088 [1982].

2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]. In her Verified Bill of Particulars, Oneika states that she was confined to her home for five months. (See Defendants' Motion Sequence #1, Exhibit "C" Paragraph 7(b)). However, when asked during her deposition if there was a period of time during which she was confined to her home, only leaving for medical appointments, Oneika answered "[n]o." (See Defendants' Motion Sequence #1, Exhibit "D" Page 34). Oneika does not explain the apparent discrepancy.

Dr. Brenner's report provided range of motion findings and did "compare those findings to the normal range of motion..." *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2d Dept 2005]. Assuming that the Defendants had met their initial *prima facie* burden, Oneika would have to prove that there are triable issues of fact as to whether the she suffered serious injuries, as defined by Insurance Law §5102, in order to prevent the dismissal of her action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2d Dept 1994]; *Bryan v Brancato*, 213 AD2d 577 [2d Dept 1995]. In this regard, Oneika must submit quantitative objective findings, as well as opinions relative to the significance of the her injuries, as defined by statute. *See Shamsoodeen v. Kibong*, 41 AD3d 577, 578, 839 N.Y.S.2d 765, 766 [2d Dept 2007]; *Grossman v Wright*, 268 AD2d 79 [2d Dept 2000].

Oneika, in opposition, proffers the affirmed report of Irving Friedman, M.D. dated October 4, 2019, in relation to an examination the same day. Dr. Friedman conducted a range of motion exam of Oneika's cervical spine and found limited range of motion with "[c]ervical rotation was guarded to 70 degrees out of 90, i.e. 22% deficit at the cervical spine with passive and active range of motion using a hand held goniometer." He further found that in relation to the lumbar spine "forward flexion 60 degrees out of 90. Straight leg raising was positive bilaterally at 60 degrees out of 90." The Dr, represented that he utilized a hand held goniometer to determine his findings. Dr. Friedman opined that Oneika "has limitation of range of motion at the cervical and lumbar regions with radicular symptoms of the upper extremities." (See Plaintiffs' Affirmation in Opposition, Report of Dr. Friedman, Exhibit I). Dr. Friedman also causally related the injuries to the accident on June 22, 2015. Dr. Friedman also suggests further treatment, including invasive procedures, which he states that Oneika was unwilling and hesitant to proceed with. This suggests that Dr. Friedman was acting as more than an expert in relation to the motion. Finally, Oneika states in her affidavit that lack of coverage was the reason for the cessation of treatment. (See Plaintiffs' Affirmation in Opposition, Report of Dr. Friedman, Exhibit J). *See Jules v.*

Barbecho, 55 A.D.3d 548, 866 N.Y.S.2d 214 [2d Dept 2008]. The report of Dr. Friedman raises a triable issues of fact as to whether Oneika has sustained serious injuries that satisfy the requirements of Insurance Law 5102, sufficient to deny the Defendants' motion for summary judgment. *See King v. Chisholm*, 118 AD3d 956, 957, 988 N.Y.S.2d 660, 661 [2nd Dept 2014]; *see also Perl v. Meher*, 18 N.Y.3d 208, 960 N.E.2d 424 [2011].

Orville Munroe

In support of their motion (motion sequence #3) as against Orville, the Defendants proffer an affirmed medical report of Stephen L. Brenner, M.D. Dr. Brenner examined Orville on March 4, 2019. Dr. Brenner conducted range of motion testing of Orville's cervical spine, lumbar spine, right hip, left hip, right knee and left knee. Dr. Brenner found normal range of motion and opined that Orville had resolved his cervical spine sprain/strain and had resolved his lumbar spine sprain/strain.[2] Dr. Brenner also found that "Mr. Munroe can perform his activities of daily living as he was doing prior to the accident." (See Defendants Motion Sequence #3, Report of Dr. Brenner, Exhibit E).

While Orville sets forth in his verified Bill of Particulars that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident, 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 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 A.D.3d 706, 863 N.Y.S.2d 754 [2d Dept, 2008]. In his Verified Bill of Particulars, Orville states that he was confined to his bed for one month and confined to his home for three months. (See Defendants' Motion, Exhibit "C" Paragraph 7(b)). However, when asked during his deposition if there

[2] As to Orville's right knee, Dr. Brenner reported flexion at 130 degrees (150 degrees normal), and extension at 0 degrees (0 degrees normal). For the left knee Dr. Brenner reported flexion at 130 degrees (150 degrees normal), and extension at 0 degrees (0 degrees normal). For the lumbar spine Dr. Brenner reported flexion at 50 degrees (60 degrees normal). As stated above these limitations are not significant for the purposes of this motion. See *Grossman v. Wright*, 268 A.D.2d 79, 83, 707 N.Y.S.2d 233, 236 [2d Dept 2000], *quoting Licari v. Elliott*, 57 N.Y.2d 230, 441 N.E.2d 1088 [1982].

was a period of time during which he was confined to his home, Orville answered, "[a]bout a month." (See Defendants' Motion Sequence #3, Exhibit "D" Page 51). Orville does not explain this apparent discrepancy.

Dr. Brenner's report provided range of motion findings and did "compare those findings to the normal range of motion..." *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2d Dept 2005]. Assuming that the Defendants have met their initial *prima facie* burden, Orville must prove that there are triable issues of fact as to whether the he 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 [2d Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2d Dept 1995]. Assuming that the Defendants met their *prima facie* burden, Orville must submit quantitative objective findings, as well as opinions relative to the significance of the his injuries, as defined by statute. *See Shamsoodeen v. Kibong*, 41 AD3d 577, 578, 839 N.Y.S.2d 765, 766 [2d Dept 2007]; *Grossman v Wright*, 268 AD2d 79 [2d Dept 2000].

Orville, in opposition, proffers the affirmed report of Irving Friedman, M.D. dated September 24, 2019, in relation to an exam on the same day. Dr. Friedman conducted a range of motion exam of Orville's cervical spine and lumbar spine and found limited range of motion. Dr Friedman found that "Cervical rotation was guarded to 60 degrees out of 90, i.e. 33% deficit at the cervical spine with passive and active range of motion using a hand held goniometer." Dr. Friedman also found that Orville "was not able to squat without extreme pain, i.e. greater than 50% deficit at the lumbar spine with passive and active range of motion using a hand held goniometer." Dr. Freidman opined that "[p]rognosis for any further functional improvement, short of invasive pain management, is extremely poor, i.e. he remains grossly symptomatic 4 years and 3 months following his injuries." (See Plaintiffs' Affirmation in Opposition, Report of Dr. Friedman, Exhibit I). Dr. Friedman also causally related the injuries to the subject accident. The Doctor also prescribed medication and directed an exercise program, and suggested more invasive procedures which he stated Orville was hesitant to consider. This shows that Dr. Friedman was indicating further treatment which suggests that he was more than an expert for purposes of opposing a motion. Orville also stated that his inability to further treat was because his no fault benefits expired and he could not afford treatment. (See Plaintiff's Opposition, Exhibit "J"). *See Pindo v. Lenis*, 99 A.D.3d 586, 587, 952 N.Y.S.2d 544 [1st Dept 2012]. The report of Dr. Friedman raises a triable issues of fact as to whether Orville has sustained serious injuries that

satisfy the requirements of Insurance Law 5102, sufficient to deny the Defendants' motion for summary judgment. *See King v. Chisholm*, 118 A.D.3d 956, 957, 988 N.Y.S.2d 660, 661 [2d Dept 2014]; *Perl v. Meher,* 18 N.Y.3d 208, 960 N.E.2d 424 [2d Dept 2011].

Plaintiffs' Motion

The Plaintiffs' motion (motion #2) is granted without any substantial opposition. This is because "[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Klopchin v. Masri*, 45 AD3d 737, 737, 846 N.Y.S.2d 311, 311 [2d Dept 2007]. The testimony of the Plaintiffs was sufficient to meet their *prima facie* burden and the Defendant did not oppose the motion and they therefore failed to raise a material issue of fact that would prevent the Court from granting partial summary judgment on the issue of liability. See *Hakakian v. McCabe*, 38 A.D.3d 493, 494, 833 N.Y.S.2d 106, 107 [2d Dept 2007]; see also *Tumminello v. City of New York*, 148 A.D.3d 1084, 1085, 49 N.Y.S.3d 739, 741 [2d Dept 2017]. Accordingly, the Plaintiffs' motion is granted and the matter will proceed to trial, solely on the issue of damages. As to Defendants' request for further discovery with regard to damages, the Defendants do not specify what, if any, discovery is outstanding in this post Note of Issue case.

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

Defendants' motions (motions sequence #1 and #3) for summary judgment are denied.

Plaintiffs' motion (motion sequence #2) for partial summary judgment on the issue of liability is granted, and the matter shall proceed to trial on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

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