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 20th day of March, 2020.

PRESENT:
CARL J. LANDICINO,
Justice.

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SONNET MAYS,

Plaintiff(s),

-against-

SILVERCUP SCAFFOLDING 1 LLC, and LISANGEL SANCHEZ,

Defendant(s).

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Index No.: 502128/2018

DECISION AND ORDER

Motion Seq.: #2

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

	Papers Numbered
Notice of Motion/OTSC and Affidavits (Affirmations) Annexed	1/2
Opposing Affidavits (Affirmations)	3
Reply/Sur-Reply Affidavits (Affirmations)	4
Memorandum/Memoranda of Law	
Papers/Affidavit(s) of Service	

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

Defendants, Silvercup Scaffolding 1 LLC and Lisangel Sanchez (the "Defendants"), move (motion seq. # 2) for summary judgment and dismissal of the complaint pursuant to CPLR 3212. The basis for the motion is that the Defendants contend that the Plaintiff, Sonnet Mays (the "Plaintiff") has failed to meet serious injury threshold requirements as defined by and pursuant to Insurance Law 5102 and 5104. The Plaintiff opposes the motion. Plaintiff alleges that on November 15, 2017 she was seriously injured following a motor vehicle accident that occurred on Saratoga Avenue, near Pacific Street in Brooklyn, New York. Plaintiff, in her Bill of Particulars, alleges injuries to, *inter alia,* her cervical and lumbar spine, right shoulder, right wrist and right knee. (See Defendants' Motion Exhibit "C")

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 its motion the Defendant proffered the Plaintiff's deposition. (Defendants' Motion Exhibit "F") In addition, the Defendants proffered the affirmed medical reports of Dr. Jeffrey Passick (orthopedist) and Stephen W. Lastig (radiologist). Dr. Passick examined the Plaintiff on February 20, 2019. Dr. Passick indicated that he reviewed a number of documents in relation to the Plaintiff including MRI reports and the plaintiff's Bill of Particulars. Dr. Passick indicated that he performed range of motion testing with the use of a goniometer, an objective test instrument. As result of the examination Dr. Passick found normal range of motion in

relation to the Plaintiff's cervical and lumbar spine, right and left shoulder, right and left elbow, right and left wrist/hand and right and left knee. He further determined that all areas examined were fully resolved as of the date of his examination, some 15 months after the accident. Dr. Passick did not indicate whether the accident caused any injury to the Plaintiff during the period between the accident and the examination. (Defendants' Motion Exhibit""D")

Dr. Lastig reviewed an MRI of the Plaintiff's Right Shoulder (12/4/17) and indicated no evidence of fracture or tear and determined that "there are no findings on this study which are causally related to the reported accident of 11/15/17." Dr. Lastig reviewed an MRI of the Plaintiff's Thoracic Spine (12/4/17) and indicated no evidence of herniations or bulges and determined that "there are no findings on this study which are causally related to the reported accident of 11/15/17." Dr. Lastig reviewed an MRI of the Plaintiff's Right Knee (11/29/17) and found no tear or fracture and stated that "I see no evidence of internal derangement or osseous injury." Dr. Lastig reviewed an MRI of the Plaintiff's Lumbar Spine (12/3/17) and indicated "[d]egenerative disc disease with disc desiccation is seen at the L5-S1 level" and no evidence of herniation. Dr Lastig made a conclusive determination of evidence of "degenerative disc disease" with disc desiccation at the L5-S1 level for this approximately 28 year old Plaintiff. Dr. Lastig reviewed an MRI of the Plaintiff's Right Wrist (11/29/17) and indicated no evidence of "fracture, marrow edema or osteochondral defect" and determined that "there are no findings on this study which are causally related to the reported accident of 11/15/17." Dr. Lastig reviewed an MRI of the Plaintiff's Cervical Spine (12/3/17) and found evidence of "degenerative disc disease with disc desiccation" at C2-C3 and C3-C4 levels. However, in addition, Dr. Lastig states that "[a]t the C3-C4 level, there is small midline disc herniation which mildly impresses on the ventral subarachnoid space" and "[t]here is mild bilateral uncovertebral joint hypertrophy at the C3-C4 and C4-C5 levels resulting in mild encroachment on the neural foramina." Dr. Lastig

makes a conclusory finding of degenerative disc disease and makes no causation conclusion as to the mild bilateral uncovertebral joint hypertrophy at the C3-C4 and C4-C5 levels.

In order to rebut any arguable *prima facie* showing of the Defendants, the Plaintiff must prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries. *See Levitant v. Beninati*, 167 A.D.3d 730, 731, 87 N.Y.S.3d 504, 505 [2nd Dept, 2018]; *Nussbaum v. Bablu*, 138 A.D.3d 703, 704, 27 N.Y.S.3d 886, 887 [2nd Dept, 2016]. 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 Ye Jin Han v. Karimzada*, 92 N.Y.S.3d 906, 907 [2nd Dept, 2019]; *Lacombe v. Castellano*, 134 A.D.3d 905, 906, 22 N.Y.S.3d 484, 484 [2nd Dept, 2015].

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].

The issue of whether a serious injury was sustained involves a comparative determination of the degree or qualitative nature of an injury based upon the otherwise normal function, purpose and use of the body part. *See Toure v Avis Rent-a-Car Sys.*, Inc., 98 NY2d 345, 353 [2002]; *Walker v. Esses*, 72 A.D.3d 938, 939, 899 N.Y.S.2d 321, 322 [2nd Dept, 2010]. In the alternative, the Plaintiff must establish that she sustained a medically-determined injury or impairment which prevented her from conducting substantially all of the material acts which

constituted her usual and customary daily activities for 90 out of the 180 days immediately following the accident. *See Licari v Elliott*, 57 NY2d 230 [1982].

While 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, 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]. The Plaintiff does not support the conclusory claim made in her Bill of Particulars.

As indicated above there are some unexplained findings by Dr. Lastig which are somewhat conflicting with Dr. Passick's findings, arguably resulting in Defendants' failure to make a *prima facie* showing that the Plaintiff did not suffer a serious injury as a result of the subject accident. However, even assuming that the Defendants had made a *prima facie* showing, the Plaintiff's evidence serves to raise a material issue of fact as to whether she suffered a serious injury as a result of the subject accident.

The Plaintiff proffers an affirmed medical report of Dr. Barry M. Katzman (Orthopedic Surgeon) dated June 3, 2019, in opposition. Dr. Katzman, indicates that he was treating the Plaintiff for her right shoulder only and first examined the Plaintiff on April 23, 2018. He indicated, among other things, that the Plaintiff complained of pain in her right shoulder and he found limited range of motion of the Plaintiff's right shoulder. He also stated that he "gave her

an injection into her right biceps tendon sheath." Upon review of the MRI of the Plaintiff's shoulder he found evidence of "intrasubstance tear posterior glenoid labrum and supraspinatus tendinopathy." This was the same MRI reviewed by Defendants' doctors. Dr. Katzman states that of the date of the report the Plaintiff was still painful, although improved. Dr. Katzman represented that limited range of motion tests were performed with a goniometer and found limited range in various areas, the most extreme of which were limitations in the Plaintiff's right shoulder (flexion 90 degrees, 180 degrees normal). Finally, Dr. Katzman causally related the injuries to the subject accident and found "permanency" due to continued pain and range limitations. (See Plaintiff's Opposition Exhibit "A")

Although the Defendants arguably established that the Plaintiff did not suffer a serious injury as a result of the accident on November 15, 2017, the medical report of Dr. Katzman served to raise a material issue of fact as to whether the Plaintiff suffered a serious injury, as such term is defined in Insurance Law 5102(d), as a result of that 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]. Accordingly the motion is denied.

It is therefore ORDERED that:

The Defendants' motion for summary judgment on the issue of serious injury (Motion Sequence Number 2) is denied.

This constitutes the decision and order of the Court.

ENTER:

Carl J. Landicino, J.S.C.