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 1st day of September, 2020.

PRESENT:
CARL J. LANDICINO, J.S.C.

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ANTHONY SWINTON,
Plaintiff,

Index No., 517447/2018

DECISION AND ORDER

-against-

MTA BUS COMPANY and RONALD PONGER,
Defendants.

Motion Sequence #1

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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	10-16
Opposing Affidavits (Affirmations)	19-24
Reply Affidavits (Affirmations)	25

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

This lawsuit arises out of a motor vehicle accident that allegedly occurred on March 29, 2018. Plaintiff Anthony Swinton (hereinafter "the Plaintiff") alleges in his Complaint that on that date he suffered personal injuries after the vehicle he was operating was in a multiple vehicle collision with a vehicle operated by Defendant Ronald Ponger and owned by Defendant MTA Bus Company (hereinafter referred to collectively as "Defendant MTA"). The Plaintiff alleges in his complaint that the motor vehicle collision occurred on Cortelyou Road at or near its intersection with Marlboro Road, in the County of Kings, City and State of New York. In his Verified Bill of Particulars the Plaintiff alleges injuries to his lumbar spine and that he suffered a "significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents Plaintiff from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment."

Defendants move (motion sequence #1) 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). The Plaintiff opposes the motion and argues that the Defendants have failed to meet their burden and as a result the motion should be denied.

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 NY2d 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 NY2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 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 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of their motion the Defendants proffer affirmed medical reports from Jay W. Eneman, M.D. Dr. Eneman examined the Plaintiff on June 17, 2019, more than a year after the date of the accident. As part of the examination, Dr. Eneman conducted range of motion testing of the Plaintiff's lumbar spine, with the use of a goniometer. Dr. Eneman found "[r]ange of motion of the lumbar spine reveals forward flexion to 60 degrees (60 normal), extension to 25 degrees (25 normal), right lateral bsñding 25 degrees (25 normal), and left lateral bending 25 degrees (25 normal)." Dr. Eneman opined that "Mr. Swinton is able to perform the duties of his occupation as a warehouse worker without restrictions or limitations and is capable of performing all activities of daily living." (Defendants' Motion, Exhibit E)

Turning to the merits of the Defendants' motion, the Court is of the opinion that the Defendants have not met their initial burden of proof. *See Che Hong Kim v. Kossoff*, 90 AD3d 969, 969, 934 N.Y.S.2d

867 [2d Dept 2011]. The Defendants contend that the affirmed reports of Dr. Eneman supports their contentions that the Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). Dr. Eneman conducted a medical examination of plaintiff on June 17, 2019, more than a year after the date of the accident. Dr. Eneman, reviewed a Magnetic Resonance Imaging Scans (MRIs) of the Plaintiff. These MRIs were performed relatively shortly after the motor vehicle incident. However, while Dr. Eneman did note that the Plaintiff explained that he did not work for five months after the accident because of his condition, Dr. Eneman did not opine on the ability of the Plaintiff to conduct her daily activities during this early post-accident period. Dr. Eneman did not address Plaintiff's alleged "90/180" claim. In the instant proceeding, the Plaintiff's Bill of Particulars indicates that he became incapacitated from March 30, 2018 to August 14, 2018. What is more, the Plaintiff, at his examination before trial stated that he was unable to return to work and had approximately missed five months of work as a result of his injuries caused by the accident. (Defendant's Motion, Exhibit D, Page 75). As a result, the Court is of the opinion that the motion fails to adequately address, as a matter of law, the Plaintiff's claim set forth in the verified bill of particulars, 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. *See Aujour v. Sing*h, 90 AD3d 686, 934 N.Y.S.2d 240 [2d Dept 2011]; *Lewis v. John*, 81 AD3d 904, 905, 917 N.Y.S.2d 575 [2d Dept 2011]; *Menezes v. Khan*, 67 AD3d 654, 889 N.Y.S.2d 54 [2d 2009]; *Faun Thai v. Butt*, 34 AD3d 447, 448, 824 N.Y.S.2d 131, 132 [2d Dept 2006].

Even assuming, *arguendo,* that the Defendants had met their *prima facie* burden, the Court finds that the Plaintiff has raised material issues of fact relating to his ability to meet the threshold required by Insurance Law 5102. The Plaintiff relies on an initial evaluation from Dr. Thomas Pobre, an MRI report from Dr. Narayan B. Paruchuri, and an examination report from Dr. Brian Haftel. Dr. Haftel examined the Plaintiff on several occasions.

Dr. Pobre examined the Plaintiff on April 6, 2018, 8 days after the accident. He found pronounced limited range of motion in the Plaintiff's lumbar spine with the use of a goniometer, and causally related the limitations to the accident. On September 5, 2019, Dr. Haftel conducted range of motion testing of the Plaintiff's lumbar spine, with the use of a goniometer. Dr. Haftel found that "Mr. Swinton's lumbar spine forward flexion range of motion was 55 degrees whereas the normal range of motion for that motion is 90 degrees - thereby reflecting a 39% loss of the use of his lumbar spine forward flexion motion; and Mr. Swinton's lumbar spine extension range of motion was 20 degrees whereas the normal range of motion

for that motion is 30 degrees - thereby reflecting a 33% loss of the use of his lumbar spine extension motion." Dr. Haftel opined that "the pathologies reflected in Mr. Swinton s MRI report and films and the motion losses that he has experienced in his lumbar spine are not the product of any degenerative or pre-existing condition in his back, but, rather, are directly attributable to the accident, given the nature of the accident in which Mr. Swinton was involved, his complaints relating to his back and lack of any prior injuries to that part of his body, the onset of pain that area of his body shortly following the accident the lack of any complaints relating to that area prior to the accident, my review of Mr. Swinton's records, and the results of my examination of Mr. Swinton." (See Plaintiff's Affirmation in Opposition, Exhibit "D").

Plaintiff's evidence, namely the affirmed reports of Dr. Haftel, raises triable issues of fact with regard to the Plaintiff's claim that he sustained a serious injury. *See McNeil v. New York City Transit Auth.*, 60 AD3d 1018, 1019, 877 N.Y.S.2d 351, 351 [2nd Dept 2009]. "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 NY2d 345, 774 N.E.2d 1197 [2002]; *see Dufel v. Green*, 84 NY2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

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

Defendants' motion for summary judgment (motion sequence #1) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.