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 27th day of September 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

TERRANCE PATTERSON,

Plaintiffs,

- against -

EMMANUEL A. WALKER, ARTHEA A. BENNETT, MD MAHMUDUR RAHMAN and RIGO LIMO-AUTO, CORP,

Defendant.

Index No.: 508477/2018

DECISION AND ORDER

Motion Sequence #2, #4

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	35-42, 55-56,
Opposing Affidavits (Affirmations)	69, 71-82,
Reply Affidavits (Affirmations)	83

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

This action concerns a motor vehicle accident that occurred on January 8, 2018. On that day, Plaintiff Terrance Patterson (hereinafter the "Plaintiff") was a passenger in a vehicle operated by Defendant Mahmudur Rahman and owned by Defendany Rigo Limo-Auto Corp. (hereinafter the "Rigo Defendants"). That vehicle was allegedly involved in a motor vehicle collision with a vehicle operated by Defendant Emmanuel A. Walker and owned by Defendant Arthea A. Bennett (hereinafter the "Bennett Defendants") The accident purportedly occurred on Halsey Street at or near its intersection with Marcy Avenue in Brooklyn, New York. Plaintiff claims in his Verified Bill of Particulars (Defendants' Motion Exhibit B, Paragraph 10), that he sustained a number of

serious injuries, *inter alia*, injuries to his neck, back, left leg and bilateral shoulders, trauma and pain. In his Bill of Particulars, the Plaintiff also states that he was prevented from "performing substantially all of the material acts which constituted his usual and customary daily activities for not less that ninety days during the one hundred eighty days immediately following subject occurrence."

The Rigo Defendants now move (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the claims against them on the ground that none of the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of this application, the Defendants rely on the deposition of the Plaintiff and the reports of Willie E. Thompson, M.D. and Mark J. Decker, M.D.[1]

The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff contends that the movants have failed to meet their *prima facie* evidentiary showing, and that even assuming that they had, there are sufficient issues of fact raised by the reports of the Plaintiff's doctors which serve to support the denial of summary judgment.

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*

[1] The Bennett Defendants also cross-move (motion sequence #4) for the same relief and for the sake of judicial economy adopt and incorporate the submissions made by the Rigo Defendants.

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 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of their motion (motions sequence #2) the Rigo Defendants proffer the affirmed medical report from Dr. Willie E. Thompson and Dr. Mark J. Decker. Dr. Thompson examined the Plaintiff on October 21, 2019, one year and nine months after the date of the accident. Dr. Thompson purportedly conducted range of motion testing of the Plaintiff's cervical spine, lumbar spine, right shoulder, left shoulder and left knee. Dr. Thompson found normal range of motion for the Plaintiff's cervical spine and lumbar spine, with minor limitations regarding the right shoulder, left shoulder and left knee/leg. Relating to the Plaintiff's right shoulder Dr. Thompson found "forward flexion at 170 degrees (180 degrees normal), extension at 40 degrees (40 degrees normal), abduction at 170 degrees (180 degrees normal), adduction at 30 degrees (30 degrees normal), internal rotation at 80 degrees (80 degrees normal), and external rotation at 90 degrees (90 degrees normal)." Regarding the Plaintiff's left shoulder Dr. Thompson found "forward flexion at 170 degrees (180 degrees normal), extension at 40 degrees (40 degrees normal), abduction at 170 degrees (180 degrees normal), adduction at 30 degrees (30 degrees normal),

internal rotation at 80 degrees (80 degrees normal) and external rotation at 90 degrees (90 degrees normal)." As to the Plaintiff's left knee, Dr. Thompson found "flexion at 140 degrees (150 degrees normal), and extension at 0 degrees (0 degrees normal)." Dr. Thompson opined that "[t]here is no evidence an [sic] orthopedic disability." Dr. Thompson further opined that "[l]imited ranges of motion are as allowed by the claimant." (See Rigo Defendants' Motion, Exhibit E, Report of Dr. Thompson).

Dr. Mark J. Decker did not examine the Plaintiff but instead reviewed an MRI of the Plaintiff's cervical spine and lumbar spine. The MRI of the Plaintiff's lumbar spine was initially conducted on January 26, 2018, several weeks after the accident. Dr. Decker's review of the MRI of the lumbar spine revealed "[n]o herniation." Broad bulges were found. Dr. Decker further found "[d]iffuse multilevel bulging and facet hypertrophy with inferior foraminal encroachment at LS-St." As to the MRI of the lumbar spine Dr. Decker stated that "[t]hese findings are all longstanding and not causally related to the date of accident of 01/08/2018." "No evidence to suggest that an acute traumatic injury was sustained." The MRI of the cervical spine was also conducted on January 26, 2018. As to the cervical spine, Dr. Decker found "[n]o herniation." Broad bulges were found. Dr. Decker stated that "[t]hese findings are all longstanding and not causally related to the date of accident of 01/011/2018." "No evidence to suggest that an acute traumatic injury was sustained." (See Riga Defendants' Motion, Exhibit F, Report of Dr. Decker).

Turning to the merits of the Rigo Defendants' motion, the Court is of the opinion that the Rigo 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. Thompson and Dr. Decker support their contentions that the Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). Dr. Thompson conducted a medical

examination more than a year and nine months after the date of the accident. Dr. Decker, reviewed a Magnetic Resonance Imaging Scans (MRIs) of the Plaintiff. These MRIs were performed relatively shortly after the motor vehicle incident. MRIs were not conducted of the knee or shoulders. However, neither Dr. Thompson nor Dr. Decker spoke to the ability of the Plaintiff to conduct his daily activities during this early post-accident period, nor did they address Plaintiff's alleged "90/180" claim. Bulges in the spine and neck were found and Dr. Decker's indication of longstanding injury for this approximately 20 year old Plaintiff was not explained. During his EBT the Plaintiff denied having prior injuries (See Riga Defendants' Motion, Exhibit D, Page 51). In his Bill of Particulars, the Plaintiff stated that he "was intermittently confined to his home/bed for approximately one (1) month, and intermittently thereafter." However, during his deposition, Plaintiff stated that he was confined to his bed for two months and his home for one year. (See Riga Defendants' Motion, Exhibit D, Page 54). Moreover, when the Plaintiff was asked, during his deposition, whether there had been any activities he could not engage in because of the accident, he stated "[b]asketball, running, football, dancing." "Just being me." When asked what he does in a typical day after the accident, the Plaintiff stated "[g]et up, shower. Um, lay back down." (See Riga Defendants' Motion, Exhibit D, Pages 56 through 61).

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 non-permanent nature which prevents the Plaintiff's injured person's usual and customary daily activities for not less than ninety days (90) during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment." *See Aujour v. Singh*, 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 A.D.3d 447, 448, 824 N.Y.S.2d 131, 132 [2d Dept 2006]. As a consequence, the Court need not address the Plaintiff's opposition. See *Che Hong Kim v. Kossoff*, 90 AD3d 969, 934 N.Y.S.2d 867 [2d Dept 2011].

However, even assuming, *arguendo*, that the Rigo Defendants had met their *prima facie* burden, the Court finds that the Plaintiff has raised material issues of fact relating to the Plaintiff's ability to meet the threshold required by Insurance Law 5102. The Plaintiff relies primarily on the reports of Narayan Paruchi, M.D. and Gautam Khakar, M.D.

Dr. Paruchi, a radiologist, "supervised and interpreted" the MRI of the Plaintiff's cervical spine and lumbar spine, both performed on January 26, 2018. Dr. Paruchi found that the "[l]umbar Spine MRI is, at L5-S1, there is a disc bulge and a right foraminal hemiation, with severe right lateral recess stenosis and moderate to severe right foraminal stenosis, moderate to severe left lateral recess stenosis, and moderate to severe lateral recess stenosis and left foraminal stenosis, and at L4-5, there is a disc bulge with lateral recess stenosis bilaterally." Dr. Paruchi also found that that "my impression for the Cervical Spine MRI study is, at C6-7, there is a right paracentral herniation resulting in right lateral recess stenosis." Dr. Paruchi opined that "I have reviewed the defense expert report of Mark J. Decker, MD, dated August 5, 2019, and I do not agree with said expert's opinion as to the lack of causal relationship with the patient's aforementioned cervical and lumbar spinal injuries and the accident of January 8, 2018." Dr. Paruchi found that the injuries are causally related to the accident on January 8, 2018 and not longstanding as asserted by Dr. Decker. (See Plaintiff's Affirmation in Opposition, Exhibit G, Report of Dr. Paruchi).

Dr. Khakar first examined the Plaintiff on January 18, 2018 and on a number of other occasions, including a final exam on January 21, 2020. On that date, Dr. Khakar conducted a range of motion exam (indicating that a goniometer was utilized) of the Plaintiff's lumbar spine. As to

the lumbar spine, he found limited range of motion, specifically "[l]umbar flexion was to 75 (normal 90 degrees), extension 25 degrees (normal 30 degrees), left side bending 25 degrees (25 degrees normal), right side bending 25 degrees (25 degrees normal), left rotation 40 degrees (45 degrees normal), right rotation 40 degrees (45 degrees normal)." Dr. Khakar referenced a number of epidural steroid injections for pain. The doctor also stated that "Mr. Patterson may continue to experience pain and limitation of his activities for a long period of time." "These changes are permanent and physical stress may trigger recurrent episodes of neck and back pain with radicular type symptoms." Dr. Khakar opined that "[a]s a result of the accident of January 8, 2018, Patterson has sustained significant injuries to his cervical and lumbar spine." Dr. Khahar further found that "the trauma to the neck and back caused by the accident resulted in post-traumatic sprain/strain syndromes with myofascial derangements, secondary to ligaments being over-stretched, nerves being irritated and various soft tissues becoming inflamed." (See Plaintiff's Affirmation in Opposition, Exhibit I, Report of Dr. Khakar). This evidence supports the position that the Plaintiff sustained a serious injury within the meaning of Insurance Law 5102(d) under the significant limitation of use and permanent consequential limitation of use categories.

As a result, the Court finds that the Plaintiff has raised material issues of fact that prevent the Court from granting summary judgment to the Defendants. *See Chul Koo Jeong v. Denike*, 137 A.D.3d 1189, 1190, 28 N.Y.S.3d 393, 394 [2d Dept 2016]; *Casiano v. Zedan*, 66 AD3d 730, 730, 887 N.Y.S.2d 613, 614 [2d 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 also Mitchell v. Casa Redimix Concrete Corp., 83 AD3d 1015, 1015, 921 N.Y.S.2d 543 [2d Dept 2011].

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

The motion by the Riga Defendants (motion sequence #2) is denied.

The motion by the Bennett Defendants (motion sequence #4) is denied.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.