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 June, 2022.

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

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ALEJANDRO VALENCIA,

Plaintiff,

- against -

MANUEL I. MARTINEZ AND WAI CHEUNG,

Defendant.

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Index No.: 517287/2016

DECISION AND ORDER

Motion Sequence #6, #7, #8, #9

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..... 111-120, 122-132, 134-148, 156-166,
Opposing Affidavits (Affirmations).....167-174, 177-184, 192-196, 197-201, 202-204, 205-207,
Reply Affidavits (Affirmations).....208-210,
Memorandum of Law.....175, 185

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

This action concerns a motor vehicle accident that occurred on April 16, 2016. The Plaintiff, Alejandro Valencia (hereinafter the "Plaintiff"), alleges in his Complaint that on that date he suffered personal injuries while a passenger in a vehicle owned and operated by Defendant Manuel I. Martinez, after that vehicle was struck by a vehicle owned and operated by Defendant Wai Cheung (Defendant Cheung). Plaintiff alleges that the incident took place on the Belt Parkway at or near its intersection with the Bay Parkway in Brooklyn, N.Y. The Plaintiff further claims in his Verified Bill of Particulars and Supplemental Bill of Particulars (See Defendant Martinez' Motion, Motion Sequence #6, Exhibit B, Paragraph 11), that he sustained a number of serious

injuries, *inter alia*, injuries to his left knee, right shoulder, neck and back.[1] The Plaintiff also alleges (See Defendant Martinez' Motion, Motion Sequence #6, Exhibit B, Paragraph 20) that he suffered from a "a medically determined injury or impairment of a nonpermanent nature which prevented the 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 complained of herein." ("90/180 claim").

Defendant Martinez now moves (motion sequence #6) for an order pursuant to CPLR 3212, granting him summary judgment and dismissing the complaint 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, Defendant Martinez relies on the deposition of the Plaintiff and the reports of Dr. Jeffrey Guttman and Dr. Darren Fitzpatrick. Defendant Cheung also moves (motion sequence #7) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement. The Defendants also raise cessation of treatment. Defendant Cheung utilizes and incorporates the same doctors' reports as Defendant Martinez. Defendant Martinez also moves (motion sequence #9) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint on the grounds that he was not liable for the collision as a matter of law.

The Plaintiff opposes these motions and cross moves for separate relief. The Plaintiff contends that based upon the Defendants' own doctors' reports, the Defendants 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

[1] By letter dated August 24, 2020, Plaintiff withdrew claims of injury to his "cervical, lumbar and thoracic spine." (See Defendant Cheung's Affirmation in Support (NYSCEF Doc. #27).

summary judgment in relation to Insurance Law 5102. The Plaintiff also cross-moves (motion sequence #8) for summary judgment on the issue of liability against the Defendants. The Plaintiff contends that during the incident at issue he was an "innocent passenger" free from liability and as a result summary judgment on the issue of liability should be granted in his favor and each of the Defendants' affirmative defenses should be striken and dismissed.

As it relates to the motion by Defendant Martinez (motion sequence #9) for summary judgment on the issue of liability, both Defendant Cheung and the Plaintiff oppose the motion and contend that Defendant Martinez has failed to meet his *prima facie* burden. The opponents of this motion contend that Defendant Martinez has failed to provide evidence that he was not liable for the accident. First, Defendant Cheung notes that Defendant Martinez was precluded from providing an affidavit of his own in support of his motion. This preclusion was apparently a result of Defendant Martinez' failure to appear for a deposition as reflected in an order dated January 21, 2021 by the Hon. Lawrence Knipel, J.S.C. In addition, Defendant Cheung argues that the Police Accident Report contains an admission by Defendant Martinez that supports Cheung's own deposition testimony wherein he states that the accident occurred because the vehicle operated by Defendant Martinez quickly moved in front of Cheung's vehicle. The Plaintiff also argues that there are questions of fact as to whether Defendant Martinez was stopped or moving at the time of impact, and whether the accident occurred because Defendant Martinez abruptly drove in front of Defendant Cheung.

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 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Motions Sequence #6, #7 (Defendants Summary Judgment Motion-Insurance Law § 5102(d))

In support of the Defendants' motions (motions sequence #6, #7) the movants proffer the affirmed medical reports of Dr. Jeffrey Guttman and Dr. Darren Firzpatrick. Dr. Guttman conducted an orthopedic medical examination of the Plaintiff on January 29, 2020, more than three years after the collision at issue. In his report, Dr. Guttman detailed his findings based upon his personal observations and objective testing. Dr. Guttman performed an orthopedic examination of the Plaintiffs left knee and right shoulder with the use of a hand-held goniometer. As to the right shoulder Dr. Guttman found "[r]ange of motion flexion to 180 degrees (180 degrees normal), extension to 60 degrees (60 degrees normal), abduction to 165 degrees (180 degrees normal) [8 % reduction], external rotation 80 degrees (90 degrees normal)[12% reduction], and internal rotation

to 60 degrees (70 degrees normal) [15% reduction]." Dr. Guttman's impression regarding the Plaintiff's right shoulder was "post right shoulder arthroscopy resolved." As for the left knee, Dr. Guttman found "[r]ange of motion of flexion to 135 degree (140 degrees normal)[4% reduction] and extension to 0 degrees (0 degrees normal)." Dr. Guttman's impression regarding the Plaintiff's left knee was "post left knee contusion resolved." (See Motions Sequence #6, #7, Report of Dr. Guttman). These limitations in range of motion noted by Dr. Guttman are not significant within the meaning of the no-fault statute. See *McLoud v. Reyes*, 82 AD3d 848, 849, 919 N.Y.S.2d 32 [2d Dept 2011]; *Ibragimov v. Hutchins*, 8 AD3d 235, 235, 777 N.Y.S.2d 663 [2d Dept 2004].

Dr. Fitzpatrick did not examine the Plaintiff but reviewed the MRI of the Plaintiff's right shoulder and left knee. The right shoulder MRI was performed on June 13, 2016, almost nine weeks after the Plaintiff's accident. Dr. Fitzpatrick stated that as to the right shoulder "[r]otator cuff tendons and musculature unremarkable." He then stated "[u]nremarkable right shoulder MRI-no traumatic injury." The left knee MRI was performed on June 8, 2016, almost eight weeks after the Plaintiff's accident. Dr. Fitzpatrick noted "[m]edial and lateral minisci are intact." Dr. Fitzpatrick also noted "[m]oderate joint effusion." Dr. Fitzpatrick concluded that "[m]oderate joint effusion is a nonspecific finding and **may be** due to antecedant trauma, infection, inflammation or other etiologies." [emphasis added] (See Motions Sequence #6, #7, Report of Dr. Fitzpatrick).

When 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 for summary judgment. *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 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]. In this case, the Verified Bill of Particulars state

(paragraph 9) that the Plaintiff was confined to his bed for only one month after the accident. Moreover, in his deposition, when asked about the pain he felt and his limitations the Plaintiff stated "[a]t night to sleep and also when I'm going to lift something up, when I'm going to raise something, when I'm going to raise my arm." (see Defendants Motion, Motion Sequence #6, Exhibit "D", Page 45) The Court is of the opinion that this is not sufficient to state a 90/180 claim. *See Salman v. Rosario*, 87 AD3d 482, 485, 928 N.Y.S.2d 531 [2d Dept 2011].

Assuming that the Defendants have made a *prima facie* showing that the Plaintiff has not sustained a serious injury as defined by the statute, it therefore becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, in order to avoid 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, the Plaintiff must submit quantitative objective findings, in addition to opinions as to the significance of the Plaintiff's injuries. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 AD3d 641, 642, 775 N.Y.S.2d 546, 547 [2d Dept 2004]; *Burnett v Miller*, 255 AD2d 541 [2d Dept 1998]; *Beckett v Conte*, 176 AD2d 774 [2d Dept 1991].

Dr. Salehin examined the Plaintiff on several occasions, including April 19, 2016, May 16, 2016, July 11,2016, October 11, 2016, December 20, 2016 and January 3, 2017. Dr. Salehin, conducted a range of motion examinations (with a goniometer) of the Plaintiff's left knee and right shoulder and found limited range of motion in varying degrees. As part of the April 19, 2016, as to the initial examination of the right shoulder Dr. Salehin found "[f]lexion was restricted to 100 degrees (normal is 180 degrees), extension was restricted to 40 degrees (normal is 50 degrees), abduction was restricted to 90 degrees (normal is 180 degrees)." As to the left knee Dr. Salehin found that "left knee revealed that his flexion was restricted to 80 degrees (normal is 180 degrees)."

Dr. Salehin also found limited ranges of motion for the right shoulder and left knee during the other examinations. As part of the October 11, 2016 right shoulder range of motion examination Dr. Salehin found that "[f]lexion was restricted to 170 degrees (normal is 180 degrees), extension was restricted to 40 degrees (normal is 50 degrees), and abduction was restricted to 140 degrees (normal is 180 degrees)." He also found "[r]ange of motion testing of his left knee revealed that his flexion was restricted to 120 degrees (normal is 140 degrees)." Dr. Salehin raised the Plaintiff's subsequent accident and stated that "Mr. Valencia did not complain of pain to, nor did he injure, his right shoulder in connection with this subsequent incident." Dr. Salehin concluded that the Plaintiff's "injuries to his right shoulder and left knee were traumatically induced and directly caused by the subject motor vehicle collision of April 16, 2016." (See Plaintiff's Affirmation in Opposition, Report of Dr. Salehin).

Dr. Beyda reviewed MRIs of both the right shoulder and left knee referred to above and found injuries to both as a result of the subject accident. As for the left knee, Dr. Beyda found "[s]mall joint effusion; - [o]blique tear in the posterior horn of the medial meniscus; - [o]blique tear in the anterior horn of the lateral meniscus; and - [l]egion in the posterior distal femur which may represent an enchondroma." As to the right shoulder, Dr. Beyda found "[p]artial tear of the distal supraspinatus tendon superimposed upon tendinosis." (See Plaintiff's Affirmation in Opposition, Report of Dr. Beyda).

Dr. Shul also examined the Plaintiff on several occasions, including June 22, 2016, June 29, 2016 (when he performed surgery on the Plaintiff's right shoulder), July 11, 2016 and May 19, 2021. As part of the June 22, 2016 examination, Dr. Shur stated that "[b]ased on my review of Mr. Valencia's MRIs, his history of complaints, the results of his physical examination, the failure of conservative measures, his continued pain and mechanical symptoms, as well as his limitations in

activities of daily living, it was my impression that Mr. Valencia was suffering from, *inter alia*, right frozen shoulder, right shoulder impingement, right shoulder derangement, and left knee meniscal tear." Dr. Shur recommended surgery as a result. Dr. Shur stated in his report that "I performed a right shoulder diagnostic therapeutic arthroscopy, major synovectomy with lysis of adhesions, anterior capsular release, debridement radiofrequency treatment of the anterior glenoid labrum, subacromial bursectomy, subacromial decompression, debridement radiofrequency treatment of the partially torn rotator cuff, manipulation of the right shoulder under anesthesia, and steroid injection for postoperative pain control and treatment of inflammatory changes." Dr Shur also opined that "arthroscopic surgical procedure that I performed on June 29, 2016 was caused and necessitated as a direct result of the right shoulder injuries he sustained from the April 16, 2016 motor vehicle collision." As to the subsequent accident, Dr. Shur stated that "Mr. Valencia did not injure his right shoulder in that subsequent incident and, as such, my opinions related to the diagnoses and prognosis of his right shoulder injuries sustained from the April 16, 2016 motor vehicle collision remain unchanged." Finally, Dr. Shur opined that "based on the nature of Mr. Valencia's injuries to his right shoulder, my review of the objective medical evidence, the fact that Mr. Valencia is still experiencing mechanical symptoms, restrictions, limitations, and inability to perform his activities of daily living over five (5) years since the post-accident onset, the presence of arthroscopically documented tears to the anterior glenoid labrum and rotator cuff in his right shoulder, it is my opinion, to a reasonable degree of medical certainty, that Mr. Valencia's injuries to his right shoulder are permanent in nature." (See Plaintiff's Affirmation in Opposition, Report of Dr. Shur).

The Plaintiff also addresses any alleged "gap in treatment" in his affidavit submitted in opposition where he states (See Plaintiff's Affirmation in Opposition, Exhibit B, Paragraph 5) that

"I stopped treating for my right shoulder with Dr. Salehin's office around December 2016. At that time, I was advised by Dr. Salehin that it was my choice to decide whether to continue receiving therapy at his office for my right shoulder or to continue to perform the home exercises I was taught by his office and Dr. Shur's office." This is supported by the report of Dr. Salehin who states (See Plaintiff's Affirmation in Opposition, Exhibit B, Paragraph 9) "Thereafter, Mr. Valencia continued his course of treatment at my office in connection with his April 16, 2016 motor vehicle accident until December 20, 2016, at which time Mr. Valencia was advised that it was his choice as to whether to continue with conservative therapy at my office or to continue with his home exercise therapy at home." This is sufficient for the Plaintiff to justify any gap in treatment. *See Pommells v. Perez*, 4 N.Y.3d 566, 580, 830 N.E.2d 278, 287 [2005].

As a result, the Court finds that the Plaintiff has raised material issues of fact as to the severity of Plaintiff's injuries as a result of the accident that prevent the Court from granting summary judgment. *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 NE 2d 105 [1995]. Accordingly, the Defendants' motions (motions sequence #6 and #7) are denied.

Motion Sequence #8 (Plaintiff's Summary Judgment Motion on the issues of liability)

Turning to the merits of the Plaintiff's motion for partial summary judgment on the issue of liability, the Court finds that sufficient evidence has been presented by the Plaintiff to establish

that the Plaintiff was a passenger in Defendant Martinez's vehicle and is free from liability. In support of the Plaintiff's motion, the Plaintiff relies primarily on his own deposition and the deposition of Defendant Cheung. During his deposition, when the Plaintiff was asked where he was in the vehicle while it was being driven by Defendant Martinez, he stated (See Plaintiff's Motion, Exhibit F, Page12) "[r]ear passenger." When asked what part of the vehicle he was in when it was struck, the Plaintiff stated (page 14) "[t]he rear part, the rear driver side." This evidence was sufficient to establish the Plaintiff's *prima facie* burden. "The plaintiff made a *prima facie* showing that he did not engage in any culpable conduct that contributed to the happening of the accident." *Medina v. Rodriguez*, 92 AD3d 850, 851, 939 N.Y.S.2d 514, 515 [2d Dept 2012].

However, the Court finds that sufficient evidence has not been provided by the Plaintiff to establish that the either Defendant was a proximate cause of the accident. When asked if he witnessed the collision, the Plaintiff stated (See Plaintiff's Motion, Exhibit F, Page 14) "[n]o." What is more, Defendant Cheung, during his deposition testimony, when asked whether the vehicle he collided with was stopped or moving, he stated (See Plaintiff's Motion, Exhibit G, Page 31) "[m]oving." When asked how the collision occurred, Defendant Cheung answered (Page 31), "[t]hat vehicle cut in." Accordingly, the Plaintiff's motion for summary judgment on the issue of liability is granted, solely to the extent that the Plaintiff was an innocent passenger free from liability. Although "[t]he right of the plaintiff, as an innocent passenger, to summary judgment is not 'restricted by potential issues of comparative negligence' which may exist as between [two Defendants]", *Jung v. Glover,* 169 A.D.3d 782, 783, 93 N.Y.S.3d 390, 393 [2d Dept 2019], quoting *Medina v. Rodriguez*, 92 AD3d 850, 851, 939 N.Y.S.2d 514, 515 [2d Dept 2012], without there being a determination that either Defendant was a proximate cause of the accident, the Plaintiff is only entitled to judgment that he is free from comparative fault.

Moreover, inasmuch as the Defendants have not raised an issue of fact as to Plaintiff's comparative negligence the Defendants' affirmative defense of culpable conduct on the part of the Plaintiff, if any, is dismissed. *See Sapienza v. Harrison*, 191 A.D.3d 1028, 142 N.Y.S.3d 584, 588 [2d Dept 2021]; *Kwok King Ng v. West*, 195 A.D.3d 1006, 146 N.Y.S.3d 811, 812 [2d Dept 2021].

Motion Sequence #9 (Defendant Martinez Summary Judgment Motion)

Turning to the merits of the motion (motion sequence #9) by Defendant Martinez, the Court finds that Defendant Martinez has failed to provide good cause for the late motion for summary judgment. Pursuant to the Kings County Supreme Court Civil Term rules, "post note of issue summary judgment motions, where the City of New York is not a defendant. . . must be made no later than sixty (60) days after the filing of the note of issue." "'In the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment.'" *Bargil Assocs., LLC v. Crites*, 173 A.D.3d 958, 958, 100 N.Y.S.3d 897 [2d Dept 2019], quoting *Bivona v. Bob's Disc. Furniture of NY, LLC*, 90 A.D.3d 796, 935 N.Y.S.2d 605, 606 [2d Dept 2011]; see also *Brill v. City of New York*, 2 N.Y.3d 648, 651, 814 N.E.2d 431, 433 [2004]. In the instant proceeding, the note of issue was filed on February 24, 2021. As a result, the motion should have been filed by April 26, 2021, but was instead filed on June 24, 2021, 120 days after plaintiff's filing of the Note of Issue. The Plaintiff raises this issue in opposition. The Defendant did not attempt to provide a good cause for this late filing in the motion. Accordingly, the motion is denied.

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

The motion by the Defendant Martinez (motion sequence #6) for summary judgment on the issue of serious injury is denied.

The motion by Defendant Cheung (motion sequence #7) for summary judgment on the issue of serious injury is denied.

The motion by the Plaintiff (motion sequence #8) for partial summary judgment on the issue of liability is granted, solely to the extent that the Plaintiff is an innocent passenger free from liability.

The motion by Defendant Martinez (motion sequence #9) for summary judgment on the issue of liability is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.