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 6th day of January 2023.

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

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LAUREL TONEY,

Plaintiff,

-against-

MIKHELL DUNN and "JOHN DOE", name being fictitious and unknown to plaintiff at this time,

Defendants.

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Index No.: 525595/2018

DECISION AND ORDER

Motions Sequence #3, #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	57-66, 85-95,
Opposing Affidavits (Affirmations)	72-84,
Reply Affidavits (Affirmations)	98

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

This is an action for personal injuries allegedly sustained by the Plaintiff, Laurel Toney (hereinafter the "Plaintiff") on August 5, 2018. The Plaintiff alleges in her Complaint that she suffered personal injuries when her vehicle was involved in a motor vehicle collision with a vehicle owned and operated by Defendant Mikhell Dunn (hereinafter the "Defendant"). The collision purportedly occurred on 140th Avenue at or near its intersection with 170th Street in Queens, New York. The Plaintiff claims, in her Verified Bill of Particulars, that she sustained a number of serious injuries including, *inter alia*, injuries to her cervical spine, and right knee (including right knee surgery). The Plaintiff also alleges that she was unable to perform "substantially all of the material

acts which constitute her 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." (the "90/180 claim").

The Defendant now moves (motion sequence #3) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that by the Plaintiff failed to sustain a "serious injury" as defined by Insurance Law § 5102(d). In support of this application, the Defendant relies on the deposition of the Plaintiff and the reports of Dr. Dana Mannor and Dr. Jonathan Lerner.

The Plaintiff opposes the motion and cross-moves (motion sequence #4) for separate relief. The Plaintiff contends that the Defendant has failed to meet his *prima facie* burden. The Plaintiff also contends that in any event she has submitted sufficient proof to create a material issue of fact that should prevent the Court from granting summary judgment. The Plaintiff relies primarily on the reports of Dr. Andrew McDonnell, Dr. Jack Baldassare and Dr. Stanislav Avshalumov. The Plaintiff also cross-moves (motion sequence #4) for an order pursuant to CPLR 3212 granting her summary judgment on the issue of liability as against the Defendant and setting the case down for a trial on damages. The Plaintiff contends that summary judgment should be granted because at the time of the accident the Plaintiff was parked in her vehicle when it was struck in the side by the Defendant's vehicle and there is no non-negligent explanation for this collision on the part of the Defendant. The Defendant has not opposed the Plaintiff's motion.

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

party seeking 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].

Motion Sequence #3 (Defendant's Summary Judgment Motion-Insurance Law § 5102(d))

In support of the Defendant's motion, the Defendant proffers the affirmed medical reports of Dr. Dana Mannor and Dr. Jonathan Lerner. Dr. Mannor, a board-certified orthopedic surgeon, examined the Plaintiff on November 5, 2020, two years and three months after the date of the Plaintiff's accident. Dr. Mannor conducted range of motion testing of the Plaintiff's cervical spine and right knee, with the use of a goniometer, and found no limitation in the Plaintiff's range of motion in relation to these areas. Dr. Mannor's diagnosis was that "1. Cervical spine sprain/strain - resolved. 2. Status post right knee arthroscopic surgery on 09/27/2018 - healed by examination." Dr. Mannor also opined that "[b]ased on today's examination and within reasonable degree of a

medical certainty, there is no objective evidence of an orthopaedic disability." (See Defendants' Motion, Report of Dr. Mannor, Exhibit "F").

Dr. Lerner, a radiologist, did not examine the Plaintiff but reviewed the MRI of the Plaintiff's cervical spine and right knee. The cervical spine MRI was performed on October 23, 2018, about two months and two weeks after the Plaintiff's accident. Dr. Lerner states that ""[t]here is diffuse loss of height and signal within the cervical intervertebral disc consistent with dehydration." Dr. Lerner also stated that "[t]here is normal appearance of the cranio-cervical junction." In summary, Dr. Lerner found that "[t]he above findings are seen in the setting of diffuse desiccation of the cervical intervertebral disc space levels, which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event." Dr. Lerner additionally reviewed the MRI of the Plaintiff's right knee dated August 31, 2018, less than one month post-accident. Dr. Lerner opined that "[t]his suggests a degenerative meniscal tear of the posterior horn of the medial meniscus as well as the myxoid degeneration within the anterior horn of the lateral meniscus without a tear." Dr. Lerner opined that "[t]hese findings are reflective of a chronic degenerative process as opposed to an acute traumatic event." Dr. Lerner also reviewed a radiograph of the Plaintiff's right knee performed on August 8, 2018, a few days after the Plaintiff's accident. Dr. Lerner stated that "[r]adiographs of the right knee demonstrate no evidence of fracture, dislocation, or soft tissue abnormality to suggest an acute traumatic event." Dr. Lerner also stated that the "[e]valuation of this x-ray examination reveals no causal relationship between the claimant's alleged accident and the findings on this x-ray examination." (See Defendants' Motion, Report of Dr. Lerner, Exhibit G).

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, including expert medical testimony, the Defendants have

met their initial burden of proof as to the Plaintiff. In the instant proceeding, the Defendants' proof, in the form of the reports of Drs. Mannor and Lerner are sufficient to establish that the Plaintiff's injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). What is more, the Court finds that the Defendant has provided sufficient evidence regarding the Plaintiff's 90/180 claim. Generally, where the Bill of Particulars contains conclusory allegations of a 90/180 claim, and the deposition or affidavit of the 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 on that category (*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 indicates that the "Plaintiff was incapacitated from employment for approximately one (1) day following the accident and four (4) days following the right knee surgery." (See Defendant's Motion, Bill of Particulars, Exhibit D, Paragraph 5). At her deposition, when asked how much time she missed from work after this accident, the Plaintiff stated "[a]bout four days or so, I don't remember." (See Defendants' Motion, Plaintiff's Deposition, Exhibit E, Page 16). When asked whether she stopped her job as a school bus assistant because she moved to South Carolina, the Plaintiff stated "[y]es." (See Defendants' Motion, Plaintiff's Deposition, Exhibit E, Page 18).

As a result, it becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, as defined by statute, 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].

As an initial matter, some of the records that the Plaintiff relied upon, such as the records purportedly related to treatment from Brooklyn Medical Practice, P.C. (See Affirmation in Opposition, Exhibit E) and the EMG results (See Affirmation in Opposition, Exhibit J) were not properly affirmed. As a result these records are inadmissible and are therefore without probative value. See CPLR 2106 and *Parente v. Kang,* 37 A.D.3d 687, 831 N.Y.S.2d 430 [2nd Dept, 2007]; *See Mora v. Riddick*, 69 A.D.3d 591, 591, 893 N.Y.S.2d 149, 150 [2nd Dept, 2010]; *Washington v. Mendoza*, 57 A.D.3d 972, 871 N.Y.S.2d 336 [2nd Dept, 2008]. *Bycinthe v. Kombos*, 29 A.D.3d 845, 815 N.Y.S.2d 693 [2nd Dept, 2006], *Joseph v. A&H Livery*, 58 A.D.3d 688, 871 N.Y.S.2d 663 [2nd Dept, 2009].

The Plaintiff also relies on the reports of Dr. Andrew McDonnell, Dr. Jack Baldassare and Dr. Stanislav Avshalumov. Dr. McDonnell, a board certified radiologist, did not examine the Plaintiff but reviewed the MRI of the Plaintiff's left shoulder taken on August 20, 2018, more than two weeks after the Plaintiff's accident. Dr. McDonnell found that the MRI of the left shoulder revealed "[p]rominent tendinitis changes are seen at the supraspinatus and infraspinatus tendons." Dr. McDonnell made a finding that "[t]here is no impingement." Dr. McDonnell also found that "[t]he subscapularis and teres minor tendons are intact." (See Affirmation in Opposition, Report of Dr. McDonnell, Exhibit "F").

Dr. Baldassare, a board certified radiologist, did not examine the Plaintiff but reviewed the MRI of the Plaintiff's right knee and cervical spine. The MRI of the right knee was taken on August 31, 2018, several weeks after the Plaintiff's accident. Dr. Baldassare found that "[t]here is a

horizontal irregular tear of the posterior horn of the medial meniscus." Dr. Baldassare found that "[t]here is a peripheral tear in the anterior horn of the lateral meniscus." Dr. Baldassare opined that "[t]here is no joint effusion." The MRI of the cervical spine was taken on October 23, 2018. As to the cervical spine Dr. Baldassare found that "C5-C6: central herniation impress the anterior dural sac." Dr. Baldassare also found that "C6-C7: Central herniation impress the anterior dural sac extends to the right abutting the cord." (See Affirmation in Opposition, Report of Dr. Baldassare, Exhibit "G").

Dr. Avshalumov conducted medical examinations of the Plaintiff on several occasions, including September 10, 2018, October 7, 2018 (involving arthroscopic surgery to the right knee) and January 31, 2022. He found that "[h]er complaints and symptoms arose of the acute traumatic injuries from a motor vehicle accident of 8/15/18. The mechanism of the injury is entirely consistent with the clinical presentation." As for the January 31, 2022 examination, Dr. Avshalumov performed an examination of the Plaintiff's left shoulder and right knee, with the use of a hand held goniometer. Dr. Avshalumov found limited range of motion in the left shoulder. Dr Avshalumov opined that "[t]he patient's injuries have caused significant limitations to activities of daily living, which are expected consequences of injuries of this nature." Dr. Avshalumov also opined that "I believe that she is suffering from pos-traumatic internal derangement of her left shoulder and has reached the point of maximal medical improvement from treatment." As to the right knee, Dr. Avshalumov opined that "[t]he right knee injuries sustained have caused limitations to the motion and use of that knee, and to the activities of daily living, which are expected consequences of injuries of this nature." Dr. Avshalumov stated opined that "I believe that she is suffering from post-traumatic osteoarthritis of her right knee and has reached the point of maximal medical improvement." He also stated that "the post-traumatic arthritis will progress with age and

is permanent." "It is more probable than not that she will require a total knee replacement." (See Affirmation in Opposition, Report of Dr. Avshalumov, Exhibit "K").

Dr. Avshalumov provided a further affirmation wherein he found "that the patient's radiologists' findings are consistent with the films." He states that he recommended right knee arthroscopic surgery, and performed same on September 27, 2018. He found that the surgery showed that in the right knee, the patient had post traumatic internal derangement with a medical and lateral meniscal tear." Dr. Avshalumov stated as a consequence of his February 2, 2022 examination, "[w]ith regards to the current state of the patients right knee, it is my opinion, based on a reasonable degree of medical certainty, along with the patient's complaints and my clinical examination with positive orthopedic findings, and significant lack of patient's improvements to conservative nonsurgical treatment, that the patient has sustained a permanent post-traumatic injury to her right knee." Dr. Avshalumov related the injuries to the accident. He also indicated that the Plaintiff had further treatment, and she "has reached the point of maximal medical improvement." (See Affirmation in Opposition, Report of Dr. Avshalumov, Exhibit "L").

However, the Plaintiff's Doctors have failed to specifically acknowledge the issue of degeneration raised by the Defendant's doctors. *See Campanile v. Miller*, 171 AD3d 690, 691, 95 N.Y.S.3d 849 [2d Dept 2019]; *Amato v. Gorecik*, 167 AD3d 557, 86 N.Y.S.3d 905 [2d Dept 2018]; *Williams v. Laura Livery Corp.,* 176 AD3d 557, 558, 112 N.Y.S.3d 16 [1st Dept 2019]; *Irizarry v. Lindor*, 110 AD3d 846, 848, 973 N.Y.S.2d 296 [2d Dept 2013]; *Duciau v. Levano*, 177 AD3d 700, 701, 110 N.Y.S.3d 557 [2d Dept 2019]; *Blumenberg v. Lora,* 193 AD3d 445, 446, 146 N.Y.S.3d 107 [1st Dept 2021]. "The affirmations of the plaintiff's treating neurologist failed to address the findings of the defendant's examining radiologist that the plaintiff suffered from a longstanding and degenerative disc disease in his cervical spine which was not caused by the

subject accident." *John v. Linden*, 124 AD3d 598, 599, 1 N.Y.S.3d 274 [2d Dept 2015]. What is more, the report of Dr. Avshalumov, in conjunction with the deposition of the Plaintiff, fail to raise an issue of fact in relation to the Plaintiff's 90/180 claim. See *Knopf v. Sinetar*, 69 A.D.3d 809, 810, 895 N.Y.S.2d 108, 109 [2d Dept 2010]. Finally, the Plaintiff fails to address her cessation, or gap, in treatment. *See Atken v. Jackson*, 164 AD3d 869, 79 N.Y.S.3d 917 [2d Dept 2018]; *Osgood v. Martes*, 39 AD3d 516, 831 N.Y.S.2d 724 [2d Dept 2007]; *Neugebauer v. Gill*, 19 AD3d 567, 568, 797 N.Y.S.2d 541 [2d Dept 2005]; *Sibrizzi v. Davis*, 7 AD3d 691, 692, 776 N.Y.S.2d 843 [2d Dept 2004]. As a result, the Defendant's motion is granted, and the complaint is dismissed. The Plaintiff's cross-motion (motion sequence #4) is therefore denied as academic.

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

The motion by the Defendant (motions sequence #3) is granted and the complaint is dismissed.

The Plaintiff's cross-motion (motion sequence #4) is denied as academic.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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