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 February 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

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WILLIAM WADDEL,

Plaintiff,

-against-

MORTIMER ROLLINS,

Defendant.

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Index No.: 525790/2018

DECISION AND ORDER

Motions Sequence #3

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	33-42,
Opposing Affidavits (Affirmations)	46, 48-52,
Reply Affidavits (Affirmations)	54

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, William Waddel (hereinafter the "Plaintiff") on August 13, 2018. The Plaintiff alleges in his Complaint that he suffered personal injuries as a pedestrian when a vehicle owned and operated by Defendant Mortimer Rollins (hereinafter the "Defendant") collided with him. The collision purportedly occurred on the street adjacent to 12205 Flatlands Avenue, Brooklyn, New York. The Plaintiff claims, in his Verified Bill of Particulars, that he sustained a number of serious injuries including, *inter alia*, injuries to his lumbar spine, cervical spine, left shoulder and left knee. The Plaintiff also alleges that he sustained "a disabling injury for a period in excess of 90 out of the first 180 days following this occurrence." (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 Defendants rely on the deposition of the Plaintiff and the report of Dr. Jeffrey Guttman.

The Plaintiff opposes the motion. The Plaintiff contends that the Defendant has failed to meet his *prima facie* burden. The Plaintiff also contends that, in any event, he 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. Hank Ross, Dr. Guenadi Amoachi and other medical documents.

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].

In support of their motion, the Defendants proffer the affirmed medical reports of Dr. Jeffrey Guttman. Dr. Guttman, examined the Plaintiff on September 23, 2020, more than two years after the date of the accident. Dr. Guttman conducted range of motion testing with the use of a goniometer. He examined the Plaintiff's cervical spine, lumbar spine, left shoulder, left knee, left hip and left ankle and found no limitation in the Plaintiff's range of motion in relation to those areas. Dr. Guttman opined that the cervical spine sprain had resolved, the lumbar strain had resolved, the left shoulder strain had resolved, the left knee sprain had resolved, the left hip strain had resolved and the left ankle sprain had resolved. Dr. Guttman also stated that "[t]here were no objective findings to substantiate the subjective complaints." Dr. Guttman also opined that "[w]ithin a medical degree of certainty and based on review of the available medical record and the history as reported by the claimant, the injuries reported above casually related to the accident of 8/13/18." (See Defendant's Motion, Report of Dr. Guttman, Exhibit F). Dr. Guttman did not address the six months immediately following the accident.

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, the Defendant 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 states at paragraph 7 that the Plaintiff "was confined to home for a period of approximately 3 weeks to date, except for necessary and essential excursion for required purpose." Plaintiff at paragraph 8

indicates that he was not employed at the time of the accident. The Bill of Particulars is verified by the Plaintiff's attorney. During his deposition, when asked if there was a period of time he was confined to his home, the Plaintiff stated "[t]hat was from October of '18 to July of '19" (approximately nine months). (See Defendant's Motion, Exhibit E, Pages 88-89). During his deposition he stated that he had issues with intimate relations. He also stated that he could no longer play sports and was unable to train family members for sports activity at school/college. When asked if there were activities he could no longer engage in, the Plaintiff stated "[i]nteract with my children." When asked to specify, the Plaintiff stated "[c]an't run and play with them. Can't play with the dog with them." (See Defendant's Motion, Exhibit E, Page 100).

Assuming that the Defendant had made a *prima facie* showing that the Plaintiff had 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 his 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 Trinity Medicine, P.C. and Sufficient Chiropractic Care, P.C. (Exhibit "D") were not properly affirmed or otherwise illegible. 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].

However, Dr. Kamal Tadros, M.D. examined the Plaintiff on August 14, 2018, one day after the accident. He indicates limited range of motion, (cervical, lumbar, left shoulder, and left knee), finds the Plaintiff totally disabled, and relates his findings to the accident. However, he does not indicate that he used an objective test instrument. *See Durand v. Urick*, 131 AD3d 920, 15 N.Y.S.3d 475, 476 [2d Dept 2015].

Dr. Guenadi Amoachi, a board certified radiologist, did not physically examine the Plaintiff but reviewed the MRIs of the Plaintiff's cervical spine, thoracic spine, lumbar spine, left hip and left shoulder and affirmed them as accurate. The cervical spine MRI was performed on September 28, 2018, approximately six weeks after the Plaintiff's accident. As to the cervical spine, the MRI report stated, "C5-C6: Central and bilateral paracentral disc herniation causing effacement of the anterior aspect of the articular sac, no spinal stenosis or neural foraminal narrowing." The thoracic spine MRI was performed on October 19, 2018, approximately two months after the Plaintiff's accident. As to the thoracic spine, the MRI report stated, "T11-T12 central and bilateral paracentral disc herniation causing effacement of the anterior aspect of the thecal sac, no spinal stenosis or neural foraminal narrowing." The lumbar spine MRI was performed on September 28, 2018, approximately six weeks after the Plaintiff's accident. As to the lumbar spine, the MRI report stated, "L5-S1: Central and bilateral paracentral disc herniation, causing mild left neural foraminal narrowing, right neural foramina is patent, no spinal stenosis." The left hip MRI was performed on September 17, 2018, approximately five weeks after the Plaintiff's accident. As to the left hip, the MRI report stated, "[t]here is linear increased signal in the acetabular labrum suggesting a

labral tear versus intrasubstance changes." The doctor does not state that his findings relate to the subject accident. (See Plaintiff's Affirmation in Opposition, Report of Dr. Amoachi, Exhibit B)

Dr. Hank Ross, examined the Plaintiff on November 11, 2021, more than three years and three months after the date of the accident. Dr. Ross conducted range of motion testing of the Plaintiff's cervical spine, lumbar spine, left shoulder and left knee, and found limitation in the Plaintiff's range of motion in relation to these areas. He did not indicate the use of an objective test instrument. Dr. Ross indicated that he reviewed the Plaintiff's MRIs with the Plaintiff. Dr. Ross opined that "I have explained that he suffered injuries to the soft tissues that support his cervical, thoracic, and lumbar spines, including the intervertebral discs, and that this is responsible for his persistent pain, weakness, and loss of function." Dr. Ross also opined that "I have explained that this condition is permanent in nature and that he is likely to continue to suffer these symptoms as well as suffer exacerbations of variable intensity and severity." Dr. Ross also opined that "[c]oncerning his shoulder, I have explained that he is suffering from impingement upon the rotator cuff and that he has a torn piece of cartilage, the glenoid labrum, that will not heal on its own, and is responsible for his persistent pain, weakness, and loss of function." Dr. Ross also stated that "I do believe that these injuries are causally related to the motor vehicle accident described above and that they are permanent in nature." (See Plaintiff's Affirmation in Opposition Motion, Report of Dr. Ross, Exhibit C).

In relation to the Defendant's reply, the Plaintiff in his affidavit did discuss the purported gap in treatment and provided an adequate explanation for the gap in his treatment history. See *Pommells v. Perez*, 4 N.Y.3d 566, 576, 830 N.E.2d 278, 284 [2005]. An affidavit stating that a Plaintiff stopped receiving treatment because his benefits were terminated and he could not afford to continue to pay for such treatment out of pocket is an adequate explanation for the gap in his

treatment history. *See Delorbe v. Perez,* 59 AD3d 491, 492, 873 N.Y.S.2d 198, 199 [2d Dept 2009]; see also *Black v. Robinson*, 305 AD2d 438, 439–40, 759 N.Y.S.2d 741, 742 [2d Dept 2003] [plaintiff testified at EBT that she underwent therapy until her insurance ran out sufficiently addressed gap in treatment]. Here, as part of his affidavit, the Plaintiff stated that, "I stopped treating because my medical bills for the treatment I received were paid by what I have been informed are commonly referred to as "no fault" benefits." The Plaintiff also stated that "[o]nce payment for my medical care was terminated by no-fault, I had to stop treating because I could not afford to pay for treatment out of my own pockets." This is an adequate explanation for the alleged gap in treatment. See *Gutierrez v. Yonkers Contracting Co.,* 61 A.D.3d 823, 824, 877 N.Y.S.2d 226, 227 [2d Dept 2009][Plaintiff stated in affidavit that he stopped treatment because his no-fault benefits were terminated and he could not afford to pay "out of pocket"].

Although there are concerns as to whether these reports sufficiently rebut the Defendant's showing, it is true that although Dr. Guttman indicated that he viewed the MRIs, he makes no further reference to them and is otherwise unable to opine as to the Plaintiff's 90/180 claim. The Plaintiff's 90/180 claim is stated in some detail in his deposition and later in his affidavit, as referenced herein. Although there is inconsistency as to the period of time the Plaintiff was restricted to home, the period referenced in the Bill of Particulars is verified by the Plaintiff's counsel, not the Plaintiff. Plaintiff is consistent as to his limitations during the 90/180 period and, in any event, the inconsistency would only serve to raise a question of credibility. *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]. Accordingly, the Defendant's motion is denied.

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

The motion for summary judgment by the Defendant (motions sequence #3) is denied.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.