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 11th day of April, 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

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IMARI DHALWAH BACTOWAL,

Plaintiff,

-against-

OTABEK UMMATOV, MAJOR LEASING, LLC, TRISTAN SAMUEL and LISA COLLINS-SAMUEL

Defendants.

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Index No.: 517169/2019

DECISION AND ORDER

Motions Sequence #2, #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	37-46, 48-54, 55-57,
Opposing Affidavits (Affirmations)	61, 63-76, 77-90,
Reply Affidavits (Affirmations)	62, 91, 92,

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, Imari Dhalwah Bactowal (hereinafter the "Plaintiff") on March 15, 2018. The Plaintiff alleges in her Complaint that she suffered personal injuries while a passenger in a vehicle owned by Defendant, Lisa Collins-Samuel and operated by Defendant, Tristan Samuel (hereinafter referred to individually or collectively as the "Samuel Defendants"), when the Samuel Defendants' vehicle was involved in a motor vehicle collision with a vehicle owned by Defendant, Major Leasing, LLC and operated by Defendant, Otabek Ummatov (hereinafter the "Major Leasing Defendants"). The collision purportedly occurred on Haring Street, at or near its intersection with 11th Avenue, in Brooklyn, 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 left

shoulder and the cervical, thoracic and lumbosacral regions of her spine. The Plaintiff also alleges that she was unable to perform "substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment". (the "90/180 claim").

The Major Leasing Defendants now move (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that the Plaintiff failed to sustain a "serious injury" as defined by Insurance Law § 5102(d). In support of this application, the Major Leasing Defendants rely on the deposition of the Plaintiff and the reports of Dr. Dana A. Mannor and Dr. Mark J. Decker. The Samuel Defendants cross-move (motion sequence #4) for the same relief and for the sake of judicial economy adopt and incorporate the submission made by the Major Leasing Defendants.

The Plaintiff contends that the Defendant movants have failed to meet their *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. Bernard Osei Tutu, Dr. Danilo Humberto Sotello-Oarza, Dr. Ajoy Sinha and Dr. Kenneth R. Alleyne.

The Samuel Defendants move (motion sequence #3) for an order, pursuant to CPLR 3212, granting them summary judgment on the issue of liability and dismissal of the complaint. The Samuel Defendants argue that the Major Leasing vehicle was the proximate cause of the Plaintiff's injuries as that vehicle failed to yield the right of way despite a stop sign governing their lane of travel, in violation of Vehicle and Traffic Law §§ 1142(a). The Major Leasing Defendants oppose the motion and argue that the motion should be denied as there are material issues of fact regarding whether the Major Leasing Defendants were the sole proximate cause of the collision at issue.

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].

Motions Sequence #2, #4 (Major Leasing Defendants' and Samuel Defendants' Summary Judgment Motion-Insurance Law § 5102(d))

In support of their motion (motions sequence #2) the Major Leasing Defendants proffer the affirmed medical reports of Drs. Dana A. Mannor and Mark J. Decker. Dr. Dana A. Mannor examined the Plaintiff on August 12, 2021, approximately three years and five months after the date of the accident. Dr. Mannor conducted range of motion testing of the Plaintiff's cervical spine, lumbar spine, right and left

shoulders and right and left wrist and hands with the use of an objective test instrument, a goniometer. Dr. Mannor found normal range of motion for each area. The doctor did not indicate range of motion testing of the thoracic spine. Dr. Mannor's impression was that "[b]ased on my examination, all tests performed produced negative results and there were no positive objective clinical findings on examination of the above diagnosed sites to substantiate Ms. Imari Bactowal's subjective complaints of pain." Dr. Mannor opined that "[t]here is no evidence of orthopedic disability." Dr. Mannor opined that "[t]here is no evidence of any contributing pre-existing condition" and concluded that "Ms. Bactowal's current prognosis is good." (See Major Leasing Defendants Motion, Report of Dr. Mannor, NYSCEF Doc. 44).

Dr. Mark J. Decker reviewed MRIs of the Plaintiff's thoracic spine, lumbar spine, cervical spine and left shoulder. The MRI of the Plaintiff's thoracic spine was performed on June 1, 2018. Dr. Decker's review of the MRI of the thoracic spine revealed, in his opinion, that "[t]here is no evidence for disc herniation, foraminal encroachment, or central stenosis." Dr. Decker opined that there was "[n]o evidence to suggest that an acute traumatic injury was sustained." The MRI of the Plaintiff's lumbar spine was performed on May 18, 2018. Dr. Decker's review of the MRI of the lumbar spine revealed, in his opinion, that "[b]ulge and facet hypertrophy at L4-L5 and L5-Sl." Dr. Decker also noted that "[t]hese findings are longstanding and not causally related to the date of accident 03/15/2018." Dr. Decker concluded that there was "[n]o evidence to suggest that an acute traumatic injury was sustained." The MRI of the Plaintiff's cervical spine was performed on May 11, 2018. Dr. Decker's review of the MRI of the cervical spine revealed, in his opinion, that "[r]eversal of lordosis secondary to diffuse degenerative disc disease." Dr. Decker also noted that "[t]hese findings are longstanding and not causally related to the date of accident 03/15/2018." Dr. Decker concluded that there was "[n]o evidence to suggest that an acute traumatic injury was sustained." The MRI of the Plaintiff's left shoulder was performed on April 18, 2018. Dr. Decker's review of the MRI of the left shoulder revealed, in his opinion, that there was "[d]egeneration and tear of

the superior labrum." Dr. Decker also noted that there was "[t]race joint effusion." Dr. Decker also noted that "[t]hese findings are longstanding and not causally related to the date of accident 03/15/2018." Dr. Decker concluded that there was "[n]o evidence to suggest that an acute traumatic injury was sustained." (See Major Leasing Defendants Motion, Report of Dr. Decker, NYSCEF Doc. 45).

The Defendants contend that the affirmed reports of Drs. Mannor and Decker support their contentions that the Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). Dr. Mannor conducted a medical examination of Plaintiff on August 12, 2021, approximately three years and five months after the date of the accident. Dr. Decker reviewed a Magnetic Resonance Imaging Scans (MRIs) of the Plaintiff. The Court notes that the earliest MRI was more than one month after the accident. Where 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. *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 the instant proceeding, the Plaintiff's Bill of Particulars (not verified) indicates that "[b]y reason of the subject occurrence and the serious injuries sustained therein, Plaintiff was confined to home for a period of approximately two (2) months post trauma." The Bill of Particulars also states that the "Plaintiff was incapacitated from her employment for a period of approximately three (3) weeks and continuing intermittently thereafter, returned to work with diminished capacity and remains permanently partially disabled to date." (See Major Leasing Defendants Motion, Bill of Particulars, NYSCEF Doc. 65, Paragraphs 12 and 13). However, the Plaintiff in her deposition stated that she was confined to bed for "[m]aybe like two or three days." However, the Plaintiff did detail a number of activities that she could then no longer perform as a consequence of the accident. (Pages 69-71). When asked how long she was

confined to her home after the accident stated "[s]o after the accident, like right after the accident, maybe like about a week. And then after the surgery, about two weeks." (See Major Leasing Defendants Motion, Plaintiff's Deposition, NYSCEF Doc. 66, Page 94).

Assuming that the Defendants have met their *prima facie* showing, 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 Dr. Angela Sweeny (NYSCEF Doc. 67), Dr. Ajoy K. Sinha (NYSCEF Doc. 71), and Dr. Robert Solomon and Dr. Oded Greenberg's MRI Reports (NYSCEF Doc. No. 72) were not properly affirmed, while others, such as some of the medical records that were otherwise affirmed by Dr. Bernard Onei Tutu (NYSCEF Docs. 68 and 69), were partially 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].

Dr. Danilo Humberto Sotelo-Oarza examined the Plaintiff on June 21, 2018, more than three months after the accident. He indicates limited range of motion of the cervical spine and finds "[l]eft

shoulder labral tear. cervical and lumbar sprain." However, he does not indicate that he used an objective test instrument and mostly fails to address findings in relation to normal. *See Durand v. Urick*, 131 AD3d 920, 15 N.Y.S.3d 475, 476 [2d Dept 2015]. (See Plaintiff's Affirmation in Opposition Motion, Report of Dr. Sotelo-Oarza, NYSCEF Doc. 70).

Dr. Kenneth Alleyne completed an operative report in relation to the Plaintiff's left shoulder surgery that was conducted on April 20, 2019. Dr. Alleyne stated that "[i]t is my opinion, based on the history of the patient's symptoms, diagnosis and examination that the above noted injuries were sustained or aggravated in the Motor Vehicle Accident that occurred on 03/15/2018." Dr. Alleyne's pre-operative diagnosis was "[l]eft shoulder anterior labral tear." Dr. Alleyne also found that the Plaintiff "is a patient with a history of traumatic injury to the left shoulder." The doctor also stated that "[t]he prognosis for complete recovery is presently guarded." (See Plaintiff's Affirmation in Opposition Motion, Report of Dr. Alleyne, NYSCEF Docs. 73, 74).

Dr. Bernard Onei Tutu, examined the Plaintiff on several occasions, with the last examination taking place on June 9, 2022, more than four years and two months after the date of the accident. Dr. Tutu conducted range of motion testing of the Plaintiff's cervical spine, lumbar spine and left shoulder with the use of a goniometer. As to the cervical spine, Dr. Tutu found limited range of motion and stated that the "[e]xamination of the cervical spine revealed mild spasms." As to the lumbar spine, Dr. Tutu also found limited range of motion and also found that "[s]traight leg testing was positive on the left at 45 degrees." As to the left shoulder, where limited range of motion was found, Dr. Tutu stated "[i]mpingement sign is positive." Dr. Tutu opined that "[i]t is my opinion that the force associated with the subject motor vehicle accident caused stress to the supportive ligaments of the spine and caused stretching and inflammation of the connective tissue fibers, and caused traumatic bulging disc." Dr. Tutu also opined that "I have reviewed Mark J. Decker, M.D.'s left shoulder MRI film review dated April 15, 2020. I disagree with his

conclusion that the left shoulder MRI does not reveal any post-traumatic injuries. Rather, it is my opinion that the left shoulder MRI reveals an acute tear of the superior labrum." Dr. Tutu also stated that "I have also reviewed Dana A. Mannor, M.D.'s report dated August 12, 2021, and disagree with his impression that all of the patient's injuries have resolved. It is rather my opinion that the patient's left shoulder condition is permanent and is the competent producing cause of her pain and limited range of motion." (See Plaintiff's Affirmation in Opposition Motion, Report of Dr. Alleyne, NYSCEF Docs. 75).

In relation to the Defendants' reply papers, the documents provided from Linden Medical West, P.C. by Dr. Tutu from April 12, 2018 directly address the Defendants' claim that the Plaintiff did not receive initial treatment. Moreover, much of Dr. Tutu's findings were a result of his examination of the Plaintiff over a period of time. Dr. Tutu also consistently found limited range of motion (using a goniometer) in the cervical spine, lumbar spine and left shoulder. Dr. Tutu also addressed Dr. Decker's opinion regarding degeneration. In any event, those findings of degeneration are not detailed or supported. In addition, Dr. Alleyne made a causation finding and made observations and findings during the surgical procedure he performed on the Plaintiff's left shoulder.

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 AD3d 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].

Motion Sequence #3 (Samuel Defendants' Summary Judgment Motion – CPLR §3212)

The Samuel Defendants move for summary judgment on the issue of liability in that Defendant driver Ummatov was negligent and the proximate cause of the accident in failing to yield the right of way and proceeding when it was unsafe to do so when faced with a stop sign.

> "Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop . . . and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection" (Vehicle and Traffic Law § 1142 [a]). "A driver who fails to yield the right of way after stopping at a stop sign controlling traffic is in violation of Vehicle and Traffic Law § 1142 (a) and is negligent as a matter of law" (*Laino v Lucchese*, 35 AD3d 672, 672 [2006]; *see Fuertes v City of New York*, 146 AD3d 936, 937 [2017]; *Francavilla v Doyno*, 96 AD3d 714, 715 [2012]). "A driver with the right-of-way is entitled to anticipate that a motorist will obey traffic laws which require him or her to yield" (*Fuertes v City of New York*, 146 AD3d at 937; *Luke v McFadden*, 119 AD3d 533 [2014]; *Francavilla v Doyno*, 96 AD3d at 715). "Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (*Yelder v Walters*, 64 AD3d 762, 764 [2009] [citations omitted]; *see Fuertes v City of New York*, 146 AD3d at 937; *Bennett v Granata*, 118 AD3d 652, 653 [2014])."

Enriquez v. Joseph, 169 AD3d 1008, 1009, 94 N.Y.S.3d 599, 2019 N.Y. Slip Op. 01393 [2d Dept 2019]. *See* also *Shuofang Yang v. Sanacore*, 202 AD3d 1120, 163 N.Y.S.3d 605, 2022 N.Y. Slip Op. 01192 [2d Dept 2022] [unlike in this action, there was a question of fact as to whether the vehicle with the right of way was speeding and whether that vehicle should have seen and could have avoided a collision with the other vehicle]. The deposition testimony reflects that Defendant driver Samuel was not speeding and the impact occurred when the Samuel vehicle had already entered the intersection. The Major Leasing Defendants failed to raise an issue of fact.

At her deposition (Motion in Support, NYSCEF Doc. 52), Plaintiff stated that the Samuel vehicle was travelling at "like ten miles an hour." (Page 26). She also stated that she did not see the vehicle prior to the accident and the Samuel vehicle was "in the middle" of the intersection at the time of impact. (Page

29). She further stated that the area of the Samuel vehicle that was initially impacted was "like the passenger door to the back of the car on the driver's side." (Page 30). Defendant Samuel testified at his deposition (Motion in Support, NYSCEF Doc. 5) that he did not see the Samuel vehicle prior to the collision and became aware at the time of impact, stating that the Samuel vehicle "hit the back door of the driver's side." (Page 21). He further stated that he was travelling "[b]etween 20 and 15 miles an hour." (Pages 35). At his deposition (Motion in Support, NYSCEF Doc. 53) Defendant Ummatov stated that the front of his car was impacted as a consequence of the collision, and could not remember what part of the Samuel vehicle he collided with. (Page 26). He generally stated that he was unable to recall specific details because the accident occurred more than three years prior to his deposition. Accordingly, the Samuel Defendant's motion (motion sequence #3) is granted.

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

Defendant Major Leasings' motion for summary judgment on Insurance Law § 5102(d) (motion sequence #2) is denied.

The Samuel Defendants' motion for summary judgment on liability (motion sequence #3) is granted and the action and any cross-claims against the Samuel Defendants are dismissed.

The Samuel Defendants' motion for summary judgment on Insurance Law § 5102(d) (motion sequence #4) is denied as academic.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

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