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 18th day of July, 2023.

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

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JUDY ANDERSON,

Plaintiff,

-against-

WINDKOUNI S. OUEDRAOGO and "JOHN DOE",

Defendants.

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Index No. 526681/2019

DECISION AND ORDER

Motions Sequence #3

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	49-56,
Opposing Affidavits (Affirmations).....	59-69,
Affirmation or Affidavit in Reply	72

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

The Plaintiff, Judy Anderson (the "Plaintiff") commenced this action in relation to an alleged motor vehicle accident on January 20, 2019. At the time of the alleged accident, the Plaintiff purports to have been a passenger in a vehicle allegedly owned and operated by the Defendant, Windkouni Ouedraogo (the "Defendant").

The Defendant moves (motion sequence #3) for summary judgment to dismiss the action arguing that the Plaintiff has not suffered a serious injury as such term is defined by Insurance Law 5102. Plaintiff claims in her Bill of Particulars, that as a result of the accident she sustained injuries to her cervical, thoracic and lumbar spines, and right hand. The Plaintiff also alleges that she was

unable to perform "substantially all of the ordinary acts and responsibilities which constituted plaintiffs typical and usual and customary daily activities, for a period of more than 90 out of the 180 days immediately following the accident predicating this action." ("90/180 claim").

"Summary 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 [2nd 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 [2nd 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 [2nd 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 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

The Plaintiff was examined by Dr. Jeffrey Passick on May 31, 2022, approximately one year and four months after the accident. Dr. Passick also reviewed the Plaintiff's MRI of her lumbar spine and NCV/EMGs of her right wrist and "upper/lower extremities and cervical/lumbar

paraspinal muscles bilaterally." The doctor performed range of motion testing with the use of a goniometer and found full range of motion in the Plaintiff's cervical, thoracic and lumbar spines and bilateral shoulders and wrists. He also found "no defect" in Plaintiff's right and left hands. He stated that the cervical and lumbar spines were resolved and opined that "at this time, this individual is capable of working and performing all activities of daily living without restrictions." (See NYSCEF Doc. 55, Report of Dr. Passick).

The Defendant also proffered the report of Dr. Ignatius Roger, Board Certified Plastic Surgeon and Hand Surgeon. He examined the Plaintiff on September 2, 2022. He found no causal relationship as to the Plaintiff's right hand and the accident, and noted that the Plaintiff suffered burns to the right hand in April of 2019. He found "cosmetically acceptable" "scarring" and the unremarkable mobility of the Plaintiff's right hand and wrist. (See NYSCEF Doc. 56, Report of Dr. Rogers).

Where the Bill of Particulars contains conclusory allegations of a 90/180 claim and the deposition and/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. *See Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]. The Plaintiff contends in her attorney verified Bill of Particulars that she was confined to home for approximately one week after the accident. Plaintiff sat for a deposition on February 1, 2022 (NYSCEF Doc. 54). During her deposition, she stated that the time period during which she stayed home after her accident was "[a]bout a week or two, yeah." (Page 107). When asked if there were things she could no longer do as a result of the accident, the Plaintiff stated "I used to go dancing. I used to wear heels and purses. When food deliveries would come in, I would put it away; hundreds of pounds worth of

rice or whatever. I can't lift my son." (Page 109). Based upon her testimony, the Plaintiff has made a conclusory allegation in relation to this category of injury and fails to explain these inconsistencies. *See Streety v. Toure*, 173 AD3d 462, 103 N.Y.S.3d 438, 2019 N.Y. Slip Op. 04487 [1st Dept 2019], and *Moreira v. Mahabir*, 158 AD3d 518, 71 N.Y.S.3d 38, 2018 N.Y. Slip Op. 01129 [1st Dept 2018]. "The plaintiff's alleged injuries did not prevent her from performing 'substantially all' of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident." *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010].

Assuming that the Defendant had made a *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, 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, including the Plaintiff's hospital records (NYSCEF Doc. 60), the Plaintiff's treatment records, (NYSCEF Doc. 61), the MRI reports (NYSCEF Doc. 62), the Plaintiff's injection records (NYCEF Doc. 63) and the report of Dr. Mikelis (NYSCEF Doc. 69) were not properly certified and/or 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 Defendant raised these deficiencies in reply.

Jonathan Spitz, D.C., examined the Plaintiff on several occasions, with the first examination on January 22, 2019, treatment through July 24, 2019, and a final examination on June 7, 2022. As part of the July 24, 2019 examination, Dr. Spitz conducted range of motion testing of the Plaintiff's cervical spine and lumbar spines with the use of a goniometer. As to the cervical spine, Dr. Spitz found "forward flexion was limited to 30 degrees (normal 50 degrees), extension was to 40 degrees when (normal 60 degrees); left and right lateral flexion were limited to 30 degrees (normal 45 degrees); and left and right rotation were limited, respectively to 50 degrees where normal would have been to 80 degrees." As to the lumbar spine, Dr. Spitz found "forward flexion was limited to 40 degrees (normal 60 degrees), extension was to 20 degrees when (normal 25 degrees); left and right lateral flexion were limited to 20 degrees (normal 25 degrees); and left and right rotation were limited, to 20 degrees when normal would have been to 30 degrees." As part of the June 7, 2022 examination, Dr. Spitz again conducted range of motion testing of the Plaintiff's cervical spine and lumbar spines with the use of a goniometer. As to the cervical spine, Dr. Spitz found "forward flexion was limited to 40 degrees (normal 50 degrees), extension was to 50 degrees when (normal 60 degrees); left and right lateral flexion were limited to 35 degrees (normal 45 degrees); and left and right rotation were limited, respectively to 65 degrees where normal would have been to 80 degrees." As to the lumbar spine, Dr. Spitz found "forward flexion was limited to 70 degrees (normal 90 degrees), extension was to 20 degrees when (normal 35 degrees); left and right lateral flexion were limited to 25 degrees (normal 35 degrees); and left and right rotation were limited to 20 degrees when normal would have been to 30 degrees." Dr. Spitz

opined that "that the medical conditions set forth above were caused by the January 20, 2019 automobile accident, and have resulted in a significant limitation and loss of use of Ms. Anderson's cervical and lumbar spine. The injuries and restrictions are permanent and consequential. It is probable that she will experience pain and restricted range of motion and mobility for the balance of his life." Dr. Spitz also opined that "I believe to a reasonable degree of medical certainty that the injury set forth above and consequent loss of range of motion were objectively proven an will persist to a degree throughout Ms. Anderson's life and may require additional treatment and care. This is likely to include injection therapy and, as she ages, surgery to her neck and lower back cannot be ruled out." Dr. Spitz addressed Dr. Passick's findings and stated that "Dr. Passick failed to appreciate that the conditions diagnosed therein establish permanent partial injuries that will not resolve without further intervention. Dr. Passick also failed to address Anderson's continued complaints of pain and restrictions, or increased pain with prolonged, sitting and walking." (See Plaintiff's Affirmation in Opposition Motion, Report of Dr. Alleyne, NYSCEF Docs. 64).

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 Toure v. Avis Rent A Car Sys., Inc.,* 98 N.Y.2d 345, 346, 774 N.E.2d 1197 [2002]; *Williams v. New York City Transit Auth.,* 12 AD3d 365, 786 N.Y.S.2d 183 [2d Dept 2004]; *Acosta v. Rubin*, 2 AD3d 657, 659, 768 N.Y.S.2d 642, 643 [2d Dept 2003]. What is more, Dr. Spitz noted that the Plaintiff stopped receiving regular treatment because her no fault benefits were terminated. *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]. "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 Defendant's motion (motion sequence #3) for summary judgment is denied.

This Constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.