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 5th day of April, 2023.

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

----------x

ALEYHA MOHAMED[1] & BLAKE BIGOT,
Plaintiff,

Index No. 514344/2019

-against-

DECISION AND ORDER

RIGO LIMO AUTO CORP., MOURAD SOUHAR, AND DHAVINDRA B. MANGAL,
Defendants.

Motions Sequence #5, #6, #7

----------x

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	63-71, 75-76, 77,
Opposing Affidavits (Affirmations)	84, 86, 87,
Affirmation or Affidavit in Reply	90,
Memorandum of Law	85.

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

Defendant, Dhavindra Mangal ("Defendant Mangal"), moves (motion sequence #5) for summary judgment pursuant to CPLR §3212 dismissing the complaint of Plaintiff, Blake Bigot ("Plaintiff Bigot" or "Plaintiff") on the grounds that Bigot has failed to meet the serious injury threshold as defined by Insurance Law §5102(d). Defendants Rigo Limo Auto Corp. and Mourad Souhar ("the Rigo Defendants") also move (motion sequence #6) for the same relief, and "[f]or the purpose of judicial economy" incorporate the subject matter of Defendant Mangal's motion. The Rigo Defendants also move for the same relief as part of a consolidated action (Index No.

[1] The parties have represented that the action relating to Plaintiff Aleyha Mohamed has been settled.

517190/2020)[2]. This action concerns a motor vehicle collision that purportedly occurred on March 16, 2019, at which time Plaintiff was a passenger in the Rigo Defendants' vehicle. Plaintiff alleges injuries in relation to his lumbar, cervical, and thoracic spines, and his right shoulder. Plaintiff opposes the motions and contends in his Bill of Particulars that he was confined to home and bed for approximately three months after the accident and was not working at the time of the accident. The Plaintiff also alleges that he was unable to perform "substantially all of the material acts which constitute plaintiffs usual and customary daily activities for not less than ninety (90) days during the one hundred and eighty (180) days immediately following the occurrence of the injury or impairment." ("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

[2] By order dated June 9, 2021, this action was consolidated with that action.

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].

Insurance Law §5102 (d) defines "serious injury" as:

> "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; ***or*** a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing 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" (emphasis added).

Thus, a plaintiff must have suffered a "serious injury" by, among other things, demonstrating: (1) permanent consequential limitation of use of a body organ, member, function or system, (2) significant limitation of use of a body function or system or (3) a non-permanent medical injury which prevents her from performing substantially all of her customary daily activities for at least 90 days during the 180 days immediately following the accident.

To succeed on a summary judgment motion based on the lack of a serious injury, defendant must submit evidence eliminating any material issues of fact with respect to all categories of the "serious injury" threshold (*see generally Ocasio v Henry*, 276 AD2d 611 [2d Dept 2000]). Typically, it is necessary that defendants proffer medical evidence in the form of an expert opinion demonstrating the absence of a serious injury to be entitled to an accelerated judgment dismissing the action (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49-51 [2d Dept 2005]; *cf. Sequeira v W&E Auto Repair, Inc.*, 17 AD3d 442, 442-443 [2d Dept 2005]). Such evidence must

affirmatively attest, within a reasonable degree of medical certainty, that the alleged injury did not result in a permanent injury limiting use of the body part's function *or* a non-permanent injury limiting plaintiff's ability to perform her daily activities for a period of 90/180 days (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002], *citing Dufel v Green*, 84 NY2d 795 [1995]; *Lopez v Senatore*, 65 NY2d 1017 [1985]). Plaintiff's own sworn statements may also be proffered to demonstrate that she did not suffer injuries or that her daily and customary activities were not limited (*see Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664 [2d Dept 2008]; *Ocasio*, 276 AD2d at 612 [plaintiff testified that she missed only two weeks of work and school, thus failing to demonstrate she was prevented from performing substantially all material acts constituting her customary daily activities]).

Plaintiff appeared for an IME on March 16, 2019 at the office of Howard A. Kiernan, M.D., a board-certified orthopedist (approximately one year and eight months after the accident). Dr. Kiernan performed range of motion testing with the use of a goniometer. Dr. Kiernan found that Plaintiff had full range of motion in all of the purportedly injured areas and found that the "sprains/strains" had been resolved. He further opined that Plaintiff was capable of seeking gainful employment, and that there was "no evidence of orthopedic disability, permanency, or residuals." Assuming that the exhibits of motion sequence #7 motion (contained under the related Index No. 517190/2020) are appropriately before the Court, it contains Dr. Kiernan's report, and an MRI reading of Plaintiff's lumbar spine by Dr. Audrey Eisenstadt. The MRI reading generally states that there was no herniation and finds degeneration.

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]. As stated, Plaintiff contends in his attorney verified Bill of Particulars that he was confined to home for approximately three (3) months after the accident. Plaintiff sat for a deposition on September 15, 2021. During his deposition, he stated that the time period during which he only left his house to have treatment was, "[p]robably about a day or two." (Page 49). He stated that as a result of the accident, he could no longer "[s]it down for a very long period of time." (Page 50). He also stated that as a result of the accident, he was unable to work for "about three to six months." (Page 55). However, he fails to elaborate. Further, as to whether he sought employment immediately after the accident, Plaintiff said, "I don't remember." Based upon his 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].

Plaintiff in opposition provides an initial medical report by Dr. Michael Monfett, M.D. dated March 25, 2019, less than ten days after the accident. (See Plaintiff's Opposition Exhibit A). Dr. Monfett conducted range of motion testing of the Plaintiff's cervical spine with the use of a goniometer. He found significant limitations in that area, and causally related them to the accident. He also ordered therapy. Dr. Monfett examined the Plaintiff on April 8, 2019 and conducted objective range of motion testing of the Plaintiff's lumbar spine. Dr. Monfett found significant

limitation in that area, and causally related it to the accident. Dr. Monfett examined Plaintiff on April 25, 2019. The doctor continued to find limited range of motion in the lumbar region of the Plaintiff's spine, and causally related it to the accident. His review of the Plaintiff's MRI reflected disc bulges at L4-5 and L5-S1. Dr. Monfett found full range of motion of the lumbar spine with discomfort during his April 27, 2020 exam. Dr. Monfett examined the Plaintiff on May 16, 2019 and stated that "[t]his is a normal study." Dr. Monfett examined Plaintiff on June 19, 2019 and found limited range of motion in the Plaintiff's lumbar region. However, Dr. Monfett found full range with discomfort on July 22, 2019 and July 2, 2020. Dr. Monfett found painless full range of motion of the lumbar region on October 24, 2019 (a little more than seven months after the accident). Dr. Monfett also recently examined the Plaintiff on August 25, 2022. He conducted objective range of motion testing of the Plaintiff's lumbar region and again found limitation of "extension 20 degrees (normal 30 degrees)", but does not explain these findings in light of prior findings of full range of motion without pain. Notwithstanding this, Dr. Monfett does opine that "[d]ue to the fact that the patient continues to demonstrate discomfort, limitations, and loss of up to 33% lumbar extension over three years since the time of his accident, his injuries are likely permanent in nature." Moreover, the doctor fails to address the gap in treatment. Plaintiff does not provide an affidavit.

Plaintiff's evidence, namely the affirmed reports of Dr. Monfett, fails to properly raise a triable issue of fact with regard to the Plaintiff's claim that he sustained a serious injury. While Dr. Monfett does opine that the Plaintiff's injuries are permanent, the findings of permanency were conclusory and speculative. see *Sapienza v. Ruggiero*, 57 AD3d 643, 645, 869 N.Y.S.2d 192, 194 [2d Dept 2008]; *Elgendy v. Nieradko*, 307 A.D.2d 251, 251, 762 N.Y.S.2d 275 [2d Dept 2003]; *Diaz v. Wiggins*, 271 A.D.2d 639, 640, 707 N.Y.S.2d 870, 871 [2d Dept 2000]; *Attanasio v.*

Lashley, 223 A.D.2d 614, 614–15, 636 N.Y.S.2d 834, 835 [2d Dept 1996]. What is more, the report of Dr. Monfett 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 his cessation, or gap, in treatment, See *Neugebauer v. Gill*, 19 AD3d 567, 568, 797 N.Y.S.2d 541, 542 [2 Dept 2005]; *Sibrizzi v. Davis*, 7 AD3d 691, 692, 776 N.Y.S.2d 843 [2d Dept 2004].

Plaintiff's conclusory 90/180 claim together with the speculative nature of the Plaintiff's medical reports, do not serve to rebut the Defendants' *prima facie* showing. As such, the Defendants' motions are granted and the action on behalf of Plaintiff Bigot is dismissed.

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

Defendants' motions (motion sequence #5, #6, and #7) for summary judgment are granted, and the action as it relates to Plaintiff Blake Bigot is dismissed.

This Constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
2023 APR 13 AM 9:24