At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 6th day of May, 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

BARBARA KELLY,

Plaintiff,

-against-

EMIN KAPLAN, NOMAD BLACK LINE INC., ALAVARO CAESAR AND EAN HOLDINGS LLC,

Defendant.

----------X

Index No.: 512644/2022

DECISION AND ORDER

(Mot. Seq. No. 2-3)

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion//Affidavits Annexed Exhibits Annexed/Reply……..	30-38
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed……	39-44
Notice of Motion//Affidavits Annexed Exhibits Annexed/Reply……..	45-49; 58-59
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed……	50-55

In this action, Emin Kaplan ("Kaplan") and Nomad Black Line Inc. ("Nomad") move (Motion Seq. 2) pursuant to CPLR § 3212, for summary judgment dismissing Barbara Kelly's ("Plaintiff") Complaint on the grounds that Plaintiff did not sustain a "serious injury" under Insurance Law § 5102 (d); to dismiss any and all sub portions of Insurance Law § 5102 (d) which are not viable as a matter of law. Additionally, Ean Holdings, LLC ("Ean") and Alavaro Caesar a/k/a Alvaro Caesar ("Caesar") move (Motion Seq. 3) for summary judgment to dismiss Plaintiff's complaint pursuant to CPLR § 3212. Plaintiff has opposed both motions.

This action arises out of a motor vehicle accident that occurred at the intersection of Rockaway Parkway and Seaview Avenue on October 22, 2021 where Plaintiff was a passenger in the car. As a result of the accident, Plaintiff seeks to recover damages for injuries to her cervical spine, lumbar spine, left shoulder, right knee and right thumb.

In support of their threshold motion, Defendants Kaplan and Nomad rely on the report of orthopedic surgeon Dr. Hugh Selznick ("Dr. Selznick"), who conducted an independent medical examination of Plaintiff on October 20, 2023, measuring Plaintiff's range of motion using a goniometer and comparing the findings to the AMA guidelines. Upon examination, Dr. Selznick concluded that Plaintiff exhibited no decreased range of motion, neurological deficits, or positive provocative tests. Dr. Selznick further concluded that Plaintiff's alleged injuries to the cervical

spine, thoracic spine, lumbar spine, left shoulder, right thumb, and right knee were fully resolved. Accordingly, Defendants argue that the examination establishes that Plaintiff did not sustain (1) any permanent loss of use; (2) any permanent consequential limitation; or (3) any significant limitation of use of a body function or system; (4) did not sustain any permanent injury as a result of the motor vehicle accident, and Plaintiff is able to perform activities of work and daily living without restrictions. Defendants Kaplan and Nomad also rely on Dr. Scott A. Springer, a board certified radiologist, who performed a radiological evaluation of the MRI films, of the Plaintiff's cervical spine, lumbar spine, right knee, left shoulder, and right thumb. Dr. Springer found Plaintiff's MRIs to her cervical spine, lumbar spine, right knee, left shoulder, and right thumb that revealed pre-existing degeneration with no posttraumatic changes causally related to the accident. There is no evidence to suggest any type of recent traumatic injury to the cervical spine, lumbar spine, right knee, left shoulder, or right thumb.

Defendants Kaplan and Nomad also cite Plaintiff's Bill of Particulars and deposition testimony on November 7, 2023 to assert that Plaintiff did not "suffer from medically determined injuries or impairments of a non-permanent nature that substantially curtailed her usual and customary activities for 90 days during the first 180 days following the incident" (NYSCEF Doc No. 46, p.g.5). Defendants Kaplan and Nomad assert that Plaintiff's Bill of Particulars does not specify the duration of time, if any, Plaintiff was confined to bed or home or incapacitated from employment. At her deposition, Plaintiff testified that she had to miss work for 7 months immediately after the accident; however, Defendants argue that Plaintiff clearly did not suffer a medically determined injury that prohibited her from performing substantially all of her daily activities for at least 90 out of the 180 days. Defendants Kaplan and Nomad also argue that Plaintiff testified she was confined to bed for only three weeks immediately following the accident, and that she was also able to feed herself after approximately one week. Thus, Defendants contend that Plaintiff did not sustain a serious injury under the 90/180-day category. Additionally, During Plaintiff's EBT testimony, Plaintiff testified that the only activities that she cannot perform are running and wearing high heels; however, the defendant argued that due to Plaintiff's weight, she was unable to do those acts prior to the accident.

In opposition to the motion, Plaintiff argues that Defendants Kaplan and Nomad have not met their burden entitling them to summary judgment. Plaintiff argues that Dr. Selznick does not give an opinion regarding Plaintiff's condition during the first 180 days. Since Dr. Selznick failed to review medical records and relied solely upon the Bill of Particulars, Plaintiff contends that

Defendants Kaplan and Nomad failed to satisfy their initial burden. . In support of her opposition, Plaintiff submits an affidavit of Scott Leist, D.C., her chiropractor whom she has treated with since October 25, 2021. In his affidavit, Dr. Leist states that Plaintiff's examinations in 2021 and 2022, reflected positive test results and that the disc pathology showed a decrease in the range of motion of the cervical spine and lumbar spine. According to his recent range of motion testing of Plaintiff on August 5, 2024, Plaintiff continued to exhibit decreased ranges of motion. Dr. Leist opined that the subject accident caused, precipitated, aggravated and/or exacerbated Plaintiff's injuries and are not degenerative nor from a prior accident. In addition, Plaintiff submits the affidavits of radiologists Dr. Harold M. Tice and Dr. Mark J. Lodespoto, who reviewed Plaintiff's MRIs of her lumbar spine and cervical spine taken in December 2021, respectively. Drs. Tice and Lodespoto confirmed the MRIs abnormal findings, including multiple disc herniations..

In support of their motion, the Defendants Ean and Caesar argue that neither the medical evidence nor the legal pleadings indicate any injury that could reasonably fit within any category of "serious injury." Defendants Ean and Caesar state that, for the sake of judicial economy, they adopt all legal and factual arguments regarding the threshold motion presented by the co-Defendants Kaplan and Nomad in Motion Seq. 2. Moreover, Defendants Ean and Caesar request that in the event the court finds there to be a triable issue of fact with regards to whether Plaintiff sustained 1) permanent loss of use of a body organ, member function or system; (2) any permanent consequential limitation; or (3) any significant limitation of use of a body function or system, the Court should grant partial summary judgment as to the 90/180 category.

In opposition to the motion, Plaintiff requested that the Defendants' motion be denied. Plaintiff adapts all her legal and factual arguments set forth in opposition to Motion Seq. 2.

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], *citing Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau*

County, 111 A.D.2d 212, [2d Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2d Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore,* 172 AD2d 600 [2d Dept. 1991]).

The issue of whether a claimed injury falls within the statutory definition of "serious injury" can be a question of law for the Court which may be decided on a motion for summary judgment (*Licari v Elliot,* 57 NY2d 230 [1982]). As such, inherent in the court's consideration of a motion for summary judgment for lack of serious injury is the requisite determination that there are no issues of fact with regard to the injuries sustained by a plaintiff. The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [2016]). Once the movant has made such a showing that a party has or has not suffered a serious injury as a matter of law, the burden shifts to the opposing party to submit evidence in admissible form sufficient to create a material issue of fact warranting a trial (*Franchini v Palmieri,* 1 NY3d 536 [2003]; *Grasso v Angerami*, 79 NY2d 813 [1991]).

A plaintiff claiming permanent loss of use of a body organ, member, function or system must demonstrate that the permanent loss of use is a total loss of use (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]). In *Toure v. Avis Rent–a–Car Systems, Inc.,* 98 NY2d (2002), the Court of Appeals stated that resolving the question of whether plaintiff suffered a "serious injury" involves a comparative analysis of the quantified degree and duration of an alleged injury, or its qualitative impact and duration in the claimant's normal activities. This analysis requires admissible proof of injury based on objective medical testing, which establishes a causal relation between the accident and the injury alleged, as well as between the injury and the claimed limitation and impairment. In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]; *Dufel v Green*, 84 NY2d 705 [1995]; *Lemieux v Horn*, 209 AD3d 1100 [3d Dept. 2022]). 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 (*Id.*; *Black v Robinson*, 305 AD2d 438 [2d Dept. 2003; *Junco v Ranzi*, 288 AD2d 440 [2d Dept. 2001]; *Papadonikolakis*

v First Fid. Leasing Group, 273 AD2d 299 [2d Dept. 2001]). Establishing a lack of limitations normally would enable a defendant to successfully establish that the permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system have not been satisfied by Plaintiff (*Toure* at 350; *Franchini* at 536).

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than a mild, minor or slight limitation of use and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Burnett v. Miller,* 255 A.D.2d 541 [2d Dept. 1998]; *Booker v. Miller,* 258 AD2d 783 [3d Dept. 1999]; *Jones v Marshall*, 147 AD3d 1279 [3d Dept 2017]).

With respect to the 90/180-day category, a "serious injury" is defined as a plaintiff's inability to perform substantially all of the material acts which constitute his or her usual and customary activities for not less than 90 of the 180 days immediately following the date of the accident (Insurance Law 5102[d]). A claim under the 90/180-day category by its terms does not have a durational element beyond the 180–day period set forth by the statute, making a plaintiff's current condition irrelevant as to whether he or she was unable to carry out her normal and customary activities during the statutory period (see Insurance Law 5102; *Peplowv Murat*, 304 AD2d 633 [2d Dept. 2003]). To prevail under this category, a plaintiff must demonstrate through competent, objective proof, a medically determined injury or impairment of a nonpermanent nature which would have caused limitations on the plaintiff's daily activities (*Ryan v Xuda*, 243 AD2d 457 [2d Dept. 1997]; *Olivare v Tomlin*, 187 AD3d 642 [1st Dept. 2020]; *Fernandez v Fernandez*, 151 AD3d 581 [1st Dept. 2017]). This limitation must be to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230 [1982]). Additionally, a gap or cessation of treatment is immaterial as to whether the plaintiff sustained a medically determined injury or impairment of a nonpermanent nature which prevents him or her from performing substantially all the material acts which constitute his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (Insurance Law 5102 [d]). Plaintiff, however, must offer some reasonable explanation for the gap in treatment or cessation of treatment (*Pommells v Perez*, 4 NY3d 566 [2005]; *Neugebauer v Gill*,19 AD3d 567 [2d Dept. 2005]).

Here, the court finds that Plaintiff has raised a triable issue of fact as to whether she has suffered a permanent or significant limitation. While Defendants submit in part reports from

examining doctors to argue that Plaintiff's injuries have completely resolved, and/or are pre-existing, degenerative in nature and/or are unrelated to the subject accident, in opposition, Plaintiff submits medical reports which conclude that Plaintiff's injuries are causally related to the accident, not degenerative, and permanent in nature. Upon review of the records, Plaintiff has sufficiently submitted physician affirmations stating that based upon a reasonable degree of medical certainty that Plaintiff's injuries and limitations are permanent in nature and state in addition an opinion as to how Plaintiff's alleged injuries affects her daily and customary activities and that the alleged injuries are causally related to the subject accident. Additionally, the physician opinions are supported by the doctor's own examination of the patient and the report references objective diagnostic tests that were conducted (see *Addison v NYC Trans. Auth.*, 208 AD2d 368 [1st Dept. 1994]).

With respect to the claim under the 90/180 category, the court finds that there is a triable issue of fact as to whether Plaintiff was unable to perform substantially all of the material acts which constitute his or her usual and customary activities for not less than 90 of the 180 days immediately following the date of the accident. While Defendants argue that Plaintiff has only been able to do certain activities due to her weight and not the accident, in opposition, Plaintiff cites to her EBT testimony wherein she states that she was confined to her home and missed seven months of work following the accident as directed by her doctor.

Accordingly, it is hereby,

ORDERED, that Defendant's Kaplan and Nomad's motion (motion seq. 2) for summary judgment is denied due to triable issues of fact; and it is further,

ORDERED, that Defendant's Ean and Caesar's motion (motion seq, 3) for summary judgment is denied due to triable issues of fact.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice