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 16th day of April, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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HASAN B. BRINSON,

Plaintiff,

- against -

CHRISTOPHER JAMES, CORY A. VICTORIAN, ZVI M. SAMUELS and DANIEL SAMUELS.,

Defendant.

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Index No.: 509039/2017

DECISION AND ORDER

Motions Sequence #~~6~~ Corrected 5

5/14/19

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2,
Opposing Affidavits (Affirmations).....	3,
Reply Affidavits (Affirmations).....	4,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle incident that occurred on May 24, 2016. The Plaintiff Hasan B. Brinson (hereinafter "Plaintiff") was a passenger the vehicle, owned by Defendant Cory A. Victorian (hereinafter "Defendant Victorian") and being operated by Defendant Christopher James (hereinafter "Defendant James") (collectively hereinafter "Defendant Movants") when it was allegedly involved in a collision with a vehicle being operated by Defendant Zvi M. Samuels (hereinafter "Defendant Zvi") with the permission and consent of Defendant Daniel Samuels (hereinafter "Defendant Daniel") who allegedly maintained, repaired and managed the aforementioned vehicle. The collision purportedly occurred at the intersection of 112th Street and 72nd Avenue, in Queens County of the State of New York. By way of a summons and verified complaint, the Plaintiffs assert causes of action against the Defendants alleging the negligent operation of the respective vehicles.

Plaintiff claims in his Verified Bill of Particulars (Defendant Movants' Motion Exhibit D, Paragraphs 9), that as a result of said incident he has sustained a number of serious injuries, including, *inter alia*, traumatic sprain of the lumbar spine, disc herniation with impingement and marked restriction in range of motion and weakness to the right shoulder. Plaintiff also alleges (Defendant Movants' Motion Exhibit D, Paragraph 15) that he was prevented from "performing substantially all the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment."

Defendant Movants move (motion sequence #6) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint, as against Defendant Movants, on the ground that none of the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d).[1]

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 [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

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[1] On December 20, 2017, this Court issued a Decision and Order that granted the Samuel Defendants' application for summary judgment made as part of Motion Sequence #2.

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].

Insurance Law § 5102(d)

Defendants contend that the affirmed reports of Dr. Richard Lechtenberg and Dr. Andrew Robert Miller, support their contention that Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). In making a motion for summary judgment on threshold grounds a defendant has the initial burden of demonstrating that the Plaintiff did not sustain a "serious injury" as that term is defined by Insurance Law § 5102.

Defendant Movants' Reports

Dr. Richard Lechtenberg, performed an independent neurologic examination on April 24, 2018. In his report dated May 1, 2018, which was duly affirmed on that same day, Dr. Lechtenberg detailed his findings based upon his examination and a review of medical records and documents related to the instant matter. Dr. Lechtenberg opined, among other things, that the Plaintiff had no objective, clinical, neurological deficiencies upon examination, that are related to the May 24, 2016 accident. (See Defendant Movants' Motion, Exhibit E).

Dr. Andrew Robert Miller, conducted an Orthopedic Evaluation of the Plaintiff on April 26, 2018. In his report dated April 26, 2018, which was duly affirmed on that same day, Dr. Miller detailed his findings based upon his evaluation and a review of medical records and documents

related to the instant matter. Dr. Miller opined that the Plaintiff's examination resulted in a finding that no injury remained and there was full range of motion and no tenderness. (See Defendant Movants' Motion Exhibit F).

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, the Defendant Movants have met their initial burden of proof. This is primarily because Dr. Miller's report provided a range of motion and did "compare those findings to the normal range of motion..." *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2nd Dept, 2005]. What is more, the Court finds that the Defendant Movants met their *prima facie* burden regarding the Plaintiff's "90/180" claim, in as much as they proffered Plaintiff's deposition testimony and bill of particulars, which reflected that he was not confined to his bed or home and there were no daily activities that he was not able to perform during a period of at least 90 out of the first 180 days following the accident. (See Plaintiff's Deposition, Defendants' Motion, Exhibit G, Pages 91 and 92 and Plainitiff's Bill of Particulars, Exhibit D, Paragraph 11) *Cavitolo v. Broser*, 163 A.D.3d 913, 914, 81 N.Y.S.3d 188, 189 [2nd Dept, 2018]; *Brun v. Farningham*, 149 A.D.3d 686, 687, 51 N.Y.S.3d 172 [2nd Dept, 2017]; *Kuperberg v. Montalbano*, 72 A.D.3d 903, 904, 899 N.Y.S.2d 344, 345–46 [2nd Dept, 2010]; *Richards v. Tyson*, 64 A.D.3d 760, 761, 883 N.Y.S.2d 575, 577 [2nd Dept, 2009].

As the Defendant Movants have met their initial *prima facie* burden, the Plaintiff must now prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, as defined by Insurance Law §5102, in order to prevent the dismissal of the action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2nd Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2nd Dept, 1995]. In this regard, the Plaintiff must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff's injuries as defined by statute. *See Shamsoodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2nd Dept, 2007]; *Grossman v Wright*, 268

AD2d 79 [2nd Dept, 2000]. In order to rebut any arguable *prima facie* showing of the Defendants, the Plaintiff must prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries. *See Levitant v. Beninati*, 167 A.D.3d 730, 731, 87 N.Y.S.3d 504, 505 [2nd Dept, 2018]; *Nussbaum v. Bablu*, 138 A.D.3d 703, 704, 27 N.Y.S.3d 886, 887 [2nd Dept, 2016]. In this regard, the Plaintiff must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff's injuries, as defined by statute. *See Ye Jin Han v. Karimzada*, 92 N.Y.S.3d 906, 907 [2nd Dept, 2019]; *Lacombe v. Castellano*, 134 A.D.3d 905, 906, 22 N.Y.S.3d 484, 484 [2nd Dept, 2015].

The issue of whether a serious injury was sustained involves a comparative determination of the degree or qualitative nature of an injury based upon the otherwise normal function, purpose and use of the body part. *See Toure v Avis Rent-a-Car Sys.*, Inc., 98 NY2d 345, 353 [2002]; *Walker v. Esses*, 72 A.D.3d 938, 939, 899 N.Y.S.2d 321, 322 [2nd Dept, 2010]. In the alternative, the Plaintiff must establish that he sustained a medically-determined injury or impairment which prevented her from conducting substantially all of the material acts which constituted his usual and customary daily activities for 90 out of the 180 days immediately following the accident. *See Licari v Elliott*, 57 NY2d 230 [1982].

In opposition, the Plaintiff has failed to raise a material issue of fact that prevents this Court from granting summary judgment. The Plaintiff seeks to rely on the affidavit of the Plaintiff, a medical report by Dr. Francis Joseph Lacina, and various medical records relating to the Plaintiff's medical treatment after the alleged incident. First, the report of Dr. Lacina was inadmissible, because the report was not affirmed. *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]; *Casas v. Montero*, 48 A.D.3d 728, 729, 853 N.Y.S.2d 358, 360 [2nd Dept, 2008].

What is more, the medical records certified by James Garcia, who was not the Plaintiff's treating physician[2], were not affirmed. As such, the contents of any of the reports or records that were annexed had no probative value. Moreover, the records were mostly inconclusive, unexplained, not causally related or unclear. *See Fortunato v. Murray*, 101 A.D.3d 872, 873, 955 N.Y.S.2d 206, 208 [2nd Dept, 2012]. The Court also finds that the Plaintiff's affidavit (Plaintiff's Opposition, Exhibit 1) was conclusory and self serving and contradicted his Deposition testimony. Finally, Plaintiff failed to set forth any medical evidence to establish that he "sustained a medically-determined injury of a nonpermanent nature which prevented [him] from performing her usual and customary activities for 90 of the 180 days following the subject accident." *Leeber v. Ward*, 55 A.D.3d 563, 564, 865 N.Y.S.2d 614, 616 [2nd Dept, 2008]; *Vickers v. Francis*, 63 A.D.3d 1150, 1151, 883 N.Y.S.2d 77, 79 [2nd Dept, 2009].

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

Defendant Movants' motion (motion sequence ~~#6~~ #5) is granted. Accordingly, the complaint is dismissed as against Defendant James and Defendant Victorian.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C

KINGS COUNTY CLERK
FILED
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[2] It appears that Mr. Garcia is not a physician.