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 3rd day of December, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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ANTONETTE A. HILL,
*Plaintiff,*
- against -
TOM V. PAULOSE and PAUL KURIEN
*Defendants.*

Index No.: 501132/2018

**DECISION AND ORDER**

*Motion Sequence #1*

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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 submission, the Court finds as follows:

This action concerns a motor vehicle incident that occurred on December 30, 2016. The Plaintiff, Antonette A. Hill (hereinafter "the Plaintiff") was allegedly involved in a motor vehicle collision with a vehicle owned by Defendant Paul Kurien and operated by Defendant Tom V. Paulose (hereinafter referred to collectively as "the Defendants"). The alleged accident occurred on Albany Avenue at or near its intersection with Clarkson Avenue in the County of Kings, State of New York. The Plaintiff claims in her Verified Bill of Particulars (Defendants' Motion Exhibit C, Paragraph 4), that as a result of the accident she sustained a number of serious injuries, including but not limited to, injuries to her left shoulder, lumbar spine, cervical spine, neck pain and knee pain.

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

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 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)*

The Defendants contend that the affirmed report of Dr. Edward A. Toriello and Dr. Marc J. Katzman, 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.

Dr. Toriello, conducted an orthopedic medical examination of Plaintiff on February 6, 2019. In his report, which was duly affirmed on that day, Dr. Toriello detailed his findings based upon his review of Plaintiff's medical records, his personal observations and objective testing. Dr. Toriello performed an orthopedic examination of the Plaintiff's right shoulder, left shoulder, cervical spine, right elbow, left elbow, right wrist and left wrist, and lumbar spine, all with the use of a hand held goniometer. Dr. Toriello did not find limited range of motion for the Plaintiff's purported injuries. As part of his diagnosis, Dr. Toriello opined that the Plaintiff revealed evidence of a resolved cervical strain, resolved low back strain, and resolved shoulder contusions. He found the resolved injuries as having been causally related to the subject accident. Dr. Toriello further opined that "[t]he claimant reveals no objective evidence of continued disability." (See Defendants' Motion, Exhibit E).

Dr. Marc J. Katzman did not conduct a medical examination but instead reviewed the MRI records related to examinations of the Plaintiff's cervical spine (1/05/17), lumbar spine (1/05/17) and left shoulder (1/26/17). For the cervical spine, Dr. Katzman found that there was "no evidence of recent post-traumatic injury to the cervical spine on the basis of this MRI examination." For the lumbar spine, Dr. Katzman found that there was "no evidence of recent post-traumatic injury to the lumbar spine on the basis of this MRI examination." Finally, for the left shoulder Dr. Katzman found that "there is no evidence of recent post-traumatic injury to the

left shoulder on the basis of this MRI exam." Dr. Katzman related any of the mild injuries as degenerative in nature. (See Defendants' Motion, Examination of Dr. Katzman, Exhibit F).

Additionally, 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 A.D.3d 589, 590, 996 N.Y.S.2d 116, 117 [2nd Dept, 2014]; *Kuperberg v. Montalbano*, 72 A.D.3d 903, 904, 899 N.Y.S.2d 344, 345 [2nd Dept, 2010]; *Camacho v. Dwelle*, 54 A.D.3d 706, 863 N.Y.S.2d 754 [2nd Dept, 2008]. In this action the Plaintiff represents in her bill of particulars that she returned to work with three days after the accident.

Accordingly, the Court is of the opinion that based upon the foregoing submissions, the Defendants have made a *prima facie* showing in support of their motion. This is primarily because Dr. Toriello'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]. As the Defendants have met their initial *prima facie* burden, the Plaintiff must 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, Plaintiff Hill 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 establish that the Plaintiff suffered a permanent 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 has the burden to show more than "a mild, minor or slight limitation of use." The Plaintiff must provide objective medical evidence in addition to medical opinions of the extent or

degree of the limitation alleged and its duration. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 A.D.3d 641, 642, 775 N.Y.S.2d 546, 547 [2nd Dept, 2004]; *Burnett v Miller*, 255 AD2d 541 [2nd Dept, 1998]; *Beckett v Conte*, 176 AD2d 774 [2nd Dept, 1991]. In the alternative, the Plaintiff must establish that he sustained a medically-determined injury or impairment which prevented him 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].

The Plaintiff proffers the affirmation of Drs. William A. Weiner and Kris Rusek. Dr. Weiner did not conduct a medical examination but instead reviewed the MRI records related to examinations of the Plaintiff's cervical spine (1/09/17). Dr. Weiner opined that "[g]iven that the injuries I observed are non-degenerative- the patient was 23 years old at the time the films were taken, with straightening of her cervical lordosis, and a signal intensity non indicative of degeneration- I affirm to a reasonable degree of medical certainty that an automobile accident of December 30th, 2016 caused the observed Cervical bulges and that they did not pre-exist the accident." (See Affirmation in Opposition, Affirmation of Dr. Weiner, Attached as Exhibit B).

Dr. Rusek conducted range of motion testing using an inclinometer on the Plaintiff on March 6, 2019, and examined the Plaintiff's lumbar spine and left shoulder and found limited ranges of motion for both. Dr. Rusek's diagnosis was that the Plaintiff suffered from disc bulges and a "left shoulder intrasubstance focal partial tear subpraspinatus tendon with supraspinatus tendinosis, based on MRI performed." Dr. Rusek further opined that the Plaintiff is "suffering severe and persistent symptoms that with most certainty are causally related to an auto-related accident she sufferend on 12/30/16." (See Affirmation in Opposition, Affirmation of Dr. Rusek, Attached as Exhibit C).

While the affirmations the Defendants' Doctors were arguably sufficient to meet the Defendants' *prima facie* burden, Plaintiff's evidence, namely the affirmed reports of Drs. Weiner and Rusek, raise triable issues of fact with regard to the Plaintiff's claim that she sustained a

serious injury as a result of the subject accident. "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 N.Y.2d 345, 774 N.E.2d 1197 [2002]; *see Dufel v. Green,* 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995]. Accordingly, the Defendants' motion is denied.

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

The Defendants' motion (motion sequence #1) is denied.

This constitutes the Decision and Order of the Court.

ENTER:



**Carl J. Landicino**

**J.S.C.**