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 9th day of October, 2020.

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

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RAZA NAQVI,
*Plaintiff,*

Index No.: 507984/2018

DECISION AND ORDER

-against-

MAGDY A. ELKOMY and NOURA HUSSEIN
*Defendants.*

Motion Sequence #2, #4

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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 | 19-27, 53-58 |
| Opposing Affidavits (Affirmations) | 32-34, |
| Reply Affidavits (Affirmations) | 60 |

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

This lawsuit arises out of a motor vehicle accident that allegedly occurred on December 14, 2017. Plaintiff Raza Naqvi (hereinafter "the Plaintiff") alleges in his Complaint that on that date he suffered personal injuries after the vehicle he was operating was in a collision with a vehicle operated by Defendant Noura Hussein and owned by Defendant Magdy A. Elkomy (hereinafter referred to individually or collectively as the "Defendants"). The Plaintiff alleges in his complaint that the motor vehicle collision occurred on Cropsey Avenue at or near its intersection with Bay 376 Street in Brooklyn, N.Y. In his Verified Bill of Particulars the Plaintiff alleges injuries to, *inter alia*, his lumbar, thoracic and cervical spine, and that he suffered a "a medically determined injury or impairment which prevents plaintiff from performing substantially all of the material acts which constituted plaintiffs usual and customary activities for such period of time all as specified by Section 5102 of the Insurance Law, Subsection (d)."

Defendants move (motion sequence #2) 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). The Plaintiff opposes the motion and cross-moves (motion sequence #4) for an order pursuant to CPLR 3212, granting partial summary judgment on the issue of liability.

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 [2d Dept 2005], *citing Andre v. Pomeroy,* 35 NY2d 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 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 NY2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 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 [2d 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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

*Insurance Law 5102 (Motion Sequence #2)*

In support of their motion the Defendants proffer an affirmed medical report from Joseph C. Elfenbein, M.D. Dr. Elfenbein examined the Plaintiff on September 19, 2019, more than twenty months after the date of the accident. Dr. Elfenbein states that he conducted range of motion testing of the cervical, lumbar and thoracic/sacroiliac spine, with the use of a goniometer. Dr. Elfenbein found normal range of motion for the cervical and thoracic spine. Dr. Elfenbein, upon examination of the lumbar/sacroiliac spine, found " [r]ange of motion reveals flexion to 60 degrees (60 degrees normal), extension to 15 degrees (25 degrees normal)(40 percent deficit), and right lateral bending to 20 degrees (25 degrees normal)(20 percent deficit) and left lateral bending to 20 degrees (25 degrees normal)(20 percent deficit)." Dr. Elfenbein opined that "[t]here are no positive objective findings noted on today's examination to support subjective complaints of pain, tenderness or decreased range of motion." Dr. Elfenbein causally related the injuries to the subject motor vehicle accident. (Defendants' Motion, Exhibit G)

Turning to the merits of the Defendants' motion, the Court is of the opinion that the Defendants have not met their initial burden of proof. *See Che Hong Kim v. Kossoff*, 90 AD3d 969, 969, 934 N.Y.S.2d 867 [2d Dept 2011]. The Defendants contend that the affirmed report of Dr. Elfenbein supports their contention that the Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). Dr. Elfenbein found limitations in the Plaintiff's range of motion in relation to his lumbar/sacroiliac spine. As part of his report Dr. Elfenbein indicated that the Plaintiff's decreased ranges of motion were subjective, but he "...failed to adequately explain and substantiate his belief that the limitation of motion" "...was self-imposed." *India v O'Connor,* 97 AD3d 796, N.Y.S.2d 678 [2nd Dept, 2012]; *Rivas v. Hill,* 162 AD3d 809, N.Y.S.3d 225 [2nd Dept, 2018]; *Mercado v. Mendoza*, 133 A.D.3d 833, 834, 19 N.Y.S.3d 757 [2nd Dept, 2015]; *Nash v. MRC Recovery, Inc.*, 172 A.D.3d 1213,

1215, 101 N.Y.S.3d 376 [2nd Dept, 2019]; *Castro v. Anthony*, 153 A.D.3d 655, 656, 57 N.Y.S.3d 895 [2nd Dept, 2017]; *Protonentis v. Battaglia*, 150 A.D.3d 1286, 52 N.Y.S.3d 888 [2nd Dept, 2017].

Moreover, Dr. Elfenbein did not opine on the ability of the Plaintiff to conduct his daily activities during the early post-accident period. Dr. Elfenbein conducted a medical examination of plaintiff on September 19, 2019, more than twenty months after the date of the accident, and did not address Plaintiff's alleged "90/180" claim. The Plaintiff's Verified Bill of Particulars states that the "Plaintiff was incapacitated from employment or occupation from 12/19/2017 to 12/26/2017 and continuing intermittently thereafter." (Defendant's Motion, Exhibit C, Paragraph 10). The Plaintiff, at his examination before trial, clarified his claim and stated that he was unable to return to work and had approximately missed four months of work as a result of his injuries caused by the accident. (Defendant's Motion, Exhibit D, Page 82). The Plaintiff further explained that he was not able to work because his injuries made driving difficult. (Defendant's Motion, Exhibit D, Page 179) As a result, the Court is of the opinion that the motion fails to adequately address, as a matter of law, the Plaintiff's claim set forth in the verified bill of particulars, that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented [her] from performing substantially all of the material acts which constituted [her] usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. *See Aujour v. Singh*, 90 AD3d 686, 934 N.Y.S.2d 240 [2d Dept 2011]; *Lewis v. John*, 81 AD3d 904, 905, 917 N.Y.S.2d 575 [2d Dept 2011]; *Menezes v. Khan*, 67 AD3d 654, 889 N.Y.S.2d 54 [2d 2009]; *Faun Thai v. Butt*, 34 AD3d 447, 448, 824 N.Y.S.2d 131, 132 [2d Dept 2006].

Even assuming, *arguendo,* that the Defendants had met their *prima facie* burden, the Court finds that the Plaintiff has raised material issues of fact relating to his ability to meet the serious injury threshold requirements of Insurance Law 5102. The Plaintiff relies on an initial evaluation from Dr. Kevin H. Weiner. Dr. Weiner examined the Plaintiff on December 13, 2019, having initially seen the

Plaintiff on August 1, 2018. He found pronounced limited range of motion in the Plaintiff's cervical spine and lumbar spine, with the use of a goniometer. As to the Plaintiff's thoracic spine, Dr. Weiner noted that the Plaintiff "received trigger point injections to the left iliocostalis thoracics in superior aspect of the sacroiliac joint." Dr. Weiner opined that " It is my opinion with a reasonable degree of medical certainty that based on the history that has been provided to me by the patient and review of the medical records and physical exam findings, the injury to his lumbar spine is directly and causally related to the accident which the patient was involved on 12/14/2017." (See Plaintiff's Affirmation in Opposition, Report of Dr. Weiner, Exhibit "A").

Plaintiff's evidence, namely the affirmed report of Dr. Weiner, raises triable issues of fact with regard to the Plaintiff's claim that he sustained a serious injury. *See McNeil v. New York City Transit Auth.*, 60 AD3d 1018, 1019, 877 N.Y.S.2d 351, 351 [2nd Dept 2009]. "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 Dufel v. Green*, 84 NY2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

*Liability (Motion Sequence #4)*

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented by the Plaintiff to establish, *prima facie*, that the Defendants' vehicle hit the Plaintiff's vehicle in the rear when it was stopped. In support of his application, the Plaintiff relies primarily on the Plaintiff's deposition. When asked if the accident occurred while his car wa stopped behind a bus, the Plaintiff stated "[y]es." When asked how long he was stopped behind the bus before the accident happened the Plaintiff testified "[a] few minutes." (Plaintiff's motion, Exhibit C, Pages 103, 104) This testimony is sufficient for the Plaintiff to meet his prima facie burden. *See Martinez v. Allen*, 163

AD3d 951, 82 N.Y.S.3d 130 [2nd Dept 2018]. This is because "[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Klopchin v. Masri*, 45 AD3d 737, 737, 846 N.Y.S.2d 311, 311 [2nd Dept 2007]*See Hakakian v. McCabe*, 38 AD3d 493, 494, 833 N.Y.S.2d 106, 107 [2nd Dept 2007]; *see also Tumminello v. City of New York*, 148 AD3d 1084, 1085, 49 N.Y.S.3d 739, 741 [2nd Dept 2017]. The Defendant has failed to raise a material issue of fact that would prevent this Court from granting the motion (motion seequence #4) for partial summary judgment on the issue of liability. The Defendant has been precluded from testifying by an Order of the Hon. Lisette Colon, dated January 7, 2020 and the motion is unopposed. Accordingly, the Plaintiff is awarded summary judgment on the issue of liability as against the Defendants in that the Defendants were negligent and the proximate cause of the accident and the matter shall proceed on the issue of damages.

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

Defendants' motion for summary judgment (motion sequence #2) is denied.

The Plaintiff's motion for partial summary judgment (motion sequence #4) is granted. The Plaintiff is awarded summary judgment on the issue of liability as against the Defendants in that the Defendants were negligent and the proximate cause of the accident and the matter shall proceed on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

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