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 May, 2023.

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

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GRACIELA G. MEZA,

Plaintiff,

-against-

GREEN LEASING INC., JEREMY D. ELLISON and EMALYN GIUFFRIDA,

Defendants.

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Index No. 511923/2019

DECISION AND ORDER

Motion Sequence #1

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	19-35,
Opposing Affidavits (Affirmations)	40-50,
Reply Affidavits (Affirmations)	51-52.

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

This action concerns alleged personal injuries on the part of the Plaintiff, Graciela G. Meza (the "Plaintiff") as a result of a motor vehicle accident that purportedly occurred on December 2, 2018 in Brooklyn, NY. Defendants, Green Leasing Inc., Jeremy D. Ellison, and Emalyn Giuffrida (the "Defendants") now move (motion sequence #1) for summary judgment pursuant to CPLR 3212 dismissing the action on the contention that the Plaintiff has failed to meet the serious injury threshold, as such term is defined in Insurance Law 5104(a) and 5102(d). Plaintiff opposes the motion.

"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 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 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 AD2d 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]).

In her Verified Bill of Particulars, Plaintiff contends that she suffered injuries to both of her shoulders and her cervical spine and lumbar spine. Plaintiff also alleges that she had surgery to her right shoulder on March 7, 2019 (less than three months post-accident). Plaintiff additionally alleges that she was confined to her bed for three days following the accident, and one week following her right shoulder surgery. Plaintiff further states that she was confined to home approximately three months after the

accident and four months after her right shoulder surgery. As to her employment, Plaintiff alleges that she was "incapacitated from employment" for approximately seven months after the accident. The Plaintiff's deposition testimony supports the time out of work. *See* Plaintiff's Deposition (NYSCEF Doc. No. 31). The Plaintiff sat for deposition on August 20, 2020. When asked whether she was making a claim of lost earnings and missed work because of the accident, Plaintiff stated, "[y]es. Correct." (Page 10). When asked how long she did not work, Plaintiff stated, "I would say that the missing job started the day after the accident, and I went back to work in June 17, 2019." (Pages 10-11). Additionally, Plaintiff stated that upon returning to work on June 17, 2019, her schedule was part-time. (Page 92). When asked whether there was anything she could not do at the time of the deposition or do as well as she was able to do before the time of the accident, Plaintiff stated, "[w]ell, mostly it's been lifting anything heavy." (Page 100).

In support of their motion, the Defendants proffer the deposition of the Plaintiff that occurred on August 20, 2020, the Bill of Particulars, a purported Brooklyn Methodist Hospital record, and a medical report of Dr. Jeffrey Guttman, M.D.

Dr. Guttman, an orthopedist, examined the Plaintiff on November 27, 2020, almost two years after the accident. The doctor mostly found normal range of motion in all material areas and found that all areas had been resolved. The doctor also found that the Plaintiff "did not sustain any significant or permanent injury as a result of the motor vehicle accident." However, the doctor did not address the 180 day period after the accident. In fact, in light of the date of the examination and the failure to review any real time medical records in relation to that 180 day period, the doctor was not competent to address same.

While it is true that where a 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, that is not the case here. *See Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*,

72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008].

Turning to the merits of Defendants' motion, the Court finds that the Defendants have failed to meet their *prima facie* burden of proof. *See Che Hong Kim v. Kossoff*, 90 A.D.3d 969, 969, 934 N.Y.S.2d 867 [2nd Dept, 2011]. This is because the Plaintiff was examined by Dr. Guttman nearly two years after the accident, and the doctor did not relate his findings to the 90/180 category of serious injury alleged by the Plaintiff for the relevant period of time immediately following the accident. See *Owens-Stephens v. PTM Mgmt. Corp.*, 191 A.D.3d 691, 137 N.Y.S.3d 734 [2d Dept 2021]; *Rouach v. Betts*, 71 AD3d 977, 977, 897 N.Y.S.2d 242, 243 [2d Dept 2010]; *see also Epstein v. MTA Long Island Bus*, 161 AD3d 821, 823, 75 N.Y.S.3d 532, 534 [2d Dept 2018]; *Stead v. Serrano*, 156 AD3d 836, 837, 67 N.Y.S.3d 244 [2d Dept 2017]; *Nembhard v. Delatorre*, 16 AD3d 390, 791 N.Y.S.2d 144 [2d Dept 2005]; *Peplow v. Murat*, 304 AD2d 633, 758 N.Y.S.2d 160, 161 [2d Dept 2003]; *Frier v. Teague,* 288 AD2d 177, 732 N.Y.S.2d 428 [2d Dept 2001]. If the Defendants successfully met their *prima facie* burden, Plaintiff would have to show medical evidence relating to that category. However, the Court needs not address the opposing papers. "When the defendant fails to establish entitlement to judgment as a matter of law, the sufficiency of the plaintiff's opposition papers need not be considered (*see Junco v. Ranzi*, 288 AD2d 440, 733 N.Y.S.2d 897 (Mem), 2001 N.Y. Slip Op. 09530 [2d Dept 2001]." *Gamberg v. Romeo*, 289 AD2d 525, 736 N.Y.S.2d 64, 2001 N.Y. Slip Op. 10974 [2d Dept 2001].

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

The motion by the Defendants (motion sequence #1) for summary judgment is denied.
The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

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