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 13th day of June, 2023.

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

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JEAN COLLYMORE-MAYNARD,

Plaintiff,

-against-

NATASHA GAYLE-LYKEN, DWYGHT LYKEN, BAKHIT MOUMENIZA, CURB MOBILITY, LLC, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA NEW YORK CITY TRANSIT AUTHORITY DIVISION OF PARATRANSIT and MOHIELDIN ABDALLA

Defendants.

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Index No. 516923/2020

DECISION AND ORDER

Motion Sequence #2, 3, 4, 5

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

	Papers Numbered (NYSEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	39-46, 47-50, 51-60, 92, 96-101, 110-111, 112
Opposing Affidavits (Affirmations)	65-77, 79-90, 93-94, 115-116, 117-118,
Reply Affidavits (Affirmations)	103, 114, 119,

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

This lawsuit arises out of a motor vehicle accident that purportedly occurred on September 22, 2019. Plaintiff Jean Collymore-Maynard (hereinafter "the Plaintiff") alleges in her Complaint that on that date she suffered personal injuries after the vehicle she was a passenger in was involved in a collision with two other vehicles. In her Verified Bill of Particulars the Plaintiff alleges injuries to her cervical and lumbar spines, right shoulder and right knee. The Plaintiff also states that she suffered a "a medically determined injury or impairment of a non-permanent nature which prevents

Plaintiff from performing substantially all of the material acts which constitute Plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury." (90/180 claim)

Defendants Natasha Gale Lyken and Dwyght Lyken (hereinafter the "Lyken 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).[1] The Plaintiff opposes the motions and argues that the Defendants have failed to meet their burden and as a result the motion should be denied.

Defendants Bakhut Moumeniza and Mohieldin Abdalla (hereinafter referred to collectively as the "Abdalla Defendants") cross-move (motion sequence #4) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the grounds that they were not liable as a matter of law for the collision at issue. The Abdalla Defendants argue that the complaint should be dismissed as against them as the evidence shows that their vehicle was struck in the rear by the Lyken Defendants' vehicle while the Abdalla Defendants' vehicle was stopped at a red traffic signal. The Plaintiff does not oppose this motion. The Plaintiff moves (motions sequence #5) for an order pursuant to CPLR 3212 granting her summary judgment on the issue of liability as against the Lyken Defendants. The Lyken Defendants' oppose both motions (motion sequence #4, 5) and argue that there are issues of fact regarding whether the Abdalla Defendants' vehicle stopped suddenly at the time of collision.

[1] Defendants Bakhut Moumeniza and Mohieldin Abdalla cross-move (motion sequence #3) for the same relief and for the sake of judicial economy adopt and incorporate the submissions made by the Lyken Defendants.

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].

Threshold (Insurance Law 5102)

In support of their motion the Lyken Defendants proffer an affirmed medical report from Howard A. Kiernan, M.D. Dr. Kiernan examined the Plaintiff on November 15, 2021, more than two years after the date of the accident. Dr. Kiernan conducted range of motion testing with the use of a goniometer. He examined the Plaintiff's cervical, thoracic and lumbar spine, right shoulder

and right knee and found no limitation in the Plaintiff's range of motion in relation to those areas, except for limited flexion of the right knee. "...flexion at 120 degrees (150 degrees normal)." Dr. Kiernan found that the cervical spine sprain had resolved, the lumbar sprain had resolved, the right shoulder sprain had resolved, and the right knee sprains had resolved. He also causally relates the diagnoses to the subject accident. Dr. Kiernan also found that "[t]here is evidence of contributing preexisting arthritis of the knee that impacting on the current injuries." Dr. Kiernan does not indicate the basis for this determination. Additionally, Dr. Kiernan does not address the Plaintiff's condition in relation to the 180 day period immediately following the accident. (See Lyken Defendants' Motion, Report of Dr. Kiernan, NYSCEF Doc. 45).

When 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, the Defendant may utilize those factors in support of its motion for summary judgment. *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]. In this case, the Verified Bill of Particulars states, at Paragraph 10, that the Plaintiff "was incapacitated from employment from approximately September 23, 2019 to March 13, 2020." During her deposition, when asked when she returned to work after her accident, the Plaintiff stated, "I've been back to work two weeks in March and then on the 17th, I believe, and then the COVID hit and the hotel closed." (NYSCEF Doc. 44, Page 95). When asked if she performed her regular duties, the Plaintiff stated "[m]y regular duties, yes." (Page 96). When asked if she was out of work from September to March, the Plaintiff stated "[t]he doctor gave me, I can't remember his name. He sent me back to work 16 on the 17th." (Page 96).

Assuming that the Defendants had made a *prima facie* establishing that the Plaintiff did not sustain a serious injury as defined by the statute, it becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, in order to avoid dismissal of the action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2d Dept 1994]; *Bryan v Brancato*, 213 AD2d 577 [2d Dept 1995]. In this regard, the Plaintiff must submit quantitative objective findings, in addition to opinions as to the significance of the Plaintiff's injuries. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 AD3d 641, 642, 775 N.Y.S.2d 546, 547 [2d Dept 2004]; *Burnett v Miller*, 255 AD2d 541 [2d Dept 1998]; *Beckett v Conte*, 176 AD2d 774 [2d Dept 1991].

As an initial matter, some of the records that the Plaintiff relied upon, such as some of the records are often illegible and as a result have no probative value. See CPLR 2106 and *Parente v. Kang,* 37 A.D.3d 687, 831 N.Y.S.2d 430 [2nd Dept, 2007]; *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].

Dr. Yolande Bernard examined the Plaintiff, with the first examination occurring on October 15, 2019, less than a month after the Plaintiff's accident. The final examination occurred on March 2, 2022. Each examination involved range of motion testing with the use of a hand held goniometer. The range of motion testing on the subject body areas on October 15, 2019 reflect limitations in the cervical spine, the right knee and right shoulder. The doctor stated that "[a]fter approximately ten month's of regular treatment, Ms. Collymore Maynard's treatment stopped." "…as she plateaued in treatment and it was determined that further therapy would be palliative." The March 2, 2022 examination reflects that Dr. Bernard found, as to the cervical spine, "flexion was 45 degrees, normal 50 degrees [10 percent loss]; extension was 45 degrees, normal 60 degrees

[25 percent loss]; rotation to the right was 50 degrees, to the left was 50 degrees, normal 80 degrees [38 percent loss, bilaterally]." As to the right shoulder, Dr. Bernard found "abduction was 100 degrees [44 percent loss], forward flexion was 85 degrees [56 percent loss], normal abduction and forward flexion 180 degrees, respectively." As to the right knee, Dr. Bernard found "flexion was 0 to 70 degrees, normal 0 to 130 degrees [46 percent loss]." Dr. Bernard found "[c]ervical spine herniated discs, bulging discs, myofascial derangement with right C6 radiculopathy, persistent pain, restricted range of motion, and impairment of functioning" Dr. Bernard also found "[r]ight shoulder internal derangement with history of fracture with persistent pain, restricted range of motion, and impairment of functioning." Dr. Bernard opined that "[t]here is a direct causal relationship between the patient's motor vehicle accident, which occurred September 22, 2019, and her above complaints, injuries, and disabilities." Dr. Bernard also opined that "[b]ased on her ongoing symptomatology and loss of range of motion, approximately 3 years status post her accident, it is evident that these injuries are permanent and that the prognosis for full and complete recovery remains poor." As part of Dr. Bernard's affirmation (paragraph 24) it was noted that the Plaintiff was "unable to return to work after the accident until late February 2020, a period of 5-6 months following the accident." Dr. Bernard opined that "[b]ased on the examinations, treatment and testing, as well as Ms. Collymore Maynard's complaints of stiffness, pain, aching, lifting, and numbness, I can state with a reasonable degree of medical certainty that Ms. Collymore Maynard would not have been able to perform her usual and customary activities of daily living the same as before the accident for at least the first 90 days post accident." (See Plaintiff's Affirmation in Opposition, Report of Dr. Bernard, NYSCEF Docs. 67, 70).

The Plaintiff also submits the affirmed report of Dr. Dana A. Mannor, an orthopedic surgeon. Dr. Mannor examined the Plaintiff on December 2, 2021, more than two years after the

date of the accident. Dr. Mannor conducted range of motion testing of the Plaintiff's cervical, thoracic and lumbar spines, right shoulder and right knee, using a goniometer, and found limitation in the Plaintiff's range of motion in relation to the lumbar spine and right knee. Dr. Mannor found that as to the Plaintiff's lumbar spine, "[a]ctive range of motion is in flexion to 30 degrees but when moving step stand for 50 degrees (60 degrees normal), extension to 10 degrees (25 degrees normal), and right lateral bending to 25 degrees (25 degrees normal) and left lateral bending to 25 degrees (25 degrees normal)." As to the right knee, Dr. Mannor found "[a]ctive range of motion is in flexion to 90 degrees (150 degrees normal) and extension to 0 degrees (0 degrees normal)." Dr. Mannor found that "[p]assive range of motion is same as active and consistent with age and possible arthritis and voluntarily restricted." (See Plaintiff's Affirmation in Opposition, Report of Dr. Mannor, NYSCEF Doc. 74).

Plaintiff's evidence, mostly the affirmed reports of Dr. Bernard, raises triable issues of fact with regard to the Plaintiff's claim of serious injury causally related to the subject accident. *See McNeil v. New York City Transit Auth.*, 60 A.D.3d 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 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]. Additionally, Dr. Bernard found that the Plaintiff was not able to work or otherwise perform her usual and customary activities for the required statutory period.

Moreover, in relation to the Defendant's argument that the Plaintiff did not consistently receive treatment, the Plaintiff, in her affidavit, did discuss the purported gap in treatment and

provided an adequate explanation for the gap in her treatment history. This explanation was supported by Dr. Bernard who indicated that the Plaintiff, after 10 months, reached a plateau with regard to the efficacy of further treatment. See *Pommells v. Perez*, 4 N.Y.3d 566, 576, 830 N.E.2d 278, 284 [2005].

Liability

Turning the merits of the motion by the Abdalla Defendants (motion sequence #4), the Court finds that they have met their *prima facie* burden. The Abdalla Defendants argue that summary judgment is appropriate because they were not liable for the accident given that their vehicle was struck in the rear by the Lyken Defendants' vehicle while Abdalla Defendants' vehicle was stopped at a red traffic signal. In support of their application, the Abdalla Defendants rely on the deposition of the Plaintiff, the deposition of Defendant Dwyght Lyken, an affidavit of Defendant Mohieldin Abdalla, and a Police Accident Report. As an initial matter, the Police Accident is not admissible given that the report is not certified. *See Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020]. Defendant Abdalla states in his affidavit that "[o]n 9/22/2019, I was driving livery plate # T618152C. I had one female passenger seated at the back on the right side." Defendant Abdalla also stated that, "[a]s I approached the intersection of Kings Highway & Farragut Road in Brooklyn, I had the red light." Defendant Abdalla then stated that he "was the first vehicle waiting for the green light. Suddenly without any warning, vehicle #2 rear ended my vehicle." (See Abdalla Defendants' Motion, Affidavit of Defendant Abdalla, NYSCEF Doc. 57).

The Plaintiff sat for deposition on October 4, 2021 (NYSCEF Doc. 55). During her deposition, when asked about the traffic conditions prior to the accident, the Plaintiff stated that,

"[t]here was a red light, he was stopped full at the red light." (NYSCEF Doc. 55, Page 27). When asked whether the traffic signal was a traditional signal with a red, yellow and green light, the Plaintiff stated, "I believe so, yes." (Page 28) When asked if her taxi was involved in an accident with another vehicle, the Plaintiff stated that "[t]he green cab stopped at the light for about 30 seconds steady and then a car came and hit us in the back." (Page 30). This testimony is sufficient for the Abdalla Defendants to establish a *prima facie* showing. *See Martinez v. Allen*, 163 AD3d 951, 82 N.Y.S.3d 130 [2d 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." *Tumminello v. City of New York*, 148 AD3d 1084, 49 N.Y.S.3d 739 [2d Dept 2017]; *Klopchin v. Masri*, 45 AD3d 737, 846 N.Y.S.2d 311 [2d Dept 2007].

The Lyken Defendants argue that the Abdalla Defendants motion should be denied as the Lyken Defendants' vehicle struck the Abdalla Defendants' vehicle when the Abdalla Defendants' vehicle made a sudden stop while driving through the intersection, shortly after the light turned green. In support of their opposition, the Lyken Defendants rely on the deposition of Defendant Dwyght Lyken. Defendant Dwyght Lyken sat for a deposition on October 5, 2021 (NYSCEF Doc. 56). When asked how much time had occurred between when he stopped for a red light and the accident occurred, Defendant Lyken stated, "I came to a complete stop at a red light and then the accident occurred after that." When asked how much distance separated his and the Abdalla Defendants' vehicle while they were stopped at the traffic signal, Defendant Lyken stated, "[t]hree to five feet." (NYSCEF Doc. 56, Page 25). When asked to describe the accident, Defendant Lyken stated, "I was at a stoplight completely stopped. The light changed green, traffic began to flow. The car in front of me released their brake and applied their brake. I released mine. As I start to

accelerate, I see the brake I hit my brake and that's it." (Page 26). When asked the speed of the Abdalla Defendants' vehicle prior to the accident, Defendant Lyken stated that, "I don't believe he really moved at all. He released his brake and then apply again." (Page 29). "Pursuant to VTL § 1129(a), a driver of a motor vehicle may not follow another vehicle 'more closely than is reasonable and prudent,' depending on the speed and traffic conditions on the road." *Fuchs v. City of New York*, 57 Misc. 3d 778, 781, 60 N.Y.S.3d 654, 657 [Supreme Court, Kings, 2017), *aff'd*, 186 A.D.3d 459, 126 N.Y.S.3d 652 [2nd Dept 2020]. Additionally, Lyken did not indicate whether the stop was unexpected due to traffic conditions. Further, Lyken's description of the accident does not indicate that the Abdalla vehicle made a short stop that would constitute a non-negligent act on his part or fault on the part of the Abdalla vehicle's driver.

Accordingly, the Lyken Defendants have failed to raise a non-negligent explanation for the collision. "Conclusory assertions of a sudden and unexpected stop are insufficient to rebut the inference of negligence." *Shamah v. Richmond County Ambulance Serv.*, 279 AD2d 564, 719 N.Y.S.2d 287 [2d Dept 2001]; *see Levine v. Taylor,* 268 AD2d 566, 702 N.Y.S.2d 107 [2d Dept 2000]; *Corbly v. Butler,* 226 AD2d 418, 641 N.Y.S.2d 71 [2d Dept 1996]; *Benyarko v. Avis Rent A Car Sys.,* 162 AD2d 572, 556 N.Y.S.2d 761 [2d Dept 1990]; *Young v. City of New York,* 113 AD2d 833, 493 N.Y.S.2d 585 [2d Dept 1985]. As part of his deposition, Defendant Dwyght Lyken did not indicate why the stop of Abdalla Defendants stop was unexplained. *See Tumminello v. City of New York*, 148 AD3d 1084, 1085, 49 N.Y.S.3d 739 [2d Dept 2017]. Accordingly, the motion (motion sequence #4) is granted and the action is dismissed as against the Abdalla Defendants.

Turning to the merits of the motion by the Plaintiff (motion sequence #5) the Court finds that the Plaintiff has met her burden. The Plaintiff argues that she is an innocent passenger free from liability. As stated above, the Lyken Defendants have failed to provide a non-negligent

explanation for the collision. The Lyken Defendants' conclusory claim of a sudden stop is insufficient to establish a non-negligent defense or raise an issue of comparative negligence between the Lyken Defendants and the Abdalla Defendants. *See Tumminello v. City of New York*, 148 AD3d 1084, 49 N.Y.S.3d 739 [2d Dept 2017]; *Cajas-Romero v. Ward*, 106 AD3d 850, 965 N.Y.S.2d 559 [2d Dept 2013]; *Waide v. ARI Fleet, LT*, 143 AD3d 975, 39 N.Y.S.3d 512 [2d Dept 2016].

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

The Lyken Defendants' motion (motion sequence #2) for summary judgment in relation to Insurance Law 5102(d) is denied.

The Abdalla Defendants' motion (motion sequence #3) for summary judgment in relation to Insurance Law 5102(d) is denied.

The Abdalla Defendants' motion (motion sequence #4) for summary judgment is granted. The complaint and any cross-claims as against the Abdalla Defendants are dismissed.

The Plaintiff's motion (motion sequence #5) is granted to the extent that the Plaintiff is an innocent passenger, free from liability and summary judgment on the issue of liability is granted to Plaintiff as against the Lyken Defendants.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.