

--- N.Y.S.3d ----, 2015 WL 5972104 (N.Y.A.D. 1 Dept.), 2015 N.Y. Slip Op. 07532

**This opinion is uncorrected and subject to revision before publication in the printed Official Reports.**

**\*1** Mark Walker, Plaintiff-Appellant,  
v.  
Robert C. Whitney, III, et al.,  
Defendants-Respondents.

**OPINION**  
15641 310641/11  
Supreme Court, Appellate Division, First  
Department, New York  
Decided on October 15, 2015

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

**APPEARANCES OF COUNSEL**

Riegler & Berkowitz, Melville (David H. Berkowitz of counsel), for appellant.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 31, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claims alleging that he sustained serious injuries to his cervical spine, lumbar spine and left shoulder, unanimously affirmed, without costs.

Defendants established that plaintiff did not sustain serious injuries as a result of the motor vehicle accident (see [Insurance Law § 5102\[d\]](#)). Defendants submitted the affirmed reports of an orthopedist and neurologist who found full range of motion in all parts, and of a radiologist who found that the MRI films showed degenerative disc disease in the spine, mild acromioclavicular (AC) joint osteoarthritis in the shoulder, and no evidence of causally related injury (see [Figueroa v Ortiz](#), 125 AD3d 491 [1st Dept 2015]).

In opposition, plaintiff failed to raise a triable issue of fact. He submitted no admissible medical evidence in support of his claim of serious injury to his cervical and lumbar spine, and the records did not become admissible

merely because defendants' experts reviewed them (see [Malupa v Oppong](#), 106 AD3d 538 [1st Dept 2013]; [Clemmer v Drah Cab Corp.](#), 74 AD3d 660 [1st Dept 2010]). The only admissible evidence is an affirmation from plaintiff's orthopedic surgeon, who last examined plaintiff shortly after the arthroscopic procedure. He indicated that following surgery, plaintiff had a "decreased range of motion in his left shoulder," but did not provide measurements of the actual ranges of motion or a normal value for comparison. He also did not provide evidentiary support for his conclusory statement that plaintiff's shoulder condition is related to the accident, nor did he address the opinions of defendants' experts that any shoulder injury was due to ongoing pathology and degenerative changes (see [Paduani v Rodriguez](#), 101 AD3d 470, 471 [1st Dept 2012]). Although the unaffirmed MRI report of plaintiff's radiologist, like that of defendant's expert radiologist, found "mild" hypertrophic changes of the AC joint, plaintiff's expert failed to address those findings and explain why they were not the cause of the injury (see [Batista v Porro](#), 110 AD3d 609 [1st Dept 2013]). We note too that the surgeon's statement did not address the conclusions by defendants' doctors that as of 2012, plaintiff had regained a full range of motion in his left shoulder, which is relevant to the claim of permanent injury. Here, plaintiff fails to meet the serious injury threshold (cf. [Fedorova v Kirkland](#), 126 AD3d 624 [1st Dept 2015] [plaintiff sufficiently established that at least some of her injuries met the serious injury "no-fault" threshold, warranting denial of defendants' motion to dismiss]). In sum, the surgeon's affirmation does not raise any questions of fact as to whether plaintiff suffered a "permanent consequential limitation" in the use of a body function or system (see [Pommells v Perez](#), 4 NY3d 566, 577 [2005]), a "significant limitation" in the use of a body part (see [Lopez v Senatore](#), 65 NY2d 1017, 1020 [1985]) or a non-permanent medically \*2 determined injury (the "90/180" category of serious injury) (see [Gleissner v Lo Presti](#), 135 AD2d 494 [2d Dept 1987]).

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION,  
FIRST DEPARTMENT.

ENTERED: OCTOBER 15, 2015

CLERK

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