

**Nera v Kpokou**

2024 NY Slip Op 34957(U)

August 12, 2024

Supreme Court, Queens County

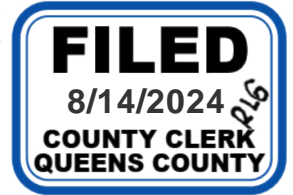
Docket Number: Index No. 712165/2020

Judge: Phillip Hom

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY



PRESENT: HON. PHILLIP HOM PART 14
Justice

ALIX NERA,
Plaintiff,
- v -

INDEX NO. 712165/2020
MOTION DATE 06/06/2024
MOTION SEQ. NO. 001

ARCHILLE KPOKOU and PORTNOVO EXPRESS
d/b/a PORTNOVO EXPRESS INC.,
Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that defendants' motion for summary judgment dismissing the complaint is determined as follows:

Plaintiff Alix Nera ("Plaintiff") commenced this action for injuries he allegedly sustained on August 30, 2019, as a result of a car crash with a vehicle owned by defendant Portnovovo Express d/b/a Portnovovo Express Inc. ("Portnovovo") and operated by defendant Archille Kpokou ("Kpokou") (collectively "Defendants"). Plaintiff alleges he suffered "serious injuries" to his left shoulder, cervical spine, and lumbar spine.

Now, Defendants move for summary judgment on the basis that Plaintiff did not suffer a "serious injury" under Insurance Law § 5102 (d). Plaintiff opposes.

In a summary judgment motion, the movant has the initial burden of demonstrating his or her prima facie entitlement to judgment as a matter of law through submission of sufficient evidence eliminating any material issues of fact (see Giuffrida v Citibank Corp., 100 NY2d 72, 81 [2003]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557, 560 [1980]). Only when the movant satisfies this prima facie burden does the burden shift to the opponent to show that material issues of fact exist (see Giuffrida, 100 NY2d at 81.). Thus, where the movant does not satisfy this initial burden, summary judgment is denied regardless of the sufficiency of the opposing papers (see Voss v Netherlands Ins. Co., 22 NY3d 728, 734 [2014]).

Of the several categories ("Subcategory" or "Subcategories") of "serious injury" listed in the statutory definition under Insurance Law § 5102 (d), four (4) are relevant here: "[1] permanent loss of use of a body organ, member, function, or system; [2] permanent consequential limitation of use of a body organ or member [Subcategory: "permanent consequential limitation of use"]; [3]

significant limitation of use of body function or system [Subcategory: “significant limitation of use”]; and [4] 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 [Subcategory: “90/180”]” (Insurance Law § 5102 [d]).

In support Defendants submit, among other things, Plaintiff’s Bill of Particulars (EF 22), their answer (EF 23), an affirmed MRI report of Michael Setton, D.O., a Radiologist (“Dr. Setton”) (EF 24), and an affirmed report of Salvatore J. Corso, M.D., a board-certified Orthopedic Surgeon (“Dr. Corso”).

In opposition, Plaintiff submits, among other things, various unaffirmed and uncertified medical records<sup>1</sup>, an affirmed report of Osafradu Opam, M.D., a neurologist (“Dr. Opam”) (EF 37); an affirmed report of Golali Nejati, M.D., Internal Medicine (“Dr. Nejati”) (EF 40), Plaintiff’s Affidavit (EF 41), and the transcript of Plaintiff’s examination before trial (“EBT”) (EF 42).

*Subcategory: Permanent Loss of Use of a Body Organ, Member, Function, or System*

Plaintiff does not specify or allege, among other things, a total loss of any of the body parts which he allegedly injured in the subject accident. Additionally, all the evidentiary submissions, including, among other things, Plaintiff’s EBT testimony, demonstrate that Plaintiff did not suffer permanent loss of use of a body organ, member, function, or system (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]; *Nesci v Romanelli*, 74 AD3d 765, 766-67 [2d Dept 2010]; *Amato v Fast Repair Inc.*, 42 AD3d 477, 477 [2d Dept 2007]; *Davis v New York City Tr. Auth.*, 294 AD2d 531, 531 [2d Dept 2002]).

*Subcategory: 90/180 Day*

During his EBT, Plaintiff testified that, at the time of the crash to current, he was working full-time as a respiratory physical therapist for both New York Health and Hospitals at Harlem Hospital and Elizabeth Seton Pediatric Center in Yonkers (EF 42). After the accident, Plaintiff missed about three days of work, but had to go back to work to support his family (EF 41). Additionally, he missed about one month after his left shoulder surgery (EF 41). Plaintiff attests that when he returned to work, he did not have any accommodations (EF 42). He avers that his duties and responsibilities included taking care of patients with difficulty breathing, by, among

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<sup>1</sup> Defendants raise the issue of admissibility of the uncertified, unsworn and unaffirmed medical records in their reply. ““(A) physician’s office records, supported by the statutory foundations set forth in CPLR 4518 (a), are admissible in evidence as business records”” (*Bronstein-Becher v Becher*, 25 AD3d 796, 797 [2d Dept 2006], quoting *Wilson v Bodian*, 130 AD2d 221, 231 [2d Dept 1987]). ““However, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor’s opinion or expert proof”” (*Bronstein-Becher*, 25 AD3d at 797). As such, any unaffirmed and uncertified reports and/or medical records are disregarded (*see Nicholson v Kwarteng*, 180 AD3d 695, 696 [2d Dept 2020]; *Irizarry v Lindor*, 110 AD3d 846, 847 [2d Dept 2013]; *Cebren v Tuncoglu*, 109 AD3d 631, 633 [2d Dept 2013]; *McLoud v Reyes*, 82 AD3d 848, 848 [2d Dept 2011]; *Dixon v Fuller*, 79 AD3d 1094, 1095 [2d Dept 2010] [portions of plaintiff’s expert’s “affirmation had to be disregarded because they recited unsworn findings of other doctors”]; *Gussack v McCoy*, 72 AD3d 644, 644 [2d Dept 2010]; *Washington v Mendoza*, 57 AD3d 972, 973 [2d Dept 2008]).

other things, assisting with placing vests around a person, lifting them, and putting a machine on during vest therapy. He further avers that his coworkers assisted him by putting on the vest until he managed “to do it with one hand without having that pressure on my left shoulder” (EF 42). Plaintiff was asked the following: “Are there things that you’re not able to do as a result of this accident?” he responded, “I am not saying 100 percent, not doing at all. I can say no, but I have limitations” (EF 42).

Thus, Defendants demonstrate that Plaintiff did not sustain a serious injury under the 90/180 Subcategory (*see Perl v Meher*, 18 NY3d 208, 220 [2011]; *Kang v Bhullar*, 167 AD3d 726, 727 [2d Dept 2018]; *Dae Kyoo Kim v Lemon Transp. Corp.*, 156 AD3d 757, 758 [2d Dept 2017]; *Small v City of New York*, 148 AD3d 959, 960 [2d Dept 2017]; *Strenk v Rodas*, 111 AD3d 920, 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time]; *Kabir v Vanderhost*, 105 AD3d 811, 811 [2d Dept 2013]; *Beltran v Powow Limo, Inc.*, 98 AD3d 1070, 1071 [2d Dept 2012]; *Valera v Singh*, 89 AD3d 929, 930-31 [2d Dept 2011]; *Bamundo v Fiero*, 88 AD3d 831, 831 [2d Dept 2011]; *Jean v Labin-Natochenny*, 77 AD3d 623, 624 [2d Dept 2010]; *McIntosh v O’Brien*, 69 AD3d 585, 587 [2d Dept 2010]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] [no rational jury could have found in the plaintiff’s favor where he “testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis”]).

In opposition, Plaintiff fails to raise a triable issue of fact. Notably, Plaintiff’s uncertified and unaffirmed medical records do not contain objective or competent evidence that Plaintiff suffered an injury under the 90/180 Subcategory. Moreover, Plaintiff’s EBT testimony fails to show that Plaintiff suffered an injury that prevented him from performing substantially all his usual and customary activities. Plaintiff’s subjective complaints of pain and/or difficulty performing his usual daily activities and/or duty at work, are insufficient to establish that he suffered a serious injury under the 90/180 Subcategory<sup>2</sup> (*see Gaddy v Eycler*, 79 NY2d 955, 958 [1992]; *Lanzarone v Goldman*, 80 AD3d 667, 669 [2d Dept 2011]; *Mercado v Garbacz*, 16 AD3d 631, 632 [2d Dept 2005]). Therefore, Plaintiff’s cause of action under the 90/180 Subcategory is dismissed.

*Subcategories: Permanent Consequential Limitation of Use and Significant Limitation of Use*

Evidence of a herniated disc, a bulging disc, a shoulder impingement, a tear in tendons or a tear in a ligament alone is insufficient to establish a serious injury; there must be additional objective medical evidence establishing that the accident resulted in significant physical limitations, as well as evidence of the injury’s duration (*see Pommells v Perez*, 4 NY3d 566, 574-76 [2005]; *McLoud v Reyes*, 82 AD3d 848, 849 [2d Dept 2011]; *Larson v Delgado*, 71 AD3d 739, 740-41 [2d Dept 2010]; *Garcia v Solbes*, 41 AD3d 426, 427 [2d Dept 2007]).

“[T]o prove the extent or degree of physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion can be used to substantiate a claim of serious injury [citation omitted]. An expert’s *qualitative* assessment of a plaintiff’s condition also may

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<sup>2</sup> “[Parties] ‘cannot create an issue of fact by making statements in an affidavit which completely contradict his prior sworn testimony without offering any explanation for the contradictions’” (*Zylinski v Garito Contr.*, 268 AD2d 427, 428 [2d Dept 2000], quoting *Gantt v County of Nassau*, 234 AD2d 338, 339 [2d Dept 1996]); *see also Allen v Wyandanch Homes & Prop. Dev. Corp.*, 298 AD2d 474, 475-76 [2d Dept 2002]).

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 Sys.*, 98 NY2d 345, 350 [2002]).

Moreover, an expert's report must identify the objective tests utilized to measure range of motion (*see Dinc v Shalesi*, 208 AD3d 558, 559 [2d Dept 2022]; *Gersbeck v Cheema*, 176 AD3d 684, 685 [2d Dept 2019] [granted defendant summary judgment where his expert measured plaintiff's range of motion with a goniometer, and plaintiff's expert failed to mention how he measured plaintiff's range of motion]; *Cho v Demelo*, 175 AD3d 1235, 1236-37 [2d Dept 2019] [denied defendants summary judgment for failure to identify objective tests utilized by their expert where expert affirmed "all ranges of motion are done visually and/or with the use of a hand held goniometer"] [emphasis added]; *Fiorucci-Melosevich v Harris*, 166 AD3d 581, 581 [2d Dept 2018]).

Use of a handheld goniometer to determine range of motion is a sufficient objective test on its own to determine whether a party has sustained a serious injury as long as the results are compared to what is a normal range of motion (*see Washington v County of Nassau*, 176 AD3d 903, 904 [2d Dept 2019]; *Gersbeck*, 176 AD3d at 685; *Cho*, 175 AD3d at 1236-37; *Chichester v Chichester*, 174 AD3d 846, 846-47 [2d Dept 2019]; *Munoz v Salcedo*, 170 AD3d 735, 736 [2d Dept 2019]; *Paez v Osborne*, 167 AD3d 766, 767 [2d Dept 2018]; *Alexander v Annarumma*, 166 AD3d 715, 716 [2d Dept 2018]; *Fiorucci-Melosevich*, 166 AD3d at 581; *Lee v McQueens*, 60 AD3d 914, 915 [2d Dept 2009]; *Kerzhner v N.Y. Ubu Taxi Corp.*, 17 AD3d 410, 410 [2d Dept 2005]; *Desulme v Stanya*, 12 AD3d 557, 557-58 [2d Dept 2004]; *Martin v Portexit Corp.*, 98 AD3d 63, 67-68 [1st Dept 2012]).

While there is no bright-line rule for what constitutes a serious injury under Insurance Law § 5102 (d), courts have required more than a "minor, mild or slight limitation of use" under the permanent consequential limitation of use and significant limitation of use Subcategories (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]; *see Licari v Elliot*, 57 NY2d 230, 236 [1982]; *Ramirez v L-T. & L. Enter., Inc.*, 189 AD3d 1636, 1637-38 [2d Dept 2020] [triable issue of fact where plaintiff's evidence showed, inter alia, a 33% deficit in cervical spine range of motion and 27% deficit in left shoulder range of motion]; *Nash v MRC Recovery, Inc.*, 172 AD3d 1213, 1215 [2d Dept 2019] [triable issue of fact where evidence showed, inter alia, that the left ankle had a 25% deficit in dorsiflexion and 33% deficit in plantar flexion]; *Broadwood v Bedoya*, 170 AD3d 795, 796 [2d Dept 2019] [insignificant within the no-fault statute where plaintiff suffered "no more than 10 percent" deficit in range of motion]; *Kholdarov v Hyman*, 165 AD3d 1087, 1088 [2d Dept 2018] [triable issue of fact where neurologist found a 20% deficit in flexion of plaintiff's cervical spine]; *Hiotidis v Ramuni*, 161 AD3d 955, 955-56 [2d Dept 2018] [upheld jury verdict that plaintiff suffered a serious injury, where testimony showed, inter alia, deficits of 33% in cervical and lumbar range of motion and 38% in right shoulder range of motion]; *Greenidge v United Parcel Serv., Inc.*, 153 AD3d 905, 906 [2d Dept 2017] [triable issue of fact where evidence showed, inter alia, a 25% deficit in cervical spine range of motion]).

Furthermore, in regards to the Significant Limitation of Use Subcategory, "while a significant limitation of use of a body function or member need not be permanent in order to constitute a serious injury, ... any assessment of the significance of a bodily limitation necessarily

requires consideration not only of the extent or degree of the limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102 (d) does not expressly set forth any temporal requirement for a significant limitation” (*Schilling v Labrador*, 136 AD3d 884, 885 [2d Dept 2016], quoting *Griffiths v Munoz*, 98 AD3d 997, 998 [2d Dept 2012]).

Where the movant provides evidence of a preexisting and/or degenerative condition, the party opposing the motion must rebut said evidence (*see Pommells*, 4 NY3d at 578-80). A treating physician’s affirmation, based upon his contemporaneous and most recent examinations of the plaintiff, opining that the plaintiff’s injuries and range of motion limitations observed are significant and permanent, and causally related to the accident, is sufficient to rebut said evidence (*see Cavitolo v Broser*, 163 AD3d 913, 914 [2d Dept 2018] [“plaintiff’s expert failed to address the findings of the defendant’s expert that the [MRI] of the plaintiff’s left shoulder, taken shortly after the accident, revealed only preexisting degenerative conditions”]; *Young Chool Yoo v Rui Dong Wang*, 88 AD3d 991, 991-92 [2d Dept 2011] [plaintiff’s expert’s affirmation finding, based upon the review of the MRI films and his examinations of the plaintiff, that plaintiff’s injuries were caused by the subject accident, and were not caused by degenerative disease, was sufficient to address issue of degeneration]; *Sforza v Big Guy Leasing Corp.*, 51 AD3d 659, 660-61 [2d Dept 2008] [plaintiff’s expert explicitly addressed degenerative issue]; *Doran v Sequino*, 17 AD3d 626, 626-27 [2d Dept 2005] [failed to raise triable issue of fact where plaintiff’s expert failed to indicate any awareness degenerative conditions, and contradicted findings of the plaintiff’s own treating physician made within a few months of the accident]).

Here, Defendants allege that Plaintiff’s injuries are not casually related to the alleged accident and/or are degenerative. Dr. Setton, a radiologist, reviewed the MRI of Plaintiff’s left shoulder, dated October 18, 2019, and concluded the following, among other things: “[N]o evidence of osseous or soft tissue injury which may have resulted from the accident 7 weeks prior. There is mild tendinosis and intermediate to high-grade partial tearing of the supraspinatus tendon, reflecting an intermediate stage of tendon degeneration related to rotator cuff impingement. [...]. It reflects a chronic repetitive overuse type injury, with no causal relation to trauma... There is no evidence of acute fracture, nor is there evidence of abnormal bone marrow signal to suggest a recent dislocation or any other occult osseous injury.” Dr. Setton opined that said findings were degenerative, and that there was no evidence to suggest a recent traumatic injury.

Dr. Setton also reviewed the MRI of Plaintiff’s cervical spine, dated October 18, 2019, and concluded the following, among other things: “There is multilevel desiccation and narrowing of the cervical intervertebral discs, reflecting a degenerative loss of disc hydration and structural integrity, chronic degenerative processes which predate and are unrelated to the accident. There [is] multilevel bulging of the cervical intervertebral discs which relates to degeneration and weakening of the outer layer of the intervertebral discs and ligament laxity, findings unrelated to trauma.” Dr. Setton opined that said findings reflected joint degeneration, which predated the accident, and it was concluded that “there is no abnormality of the paraspinal soft tissues to suggest any type of recent traumatic injury to the cervical spine.”

Similarly, Dr. Setton also reviewed the MRI of Plaintiff’s lumbar spine, dated October 25, 2019, and concluded the following, among other things: “[N]o evidence of osseous or soft tissue injury which may have resulted from the accident 8 weeks prior. There is multilevel desiccation

and narrowing of the lumbar intervertebral discs, reflecting a degenerative loss of disc hydration and structural integrity, chronic degenerative processes which predate and are unrelated to the accident. There is multilevel bulging of the lumbar intervertebral discs which relates to degeneration and weakening of the outer layer of the intervertebral discs and ligament laxity, findings unrelated to trauma... There is no evidence of acute fracture.” Dr. Setton opined that said findings reflected joint degeneration, which predated the accident, and that there was no abnormality to suggest recent trauma to the lumbar spine.

Defendants further provide the sworn report of Dr. Corso, an orthopedist, who conducted an independent medical examination of the Plaintiff on March 29, 2022. Dr. Corso did not review Plaintiff’s medical records, listing the Bill of Particulars and police report as records reviewed. Dr. Corso noted that Plaintiff reported that he suffered injuries to his neck, low back, and left shoulder, as a result of the accident on August 30, 2019. Dr. Corso affirmed that he measured the range of motion of Plaintiff’s cervical spine, lumbar spine, and left shoulder, by using a handheld goniometer, and that the Plaintiff had normal ranges of motion. All other tests were negative. Dr. Corso further opined that “[t]here are no objective clinical findings indicative of a present disability, and functional impairment, which prevents the examinee from engaging in ADL, and usual activities including work, school, and hobbies. The claimant is able to return to full duty work without restrictions.” Dr. Corso concluded that the Plaintiff “did not sustain any significant or permanent injury as a result of the motor vehicle accident on” August 30, 2019.

Thus, Defendants satisfies their burden, and the burden shifts to the Plaintiff to demonstrate an issue of fact.

The Court notes that it will determine whether various medical records included in Plaintiff’s opposition are admissible, as Defendants raise such issue in their reply (*see* footnote no. 1).

In opposition, Dr. Opam affirms he was Plaintiff’s treating physician at Glenwood Medical Neuro-Rehabilitation, and that Plaintiffs injuries are causally related to the aforementioned accident, as well as permanent in nature. The annexed neurological report, dated September 18, 2019, states Plaintiff’s range of motion of for his cervical spine, lumbar spine, and left shoulder, but does not identify the objective tests used to measure the ranges of motion, nor what would be considered normal range for examination. Additionally, Dr. Opam’s certification includes records indicating that the Plaintiff was seen by James J. Kim, David Marshak, and a physical therapist on subsequent office visits. Thus, Dr. Opam’s conclusions regarding Plaintiff’s range of motion at the initial consultation, and the unaffirmed records from James J. Kim, David Marshak, and the physical therapist, are of no probative value (*see Irizarry v Lindor*, 110 AD3d 846, 847 [2d Dept 2013]; *Cebron v Tuncoglu*, 109 AD3d 631, 633 [2d Dept 2013]; *McLoud*, 82 AD3d at 848-49; *Washington v Mendoza*, 57 AD3d 972, 973 [2d Dept 2008]; *Uribe-Zapata v Capallan*, 54 AD3d 936, 937 [2d Dept 2008]).

Additionally, the records annexed to Dr. Opam’s certification shows that on November 6, 2019, and February 7, 2020, Plaintiff’s range of motion was evaluated “with Tracker ROM from JTECH Medical using the single and dual inclinometry protocols outlined in the AMA Guides to the Evaluation of Permanent Impairment.” Although Dr. Opam signed the results, and the

measurements are compared to what would be considered normal range for these examinations, the records do not indicate who at the facility performed the actual exam. Furthermore, the dates the range of motion tests were performed do not align with the date of Plaintiff's exams at the facility.<sup>3</sup>

Moreover, Plaintiff's remaining experts fail to raise a triable issue of fact for various reasons.

Dr. Gladstein evaluated the Plaintiff's Range of motion on February 11, 2020. The annexed medical records do not identify the objective tests used to measure the ranges of motion, and thus, are of no probative value. Likewise, Dr. Ackerman evaluated the Plaintiff's range of motion on February 13, 2020. While the record states a goniometer was used for the Plaintiff's left shoulder, the objective tests used to measure the ranges of motion for the spine are not identified. Likewise, the report does not address degenerative disease as a causation for Plaintiff's alleged injuries, and instead states the injuries are "causally related to the motor vehicle accident of 8/30/19, if the history described to me is correct." Moreover, Dr. Ackerman does not identify what objective tests were used to measure the ranges of motion in Plaintiff's left shoulder on March 4, 2020. Furthermore, that same report states that "[t]he patient is feeling better since the surgery."

On October 7, 2023, Dr. Nejati affirmed that he performed a range of motion examination of Plaintiff's cervical spine, lumbar spine and left shoulder, by using a handheld goniometer. Dr. Nejati found limitations in the range of motion in Plaintiff's cervical spine, lumbar spine, and left shoulder; however, same is insufficient to raise a triable issue of fact for the reasons discussed herein.

Notably, the normal range of motion that Dr. Nejati references in his report contains different ranges than those stated by Plaintiff's prior treating doctors and Defendants' expert. Further, the report does not state whether Dr. Nejati relied upon records that were unsworn and/or unaffirmed records (*see Irizarry v Lindor*, 110 AD3d 846, 847 [2d Dept 2013]; *Cebren v Tuncoglu*, 109 AD3d 631, 633 [2d Dept 2013]; *McLoud*, 82 AD3d at 848-49; *Washington v Mendoza*, 57 AD3d 972, 973 [2d Dept 2008]; *Uribe-Zapata v Capallan*, 54 AD3d 936, 937 [2d Dept 2008]).

Moreover, Dr. Nejati's conclusions as to causation are speculative, as he only conducted an examination of Plaintiff more than four years after the accident, and more than one year after Dr. Corso conducted his examination of Plaintiff.

As such, Plaintiff fails to raise a triable issue of fact, as he fails to submit a treating physician's affirmation, based upon his contemporaneous and most recent examinations of Plaintiff, opining that Plaintiff's injuries and range of motion limitations observed are significant and permanent, and causally related to the accident (*see Cavitolo v Broser*, 163 AD3d 913, 914 [2d Dept 2018]; *Young Chool Yoo v Rui Dong Wang*, 88 AD3d 991, 991-92 [2d Dept 2011]; *Sforza*

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<sup>3</sup> The Court also notes that, notwithstanding the probative value of such reports, between February 7, 2020, and February 13, 2020, three of Plaintiff's doctors evaluated his range of motion using different objective tests and received different values of alleged impairment, ranging from a zero (0) to twenty (20) degree difference from normal measurements.

*v Big Guy Leasing Corp.*, 51 AD3d 659, 660-61 [2d Dept 2008]; *Doran v Sequino*, 17 AD3d 626, 626-27 [2d Dept 2005]).

Therefore, Plaintiff's causes of action under the Subcategories of permanent consequential limitation of use and significant limitation of use are dismissed.

In accordance with the foregoing, it is hereby **ORDERED** that Defendants' motion for summary judgment is granted; and it is further

**ORDERED** that Plaintiff's complaint is dismissed; and it is further

**ORDERED** that any requested relief and/or remaining contentions not expressly addressed herein have nonetheless been considered and are hereby expressly rejected; and it is further

**ORDERED** that Defendants shall serve, via NYSCEF, a copy of this Order with Notice of Entry upon Plaintiff, within five (5) days from the date of entry; and it is further

**ORDERED** that this action is hereby disposed.

This constitutes the Decision and Order of this Court.

Dated: August 12, 2024

  
PHILIP HOM, J.S.C.

