SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

TRIAL/IAS, PART 29
NASSAU COUNTY

DEBRA PENZONE and JOSEPH PENZONE,
Plaintiff,

Index #: 002337/01

-against-

Motion Seq. #: 002

PATRICIA E. ALDENTON and INDEPENDENT COACH CORP.,,
Defendants.

Motion Date: 06/27/02

The following paper read on this motion:

Notice of Motion 1
Affidavit in Opposition 2
Reply Affirmation..... 3

Motion by defendants for reargument pursuant to CPLR 2221 is granted to the extent of recalling the prior order dated May 6, 2002 of the undersigned and vacating said prior order entirely; and substituting the following in lieu thereof:

Defendants have made a **prima facie** showing that plaintiff has not sustained a "serious injury" within the contemplation of Insurance Law §5102(d) as a result of the subject automobile accident by (1) the affirmation dated November 15, 2000 of Dr. Allan Meyer, an orthopedist, who stated after examination of the plaintiff that no orthopedic findings were noted and that there are no findings that would indicate the claimant has a current disability; and (2) the affirmation dated August 13, 2001 of Dr. Greg Rosenn, a neurologist, who following examination stated there is no objective neurologic disability and that the claimant should be able to perform all the normal activities of daily living and pursue gainful employment. (**Gaddy v Eyler**, 79 NY2d 955.) The burden, therefore, shifted to the plaintiffs to come forward with

proof, in evidentiary form, to show the existence of genuine triable issues of fact. (See: **Lopez v Senatore**, 65 NY2d 1016, 1017; **Piccolo v DeCarlo**, 90 AD2d 609.) In opposition to defendants' motion, the plaintiffs have submitted the sworn affidavit of Dr. Richard C. Slater, a chiropractor who first saw plaintiff, Debra Penzone, two days after the accident on July 26, 2000 and continued his treatment on more than eighty occasions until March 15, 2001; and affirmation of Board Certified Neurologist, Dr. Chehebar, who saw Ms. Penzone on seven occasions between February 5, 2001 and March 18, 2002. Dr. Chehebar stated:

> "That it is my opinion, with a reasonable degree of medical certainty, given the persistence of her symptoms, physical findings and supportive diagnostic studies, i.e., MRI of the lumbar spine dated July 28, 2001, disclosing disc herniation at L4-5, the patient may require further treatment in the form of epidural cortisone injections to the lumbar spine and possible neurosurgical evaluation. If the patient is not deemed a surgical candidate she will require chronic pain management for the aforementioned injuries. given the persistence of the patient's symptoms and physical findings, her prognosis for full neurological recovery remains poor."

However, in order to reach that conclusion, Dr. Chehebar's affirmation shows that he relied on a MRI of the cervical spine obtained August 24, 2000 disclosing bulging discs at C4-5 and C5-6 as interpreted by Drs. Jeffrey Kaufman and Jay Hammel; an EMB/NCU of February 5, 2001 revealing a C6 radiculopathy and right carpel tunnel syndrome; an MRI of left shoulder on March 7, 2001 revealing a Grade 1 impingement, as interpreted by Dr. Dennis Rossi; an MRI of the thoracic spine revealing mild degenerative disc disease at T7-8 and T8-9 as interpreted by Dr. Dennis Rossi; report of Dr. Chehebar's associate, Dr. Bressier recommending orthopedic evaluation of Ms. Penzone's shoulder and a July 28, 2001 MRI of the lumbar spine revealing subligamentation disc herniation at L4-5, bulging annulle films at L5-S1 as interpreted by Drs.

Howard Gilber and Dennis Rossi. None of those MRI reports or EMG's were annexed to Dr. Chehebar's affirmation nor did Dr. Chehebar show that the doctors who interpreted them swore thereto; nor did Dr. Chehebar state that he read the original films thereof. Thus, it is clear that plaintiff's expert Dr. Chehebar improperly relied upon unsworn MRI reports and unsworn EKG test results prepared by other physicians in reaching his opinion. (See: **Rozengauz v Ha**, 280 AD2d 534; **Harney v Tombstone Pizza Corp.**, 279 AD2d 609; **Magras v Colasuonno**, 278 AD2d 388; **Kiernan v Town of Hempstead**, 282 AD2d 575; **Trent v Niewierowski**, 281 AD2d 622.) In a recent Second Department case, **Wagman v Bradshaw** (292 AD2d 84), at p.

> "Expert opinion, based on unreliable secondary evidence, is nothing more than conjecture if the only factual foundation, as in this case, is another healthcare provider's interpretation of what an unproduced MRI film purports to exhibit. Admission into evidence of a written report prepared by a nontestifying healthcare provider would violate the rule against hearsay and the best evidence rule. Inasmuch as such a written report is inadmissible, logic dictates that testimony as to its contents is also barred from admission into evidence.
>
> Plainly, it is reversible error to permit an expert witness to offer testimony interpreting diagnostic films such as X-rays, CAT scans, PET scans, or MRIs, without the production and receipt in evidence of the original films thereof or properly authenticated counterparts (*citations omitted*). Without receipt in evidence of the original films, a party against whom expert opinion testimony is offered is deprived of the opportunity to cross-examine the expert witness concerning the basis for the opinion, offer opposing evidence to clear misimpressions, or offer a contrary opinion controverting the interpretation of the films, through his or her own expert witness."

Those same principles apply on a motion for summary judgment, as here. Accordingly, Dr. Chehebar's conclusory opinion is insufficient as a matter of law.

Dr. Richard Slater's affidavit is also defective. He stated that an orthopedic and

neurological examination of the neck revealed tenderness upon digital palpatate of the C4-C5 spinous process. However, he did not annex the orthopedic or the neurological reports. If the neurologist report is that of Dr. Chehebar, such has already been held herein to be insufficient; and the chiropractor may not rely on an insufficient report. Further, he does not name the orthopedic doctor who allegedly made the report or state whether such report was sworn to by the orthopedic physician. In addition, Dr. Slater relies on Kemp's Test and Bechtere Test but he did not annex a copy of said tests or show that he personally conducted the tests or otherwise show that he did not rely on unsworn tests in reaching his opinion. (**Delpilar v Browne**, 282 AD2d 647.) Furthermore, his affidavit also shows he relied on an MRI of the cervical spine but he does not show that he read the original films nor produce copies of same, nor does he show that the radiologist, who conducted the MRI, swore to the report. Thus, information supplied by him, based on those documents, is inadmissible; and, therefore, his affidavit must be regarded as insufficient as a matter of law to create a genuine issue of fact to require a trial.

While plaintiff's attorney has submitted an affidavit in opposition to the instant motion for reargument which has annexed thereto (1) a new affidavit of Dr. Richard C. Slater, the chiropractor, sworn on June 17, 2002, containing additional facts together with his signed but unsworn Certificate of Professional Care dated July 23, 2000, stating that "at the time of the above date, Penzone, Debra was, and will continue to be under the professional care of our office"; and (2) a new affirmation of Dr. Victor Chehebar, the neurologist, dated June 18, 2002 containing additional facts together with copies of unsworn reports of Dennis R. Rossi, MD, Consulting Radiologist, dated August 1, 2001 (MRI Report of the lumbar spine); dated March 8, 2001 (MRI of the thoracic spine); dated March 8, 2001 (MRI Report of the left shoulder) of

However, these documents may not be considered by this Court. Reargument of a motion must be had on the same state of facts as that alleged in the original moving papers. (**Simpson v Loehmann**, 21 NY2d 990; **Luming Café, Inc. v Birman**, 125 AD2d 180; **Roy v National Grange Mutual Insurance Company**, 85 AD2d 832.) Reargument may not be used by either party as an opportunity to advance new arguments(**Matter of Trisha M.**, 150 Misc2d 290) or as an attempt by indirection to get the matter before the court which was not before it and considered in the original motion. (See: **Public Serv. Com'n v Grand Central C. Rent. Corp.**, n.o.r. 53 N.Y.S.2d 202, rev on other gr. 273 App. Div. 595.) Furthermore, deficiencies in proof on the former motion may not be corrected or supplied on reargument. (**Franklin National Bank of Long Island v Briskman**, n.o.r. 202 N.Y.S.2d 584.)

Accordingly, defendants' motion is granted dismissing the complaint against them for failure of the plaintiffs to show that Debra Penzone suffered a "serious injury" within the meaning of Insurance Law §5102(d).

This constitutes the decision and order of the court.

Dated: August 14, 2002

JOSEPH COVELLO, J. S. C.