SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

TRIAL/IAS, PART 29
NASSAU COUNTY

FRANCISCO PINHO, JR.,

Plaintiff,

Index #: 007263/00

-against-

Motion Seq. #: 001

WILLIAM J. McSHANE,

Defendant.

Motion Date: 08/12/02

The following paper read on this motion:

Notice of Motion 1
Affirmation in Opposition 2
Reply 3

Motion by defendant for an order pursuant to CPLR §3212 granting him summary judgment dismissing the complaint is granted, and the plaintiffs complaint is dismissed.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident on November 1, 1998. Defendant seeks dismissal of the complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law §5102(d) and required by Insurance Law §5104(a). Plaintiff claims to have suffered exacerbation of a L4-5 disc herniation, exacerbation of a L5-S1 disc herniation and left-sided L5-S1 radiculopathy.

A few hours after the accident, plaintiff went to Mercy Hospital for knee x-rays. He was released without supportive devices, medicine or prescriptions. A few days later, plaintiff began treatment at Bellmore Medical Center, where he underwent physical therapy. His last medical visit before this application was in July, 1999. Plaintiff, did not lose significant time from his work in construction, but his work abilities were limited slightly for three to four weeks.

Plaintiff's records indicate that he was previously in a motor vehicle accident on May 15, 1995 and as a result suffered lumbar and cervical herniations as well as radiculopathy, injuries identical to those alleged here.

On behalf of the defendant the plaintiff was examined by Dr. Jerrold M. Gorski, M.D., a Diplomate of the American Board of Orthopaedic Surgery and a Fellow of the American Academy of Orthopedic Surgeons, on April 11, 2001. Dr. Gorski noted that plaintiff complained of soreness and aching in his lower back and that an MRI of plaintiff's lumbar spine dated December 3, 1998, which he himself reviewed, revealed herniated discs at the L4-5 level and L5-S1 level. However, Dr. Gorski noted that these disc herniations were also evident in plaintiff's June 1995 MRI, performed after his 1995 accident. Dr. Gorski concluded that plaintiff "had a significant injury in a previous motor vehicle accident involving the neck and back. Objective tests from that time show degenerative changes in the neck and back substantially identical to those after the 1998 motor vehicle accident." He concluded: "Mr. Pinho has subjective complaints due to an underlying degenerative arthritis in the neck and back. There appear[s] to be no impairment, disability or residual from the 1998 incident."

Defendant has met his burden of proof thereby shifting the burden to plaintiff to establish the existence of an issue of fact. **Gaddy v Eyler**, 79 NY2d 955.

"In order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law §5102(d), the plaintiff's expert must submit objective findings in addition to an opinion as to the significance of the injury." **Grossman v Wright**, 268 AD2d 79, 84. In **Toure v Avis Rent A Car Systems, Inc.** (98 NY2d 345), the Court of Appeals held that "[i]n order to 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" or "[a]n 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., supra,** citing **Dufel v Green,** 84 NY2d 795, 798.

Plaintiff has failed to meet his burden. Much of what plaintiff has submitted, i.e., a medical report of Dr. Fidel Rodriguez, and the MRI report of Dr. Randall James, is not in admissible form and cannot be considered. While the report of Dr. Joseph Gregorace can be considered, those conclusions which are based upon inadmissible medical reports cannot be considered. **Grasso v Angerami,** 79 NY2d 813; **Rozenganz v Lok Wing Ha,** 280 AD2d 534; **Young v Ryan,** 265 AD2d 547; **Merisca v Alford,** 243 AD2d 613, citing **Friedman v U-Haul Truck Rental,** 216 AD2d 266. Plaintiff has failed to submit admissible objective evidence to establish a medical injury connected to the accident. **Grossman v Wright, supra; Magras v Colasuonno,** 278 AD2d 388; **Merisca v Alford, supra.** Dr. Gregorace examined the plaintiff only once, in obvious response to this motion. While he recites quantative limitations of movement in plaintiff's lumbar spine extension, his unsupported diagnosis is "chronic low back pain with lumbar spine disc herniation at L4/5, L5/S1," and he baldly concludes that the injury is causally related to the motor vehicle accident from November 1, 1998, and that plaintiff's injuries are permanent. Glaringly absent from Dr. Gregorace's report is any mention whatsoever of the injuries plaintiff was diagnosed with after his earlier car accident in 1995. Dr. Gregorace of course,could not and did not address the effects of those injuries or how the injuries allegedly suffered in the 1998 motor vehicle accident differed or exacerbated them. **Uber v Heffron, supra; Finkelshteyn v Harris,** 280 AD2d 579; see also, **Alcalay v Town of North Hempstead,**

262 AD2d 258; **Cacaccio v Martin**, 253 AD2d 384. In any event, the last day plaintiff received any treatment for his injury was no later than July 1, 1999: The three-year gap in treatment has not been addressed let alone adequately explained. **Grossman v Wright, supra**, at p. 84, citing **Smith v Askew**, 264 AD2d 405; see also, **Crespo v Kramer**, ___ AD2d ___, 744 N.Y.S.2d 187; **Uber v Heffron**, 286 AD2d 729; **Delpilar v Browne**, 282 AD2d 647.

This constitutes the decision and order of the court.

Dated: September 20, 2002

JOSEPH COVELLO, J. S. C.