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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. RALPH P. FRANCO, Justice

TRIAL/IAS, PART 12

LILLIAN TAYLOR and THE ESTATE
OF CARL IBE by PAUL HARTH, AS
EXECUTOR,

Plaintiff(s),

INDEX No.:11792/00

-against-

MOTION SEQ. NO: 1 & 2

PATRICIA DONALDSON and GENE
DONALDSON,

Defendant(s).

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause....._____
- Answering Affidavits....._____
- Replying Affidavits....._____

Motion (seq no.2) by attorney for defendants for an Order pursuant to CPLR 3212 granting defendants Patricia Donaldson and Gene Donaldson summary judgment dismissing the complaint on the grounds that plaintiffs Lillian Taylor and Carl Ibe did not suffer a 'serious injury' as defined under In law sec 5102 (d) is granted.

The report submitted by Dr. James T. Palmer, Ms. Taylor's treating chiropractor, stated that she had restrictions due to pain in her cervical spine. (His report is attached as Exhibit E to the affirmation in opposition.) With respect to the lumbar area of the spine, her range of motion was "normal and pain free." Therefore, the only portion of the spine where plaintiff can claim that she has any type of "serious injury" according to Dr. Palmer is in

the cervical area. However, in the history provided by Dr. Palmer on the first page of his report, he states that on Ms. Taylor's initial visit, on January 5, 2001, she complained of "low back, left and right hip and buttock pain radiating into lower left leg and frequently into foot." Ms. Taylor's medical records as well as her testimony indicate that she had a long history of spinal pain associated with degenerative disc disease which preceded the accident of July 31, 1997. On Dr. Mendelsohn's radiological report which is attached as part of Exhibit D to plaintiff's affirmation in opposition, and is dated May 15, 1998, plaintiff was diagnosed with multi-level degenerative changes in the cervical area and with degenerative changes containing osteophytes in the lumbar area of her spine. Dr. Putterman's report of June 17, 1999 (Exhibit F to plaintiff's affirmation in opposition) describes plaintiff as having a "long standing history of problems with lower back and left hip..." Ms. Taylor told defendants examining neurologist, Dr. Kerin Hausknecht, that she had undergone years of chiropractic treatment for her lower back prior to the accident. On page 47, lines 5 to 10, of her EBT testimony (attached as Exhibit G to defendant's affirmation supporting the cross motion), Ms. Taylor confirmed that she had treated with her chiropractor, Dr. Siegel, for her back prior to the accident.

Dr. Palmer, plaintiff's treating chiropractor, stated that he "...cannot directly connect patient Taylor's various painful episodes in her neck and low back to the MVA that occurred 7/31/97..."

Plaintiff Taylor has failed to demonstrate a causal connection between the injuries alleged and the accident. See **Williams v. Hasenflue** 272AD2d. Dr. Badalamenti, an examining chiropractor whose reports have been attached to both plaintiffs' and defendants' affirmations, indicate no restriction of motion in Ms. Taylor's cervical or lumbar spine during her examination on May 16, 1998. Ms. Taylor did not make any complaints of neck pain when initially seen by Dr. Palmer on January 5, 2001. In his most recent report of August 26, 2002, he concluded that Ms. Taylor had restrictions in range of motion of her cervical spine. However, these

restrictions were all based upon Ms. Taylor's subjective complaints of pain, and Dr. Palmer does not describe what objective tests he conducted, if any, that would have supported these findings. Therefore, his findings are insufficient to establish that Ms. Taylor sustained a "serious injury". See **Grossman v. Wright**, 268 AD2d 79 in **Shay v. Jerkins**, 263 AD2d 475 the court, in reversing and dismissing the complaint, concluded that an orthopedist's finding that plaintiff had sustained a permanent loss of use of a body organ, member, function, or system was improperly based on her subjective complaints of pain.

The surgical report submitted as Exhibit I to the affirmation opposing this cross motion is not in proper evidentiary form. See **Pagano v. Kingsbury**, 182 AD 2d 268, **Perovich v. Liotta** 273 AD 2d 367. Even if the report were in proper form, it does not establish any causal relationship between the surgery and the automobile accident in 1997. The self serving claim by Ms. Taylor that her condition worsened after the accident is insufficient to establish a causal connection. In **Klauderer v. Penta** , 261 AD 2d 365, the court found that plaintiff's affidavit consisted of vague, conclusory, and medically-unsubstantiated assertions as to the effects of the injury. Self-serving, subjective complaints of pain and disability were insufficient to raise a genuine issue regarding whether the injured plaintiff sustained any permanent injury, significant limitation, or medically-determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for a period of not less than 90 days during the 180 day period immediately following the accident. See **Yagliyan v. Gun Shik Yang**, 241 AD2d 518.

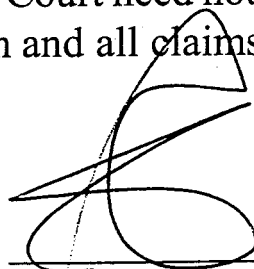
The chiropractor report submitted in defendant's affirmation supporting the cross motion, from Dr. Badalamenti, found that Mr. Ibe had sustained only a cervical strain/strain in the accident. He was not left with any disability. His overall condition had improved when seen by Dr. Badalamenti in May of 1998. The hospital record submitted by Plaintiff in

the affirmation opposing this cross- motion does not indicate that it is a record kept in the ordinary course of business, and does not appear to be in conformity with CPLR 4518(c). Nevertheless, the hospital record establishes no causal connection between Mr. Ibe's treatment and the accident of 1997, and draws no relevant medical conclusions for purposes of this motion. Neither does the record of plaintiff's chiropractor, Dr. Barbara Siegel, which was attached as Exhibit K to the affirmation in opposition. To the extent that Exhibit K contains unaffirmed records of other physicians, these records will not be considered by the Court, as Dr. Siegel may not incorporate by reference the reports of other medical care providers. See, **Friedman v. U-Haul Truck Rental**, 216 AD 2d 266. Similarly, the claim by Ms. Taylor concerning Mr. Ibe's medical condition does not constitute medical proof. See **Klauderer v. Penta supra**.

The defendants made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). It was incumbent upon the plaintiff to come forward with admissible evidence to raise a triable issue of fact. The plaintiffs failed to do so and accordingly, the defendants are entitled to summary judgment dismissing the complaint. See **Kichang Kim v. Pokruss** 290 AD2d 537.

In light of the foregoing the Court need not consider the motion (seq. no 1) dismissing the counterclaim and all claims against the plaintiff.

Dated: ~~November 16, 2002~~



Hon. Ralph P. Franco, J. S. C.

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NEW YORK COUNTY
COUNTY CLERKS OFFICE