SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice — PART 22

INDEX NO. 114304/06

WARREN ALLEN and ELIZABETH COVINGTON,

Plaintiffs,

- v -

ION DIMION and BABUL MIAH,

Defendants.

MOTION DATE

MOTION SEQ. NO. ~~005~~ 001

MOTION CAL. NO. 4

The following papers, numbered 1 to 3, were read on [illegible] motion by defendants for summary judgment on the threshold "serious injury" issue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ■ No

On September 20, 2005, while traveling on Broadway at its intersection with East 22nd Street, in Manhattan, New York, plaintiffs' vehicle was struck by a vehicle operated by defendant Babul Miah and owned by defendant Ion Dimion. At the time of the accident plaintiff Warren Allen was driving the vehicle and plaintiff Elizabeth Covington was a passenger. Plaintiffs commenced this action to recover damages on October 5, 2006, for alleged personal injuries suffered as a result of the subject accident. The defendants timely filed an answer and issue was joined. Defendants now move for an order pursuant to CPLR § 3212, granting summary judgment on the issue of "serious injury" as defined by New York Insurance Law § 5102(d).

The New York Insurance Law provides that every automobile owner must carry automobile insurance, which will compensate injured parties for "basic economic loss" for injuries caused by the use or operation of that vehicle in New York State,

irrespective of fault (Insurance Law § 5102 [d]). An injured party may initiate a suit against the automobile owner or driver, for damages caused by the accident only in the event of a "serious injury." The legislative intent underlying the No-Fault Law was designed to " significantly reduce the number of automobile personal injury accident cases litigated in the courts, and thereby help contain the no-fault premium" (*Lopez v Senatore*, 65 NY2d 1017, 1020 [1985], quoting *Licari v Elliott*, 57 NY2d 230, 236 [1982]).

A "serious injury" is defined in the New York State Insurance Law as a personal injury which "results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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" (New York Insurance Law § 5102(d); *Raffellini v State Farm Mutual Automobile Insurance Company*, 848 NY2d 1 [2007]).

SUMMARY JUDGMENT STANDARD

The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material

issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 795 NY2d 502 [2005]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986];*Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 751 NY2d 433, 434 [1 Dept 2002]; *Silverman v. Perlbinder*, 762 NY2d 386 [1 Dept 2003]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Medical Center*, *supra*). The motion must be supported "by affidavit . . . from a person having knowledge of the facts, by a copy of the pleadings and by other available proof . . ." (CPLR § 3212 [b]). A conclusory affidavit, expressions of hope, unsubstantiated allegations or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden (*Winegrad v New York Univ. Medical Center*, *supra*).

Where the proponent of the motion has made a *prima facie* showing, the burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a triable issue of fact (*Vermette v Kenworth Truck Co.*, 68 NY2d 714 [1986]; *Zuckerman v City of New York*, *supra*; *Forrest v Jewish Guild for the Blind*, 765 NY2d 326 [1 Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in to sufficiently establish the existence of a "serious injury," which mandate's resolution by trial.

DISCUSSION

In support of their motion for summary judgment, defendants proffer the pleadings, plaintiff Allen's deposition testimony and the affirmed medical reports of the

examination of both plaintiffs conducted by Dr. Edward M. Weiland, a board certified neurologist and Dr. Andrew N. Bazos, a board certified orthopedic surgeon. This evidence establishes that the defendants have come forward with sufficient evidence in admissible form to warrant as a matter of law a finding that plaintiffs have not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (*See, Gaddy v Eyler,* 79 NY2d 955, 956-957 [1992]*; Lowe v Bennett*, 511 NYS2d 603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). Thus, the burden shifts to plaintiffs to produce evidentiary proof in admissible form to warrant the showing of the existence of a serious injury creating a triable issue of fact. *(See Zuckerman v City of New York*, *supra*; *Forrest v Jewish Guild for the Blind, supra*).

In opposition, plaintiffs have submitted the police accident report, uncertified hospital medical records from the emergency room at St. Luke's Hospital, the unsworn or unaffirmed medical report of Dr. Larry Neuman, plaintiffs' various MRI and x-ray records, plaintiffs' affidavits and the unsigned affirmation of their attorney.

The Courts have unanimously held that a party may not use an unsworn medical report prepared by the parties' own physician on a motion for summary judgment (*See Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 813 NY2d 56 [1 Dept 2006]) Moreover, CPLR § 2106 ["requires a physician's statement be affirmed to be true under the penalties of perjury"]). Hence, Dr. Neuman's report fails in both respects and is inadmissible and will not be considered on this motion. Plaintiffs, at oral argument, attempted to submit an alternate affirmation in opposition, without leave of the Court or demonstrating good cause for the reason to submit the new affirmation. The alternate

opposition papers appear to be identical to the initial opposition papers except for substituting the signature of Dr. Michael Neely, D O. for Dr. Larry Neuman. Thus, this submission is unacceptable and is rejected.

In addition, the plaintiffs' hospital records are inadmissible for purposes of summary judgment because they are not certified pursuant to CPLR § 4518(c) or have submitted any other type of foundation. Moreover, assuming that these medical records were admissible, the uncertified hospital reports, various plaintiffs' MRI and x-ray records and Dr. Neuman's alleged medical report, they still do not support the plaintiffs medical proof establishing a "serious injury".

Finally, the uncertified police accident report, which was submitted by the plaintiff, however, not referenced in his opposition, has no probative value to indicate evidence of plaintiffs' alleged serious injury. The police officer who prepared the report was not an eyewitness to the accident, the report does not fall into a hearsay exception (*See Ann Connors v Duck's Cesspoool Services, Ltd.,* 144 AD 2d 329 [1 Dept 1988]) and, the report contains no evidence of serious injury.

Plaintiffs have not produced any admissible or credible evidentiary proof to indicate the existence of a "serious injury" as a result of the subject accident. Consequently, plaintiffs have failed to demonstrate the existence of a triable issue of fact.

For these reasons and upon the foregoing papers, it is,

ORDERED that the defendants' motion for summary judgment is granted, and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants, dismissing the complaint in its entirety, with costs and disbursements to defendants as taxed by the Clerk, and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: September 8, 2008

Paul Wooten J.S.C.

Paul Wooten
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST