

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SCAN

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STEPHANIE WITHERSPOON and WILLIE BRYANT,

Plaintiffs,

-against-

MTA BUS, STERLING TART, SR., HEMPSTEAD
DEPARTMENT OF PUBLIC SAFETY, THOMAS
CREEGAN, and NEW YORK CITY TRANSIT
AUTHORITY,

Defendants.

-----X
CLARA BYERS and CLARA HENDERSON,

Plaintiffs,

-against-

METROPOLITAN TRANSIT AUTHORITY, MTA
BUS CO., HEMPSTEAD DEPARTMENT OF PUBLIC
SAFETY, TOWN OF HEMPSTEAD, STERLING
TART, SR., and THOMAS CREEGAN,

Defendants.

-----X
ANNA BLAKE,

Plaintiff,

-against-

TOWN OF HEMPSTEAD, and THOMAS CREEGAN,
METROPOLITAN TRANSPORTATION AUTHORITY
and STERLING TART, SR.,

Defendants.

-----X
STERLING TART, SR.,

Plaintiff,

-against-

THOMAS CREEGAN,

Defendant.

-----X

Papers Read on this Motion:

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| Defendants' Notice of Motion | 02 |
| Plaintiffs Witherspoon and Bryant's Affirmation in Opposition | xx |

MICHELE M. WOODARD

J.S.C.

TRIAL/IAS Part 14

Index No.: 7486/07

Motion Seq. No.: 02

DECISION AND ORDER

Action No. 1

Action No. 2

Index No.: 008100/07

Action No. 3

Index No.: 11191/07

Action No. 4

Defendants MTA Bus, Sterling Tart, Sr., New York City Transit Authority, and Metropolitan Transit Authority (MTA Defendants) move for an order pursuant to CPLR § 3211 and CPLR § 3212 granting summary judgment dismissing the complaint and all cross-claims against the aforesaid MTA Defendants on the issue of liability based on the fact that there is no question that the motor vehicle accident was caused solely by the Defendant Thomas Creegan/Town of Hempstead and pursuant to Insurance Law § 5102 dismissing the complaints of the Plaintiffs Anna Blake, Stephanie Witherspoon, Willie Bryant and Clara Henderson for failure to sustain a serious injury as defined in Insurance Law § 5102.

This is an action for personal injuries allegedly sustained by the Plaintiffs in a motor vehicle accident wherein a vehicle owned by Defendant, Town of Hempstead, and driven by Defendant, Thomas Creegan, as he was exiting a driveway, struck an MTA bus operated by Defendant Sterling Tart, Sr.

Plaintiffs Stephanie Witherspoon, Willie Bryant, Clara Byers, Clara Henderson and Ana Blake were passengers on the Defendant MTA bus.

By stipulation dated May 15, 2009, Plaintiffs Clara Byers and Clara Henderson discontinued with prejudice their personal injury claims only against the MTA Defendants. The action was not discontinued as to the remaining Defendants Hempstead Department of Public Safety, Town of Hempstead and Thomas Creegan. Further, the MTA Defendants withdrew the within motion as to Plaintiffs, Clara Byers and Clara Henderson, as it relates only to the issue of whether Plaintiffs Clara Byers and Clara Henderson sustained a serious injury.

By stipulation dated May 26, 2009, the within motion was withdrawn only as to the no-fault threshold issue with regard to Plaintiff Anna Blake.

Defendant Hempstead Department of Public Safety, Town of Hempstead and Thomas Creegan have not submitted any opposition to the within motion with regard to the issue of liability. The MTA Defendants' unopposed motion for summary judgment on the issue of liability dismissing the complaint and cross-claims against the MTA Defendants is **granted**. Defendants Metropolitan Transit Authority, MTA Bus, Sterling Tart, Sr. and New York City Transit Authority shall be deleted as party Defendants.

On a motion for summary judgment where the issue is whether a Plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of presenting competent evidence that there is no cause of action. *Hughes v Cal*, 31 AD3d 385 (2d Dept 2006). The proof must be viewed in a light most favorable to the non-movants. *Perez v Exel Logistics, Inc.*, 278 AD2d 213 (2d Dept 2000). If the movant satisfies that burden, the burden shifts to the Plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she sustained a serious injury or that there are questions of fact as to whether the purported injury, in fact, is serious. *Flores v Leslie*, 27 AD3d 220 (1st

Dept 2006. In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact. *See Andre v Pomeroy*, 35 NY2d 361 (1974). Indeed, “[e]ven the color of a triable issue, forecloses the remedy.” *Rudnitsky v Robins*, 191 AD2d 488 (2d Dept 1993). Moreover, “[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate.” *Greco v Posillico*, 290 AD2d 532 (2d Dept 2002). Further, on a motion for summary judgment, the submissions of the opposing party’s pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428 2d Dept 2002).

Plaintiff Stephanie Witherspoon

Stephanie Witherspoon was a passenger on the bus. In support of the motion the MTA Defendants submit an orthopedic independent medical examination of the Plaintiff performed by Leon Sultan, M.D. Defendants’ expert performed a physical examination, cervical spine examination, right shoulder examination, right wrist examination, thoracolumbar examination, and bilateral knee examination. Dr. Sultan opined that Ms. Witherspoon’s “cervical spine, thoracolumbar spine, right wrist, right shoulder and both knees are unremarkable except for unrelated bilateral knee genu valgum deformities. She is otherwise orthopedically stable and neurologically intact and does not demonstrate any true objective signs of ongoing disability or functional impairment in regard to the occurrence of 4/13/06. From a clinical point of view, there is no correlation between today’s examination and the MRI readings.”

In opposition to the motion, Plaintiff Witherspoon submitted an affidavit from Mark Slamowitz, D.C., a licensed chiropractor who found both cervical and lumbosacral ranges of motion to be restricted and pain producing. Dr. Slamowitz’s findings were as follows:

Cervical flexion 40° - 60° being the norm
Cervical extension 35° - 45° being the norm
Cervical right rotation 60° - 80° being the norm
Cervical left rotation 60° - 80° being the norm
Right lateral flexion 40° - 45° being the norm
Left lateral flexion 40° - 45° being the norm

Left rotation 60° - normal 80°
Right lateral flexion 40° - normal 45°
Left lateral flexion 35° - normal 90°
Lumbosacral flexion 60° - normal 90°
Extension 25° - normal 30°
Right lateral flexion 20°, normal 30°
Left lateral flexion 15° - normal 30°

An MRI testing of her cervical spine on 4/26/06 showed cervical straightening with a herniated disc at the C5-6 level. A left knee MRI performed on 7/27/06 is reported to show joint effusion with

chondromalacia patella and degenerative osteoarthritic changes.

Dr. Slamowitz's reported range of motion limitations must be considered in the light most favorable to Ms. Witherspoon, and are sufficient to defeat the motion for summary judgment pursuant to Insurance Law § 5102. *See Toure v Avis Rent A Car Sys. Inc.*, 98 NY2d 345 (2002). The motion for summary judgment as to Plaintiff Stephanie Witherspoon is **denied**.

Willie Bryant

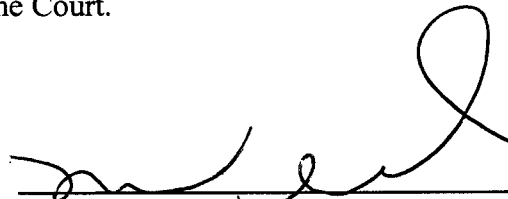
Willie Bryant was a passenger on the bus. He alleges he struck his head and face. As a result he sustained fractures of front teeth numbers seven and eight. The teeth were repaired with crowns. Evan Temkin, D.M.D., the Defendants' dental expert, opines that from a dental perspective, there is no disability causally related to the subject accident. Reginald Borgella, D.D.S., Mr. Bryant's dental expert, asserted that since both teeth were permanent adult teeth, the injury is permanent. Dr. Borgella opines "that while tremendous advances have been made in dentistry, crowns can never replace natural teeth and are subject to becoming loose and breaking off." An injured party's fractured teeth may constitute a serious injury pursuant to Insurance Law § 5102(d). *See Moffitt v Murray*, 2 AD3d 1110 (3d Dept 2003). The motion for summary judgment as to Plaintiff Willie Bryant is **denied**. It is further

ORDERED, that the remaining parties are directed to appear for trial on July 14, 2009 at 9:30 a.m. in DCM.

This constitutes the Decision and Order of the Court.

DATED: June 30, 2009
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

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ENTERED
JUL 02 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE