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Admissibility of Expert Reports

By Hillary Frommer

In a recent decision, the Supreme Court of Lawrence County denied a motion for summary judgment on the grounds that the motion was based solely on inadmissible hearsay. At first glance, there appears to be nothing outstanding or surprising about that determination, as it is well-settled in New York state and federal law that a summary judgment motion must be supported with admissible evidence.[1] In this case however, the so-called inadmissible evidence was an expert report.

In *Roberts v State Farm Fire & Cas. Co.*,[2] the defendant insurance company moved for summary judgment to dismiss a complaint brought by its insured on the grounds that the damage claimed was not covered by the policy. The defendant supported the motion with an affidavit from the defendant's claim representative, which attached the policy, and an affidavit from a structural engineering expert who attested that she inspected the damaged premises and prepared a report, which she attached thereto. Considering that evidence, the court stated "[t]his report can only be characterized as unsworn as neither its author's brief affidavit nor the report itself make any representation that the report is in any manner sworn. Accordingly, State Farm is not entitled to summary judgment because it did not meet its initial burden."

The import of this particular decision is that an expert report must be sworn to in order to be admissible. But is that the requirement? Does an expert have to sign his expert report under penalty of perjury, as he would an affidavit, in order for a party to use that report as evidence in litigation?

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The federal rules do not require a "sworn" expert report. Under Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, a party's expert disclosure "must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." The rule sets forth the requirements of the expert's report, but does mandate that the report be sworn to under penalty of perjury. To be admissible either at trial or on summary judgment, an expert report must satisfy the requirements of Rule 26(a)(2)(B), and the opinions and conclusions contained in the report must be admissible under Rule 702 of the Federal Rules of Evidence, which governs the admissibility of expert testimony. But that rule also does not require a "sworn" statement.[3] When an expert report is offered on summary judgment, the court, if faced with a challenge to that report, will consider its admissibility under Rule 702 before determining whether summary judgment is warranted.

The federal courts appear to distinguish expert reports submitted specifically pursuant to Rule 26(a)(2)(B) from professional reports in general, and have held that general, professional reports, such as a medical reports, are not admissible if not sworn to.[4] However, in *Jimenez v Gubinski*,[5] the court stated an unsworn medical report prepared by a treating physician would be admissible if the party's expert submitted his own sworn affirmation stating that he relied on that report. Thus, at least one federal court has acknowledged that a non-expert report could be admissible even if not sworn to under certain circumstances.

There is also no rule in state court requiring an expert report be sworn to. Generally, expert discovery is governed by CPLR § 3101(d)(1), which mandates disclosure of: the name of the expert the party intends to call at trial; the subject matter "in reasonable detail" on which the expert is expected to testify; the substance of the expert's facts and opinions; and the expert's qualifications. This rule does not require the expert to prepare a report or swear to the disclosure. In cases pending in the Commercial Division, the parties must comply with Rule 13, which essentially mimics Rule 26(a)(2)(B) of the FRCP, and requires the disclosure of a detailed expert report – signed by the testifying expert. Like Rule 26(a)(2)(B), Commercial Division Rule 13 does not require that the expert's signature on the report be sworn to.

The CPLR does require sworn statements in certain contexts. CPLR § 2106 provides that any statement filed by an attorney, physician, osteopath or dentist who is not a party to an action must be a sworn statement. Courts have interpreted this rule to require that a statement or report by a medical or dental expert prepared for litigation must be sworn to in order to be admissible. For example, in *Baron v Murray*,[6] a personal injury action, the defendant moved for summary judgment to dismiss the complaint on the grounds that the plaintiff did not sustain a serious injury. The trial court granted the motion, and the Appellate Division reversed, finding that the statement by the defendant's medical expert submitted pursuant to CPLR § 2106 was "neither sworn nor affirmed to be true under penalty of perjury and, thus, did not constitute competent evidence." The court in *Moore v Tappan*,[7] another personal injury action, reached a similar conclusion. It reversed the trial court's order granting summary judgment to the defendant upon finding that the defendant failed to meet its evidentiary burden because the statements from physicians were not sworn to and, thus, did not constitute competent evidence.

At least one court has recognized the distinction between a doctor's report or statement prepared specifically for litigation under CPLR 2106, and a medical report that is prepared in the ordinary course of business and which may contain medical opinions. In *Carter v Rivera*,[8] the court held that a medical record prepared and kept in the ordinary course of business (which satisfied the foundation requirements of CPLR 4518) was admissible under the business records exception to the hearsay rule, even if the record itself contained a medical opinion. In reaching that conclusion, the court stated that the proper inquiry was whether the record being offered was prepared for litigation or not – *i.e.* a genuine business record – not whether the evidence was a "report" or "opinion." Other courts have held that unsworn reports that may not fall into the business records exception are admissible evidence if relied on by a physician who submits a sworn statement or affidavit to that effect.[9]

In light of the above, it is unclear under what authority the court in *Roberts* rejected the expert engineer's report as inadmissible. On its face, CPLR 2106 does not apply to engineering

experts, and even if it did, the unsworn report was attached to the sworn affidavit of the expert. Thus, based on *Carter* and *Jimenez*, the court certainly could have considered the report as competent evidence on summary judgment.

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1 *See* CPLR § 3212(b); FRCP 56(e); *Spiegel v Schulmann*, 60 F 3d 72 (2d Cir 2010); *Beyah v Coughlin*, 789 F 2d 986 (SDNY 1986); *Charter One Bank, FSB v Leone*, 45 AD3d 958 (3d Dept 2007). 51540(U).

2 2015 NY Slip Op 51540(U) (Sup Ct, Lawrence County Sept. 1, 2015).

3 *See, e.g. Raskin v Wyatt Co.*, 125 F 3d 55, 66 (2d Cir 1997) (noting that "the admissibility of evidence on summary judgment is subject to the same rules that govern the admissibility of evidence at trial"); *Commercial Data Servers, Inc. v International Business Machines Corp.*, 262 F Supp 2d 50 (SDNY 2003) (admitting expert report on summary judgment); *Donnelly v Ford Motor Co.*, 80 F Supp 2d 45 (EDNY 1999) (upon excluding the expert report of the plaintiff's expert submitted in opposition to the defendants' motion for summary judgment because it did not satisfy the admissibility requirements of FRE 702, the court granted the defendants' motion).

4 *See, e.g.*, *Mangual v Pleas*, 2005 WL 2179083 (SDNY Sept. 8, 2005).

5 2012 WL 279432 (SDNY Jan. 30, 2012).

6 *See Baron v Murray*, 268 AD2d 495 (2d Dept 2000).

7 242 AD2d 529 (2d Dept 1997).

8 24 Misc 3d 920 (Sup Ct, Kings County 2009).

9 *See Pommells v Perez*, 4 NY3d 566