

**Graham v New York City Tr. Auth.**

2007 NY Slip Op 30189(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0109450

Judge: Donna Marie Mills

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

GRAHAM, DERRICK

INDEX NO. 109450/05

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 001

NEW YORK CITY TRANSIT AUTHORITY, ET AL.  
Defendants.

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to 2 were read on this motion for Summary Judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2

Replying Affidavits \_\_\_\_\_

CROSS-MOTION: \_\_\_\_\_ YES  NO

**FILED**

MAR 15 2007

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 3-6-07

*[Signature]*  
J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 21

-----  
DERRICK A. GRAHAM,

INDEX NO.  
109450/05

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY, ET AL.,

DECISION/ORDER

Defendants.  
-----

DONNA M. MILLS, J:

BACKGROUND

**FILED**  
MAR 15 2005  
COUNTY CLERK'S OFFICE  
NEW YORK

The subject action arises out of an automobile accident alleged to have occurred on June 21, 2004, between the plaintiff and a bus in New York County. Defendants now move for summary judgment dismissing plaintiff's action against them on the grounds that the plaintiff has failed to satisfy the requisite threshold requirements set forth in New York Insurance Law §5102(d).

APPLICABLE LAW & DISCUSSION

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). "But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have their claims promptly adjudicated" (Andre v Pomeroy, 35 NY2d 361 [1974]).

It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR §3212[b]), and must do so by tender of evidentiary proof in admissible form. Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to

establish the existence of material issues of fact which require a trial for the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The purpose of the No-Fault Law is to curtail unnecessary litigation for minor injuries (see Licari v Elliott, 57 NY2d 230 [1988]). By allowing plaintiffs to proceed with minor cases simply because defendants concede liability on the facts of the incident would undermine the legislative purpose of Insurance Law 5102(d) and would greatly increase an already overburdened court system. Therefore, regardless of defendants' position regarding liability, plaintiff must prove that he sustained a serious injury to prevail on the merits of the case.

"[A] Defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79, 83-84 [2<sup>nd</sup> Dept. 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (id. At 83-84).

In the instant action in support of their motion for summary judgment, defendants rely on plaintiff's deposition testimony and the medical report written by Dr. Robert J. Orlandi, an orthopedic surgeon who examined the plaintiff on behalf of the defendants. Dr. Orlandi found no permanent residuals and no musculoskeletal disability. In his report he also found normal lumbar range of motion. Plaintiff's deposition testimony revealed that he only missed two days of work as a result of the accident.

In opposition to the subject motion, plaintiff submitted an affidavit attesting to his present condition of pain in his neck and back, and also relied on an MRI report and affirmation of Robert Diamond, M.D., medical records of Midtown Medical Practice, P.C., and an affidavit of David H. Delman, M.D. Collectively, the medical reports detailed

treatment, testing, medical opinion and prognosis concerning plaintiff's injuries. Moreover, testing of plaintiff's cervical and lumbar spine revealed limitations of movement in both areas. These objective medical findings, in conjunction with Dr. Delman's opinion that the injuries were caused by the accident, were sufficient to make out a prima facie case that plaintiff suffered serious injury (see, Cassagnol v Williamsburg Plaza Taxi, 234 AD2d 208, 209 [1<sup>st</sup> Dept. 1996]). The contrary view of defendants' physician merely raises issues of credibility to be resolved at trial ( see Cassagnol v Williamsburg Plaza Taxi, supra at 209-210).

Accordingly, it is

ORDERED that the Defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court

Dated: 3-6-07

ENTER:



J.S.C.

**FILED**

MAR 15 2007

NEW YORK  
COUNTY CLERK'S OFFICE