

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

2007 NY Slip Op 31016(U)

April 19, 2007

Supreme Court, New York County

Docket Number: 0122480/2002

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

MOLLOY, KAREN

INDEX No. 122480/02

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 3 were read on this motion for Summary Judgment.

PAPERS NUMBERED

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

1

Answering Affidavits-- Exhibits \_\_\_\_\_

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

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

**FILED**  
MAY 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION

Dated: 4-19-07

*Donna M. Mills*  
J.S.C.

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

NON-FINAL DISPOSITION

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

INDEX NO.  
122480/02

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KAREN MOLLOY,

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Defendants.  
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DECISION/ORDER

DONNA M. MILLS, J:

**FILED**  
MAY 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE  
BACKGROUND

The subject action arises out of an accident alleged to have occurred on April 9, 2002, between the plaintiff, a bicyclist, and a bus owned by the New York City Transit Authority and operated by John D. Marlow ("Defendants"). 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 medical records and reports from various medical facilities arguing that the aforementioned reports fail to show any objective evidence that her injuries meet or exceed the serious injury threshold. Defendants also rely on plaintiff's deposition testimony and the medical report written by Dr. Barbara Joyce Freeman, an orthopedic surgeon who examined the plaintiff on behalf of the defendants. Dr. Freeman concluded that the plaintiff exhibited no orthopedic disability and had no restriction of activities which would require orthopedic intervention.

In opposition to the subject motion, plaintiff submitted an affirmed medical report of

treating neurologist, Enrico Fazzini, D.O., and the affirmed medical report of orthopedist, Mark McMahon, M.D. Collectively, the medical reports detailed treatment, testing, medical opinion and prognosis concerning plaintiff's injuries. Moreover, it is concluded by the plaintiff's experts that testing of plaintiff's right foot and knee resulted in permanent and or a significant limitation of movement in both areas. These objective medical findings, in conjunction with the opinion that the injuries were caused by the accident, are sufficient to make out a prima facie case that plaintiff suffered a serious injury (see, Cassagnol v Williamsburg Plaza Taxi, 234 AD2d 208, 209 [1<sup>st</sup> Dept. 1996]). The contrary view of defendant's 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: 4-19-07

ENTER:



J.S.C.

**FILED**  
MAY 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE