

**Withers v Green Bus Lines, Inc.**

2007 NY Slip Op 33073(U)

September 17, 2007

Supreme Court, New York County

Docket Number: 0108984/2004

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

Helen Withers

INDEX NO. 108984/04

- v -

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

Green Bus Lines

MOTION SEQ. NO. 001

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

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

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**  
SEP 28 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: Sept 17 2007

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
HELEN WITHERS,

Plaintiff,

-against-

GREEN BUS LINES, INC.,

Defendant.  
-----X

**Decision/Order**

Index No.: 108984/04

Seq. No. : 001

Present:

Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**Papers**

Def's motion [sj] w/BNG affirm in support, exhs

**Numbered**

SEP 28 2007

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*Upon the foregoing papers, the decision and order of the court is as follows:*

This is a personal injury action brought by plaintiff who allegedly slipped and fell on a bus managed by defendant Green Bus Lines, Inc. Defendant moves for summary judgment in its favor. Plaintiff has submitted no opposition to the motion.

Issue has been joined and since the motion was brought timely after the note of issue was filed, it will be considered on their merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Plaintiff, a passenger on defendant's bus, allegedly slipped on ice while exiting the bus at 9:30 a.m. on December 6, 2002 ("the accident").

Defendant moves for summary judgment on the issues of liability and damages. As to liability, defendant contends that it did not cause the alleged condition and lacked actual or constructive notice of the condition. Defendant also maintains that plaintiff

has not sustained a "serious injury" within the meaning of the Insurance Law.

The court opts to consider the issue of damages first.

Plaintiff has alleged she sustained a "serious injury," which is the predicate to recovery for non-economic loss. Plaintiff stated in her verified bill of particulars that injuries to her back and knee "are permanent and continuing in nature, except for objective signs of contusions and abrasions." Plaintiff also stated that she "cannot perform her daily household activities; vacuuming; walking the dog; cleaning; lifting; and wearing high heels.

During her deposition on May 31, 2005, plaintiff also testified that she only complained about her back and hip to emergency personnel at the time of the accident, and that she did not complain about her right knee until two days later. Plaintiff also testified that she received physical therapy for approximately six months and that she was confined to her bed for one week after the accident.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986);

Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957).

New York Courts have long recognized that the legislative intent underlying the No-Fault Law under Article 51 of the Insurance Law was to weed out frivolous claims and limit recovery to significant injuries. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002).

Ins. Law § 5104 provides that:

"in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss."

Ins. Law § 5102(d) provides that a "Serious injury" is:

"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" (emphasis added).

On this motion, defendant must establish the complete absence of a serious injury as its defense to plaintiffs' claims for damages. Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065 (1979). This would shift the burden to plaintiffs to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial on any one of the definitions of serious injury. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In support, defendant has provided the medical reports of Dr. Yaron and Dr. Weiland. Both physicians opine, based on their review of plaintiff's medical records and their own examinations, that plaintiff does not have a permanent injury. Specifically, they each concluded that plaintiff had good range of motion and no orthopedic or neurological problem as a result of the accident. The physicians both provided qualitative and quantitative evidence that plaintiff has no disability.

Defendant have also provided the report of Dr. Cantos, who concluded that plaintiff's MRI of her spine, dated July 10, 2003 was merely indicative of degenerative disc disease, which was unrelated to the accident.

The court finds that defendant has established the absence of a serious injury. Plaintiff has failed to present "competent medical evidence based upon objective medical findings and tests to support the claim of serious injury and to connect the condition to the accident." June v. Gonet, 298 A.D.2d 811 (3d Dept. 2002).

As plaintiff has failed to oppose this motion, this motion is hereby granted on default

#### **Conclusion**

In accordance with the court's decision, it is hereby

ORDERED that defendant's motion summary judgment against plaintiff is hereby granted and the complaint is hereby dismissed.

Any requested relief not otherwise expressly granted herein is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
September 17, 2007

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
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