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SHORT FORM ORDER

INDEX No. 10-12213
CAL. No. 14-00213OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-8-14
ADJ. DATE 10-14-14
Mot. Seq. # 005 - MotD
006 - MotD

REGINA CARROLL,

Plaintiff,

- against -

SUFFOLK BUS CORP. and COUNTY OF SUFFOLK,

Defendants.

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Upon the following papers numbered 1 to 56 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (005) 1-21; (006) 22-46; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 47-52 no affidavit of service; Replying Affidavits and supporting papers 53-54; 55-56; 57-58 ; Other 59-60 __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the branch of the motion (005) by defendant County of Suffolk pursuant to CPLR 3212 for summary judgment dismissing the cause of action for injunctive relief on the basis that the plaintiff, Regina Carroll, is unable to make out the essential elements to recover under Titles II or III of the Americans with Disabilities Act (ADA 42 USC § 12101 et seq), is granted; and the branch of the motion for summary dismissal of the complaint on the basis that Regina Carroll has not demonstrated that she sustained a serious injury as defined by Insurance Law 5102 (d) is denied; and it is further

ORDERED that the branch of the motion (006) by defendant Suffolk County Bus Corp. pursuant to CPLR 3212 for summary judgment dismissing that part of the complaint served by plaintiff, Regina Carroll, which seeks to recover under Americans with Disabilities Act 42 USC § 12184 and 42 USC § 12141, is granted; and the branch of the motion which seeks summary dismissal of the complaint on the basis that the plaintiff has not sustained a serious injury as defined by Insurance Law 5102 (d) is denied.

Regina Carroll asserts that she is an individual with a disability known as cerebral palsy which requires her to use a motorized wheelchair. On January 22, 2009, Suffolk Bus Corp. sent a paratransit bus to her residence at 143 Pointe Circle, North Coram, New York, for a regularly scheduled pickup at 6:15 a.m. Upon arrival, the operator of the bus, Consuela Bonilla, was observed by the plaintiff to be having difficulty deploying the wheelchair lift from the stow position to the ground through the use of a button which electronically activates the lift through its cycles. Ms. Bonilla, after several attempts, lowered the lift platform to the ground through the use of a manual lever. When the plaintiff got onto the lift in her wheelchair, the lift was inoperable with the electronic control, so the lift was operated via the use of manual lever, allegedly with difficulty, causing the lift to move up and down in a bumpy, jerky manner. Plaintiff asserts that she had a history of back problems in addition to cerebral palsy, and that she asked the operator to stop moving the lift up and down, as she was experiencing pain. Once the lift was raised to access the bus, plaintiff then moved her wheelchair into the bus. The bus operator, alleges plaintiff, secured the wheelchair with straps, but did so in an improper manner. En route to her place of employment at the Veterans Administration (VA), the movement of her wheelchair caused plaintiff physical pain. To remove plaintiff from the bus in her wheelchair, Bonilla allegedly pushed on the plaintiff's back causing her pain while two employees from the VA pushed the wheelchair. Plaintiff thereafter sought treatment at the emergency room at Stony Brook University Hospital and was admitted through February 3, 2009. During her hospitalization, she contracted pneumonia. The day of discharge from the hospital, she contracted a viral infection which caused internal bleeding for which she was admitted to St. Charles Hospital for five days for treatment.

Plaintiff alleges in the complaint that defendant County of Suffolk manages and oversees a public fixed route transportation system and a complementary paratransit bus transportation system, Suffolk County Transit, through the Department of Public Works, and contracts with private bus companies, including defendant Suffolk Bus Corp., a privately owned company, to operate, maintain, inspect, and repair all paratransit buses. Plaintiff alleges defendant Suffolk Bus Corp. failed to properly train defendant Bonilla in operating the bus lift, and failed to take the bus out of service. In a first cause of action for negligence, the plaintiff alleges that the defendants, Suffolk Bus Corp. and the County of Suffolk, improperly managed the bus and negligently moved her, among other things, causing her to sustain injury. In the second and third causes of action, the plaintiff alleges that Suffolk Bus Corp. and the County of Suffolk discriminated against her. Plaintiff seeks relief pursuant to Title II and III of the Americans with Disabilities Act, 42 USC § 1214, et seq., and 42 USC § 12184 et seq., and the enabling regulations set forth in 49 C.F.R. §§ 37.163, 165, and 173. Plaintiff seeks damages for personal injuries and a permanent injunction requiring the County of Suffolk to make all necessary modifications to their bus programs and services, and to their corporate policies, procedures and practice necessary to remedy its violations of the Americans With Disabilities Act.

In support of motion (005), the County of Suffolk submitted, inter alia, an attorney's affirmation; copy of the notice of claim and amended notice of claim; unsigned but certified hearing transcript of plaintiff pursuant to General Municipal Law § 50-h and her deposition transcript which are not objected to and are considered (*see* ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; complaint; answers; bill of particulars; FY 2011 Triennial Review of Suffolk County prepared for Federal Transit Administration; copy of agreement between County of Suffolk and Suffolk County Bus Corp. dated May 1, 2004 with three year option to renew; System Safety Program Plan; Pre-employment checklist dated March 11. 2008; training certificate for Consuela Bonilla dated October 10, 2008; walk-around form; vehicle

inspection and repair record; and the sworn report of Alan J. Zimmerman, M.D. concerning his independent orthopedic evaluation of plaintiff.

In support of motion (006), Suffolk County Bus Corp submitted, inter alia, an attorney's affirmation; copies of the notice of claim, summons and complaint, answer, and plaintiff's verified bill of particulars; unsigned but certified hearing transcript of plaintiff pursuant to General Municipal Law § 50-h and her deposition transcript which are not objected to and are considered (*see* ***Zalot v Zieba***, *supra*); uncertified discharge summary of John T. Mather Hospital and Stony Brook University Hospital and records of Chronic Pain Options, radiology report of Stony Brook Hospital, South Shore Neurologic Associates, P.C., St. Charles Hospital Physical Therapy, Howard Krebaum, Jr, PT; Employees Compensation Appeals Board; St. Charles Hospital emergency department record; the sworn report of Alan J. Zimmerman, M.D. concerning his independent orthopedic evaluation of plaintiff, MRI of plaintiff's lumbar spine dated October 30, 2007; transcript of the examination before trial of Consuela Bonilla dated June 28, 2013; walk-around form of January 22, 2009; System Safety Program Plan; and Paratransit Driver Trainer Pre-employment Check List.

At the hearing conducted pursuant to General Municipal Law § 50-h on July 2, 2009, Regina Carroll testified that she completed two years of college and has been working as a medical clerk at the Veterans Administration in Northport for eleven years, five days a week, from 8:00 to 4:30. She also has a certificate in computer science. She takes the SCAT (Suffolk County Accessible Transit) bus to and from work. Sometimes she takes the SCAT bus to shop at Walmart or Kohls, or generally, department stores. She is diagnosed as having diplegic cerebral palsy. She uses a motorized wheelchair and military crutches. She had a home health aide from 1987 through 1990, and since 2007. The home health aide assists her with showering, getting beverages, dressing, and getting into bed. Between 1990 and 2007, she did not have a home health aide, she stated, because she was not entitled to one. On the date of the alleged incident, January 22, 2009, she had a home health aide from 6:00 p.m. to 10:00 p.m., for four hours, through Medicaid. When she is unemployed, she has the home health aide for seven hours. She was last employed on April 29, 2009.

The plaintiff testified that in 2002, her employment was interrupted for two weeks when a home health aide dropped her and she sustained a concussion. In 2004, she was a passenger in the car being driven by her husband when it was involved in an accident. She was out of work for four months. In 2006, her employment was interrupted for two weeks due to a heart condition and anxiety reaction because she felt threatened when a patient did not leave her room at work. She continued that she stopped working on April 29, 2009 because she fell during a transfer in the bathroom at the VA and injured her lower back in the sacral area, causing sciatica. She testified that she sustained this injury on April 29, 2009 because she lost her balance and fell, because, since the incident of January 22, 2009, she was not able to transfer properly. After the accident of January 22, 2009, she was out of work for a couple of weeks.

On January 22, 2009, she waited in her house until she saw the SCAT bus arrive at 6:30 a.m. to take her to work. She went from her co-op to the bus in her motorized wheelchair, via the sidewalk, when she saw the driver exit the mini-bus. The wheelchair operates up to about 20 miles per hour for twelve miles. During the two minutes it takes her to leave her home to get to the mini-bus, the driver lowers the lift. On January 22, 2009, however, when she arrived at the bus, the lift was up. The bus driver, Consuela Bonilla, whom she had never seen before, was experiencing difficulty lowering the lift. She thought it took about

thirty minutes for the driver to lower the lift. Although the bus driver told her she could go into the house, she remained outside because she wanted to see how long it would take to lower the lift. If the driver couldn't get the lift down, the plaintiff was going to call for another bus, which she did. The lift went down, and she got on, but the lift wouldn't work, so the driver was moving it up and down. Plaintiff stated that the driver caused injury to her (plaintiff's) back in the process. She told her to stop after the first attempt, but the driver continued. During the ten minutes she was on the lift, with her wheelchair motor turned off, she called for another bus. The driver was unsure if she could raise the lift manually, but she did, and plaintiff got onto the bus. At some point, another bus came, but not before she got onto the bus.

The plaintiff continued that once on the bus, there are metal hooks that attached to the wheelchair by the driver, however, she stated, the driver did not attach the hooks correctly. She then stated that she told the driver where to place the hooks, and that the driver put them on the front of the wheelchair, but she could not see where they were attached in the back.[1] The wheelchair motor was off. She stated that once the wheelchair is turned off, it is not able to move as it locks automatically. On the way to the VA, all the hooks came off about one quarter of a mile from the VA on "Bread and Cheese Hollow Road," when the driver hit a curb on a very sharp left turn with her driver side wheels, front and back. She was thrown back and forth as her wheel chair was moving about 14 inches forward and backward. She then testified that when the driver made the turn, the wheelchair moved backward. While the bus was moving forward, her wheelchair was moving backwards and forwards, about seven or eight inches at a time. She told the driver, who pulled over, to reattach her wheelchair. When they arrived at the VA, she couldn't get her wheelchair off the bus because the driver broke it. She stated that the driver got several VA employees to help her and the driver pushed on the back of her wheelchair and her back, with help.[2] When her wheelchair was pushed onto the lift, the lift would not work electronically, so the driver operated it manually. The plaintiff stated she herself was screaming for help. The others pushed her 100 feet to the building, and they, including the bus driver, left her out in the rain for twenty minutes. [3]

The plaintiff testified at her examination before trial that her civil rights were violated with this incident. The driver only spoke Spanish. When she spoke Spanish to the driver, the driver could not speak Spanish back. She had no way of communicating with her. However, the plaintiff then testified that the

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[1]At her examination before trial, the plaintiff testified that she told the driver that the hooks were not properly applied and that they had to be tightened, which the driver had difficulty doing. She stated that there are also lap and shoulder belts, which the driver did not put on her, and a belt which attaches to the floor, which the driver did not attach. The plaintiff did not know which chains on the floor unhooked during the trip. She did not ask the driver to put on the lap, shoulder and floor belt. She stated the driver spoke Spanish, but she did not try to tell her in Spanish or English about the belts needing to be applied. She later testified that the driver explained to her, while attempting to raise the lift with the lever, that she wanted to make sure she (plaintiff) was safe and that there would be no injury or complication. While on the lift, she called the bus company and spoke to Mr. Reilly who told her Consuela was in training.

[2]At her examination before trial, the plaintiff testified that the two people from the laundry at the VA helped get her off the bus by pushing on her arms and they did not push on the wheelchair.

[3]At her examination before trial, the plaintiff testified that when the lift came down to ground level, that two men lifted her out of her broken wheel chair and placed her back into it once the other men lifted the wheelchair down from the lift. They then got her into the emergency room door.

driver told her, in English, that she was not properly trained. She did not recall if she ever experienced problems with the lift on the bus, identified as 784, prior to the incident. She did not know how many times she used the bus before. Prior to 2009, she experienced problems with the lifts on the bus about three times a year. She has complained to Suffolk Bus about the lift, about the air conditioning, and if they were late. She thought she complained to Suffolk County about two times a year, usually about the buses going too fast, or going over bumpy roads, but identified no specific occasions or locations.

Consuela Bonilla testified through a Spanish interpreter that she understands and reads English, but does not write it. She utilized an interpreter because she believed their conversation would be very extensive. She stated that she had no problem understanding and communicating in English, and that included conversations with her employers and the people who rode the bus. She testified to the extent that she has been employed by the Suffolk Bus Corp. as an ADA (assistant to people with disabilities) since April 2008. Suffolk Bus provides bus transportation to people with disabilities who cannot take the public bus system. Prior to this employment, she was a bus driver for five years in the Brentwood School District for Suffolk Transportation. She believed Suffolk Transportation, a private company, was the same company as Suffolk Bus Corp., but they were divided into different departments. Her pay for either job was from the same company, but from a different department. It was required that she work for the school bus system for Suffolk Transport for one year before being able to work for Suffolk Bus Corp.

Depending upon the route she was on for Suffolk Transportation, she drove the school bus with a wheelchair lift used for students with disabilities. She stated that she had five years prior experience with wheelchairs, and she was trained in the use of the lifts and how to secure someone. At the start of each new school year, she received training and had to demonstrate how to take the seat out, how to use the seat belt, and how to respond to any emergency that could occur. She stated that she was an assistant driver for four years in charge of moving the student up the automatic ramp which was operated with a control device which raises and lowers the ramp automatically. There was also training to operate the lift manually if the lift did not work. During her fifth year, when she was the driver of the school bus, she operated the lift manually about three times. She checked the lift to determine that the automatic control was operating. During training, she was shown how to use the manual lift. She stated that the only thing that can fail is the automatic control; the manual should always work. Inspection of the manual crank is included in the inspection, so she operated the manual crank on the lift every morning at Suffolk Bus Corp. If during the inspection, something was found to be wrong, it would be reported.

She was familiar with the term "Americans with Disability Act" and knew there was a federal law related to the services that were provided to students with disabilities. She was aware that the lifts had to be repaired and maintained. The bus, and especially the lift, is checked to assure it is functioning correctly. If there is something wrong with the lift, her instructions are to send the bus to the shop and get another. She cannot leave the bus station if the lift is not working. Each day before she leaves for her bus route, she checks the lift. The supervisors check her to see if the inspection is done and to look over the entire bus before the route is started. She was instructed to only use the manual lift if the automatic lift did not work properly. The defendant continued that when she started working with the ADA bus, it was assumed they were not trained and she was retrained for one week, including operating the automatic lift and the manual lift. When she finished the training, she felt she could do it well. She was given operating manuals in English, which she was able to read. Every six months she is given retraining for operating the lifts.

Ms. Bonilla stated that on the morning of the incident of January 22, 2009, she was given the manifest with the plaintiff's name on it because there was a problem with the driver who was going to pick the plaintiff up. Therefore, she was later than the time the plaintiff would normally be picked up, but arrived between 6:00 and 6:30 a.m. She stated that she wrote a report concerning the incident of January 22, 2009, and gave it to her immediate supervisor, Ms. Denise. She also spoke about the incident to the manager, Ray Grimaldi. She stated that the plaintiff was outside waiting when she arrived. About three minutes passed from the time she first saw the plaintiff until she was boarded on the bus. She described the incident, saying that the plaintiff was using a wheelchair, which was quite big. She had lowered the lift with the automatic control without any problem. The wheelchair went onto the ramp portion of the lift, and the right side by the back wheel of the wheelchair kept touching the lift, so she asked the plaintiff to move the wheelchair slightly over, but the plaintiff would not. She noticed the plaintiff's foot touching the front part of the ramp where one enters onto, closest to the bus. The lift does not work if the wheelchair touches any part of the ramp barrier around the circumference. Thereafter, the lift then only went halfway up. She stated that it is about three and one-half feet from the ground to the point that the bus is entered from the lift. The lift stopped working when it was raised about one and one-half feet. It took about thirty seconds for it to lift to that point. The ramp on the lift closes automatically when it goes upward to stop the wheelchair from rolling off. The ramp has a sensor that goes on if things are touching. At that point, she went inside the bus to raise the lift manually. It took about five or six minutes to raise the lift manually. If the lift had not been off the ground, she would have had the plaintiff go back to her apartment. While she was there, another bus arrived, which she had not called for. The driver checked by radio to see if she arrived and whether she needed help with anything. The plaintiff was already on the bus. The plaintiff did not complain about being in pain or make any noise indicating she was in pain.

Ms. Bonilla continued that en route to the VA, while on the Expressway, she could see from her rearview mirror that the plaintiff was moving herself around in the wheelchair. She knew the wheelchair was secured, but she could hear the plaintiff trying to operate it. Because the wheelchair was secured, she knew she couldn't move it. She pulled over and asked her if something was wrong, and the plaintiff responded that everything was fine, she just did not want to arrive late to work. She checked the securement devices, and none of them needed to be adjusted by either tightening or reattaching. She touched them and saw everything was secure. None of the attachments were looser than they should be. Ms. Bonilla testified that the wheelchairs are all very similar with four wheels, which she secures with four straps of S-shaped chains, two on the front and two on the back of the chair so the wheelchair cannot move. She also placed a strap over the plaintiff's body. She has done this many, many times because she has four different wheelchairs daily on her manifest. She had never given the plaintiff a ride before this and had not met her before.

Ms. Bonilla continued that on the Expressway, there was a speed limit of 55 miles per hour. There was traffic and she was driving 48 to 50 miles an hour. She did not drive faster than usual even though they were late. She did not make any turns during the trip where she came into contact with a curb. When she attempted to drop the plaintiff off at the VA in Northport, and started taking off the seat belts, the plaintiff started screaming at her that she damaged her wheelchair because the motor would not turn on. The plaintiff told her that she damaged it, but she stated she did not touch anything and explained that to her. Someone was then passing by, so she asked for help to take the plaintiff off the bus because the wheelchair was very heavy. The woman went and got two more nurses to help, who then helped move the wheelchair from the ramp. The lift was working. She lowered it down and they pushed the wheelchair all the way

inside into the hospital. When she was pushing the wheelchair, she pushed on the metal on the back of the chair. At no time did she push the plaintiff by putting her hands on the plaintiff's back. She then went inside the hospital because the plaintiff has door to door service. The plaintiff asked her why she was there and told her to leave. People inside were already trying to fix the wheelchair, but the plaintiff called the office. Ms. Bonilla then received a phone call from Ms. Denise, who asked her why she was still there as she was late for her next pickup.

Ms. Bonilla testified that she did not leave the plaintiff out in the rain, and the plaintiff was not crying. She had on other occasions since 2008, operated the lift manually when a motorized wheelchair was on it, on the same kind of bus. Ms. Bonilla testified that the lift was operating manually normally, without any problem at the time of the incident, and after the incident as well as she continued her route that day. Ms. Bonilla also testified that a year after the incident, three times a week for a nine month period, she transported the plaintiff who kept placing her foot on the ramp so the lift would stop, and each time she asked her not to put her foot very close to the barrier ramp which lifts around the perimeter of the lift.

C.F.R § 37. 161 provides in pertinent part: "(a) Public and private entities providing transportation services shall maintain in operative condition those features of the facilities and vehicles that are required to make the vehicles and facilities readily accessible to and usable by individuals with disabilities. These features include, but are not limited to, lifts and other means of access to vehicles, securement devices, elevators, signage and systems to facilitate communications with persons with impaired vision or hearing. (b) Accessibility features shall be repaired promptly if they are damaged or out of order. When an accessibility feature is out of order, the entity shall take reasonable steps to accommodate individuals with disabilities who would otherwise use the feature. (c) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs."

Based upon the adduced testimonies, plaintiff does not have a claim under C.F.R § 37. 161. The plaintiff testified that in the three years prior to the January 22, 2009 incident, she experienced lift problems maybe three times a year. Therefore, the lift problems are deemed to be isolated or temporary interruptions in service, but did not limit her access or interfere with her utilizing the service to reach her destination.

49 C.F.R. 37.163 is applicable only to public entities with respect to lifts in non-rail vehicles, in pertinent part, it sets forth that (b) the entity shall establish a system of regular and frequent maintenance checks of lifts sufficient to determine if they are operative. (c) The entity shall ensure that the vehicle operators report to the entity, by the most immediate means available, any failure of a lift to operate in service. (d) Except as provided in paragraph (e) of this section, when a lift is discovered to be inoperative, the entity shall take the vehicle out of service before the beginning of the vehicle's next service day and ensure that the lift is repaired before the vehicle returns to service.

As set forth in ***Midgett v Tri-County Metro Transp. Dist.***, 254 F3d 846, 2001 U.S. App. Lexis 14240 (9th Cir June 26, 2001), "the regulations implementing Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., do not contemplate perfect service for wheelchair-using bus commuters. Under certain circumstances, 49 C.F.R. §37.163 permits buses with inoperative lifts in this type of service area to remain in service for up to three days after the problem is discovered, and 49 C.F.R. §37.161 (c) establishes that isolated or temporary problems caused by lift malfunctions are not violations of the ADA." Because

the individual did not establish a real and imminent threat of continued future violations of the ADA by the transportation district, the district court did not abuse the discretion in denying him a permanent injunction. (*see also* ***Dorset v Septa***, 2005 US Dist Lexis 18351 (ED Pa Aug 29, 2005).

In the instant action, it is determined that the plaintiff does not have a claim under 49 C.F.R. 37.163. Suffolk Bus Corp. has a policy, which Consuela Bonilla followed, of inspecting the lift to ascertain it was properly functioning prior to starting her route each time she operated the bus. It has been established that on the date of the accident, that Consuela Bonilla checked the subject lift which was reported as functioning properly prior to the incident of January 22, 2009. It is noted that the Suffolk Bus Corp. Walk-Around form, dated Thursday, January 22, 2009, and signed by Consuela Bonilla, reported the wheelchair lift was working on the date of the incident. The form was prepared before she took the bus out that morning. The plaintiff has failed to raise a factual issue to preclude summary judgment on the issue that the lift was functioning properly before Ms. Bonilla started her bus route on the date of the incident. The incident complained of herein does not meet the definition provided by 49 C.F.R. §37.163 and 49 C.F.R. §37.161 (c).

Accordingly, the cause of action premised upon defendant County of Suffolk's alleged violation of 49 C.F.R. 37.163 is dismissed with prejudice.

Turning to the allegations as against Suffolk Bus Corp., 49 C.F.R. § 37.171 provides that every employee of a transportation provider who is involved with service to persons with disabilities must have been trained so that he or she knows what needs to be done to provide the service in the right way and must ensure that, at any given time, employees are trained to proficiency. 49 C.F.R. § 37.173 provides that "[e]ach public or private entity which operates a fixed route or demand responsive system shall ensure that personnel are trained to proficiency, as appropriate to their duties, so that they operate vehicles and equipment safely and properly assist and treat individuals with disabilities who use the service in a respectful and courteous way, with appropriate attention to the difference among individuals with disabilities.

In the instant action, it has been demonstrated prima facie that Consuela Bonilla was provided training as required pursuant to 49 C.F.R. § 37.171 and 49 C.F.R. § 37.173. The plaintiff has asserted only conclusory and unsupported assertions that Consuela Bonilla did not have training, and thus, has not raised a factual issue to preclude summary judgment.

Accordingly, the cause of action premised upon defendant Suffolk Bus Corp.'s alleged violation of 49 C.F.R. § 37.171 and 49 C.F.R. § 37.173 is dismissed with prejudice.

42 USCS § 12181 provides for equal opportunity for individuals with disabilities, of public accommodations and services operated by private entities. A private entity is defined as any entity other than a public entity 41 USCS § 12181 (6). A public entity is any state or local government or any department, agency, or other instrumentality of a state of states or local government 42 USCS § 12131 (1). Section 2. (b) (4) provides that a fixed route system is a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule. Under section (2) (b) (7), private entities are considered public accommodations, for the purpose of said section, relating to vehicles.

42 USCS § 12184 (a) provides that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

Title II of the ADA, 42 USCS § 12131-12165, prohibits discrimination by public entities, while title III 42 USCS § 12181-12189, prohibits discrimination by private entities that provide public accommodation. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Money damages are not recoverable under title III of the ADA (*see* 42 USCS § 12188 [1994]).

Here, the defendants have demonstrated prima facie that plaintiff is not entitled to an injunction. As set forth in ***Midgett v Tri-County Metro Transp. Dist.***, *supra*, because, the individual did not establish a real and imminent threat of continued future violations of the ADA by the transportation district, the district court did not abuse the discretion in denying him a permanent injunction (*see also* ***Dorset v Septa*** 2005 US Dist Lexis 18351 (ED Pa Aug 29, 2005).

In ***James v Peter Pan Transit Mgmt., Inc.***,1999 U.S. Dist. Lexis (ED NC Jan. 20, 1000), it was held that evidence of wheelchair lift failure raised a genuine issue of material fact as to whether plaintiff was discriminated against because of her disability, and a transit company's independent contractor status did not relieve the city of ADA obligations. It provided that to establish a violation of the Americans with Disabilities Act and the Rehabilitation Act, a plaintiff must prove: (1) that she has a disability; (2) that she is otherwise qualified for ... the benefit in question; and (3) that she was excluded from ... a benefit due to discrimination solely on the basis of disability. The court continued that discrimination includes failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, serrated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, citing 42 USC 42 USCS § 12182 (b)(2) (A). Citing to 42 USCS § 12182 (b)(2)(C)(1), the court stated that the ADA provides that discrimination includes a failure of a private entity to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

In the instant action, the plaintiff failed to raise a factual issue concerning a real and imminent threat of continued future violations of the ADA by Suffolk Bus Corp. or the County of Suffolk, or any past deprivations of service. Plaintiff testified only to three incidents a year in the three years prior to the incident of January 22, 2009, wherein there was a failure of a lift. She gave no testimony to raise factual issues that the subject incident and past incidents of lift failure were more than isolated incidents, or that she would be subjected to real threats of any future violations of the ADA. The plaintiff did not raise factual issues to entitle her to an injunction on the basis that she has been denied transportation at any time, even on the days that she asserts the wheelchair lift did not function the three times a year, in the three years prior to January 22, 2009 or on January 22, 2009. She has raised no factual issues to demonstrate that she may have been discriminated against by the defendants, excluded from participation in, or denied the

benefits of the services, programs, or activities of the public entity at any time.

42 USCS § 12102 provides the definition of a disability. Here, it is undisputed that the plaintiff has a disability. The adduced testimonies establish that plaintiff was not excluded, denied services, serrated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services. Rather, the adduced testimonies establish that the plaintiff was not discriminated against. Plaintiff has failed to raise a factual issue as to whether there was a failure of the private entity to operate such system so that, when viewed in its entirety, such system did not ensure a level of service to plaintiff who utilized a wheelchair, in a manner equivalent to the level of service provided to individuals without disabilities.

In ***James v Peter Pan Transit Mgmt., Inc.***, *supra*, the court also stated that the ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" (42 USC §12101 (b) [1994]). Therefore, it stated, it is unlikely that the courts would find that the ADA is a safety statute or that violation of the ADA constitutes negligence per se.

Accordingly, defendants' application for dismissal of that part of plaintiff's complaint, premised upon the defendants' alleged violations of title 11 of the ADA, 42 USCS § 12131-12165 and title III 42 USCS § 12181-12189, for an injunction is granted.

As to that part of the first cause of action which asserts that the defendant Suffolk Bus Corp. and the County of Suffolk were negligent in the services provided to the plaintiff with regard to use of the safety restraints for the wheelchair, shoulder harness, in moving her, in negligently operating the bus, and in the operation of the bus, the adduced testimonies of plaintiff and Ms. Bonilla conflict as to whether such devices were employed, and if so, whether they were properly employed, raising factual issues to preclude summary judgment on the issue of common law negligence.

The defendants also seek dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

The plaintiff testified that in 1979, she sustained two herniated discs in her neck when an elevator door closed on her. She sued the school and received a settlement. After a car accident in 1985, she had back pain in the lumbar and thoracic area for which she was hospitalized. Prior to that accident, she had pain coming from the L4-5 area of her lower back. She received treatment for the thoracic area of her back. In 1999, she fell off a horse and injured her leg. She was hospitalized for ten days, and had to learn to walk with a walker instead of crutches. The plaintiff continued that she first had an aide to assist her in 1999 with dressing due to her cerebral palsy. In 1987, she injured her back while lifting a file and twisting at work at IRS, and had a severe case of sciatica and pinching on a nerve. She filed a Worker's Compensation Claim and received three years of salary. In 2001, she was involved in two accidents in two weeks. One accident involved a SCAT bus accident, which caused her back to go into spasms, for which she had physical therapy. With the second accident in 2001, she filed a no fault claim due to spasms in her back caused by being jostled in the seat. She was hospitalized for four days at Mather Hospital. She commenced a law suit and received a settlement. In 2003, she began to use a wheelchair. In 2004, she was involved in another accident while a passenger on a SCAT bus and sustained injury to her lower back and sciatic nerve. She went to Mather Hospital and was admitted for four days. She couldn't walk. She commenced a lawsuit against Suffolk County, but discontinued it. She has been going for physical therapy as much as

possible since 2004. On January 22, 2009, she allegedly was involved in the subject incident and was admitted to Stony Brook Hospital. After about three or four days, she was diagnosed with pneumonia[4] and was treated with intravenous antibiotics. She also caught a virus during that hospitalization, and vomited for two days, including the day of her discharge. She was then admitted to St. Charles Hospital the day after her discharge from Stony Brook. After an endoscopy was performed, she was treated for a GI bleed attributed to the vomiting.

The plaintiff testified that following the incident of January 22, 2009, she was crying, and went into the emergency room at the VA. She demanded a pain killer from Dr. Habib for the pain she was experiencing in her middle back. She continued that she called her primary doctor and described to him the pain in her lower back, and sciatica going down her left leg. Per her primary physician's instruction, she went to Stony Brook University Hospital by ambulance, after waiting for her wheelchair to be repaired by the VA. Upon arrival at Stony Brook, she complained of pain in her upper back, lower back, neck, and legs, and stated both legs felt different, with radiating pain in the left and numbness in the right. She was examined, medicated for pain, and given muscle relaxants. She had CT scans, x-rays, and MRIs, however, she did not know the results. She remained at Stony Brook for three weeks, under the care of Dr. Gerber, a neurologist. She underwent physical therapy so she could function in her wheelchair again. She was discharged home with a home health care worker, seven hours a day. She stated she fell on April 29, 2009, because of the accident. Since then, she cannot perform any type of transfer. Standing causes her right knee to buckle from the pain in her back. Prior to January 22, 2009, she could take more than twenty steps at a time, depending on the day. In December 2008, she could walk a mile, depending upon what she wanted to do rather than use a wheelchair.

Since the incident of January 22, 2009, she is not as adventurous as she had been. She can walk about 27 steps. She cannot bend down, and is dependent upon other people. She missed four weeks from work due to the incident. She stated that she kept falling at work because she could not transfer. She received benefits from Worker's Compensation, but after a hearing, her claim was denied.

At her examination before trial, the plaintiff testified to additional hospitalizations, and stated that the elevator accident in 1979 caused herniated discs in her neck. In 2001, following an automobile accident, she had an EMG which showed nerve damage relating to the lumbosacral spine. She received pain management injections. In 2002, she was hospitalized for six days at St. Charles Hospital due to a concussion caused by a fall while getting out of the shower. In 2003, 2005,and 2008, she received injections for pain management. In 2010, she was admitted to St. Charles for an accidental drug overdose and pneumonia. In 2011, 2012, and 2013, she was admitted several times each year, mostly for gastrointestinal problems and pneumonia. She stated that due to her prematurity at birth and cerebral palsy, she is prone to bronchitis. A September 2012 admission to St. Charles related to a back injury she sustained while transferring from a commode to her wheelchair. The fall, she testified, was because the aide assisting her was not trained, did not know how to assist her properly, and only spoke French, so she could not communicate with her. She was discharged from St. Charles to a nursing home for three and one-half months for physical therapy, psychological, and occupational therapy. Since March 2012, she has had an aide twenty four hours a day, seven days a week. It was plaintiff's testimony that following the January

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[4]Plaintiff testified at her examination before trial that she had pneumonia in the past about twelve times.

22, 2009 incident, she was not treated "properly enough" and was not "listened to." Had she been listened to, and been given proper treatment, at the proper time, and her moans listened to, she testified, she would not have been laid off from her job. She concluded that the January 22, 2009 incident did not cause her to experience neck pain.

SERIOUS INJURY

Pursuant to Insurance Law § 5102 (d), "'[s]erious injury' means 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On this motion for summary judgment on the issue of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendants as the moving parties to present evidence in competent form, showing that she sustained a serious injury as a result of the accident (*see* ***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met the burden, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does not exist (*see* ***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

By way of the bills of particulars, the plaintiff alleges that as a result of this accident, the following injuries were sustained: exacerbation and acceleration of prior lumbosacral condition and cerebral palsy; bilateral lumbosacral pain; loss of ability to walk with crutches outside of home; loss of ability to transfer

independently in a safe manner from wheelchair to commode, bed, seats, etc., hyperlordosis of the lumbar spine; significant progression of pain, tenderness and limitations of range of motion in the lumbar spine; substantial loss of independence secondary to diminution in ability to walk with crutches and to transfer independently in a safe manner; inability to use legs secondary to progression of lumbosacral pain condition; bilateral middle and upper back pain condition; disc herniation at C6-7, degenerative joint disease at C6-7 with marginal osteophyte formation; grade 1 spondylolisthesis of C5 on C6; bilateral pneumonia secondary to hospital stay at Stony Brook University Hospital after incident of January 22, 2009 with weakening of lungs; gastrointestinal infection from hospital stay at Stony Brook University Hospital after incidents of January 22, 2009, with vomiting causing Mallory Weiss syndrome (tearing in alimentary canal at junction of esophagus and stomach); and loss of personal independence.

The discharge summary from the John T. Mather Hospital admission of April 23, 2004 indicated that the then 43 year old plaintiff had a history of spastic paraparesis following polio. She was admitted following a car accident for complaints of severe neck pain, lower back pain with radicular pain and parathesias in the upper and lower extremities. The CAT scan of her lumbosacral spine was suggestive of herniated discs at L2-3 and L4-5, for which an MRI was recommended. The MRI of plaintiff's lumbar spine dated October 30, 2007, revealed mild degenerative disc bulging at the lumbar spine slightly more at the L3-4, L4-5, and L5-S1 level. No neural foramina stenosis or nerve impingement was noted.

The plaintiff testified that she treated with Dr. Vaillancourt whose record of July 24, 2008 predated the subject incident. He noted in his record that the 47 year old woman had left lumboradicular pain extending to the hip, posterior thigh, knee and lower leg after the vehicle she was riding in went over a bump on July 10, 2008. Dr. Vaillancourt indicated plaintiff experienced similar pain for the past twenty years, and has spastic diplegia. She was status post head-trauma with skull fractures in 1964 and 1971. She was able to walk 100 to 200 meters, but otherwise uses a wheelchair. Her activities of daily living were limited. Dr. Vaillancourt further indicated that plaintiff's lumbar spine MRI of October 30, 2007 revealed multilevel bulging discs at L3-4 and L5-S1. Musculoskeletal examination revealed that she had a right shoulder elevation; dorsal scoliosis to the right; rotation of the dorsal spine to the right; rotation of the lumbar spine to the right; lumbar scoliosis to the right; hyperlordosis of the lumbar spine; and elevated pelvis on the left. Her gait was described as "bilateral spastic gait with crutches." Dr. Vaillancourt found diffuse thoracic and lumbar restrictions, with range of motion restricted in the low back in all motions. The plaintiff continued to treat with Dr. Vaillancourt for pain management treatment.

An EMG study dated August 13, 2008, revealed "findings consistent with mild, chronic left L5-S1 radiculopathy." Dr. Vaillancourt's note of February 16, 2009 indicates the plaintiff was involved in a "minor MVA" which resulted in a flare-up of back pain, which was improving, but still worse than before the accident. She was treated with a trigger point injection and instructed she could return to work in one month with light duty. She was seen in April 2009, and on May 21, 2009, complained she was worse with cervicobrachial area pain, bilateral upper and mid back pain, and bilateral low back pain. The plaintiff advised Dr. Vaillancourt that she had fallen at work which caused the worsening of her pain.

The plaintiff's CAT scan of her lumbar spine on January 23, 2009, revealed no fractures or subluxation, with kissing spinous processes at L2-3 and L3-4 consistent with Baastrup's sign. CAT scan of her spine on January 27, 2009, revealed mild disc protrusion at C6-C7 and T8-T9 levels which appear to indent the thecal sac. The thoracic MRI of that same date revealed the same findings. The lumbar spine

MRI of February 1, 2009 revealed a dextroscoliotic curvature of the lower thoracic and lumbar spine without disc protrusions or spinal stenosis.

Plaintiff testified that she had been admitted to Stony Brook Hospital again in 2009, due to a fall at work on April 29, 2009, when she was transferring from her wheelchair. She stated the fall occurred because she was not able to do wheelchair transfers after the January 22, 2009 incident the way she was able to transfer prior to the incident. It is noted, however, that plaintiff was denied Worker's Compensation benefits after a hearing relating to the fall of April 29, 2009. In her letter dated July 10, 2009, sent to the Worker's Compensation Appeals Board, she argued that she was incorrectly denied benefits and was entitled to such compensation because there was water on the floor at work. She wrote, "the floor was wet- which was the direct cause of my fall." She continued that "I fell on a wet floor...." She stated that they ignored her testimony. She continued that if one were to argue that the previous injury and her cerebral palsy played a part in the fall, it is a supposition she does not agree with. She then wrote, "I FELL ON A WET FLOOR."

The plaintiff testified that the injury of January 22, 2009 was the cause of her fall at work in April 2009, because she was not able to accomplish wheelchair transfers following the January 22, 2009 incident. Her letter of July 10, 2009, asserts she is entitled Worker's Compensation benefits because she was caused to fall because there was water on the floor. In her bill of particulars, the plaintiff pleaded injuries related to her neck. At her examination before trial, the plaintiff testified that the January 22, 2009 incident did not cause her to experience neck pain. These inconsistent statements raise issues of credibility which cannot be determined by this court (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

The defendants submitted the sworn report of Alan J. Zimmerman, M.D. concerning his independent orthopedic examination of the plaintiff. This report, however, fails to establish that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to either category of injury. Dr. Zimmerman set forth that the plaintiff did not relate any prior accidents or injuries, but advised that she has had back problems since 1999, requiring multiple epidural and pain management procedures prior to this current accident in which the plaintiff advised Dr. Zimmerman that her back was jarred when the bus hit a curb. It is noted that the plaintiff advised Dr. Zimmerman that she was wearing a seat belt at the time, but testified that the defendant bus driver failed to secure her with a seat prior to the incident, raising further factual and credibility issues. Based upon plaintiff's testimonies, she has experienced multiple accidents and injuries. Dr. Zimmerman stated that the plaintiff indicated that she has had seventeen operations for her cerebral palsy deformity.

Dr. Zimmerman performed range of motion values for plaintiff's cervical spine, and reported deficits in right and left lateral flexion, and right and left rotation. He does not indicate whether or not these deficits are related to her prior neck injury and herniated cervical discs, and cerebral palsy, or are a result of the subject accident. Dr. Zimmerman did not obtain range of motion values for plaintiff's lumbar spine, and it is not known whether or not he attempted to obtain a lumbar range of motion examination. He did note contractures throughout her lower extremities.

Dr. Zimmerman's impression was that the plaintiff sustained cervical, thoracic, and lumbar sprains,

which have resolved. He has not commented upon the findings of various diagnostic imaging studies obtained prior to and after the subject incident, and does not opine as to any differences in the findings set forth in those studies. This raises factual issues as Dr. Zimmerman has not set forth a factual basis for his conclusion that the plaintiff sustained sprains which are resolved. While Dr. Zimmerman noted that the plaintiff claims she falls more often than before the January 22, 2009 incident, he does not comment whether such falls are related to the cerebral palsy or the subject accident. It is noted that the plaintiff advised Dr. Zimmerman that she is now working as an Avon representative.

Dr. Zimmerman offered no opinion (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]) as to whether the plaintiff was incapacitated from substantially performing the usual activities of daily living for a period of ninety days in the 180 days following the accident, and did not examine the plaintiff during that statutory period (*see* ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), precluding summary judgment on this category of injury as well. There are factual issues with regard to proximate cause of plaintiff's injuries based upon plaintiff's longstanding history of, and treatment for, back pain by Dr. Vaillancourt, as set forth by Dr. Zimmerman.

The factual issues raised in defendants' moving papers preclude summary judgment as the defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury", within the meaning of Insurance Law § 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties failed to establish prima facie entitlement to judgment as a matter of law, it is unnecessary to consider whether the opposing papers are sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]), as the burden has not shifted to the plaintiff.

Accordingly, the branches of motions (005) and (006) by the defendants for summary dismissal of that part of the complaint premised on the plaintiff's claim of serious injury as defined by Insurance Law § 5102 (d) are denied.

Dated: DEC 1 1 2014

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**