

**Bailey v Forde**

2012 NY Slip Op 32754(U)

September 18, 2012

Sup Ct, Queens County

Docket Number: 30148/10

Judge: Timothy J. Dufficy

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**SHORT FORM ORDER**

**NEW YORK SUPREME COURT-QUEENS COUNTY**

**P R E S E N T : Hon. Timothy J. Dufficy  
Justice**

**Part 35**

-----X  
**ANTOINETTE BAILEY,**

**Plaintiff,**

**Index No.: 30148/10  
Motion Date: 5/31/12  
Mot. Cal No.:2  
Motion Seq.: 2**

**- against -**

**ROMONA FORDE,  
Defendant.**

-----X  
**ROMONA FORDE,**

**Third-Party Plaintiff,**

**-against-**

**ANASTASIA GIARDIELLO,**

**Third-Party Defendant**

-----X

The following papers numbered 1 to 13 read on this motion by third-party defendant **ANASTASIA GIARDIELO** for an order pursuant to CPLR 3212 granting summary judgment in her favor and against the plaintiff and for an order pursuant to CPLR 5102 dismissing plaintiff's complaint and the third-party complaint in their entirety and the cross-motion by defendant/third-party plaintiff **RAMONA FORD** for an order pursuant to CPLR 3212 granting summary judgment in her favor and against the plaintiff and dismissing plaintiff's action.

**PAPERS  
NUMBERED**

Notice of Motion-Affirmation-Exhibits.....	1-4
Cross-Motion-Affirmation-Exhibits.....	5-8
Affirmation in Opposition-Affidavits-Exhibits.....	9-11
Reply Affirmation to Opposition.....	12-13

Upon the foregoing papers it is ordered that this motion by the third-party defendant **ANASTASIA GIARDIELO** for an order pursuant to CPLR 3212 granting summary judgment in her favor and against the plaintiff and for an order pursuant to CPLR 5102 dismissing plaintiff's complaint and the third-party complaint in their entirety on the grounds that the plaintiff has not sustained a serious injury causally related to the subject accident and the cross-motion by defendant/third-party plaintiff **RAMONA FORD** for an order pursuant to CPLR 3212 granting summary judgment in her favor and against the plaintiff and dismissing plaintiff's action based on the plaintiff's failure to sustain a serious injury set forth under New York State Insurance Law §§ 5104 and 5102(d) are denied.(see the accompanying memorandum)

**Dated: September 18, 2012**

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**TIMOTHY J. DUFFICY, J.S.C.**

MEMORANDUM

NEW YORK SUPREME COURT-QUEENS COUNTY

P R E S E N T : Hon. Timothy J. Dufficy  
Justice

Part 35

-----X  
ANTOINETTE BAILEY,

Plaintiff,

- against -

ROMONA FORDE,  
Defendant.

Index No.: 30148/10  
Motion Date: 5/31/12  
Mot. Cal No.:2  
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-----X  
ROMONA FORDE,

Third-Party Plaintiff,

-against-

ANASTASIA GIARDIELLO,

Third-Party Defendant

-----X

This is an action for personal injuries sustained by plaintiff **ANTIONETTE BAILEY**, who was the driver of a school bus when the school bus was hit in the rear by defendant/third-party plaintiff **ROMONA FORDE**, who was driving a 1991 Ford that was owned by third-party defendant **ANASTASIA GIORDIELLO**. The accident occurred on March 19, 2007, on the South Service Road and the intersection at Lakeville Road in Nassau County. Plaintiff Bailey testified that she had a commercial driver's license allowing her to operate the school bus. On the day of the accident she was driving a small school bus for her then employer We Transport. At the time of the accident, the school bus contained a few student passengers, as well as an aide. The plaintiff was stopped at the traffic light on Lakeville Road waiting to make a left-hand

turn from one of the two turning lanes at that intersection. While waiting for the light to change, the plaintiff felt a heavy impact in the rear of her vehicle and heard a bang which caused her head to lunge forward hitting the front windshield. The impact also caused the plaintiff's body to hit the steering wheel of the bus. The plaintiff was wearing her seat belt at the time of the accident. Upon the impact, she felt a pain in her back and remained in her vehicle after the accident until the police arrived. After the police report was taken, the plaintiff went back to the bus yard, which was located on Merrick Boulevard, and she filled out a report at We Transport. The plaintiff's sister picked her up from the bus yard and drove her home. The next day, the plaintiff went to Mary Immaculate Hospital regarding the backache she had from the accident. The hospital prescribed medication for the plaintiff and also recommended that the plaintiff get physical therapy. After that, the plaintiff went for physical therapy on a regular basis to a chiropractor at Advanced Healing Chiro, P.C. and to an acupuncturist for her backaches. Plaintiff Bailey testified that she did not return to work for We Transport where she was earning about \$21,000.00 a year. Plaintiff Bailey testified that while she was unemployed she received income from her workman's compensation claim and from public assistance.

Plaintiff Bailey testified that due to the accident she can no longer tolerate the cold, her driving ability is limited, as well as her ability to walk. She testified that she continues to suffer from lower back pain and that she was bed ridden for a week following the accident. She stated that she was unable to do her normal daily activities for about a year.

Third-party defendant **ANASTASIA GIARDIELO**'s moves for summary judgment in her favor and against the plaintiff and for an order dismissing plaintiff's complaint and the third-party complaint in their entirety on the grounds that the plaintiff has not sustained a serious injury causally related to the subject accident and has failed to sustain the threshold requirement of "serious injury" as required by New York State Insurance Law 5104 and 5102(d). Defendant/third party plaintiff **RAMONA FORDE** cross -moves for the same relief and adopts and incorporates the facts, legal arguments, exhibits and procedural history set forth in third-party Giardiello's motion. In support of these motions, third-party defendant Giardiello submits the pleadings in this case, the deposition testimony given by the plaintiff on June 10, 2011, as questioned by defendant/

third-party plaintiff Romona Forde. Third-party defendant Giardiello also submits the deposition testimony given by plaintiff Bailey, dated December 14, 2011, as questioned by defendant/ third-party plaintiff Ramona Forde. Additionally, third-party defendant Giardiello submits the medical records regarding the plaintiff's treatment at Mary Immaculate Hospital, and the reports of the plaintiff's attending doctors regarding the plaintiff's workman's compensation claim, the affirmed report of Dr. Alan Zimmerman, who examined the plaintiff on November 16, 2011.

The defendant bears the initial burden of presenting competent evidence that there is no cause of action and that the plaintiff's injuries are not serious within the meaning of New York State Insurance Law 5102 and/or 5104 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 A.D. 2d 79 (1<sup>st</sup> Dept. 2000). Whether or not a plaintiff has sustained a serious injury is initially a question of law for the court. Licari v. Elliot, 57 N.Y. 2d 230 (1982).

Therefore, it is the defendant's burden to establish that the plaintiff has not sustained a serious injury by submitting affidavits or affirmations of its medical experts who have examined the plaintiff and have found no objective medical findings which support the plaintiff's claim. Toure vAvis Rent A Car System, 98 N.Y.2d 345 (2002); Gaddy v Eyler, 79 N.Y. 2d 955 (1992). Where a defendants' motion for summary judgment properly raises an issue as to whether the plaintiff has sustained serious injury it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden then shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she has suffered a serious injury. Gaddy v. Eyler, *supra*; Zuckerman v. City of New York, 49 N.Y. 2d 557 (1908); Grossman v Wright, *supra*.

In support of these motions, the defendant and third-party defendant have submitted the affirmed report of Dr. Alan Zimmerman, who conducted an independent medical examination of the plaintiff on November 16, 2011. In pertinent part, Dr. Zimmerman found limitations in the plaintiff's cervical spine in the left and right rotation finding a 45 degree range of motion where the normal range is 60 degrees. In the lumbar spine, Dr. Zimmerman also found that the plaintiff's range of motion was limited in

flexion to 70 degrees where the normal range of motion is 90 degrees. In all other areas Dr. Zimmerman found that the plaintiff's range of motion was normal and that there was no permanent injury. As noted above, the affirmed medical report of the examining doctor, Dr. Zimmerman, set forth that upon his examination of the plaintiff, he found limitations in rotation in both the left and right areas of the plaintiff's cervical spine which were not within the normal range of motion. Dr. Zimmerman further found that the plaintiff's lumbar spine flexion was not within normal range of motion limits. However, while Dr. Zimmerman found that the plaintiff did in fact suffer from limited range of motion in some respects, he failed to explain or substantiate with any objective medical evidence the basis for his conclusions that the plaintiff's injuries were not permanent and that her limitations were self-controlled by the plaintiff. Ianello v Vazquez, 78 A.D. 3d 1121 (2d Dept. 2010); Granovskiy v Zarbaliyev, 78 A.D. 23d 656 (2d Dept. 2010). Therefore, the defendant and third-party defendant have failed to make a prima facie showing of entitlement to judgment as a matter of law that the plaintiff did not sustain a serious injury within the meaning of New York State Insurance Law 5102 and 5104 by failing to tender sufficient evidence to demonstrate the absence of any material issues of fact. Winegrad v New York University Medical Center, 64 N.Y. 851 (1985); Reynolds v Wai Sang Leung, 78 A.D.3d 919 (2d Dept. 2010).

Accordingly, the Court finds that Dr. Zimmerman's report is insufficient to eliminate all triable issues of fact. Katanov v County of Nassau, 91 A.D. 2d 723 (2d Dept. 2012); Artis v Lucas, 84 A.D.3d 845(2d Dept. 2011); Borras v Lewis, 79 A.D. 3d 1084(2d Dept. 2010); Smith v Hartman, 73 A.D.3d 736 (2d Dept. 2010).

In opposition to the motion and cross-motion, the plaintiff submits her affidavit, a copy of the bill of particulars and an affirmed report from Marc Slamowitz, D.C., who examined the plaintiff on March 21, 2007, a couple of days after the motor vehicle accident occurred. Dr. Slamowitz performed a lumbar spine range of motion using a goniometer. The results of these tests revealed that the plaintiff's lumbar spine flexion was 70 degrees with pain, the normal being 90 degrees, extension was 20 degrees, the normal being 30 degrees, the right and the left lateral flexion were 25 degrees with pain, the normal being 30 degrees, and the left and right rotation were 25 degrees with pain, the normal being 30 degrees. Dr. Slamowitz stated that the plaintiff's tactile and motion

palpitation revealed tenderness, trigger points, and hyper tonicity in the cervical and lumbo-sacral paraspinal musculature and vertebral fixations at multiple levels of the cervical and lumbar spines. The doctor further stated that kinesiological testing revealed weak neck flexors bilaterally and weak large muscle of the lumbar spine. Dr. Slamowitz performed a cervical spine range of motion study upon the plaintiff using a goniometer. All flexion and extensions were assessed as within normal range “with pain.”

Dr. Slamowitz’s diagnosis concluded that the plaintiff suffered from lumbar intersegmental dysfunction, lumbar nerve root injury, sciatica at C4 to C7 and at L4 to L5 and S1. Furthermore, it was Dr. Slamowitz’s medical opinion that these injuries were causally related to the March 19, 2007 accident. Dr. Slamowitz stated, that in his medical opinion, the injuries that he diagnosed would inhibit the plaintiff from carrying out the normal activities of daily living such as sitting, standing, bending, lifting, and other strenuous activities and that the plaintiff has a permanent partial disability.

Dr. Slamowitz recommended that the plaintiff receive physical therapy two to three times a week. Dr. Slamowitz treated the plaintiff in his office until May 16, 2007, when the doctor concluded that the plaintiff had reached her maximum physical improvement and considered the plaintiff’s injuries to be chronic.

Dr. Slamowitz re-examined the plaintiff on March 13, 2012, when she presented herself to him with back pain, spasms, and lower back radiating pain. Dr. Slamowitz performed a cervical spine range of motions using a goniometer and the results yielded all normal ranges of motion in the cervical spine. Dr. Slamowitz also performed a lumbar spine range of motion study using a goniometer with the following results. Flexion was 70 degrees with pain, the normal being 90 degrees, extension was 20 degrees with pain, the normal being 30 degrees, plaintiff’s right and left lateral flexion were 25 degrees with pain, the normal being 30 degrees, and the left and right rotation were 25 degrees with pain, and the normal range is 30 degrees.

Dr. Slamowitz’s diagnosis, based upon his March 13, 2012 examination, was lumbar intersegmental dysfunction, lumbar nerve root injury, sciatica at C4 to C7 and at L4 to L5 and S1. Dr. Slamowitz opined that the plaintiff’s injuries were significant and permanent and that they were causally related to the motor vehicle accident that occurred on March 19, 2007.



Thus, this Court finds that the plaintiff has raised triable issues of fact by submitting the affirmed medical report of Dr. Marc Slamowitz attesting to the fact that the plaintiff has significant limitations that are permanent and that resulted from trauma causally related to the accident that occurred on March 17, 2007. Ortiz v Zorbas, 62 A.D. 2d 770 (2d Dept. 2009); Azor v Torado, 59 A.D. 367 (2d Dept. 2009). As such, the plaintiff sufficiently raised a triable issue of fact as to whether she sustained serious injury under the permanent consequential and/or the significant limitation of use categories of the New York State Insurance Law as a result of the subject accident. Therefore, the motion and cross-motion for summary judgment are denied. Khavosov v Castillo, 81 A.D.3d (2d Dept. 2010); Compass v GAE Transp, Inc., 79 A.D.3d 1091(2d Dept. 2010); Evans v Pitt, 77 A.D.3d 611 (2d Dept. 2010).

Accordingly, the motion and cross-motion for summary judgment are both denied in their entirety.

**Dated: September 18, 2012**

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**TIMOTHY J. DUFFICY, J.S.C.**