STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

NUBIS MARYLU CIARDIELLO,

PLAINTIFF,

-against-

VILLAGE OF NEW PALTZ AND KYLE J. ROBERTS,

DEFENDANTS.

DECISION AND ORDER

Index No. EF18-3323

VILLAGE OF NEW PALTZ AND KYLE J. ROBERTS,

THIRD-PARTY PLAINTIFFS,

-against-

MARCIAL I. CHUBRAX,

DEFENDANT.

HON. CHRISTOPHER E. CAHILL, JSC

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Cahill, J.

Plaintiff Nubis Marylu Ciardiello commenced this action following an accident that occurred on March 7, 2018 at the intersection of Bonticou View Drive and Route 32 in the Village of New Paltz (hereafter the Village), County of Ulster, State of New York while she was a passenger in a pick-up truck driven by third-party defendant Marcial I. Chubrax. The pick-up truck collided with a Village snowplow driven by defendant/third-party plaintiff Kyle J. Roberts. Plaintiff alleges that she sustained injuries when defendant Roberts failed to stop at a stop sign causing the snowplow to strike the front passenger side of the pick-up truck. Defendants/third-party plaintiffs the Village and Roberts in the third-party action allege, among other things, that third-party defendant Chubrax is liable for plaintiff's injuries because he caused the accident to occur due to his negligent operation of his pick-up truck.

Third-party defendant now moves for summary judgment dismissing the third-party action in its entirety pursuant to CPLR 3212 and seeks costs for the allegedly frivolous action. In addition, defendants/third-party plaintiffs move for

summary judgment dismissing the plaintiff's action in its entirety or, in the alternative, for an order denying third-party defendant's motion for summary judgment. Plaintiff opposes defendants' motion and cross-moves for summary judgment on the issue of liability. Defendant/third-party plaintiffs oppose plaintiff's and third-party defendant's motions.

On a motion for summary judgment, the movant bears the initial burden "of demonstrating its entitlement to judgment as a matter of law by proffering evidentiary proof in admissible form" (*DeBartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326, 1326 [3d Dept 2010]). "Only if that burden is met does the burden then shift to [non-movant] to raise a triable issue of fact" (*id.*).

Vehicle and Traffic Law § 1103

Defendants the Village and Roberts seek summary judgment pursuant to Vehicle and Traffic Law (hereafter VTL) § 1103 (b) on the ground that recovery for plaintiff's injuries is barred because, as the driver of a vehicle owned or operated by the Village, defendant/third-party plaintiff Roberts is exempt from the rules of the road and may only be held liable for acts occurring because of his reckless disregard for the safety of others. Defendants/third-party plaintiffs argue in the alternative that plaintiff did not sustain a serious injury as that term is defined pursuant to Insurance Law § 5102 (d).

Liability for damage alleged to have been caused by "a snowplow put to its intended use" is governed by VTL § 1103 (b) (*Howell v State*, 169 AD3d 1208, 1209

[3d Dept 2019], *lv denied* 33 NY3d 907 [2019]). VTL § 1103 "appl[ies] to drivers of all vehicles owned or operated by the United States, this state, or any county, city, town, district, or any other political subdivision of the state" except as otherwise provided for under section 1103. "Vehicle and Traffic Law § 1103 (b) . . . 'exempts from the rules of the road all vehicles . . . which are actually engaged in work on a highway, and imposes on such vehicles a recklessness standard of care' " (*Howell v State*, 169 AD3d at1209 *quoting DeLeon v New York City Sanitation Dept.*, 25 NY3d 1102, 1105 [2015][*internal quotations omitted*]). "As such, liability will only attach if defendant and its employees behaved in a reckless manner, meaning a 'conscious disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' " (*id. quoting Bliss v State of New York,* 95 NY2d 911, 913 [2000] [*internal quotations omitted*).

VTL § 1103 governs the instant suit. It is undisputed that at the time of the accident defendant Roberts was an employee of the Village and was operating a snowplow that belonged to the Village. Defendants established prima facie "that [Roberts] was actually engaged in work on a highway at the time of the accident and was therefore entitled to the protection of Vehicle and Traffic Law § 1103 (b)" (*Veralli v O'Connor*, 2021 WL 115530, *1 [2021]). Defendant Roberts states in his affidavit offered in support of the instant motion that on the day of the accident he was assigned to plow Village roads, including Bonticou View Drive, and was making a second pass with the snowplow on Bonticou View Drive when the accident occurred. Defendant Roberts further states that:

> "5. While plowing Bonticou View Drive I was heading west and slightly downhill approximately 10-15 yards east of route 32 at a decelerating speed of between 20-25 MPH. I was slowing due to the slight downhill grade as Bonticou View Drive descends toward Route 32.
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> 6. As I proceeded toward Route 32, the snow plow on the DPW truck which I was operating became caught in a snow bank alongside a ditch to my right. In order to avoid drifting into the ditch on the right side of the road and to avoid striking a nearby fire hydrant, I raised the plow blade and steered to the left so as to regain control."

Plaintiff's reliance upon portions of defendant Roberts's affidavit and deposition testimony that the truck's plow was raised at the time of the accident is insufficient to create a triable issue of fact whether defendant Roberts was actually engaged in work at the time of the accident (*see Clark v Town of Lyonsdale*, 166 AD3d 1574, 1574 [4th Dept 2018]) evidence that plow was up at time of accident did not raise triable issue whether snowplow was actually engaged in work on a highway at time of incident where plaintiff did not dispute snowplow driver was "working his run or beat at the time of the accident").[1] Here, defendant Roberts testified that while plowing Bonticou View Drive at approximately 4:30 p.m., just a few minutes prior to the accident, the plow became caught in a snow bank and he raised the plow's blade to avoid drifting into the ditch and striking a fire hydrant.

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[1] The significance attributed by plaintiff to the Court's holding in *Hofmann v Town of Ashford*, (60 AD3d 1498, 1499 [4th Dept 2009] *lv denied* 64 AD3d 1200 [4th Dept 2009]), is misplaced. There, the determinative fact was that the accident did not occur on the county driver's assigned plow route, and the Court held that the VTL § 1103 exemption does not apply to a driver traveling from one work site to another. The raised position of the blades and the fact that the plow was not sanding or salting the road at the time of the accident was mentioned in further support of the Court's finding.

The court is unable to conclude that the momentary lift of the plow's blade warrants a finding that defendant Roberts was not actually engaged in work on the highway at the time of the accident. Rather, defendant Roberts's act of lifting the blade was done in the normal course of plowing (*see Matsch v Chemung County Dept of Pub Works*, 128 AD3d 1259, 1261 [3d Dept 2015] *lv denied* 26 NY3d 997 [2015] court rejected plaintiff's argument that defendant sweeper was not actually engaged in protected work because broom was not engaged at time of accident). As defendant Roberts described during his deposition, "[w]hen you're [sic] plowing snow as you get closer to the snowbank you're trying to push snow as close to the snowbank as you can to keep the road as wide as you can. Sometimes a snowbank will catch your plow and start dragging you into the bank, so you lift it up to get yourself undone from the bank so you don't go into like a ditch or whatever, a mailbox, anything." Nor does plaintiff dispute that Bonticou View Drive was part of defendant Roberts's assigned route (*see Clark v Town of Lyonsdale*, 166 AD3d at 1574). Accordingly, "[i]nasmuch as 'the snowplow [here] was clearing the road during a snowstorm' when the accident occurred, both the snowplow and its driver are exempted 'from the rules of the road' " (*Howell v State of New York*, 169 AD3d at 1209 *quoting Riley v County of Broome*, 95 NY2d 455, 463 [2000]).

Thus, defendants may only be liable if defendant Roberts "behaved in a reckless manner, meaning a 'conscious disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' " (*id. quoting Bliss v State of New York*, 95 NY2d 911, 913 [2000][internal quotations omitted]; *see*

Veralli v O'Connor, 2021 WL 115530 at *1). The court concludes that a triable issue of fact does not exist whether defendant Roberts behaved in a reckless manner and the complaint must be dismissed.

Defendants offer sufficient proof prima facie to establish that defendant Roberts's conduct under the circumstances was reasonable and did not amount to a reckless disregard for the safety of others (*see* VTL § 1103 [b]). Defendant Roberts asserts in his supporting affidavit and deposition testimony that prior to the accident he was not distracted, and that the plow's flashing light beacon, driving headlights and four-wheel drive were activated. He decelerated to a speed of approximately 20-25 MPH as the plow descended the "slight downhill grade" on Bonticou View Drive. As the plow descended, its blade "became caught in a snowbank" because, as defendant Roberts testified, "[s]ometimes a snowbank will catch your plow and start dragging you into the bank." The plow "continued to slide downhill . . . toward Route 32 [and,] due to a sheet of road ice," defendant Roberts was unable to regain control of the plow, "despite applying steady pressure to the [plow's] ABS Braking system" up until the time of impact. Defendant Roberts was unable to stop at the stop sign and entered Route 32 colliding with third-party defendant Chubrax's truck. Defendant Roberts estimated that the snowplow was traveling at a speed of approximately 10 MPH at the time of impact.

Plaintiff has not, in the court's view, offered sufficient proof to raise a triable issue of fact whether defendant Roberts acted in a reckless manner. Plaintiff argues that it is undisputed defendant Roberts failed to stop at the stop sign,

thereby violating VTL § 1172 (a), and that a non-negligent explanation for the collision does not exist. She asserts that he contributed to the accident by raising his plow, thereby resulting in less friction with the roadway and making it more difficult for the plow to slow down or stop, and that issues of fact exist whether he violated VTL § 1180 (a) by exceeding the speed limit.

Plaintiff has not offered reliable proof, however, to show that defendant Roberts's act in passing through the stop sign was the result of any reckless conduct on his part. Neither plaintiff nor third-party defendant Chubrax observed defendant Roberts's conduct prior to the accident, and plaintiff does not offer any expert opinion regarding the cause of the accident. Plaintiff's suggestion that the plow's speed was excessive, without more, is also speculative considering defendant Roberts's testimony that he was traveling 20-25 MPH just prior to the accident and estimated a speed of 10 MPH upon impact. Nor is proof that defendant Roberts violated one or more VTL sections, without more, sufficient to raise a triable issue whether defendant Roberts behaved in a reckless manner. Indeed, the very purpose of VTL § 1103 is to exempt drivers like defendant Roberts from liability for violations of such rules of the road absent reckless behavior. Finally, plaintiff's argument that a non-negligent explanation for the collision does not exist is insufficient to meet her shifting burden where, as here, the standard is recklessness. At most, the proof offered by plaintiff suggests that one or more acts by defendant Roberts may have been negligent, but the proof offered is not probative of a " 'conscious disregard of a known or obvious risk that was so great as

to make it highly probable that harm would follow' " (*id. quoting Bliss v State of New York*, 95 NY2d at 913).

Therefore, the court need not reach the issue of whether the plaintiff suffered a "serious injury" under Insurance Law § 5102[d].

Accordingly, it is

ORDERED that defendants/third-party plaintiffs' motion for summary judgment on liability is granted, plaintiff's cross-motion on the issue of liability is denied, plaintiffs' action is dismissed in its entirety, and third-party defendant's motion to dismiss, therefore, is denied as moot.

This constitutes the decision and order of the Court. The original decision and order is being transmitted to defendants' counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this decision and order does not constitute entry or filing under CPLR 2220 and counsel is not relieved from the applicable rules respecting filing and service.

Dated: Kingston, New York
March 8, 2021

HON. CHRISTOPHER E. CAHILL, JSC

Papers Considered

1. Notice of Motion for Summary Judgment dated June 4, 2020;
2. Affirmation of Crystal Navarra, Esq. dated June 4, 2020 with exhibits;
3. Notice of Motion for Summary Judgment dated June 26, 2020;

4. Affirmation in Support of Defendants' Motion for Summary Judgment and in Opposition to Third-Party Defendant's Motion for Summary Judgment of Michael Martens, Esq. dated June 26, 2020 with exhibits;
5. Reply Affirmation by Paul A. Hurley, Esq. dated July 8, 2020;
6. Affirmation in Opposition to Defendants' Summary Judgment Motion and In Support of Cross-Motion for Summary Judgment by Derek J. Spada, Esq. with exhibits;
7. Reply Affirmation in Further Support of Defendants' Motion for Summary Judgment and In Opposition to Plaintiff's Cross Motion by Nicholas A. Pascale, Esq. dated August 14, 2020.