To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JOHN BELLANTONI,

Plaintiff,

-against-

WILLIAM H. AVERY and
VILLAGE OF TARRYTOWN,

Defendants.

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DECISION AND ORDER
Index No.: 55175/2023
Motion Date: 06/13/2023
Seq. No.: 2

DAMARIS E. TORRENT, A.J.S.C.

The following papers numbered 1 to 19 were read on the motion by defendants for an order granting summary judgment dismissing the complaint:

PAPERS	NUMBERED
Notice of Motion / Affirmation (Zefi) / Exhibits A – F / Statement of Material Facts	1 – 9
Affirmation in Opposition (Greenspan) / Exhibits 1 – 7 / Response to Statement of Material Facts	10 – 18
Reply Affirmation (Zefi)	19

This action arises out of a motor vehicle accident between a passenger car and a snowplow truck that occurred on January 7, 2022, in the town of Greenburgh, New York. On that date, plaintiff's vehicle and defendants' municipal snowplow vehicle were proceeding eastbound on Route 119 approaching the intersection of Old White Plains Road when the vehicles collided as defendant driver Avery attempted to make a u-turn. Plaintiff's prior motion for an order granting summary judgment on the issue of liability was denied by Decision and Order of this Court dated July 14, 2023.

By Notice of Motion filed on May 10, 2023, defendants seek an Order granting summary judgment dismissing the complaint. Defendants contend that Avery was actually engaged in work on a highway within the meaning of Vehicle and Traffic Law § 1103(b) at the time of the accident, and thus defendants can be held liable only if Avery acted with reckless disregard for the safety of others in attempting to execute a u-turn. Defendants contend that the record contains no evidence to suggest that Avery's conduct was reckless, and thus that the complaint should be dismissed.

Plaintiff in opposition contends that Avery, a municipal employee operating a municipal snow plow vehicle, does not qualify for the VTL § 1103(b) exemption because he was traveling outside of the boundaries of the municipality, between sites, and was not actually engaged in work on a highway. Specifically, plaintiff relies on the location of the collision being outside of Tarrytown and points to the affidavit of plaintiff Bellantoni in support of the claim that the plow was disengaged at the time of the collision. Plaintiff further contends that Avery could have taken a more logical route to return to his assigned work area and failed to explain why he chose not to do so. Plaintiff does not submit any argument on the issue of whether Avery acted with reckless disregard for the safety of others in executing a u-turn. Plaintiff thus concludes that the motion should be denied.

In reply, defendants contend that Avery's chosen path of travel is irrelevant to the inquiry on this motion, as is plaintiff's assertion that Avery's plow and salt spreader were not engaged at the time of the accident. Defendants thus conclude that the statutory exemption in VTL § 1103(b) applies, and that plaintiff's failure to raise a triable issue of fact as to whether Avery acted with reckless disregard for the safety of others requires dismissal of the complaint.

The Court has fully considered the submissions of the parties.

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . . . Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). As stated in *Scott v Long Island Power Auth.* (294 AD2d 348, 348 [2d Dept. 2002]):

> "It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether 'by no rational process could the trier of facts find for the nonmoving party' (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366)."

Vehicle and Traffic Law § 1103(b) provides for an exemption from the rules of the road for hazard vehicles: when a vehicle is actually engaged in work on a highway, the operator of that vehicle is not liable for an accident due to their negligence (*Riley v County of Broome*, 95 NY2d 455, 461 [2000]). The plaintiff then has the burden to prove that the operator acted with reckless

disregard for the safety of others to recover against the defendant in the action (*id.* at 466). "Section 1103 (b) states that a vehicle 'actually engaged in work on a highway' is exempt from the rules of the road. The statute does not require that a vehicle be located in a designated 'work area' in order to receive the protection" (*id.* at 468). A hazard vehicle is "actually engaged in work" when it performs construction, repair, maintenance, or similar work (*id.* at 464). However, when a hazard vehicle is not actively performing its function, courts will sometimes find it "actually engaged in work on a highway" when the deviation from actual work is minimal and necessary (*see Skolnick v Town of Hempstead*, 278 AD2d 481 [2d Dept 2000]).

Defendants made a prima facie showing of their entitlement to judgment as a matter of law by submission of evidence sufficient to establish that defendant Avery was actually engaged in work on a highway at the time of the accident, and that Avery did not act with reckless disregard for others in operating the defendants' snow plow truck. In opposition, plaintiff failed to raise a triable issue of fact. The motion thus is granted, and the complaint is dismissed.

As an initial matter, it cannot be said that Avery was not "actually engaged in work on a highway" when he drove a short distance outside Tarrytown to make a u-turn to go back to his assigned route. Plaintiff cites, and the Court's research revealed, no case denying the section 1103(b) exemption to a municipal vehicle solely on the ground that the vehicle had briefly left the geographic boundaries of the municipality. Similarly, no case is found denying the exemption on the ground that the defendant driver may have been able to take a slightly shorter detour, as plaintiff's opposition seems to suggest in arguing that Avery should have turned right onto Route 119 instead of turning left and then making a u-turn. Instructive on this issue is *Levine v GBE Contracting Corp.*, 2 AD3d 596 (2d Dept 2003), in which the Second Department held that a truck carrying sandblasting materials was actually engaged in work on a highway when it made a u-turn

on the New York State Thruway, at a location which defendant's president testified was outside the vehicle's work area, to travel to its designated work zone.

Further, the evidence in the record supports Avery's claim that he was actively plowing and salting at the time of the accident. The photograph annexed to the moving papers as Exhibit 1 shows a line of freshly plowed roadway leading to the scene of the accident, which aligns with Avery's claim that he was proceeding in the left lane with his plow down immediately before he attempted to execute the u-turn. Plaintiff asserts that his Exhibit 2, a photograph taken from police body camera footage at the accident scene, contradicts Avery's claim. However, that photograph (and the body camera footage submitted in hard copy as Exhibit 4) shows the same freshly plowed line in the left lane, again supporting Avery's claim that his plow was down immediately prior to the collision.

In any event, plaintiff's contention that Avery was not engaged in work because his plow was raised is unavailing, as Avery need not be so immediately and continuously engaged in work to qualify for the exemption. A vehicle may be deemed engaged in work on a highway in response to a snowstorm even if the vehicle is not engaged in the acts of plowing and salting (*see Orellana v Town of Carmel*, 212 AD3d 834 [2d Dept 2023][vehicle driven by Superintendent of Highways for the purpose of inspecting roadways to identify areas requiring attention deemed engaged in work on a highway]; *Veralli v O'Connor*, 190 AD3d 783 [2d Dept 2021][snow plow truck not engaged in plowing or salting as driver searchecd for icy spots to salt deemed engaged in work on a highway]; *Lobello v Town of Brookhaven*, 66 AD3d 646 [2d Dept 2009][dump truck making u-turn to return to school parking lot to spread sand deemed engaged in work on a highway]). Plaintiff thus failed to raise a triable issue of fact as to whether Avery was actually engaged in work at the time of the subject accident.

In the face of the section 1103(b) exemption, plaintiff's burden on this motion is to raise a triable issue of fact as to whether Avery acted with reckless disregard for the safety of others. In order to fulfill this burden, a plaintiff is required to prove that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" and has done so with "conscious indifference to the outcome" (*Saarinen v. Kerr*, 84 NY2d 494, 501[1994]). The record contains no evidence from which a rational jury could conclude that Avery acted recklessly, and plaintiff's opposition contains no argument on this issue.

Accordingly, it is hereby

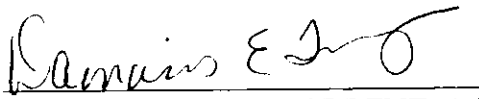
ORDERED that the motion is granted, and the Clerk shall enter judgment dismissing the complaint; and it is further

ORDERED that, within ten (10) days of the date hereof, defendants shall serve a copy of this Decision and Order, with notice of entry, upon plaintiff, and shall file proof of such service on NYSCEF.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 8, 2023
White Plains, New York

E N T E R:



HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF