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MEMORANDUM

SUPREME COURT, NASSAU COUNTY

SONIA AZUCAR and OSCAR AZUCAR,

Plaintiffs,

-against-

**VERIZON NEW YORK, INC., KELLY L.
HONERKAMP and F.W. HONERKAMP III,**

Defendants.

BY: Zelda Jonas, J.S.C.

DATED: August 22, 2005

INDEX NO. 3617/04

**MOTION DATE: July 15, 2005
(Motion Seq. No. 1)**

**CARLINSKY, DUNN & PASQUARIELLO, PLLC
Attorneys for Plaintiffs
8 Duffy Avenue
Hicksville, NY 11801**

**MONTFORT, HEALY, McQUIRE &
SALLEY
Attorneys for Defendant VERIZON
By: Christopher T. Cafaro, Esq.
1140 Franklin Avenue
P.O. Box 7677
Garden City, NY 11530**

**CARTIGLIA, CONNOLLY & RUSSO
Attorneys for Defendants HONERKAMP
100 East Old Country Road
Mineola, NY 11501**

The motion by defendant, Verizon New York, Inc. ("Verizon"), for summary judgment as to the plaintiffs' complaint and the counterclaims of the co-defendants is granted for the reasons set forth herein.

Plaintiffs commenced this action for injuries allegedly sustained in a two-car motor vehicle collision that occurred on June 25, 2002 at or near the intersection of Third Street

and Main Street, Mineola, New York. Plaintiff, Sonia Azucar (the “plaintiff), was driving the plaintiffs’ vehicle eastbound on Third Street. At the intersection, she had a stop sign. The defendant, Kelly Honerkamp (“Ms. Honerkamp”), was operating the Honerkamp vehicle northbound on Main Street. Verizon’s trucks, equipment, and signs were located in the roadway at the southeast corner of the intersection of Third and Main (*see*, Exhibit E annexed to Verizon’s motion). The Verizon employees were in and around a manhole.

Plaintiffs contend that the plaintiff’s and Ms. Honerkamp’s view and lanes of travel were obstructed by the Verizon vehicles, and this caused the collision between the plaintiffs’ vehicle and the Honerkamp vehicle. Plaintiffs also allege Verizon failed to provide appropriate warnings to the area traffic and failed to place a flag person at the intersection to direct traffic around the work site.

Verizon notes VTL § 1103(b) exempts all vehicles actively engaged in work on a highway from the standard rules of the road. Verizon contends that, pursuant to VTL § 1103(b), plaintiffs must show that the actions of Verizon’s employees, vehicles, etc., demonstrated a reckless disregard for the safety of others.

Verizon established a *prima facie* case of entitlement to summary judgment through the deposition of Thomas Tricoukes (“Tricoukes”), an outside field technician with Verizon (*see*, Exhibit H annexed to Verizon’s motion). Tricoukes stated no flag person was needed at the intersection where the Verizon trucks were located since the Verizon employees had not restricted the area to a single lane of traffic (pp. 31-33 of Exhibit H). Tricoukes indicated drivers such as the plaintiff were required to stop at the

stop sign and inch up (*see* pp. 45-46 Exhibit H) before they proceeded.

Verizon contends that the signs, safety cones, etc., in lieu of a flag person does not equate to reckless conduct by the Verizon employees.

Plaintiffs concede that VTL § 1103(b) does apply to the Verizon trucks, but plaintiffs contend that an issue of fact exists as to whether or not Verizon's conduct demonstrated a reckless disregard for the safety of others.

Except for the provisions regarding driving under the influence of drugs and alcohol, the rules of the road explicitly do not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway (VTL § 1103[b]; *Riley v. County of Broome*, 95 N.Y.2d 455).

Plaintiffs and Verizon are correct in concluding that VTL § 1103(b) is applicable herein since vehicles engaged in road work, such as the Verizon vehicles, are given the same lesser standard of care as emergency vehicles (*Riley v. County of Broome, supra*). Thus, the Verizon employees are subject to a "reckless disregard" standard of review (*Riley v. County of Broome, supra*).

Here, the Verizon employees were engaged in work on the highway, and they were not merely traveling from one work site to another wherein the statutory rules of the road exemption would not be applicable (*see, Davis v. Incorporated Village of Babylon*, 13 A.D.3d 331; *Ibarra v. Town of Huntington*, 6 A.D.3d 391).

The standard of care owed to other drivers by the vehicles actually engaged in work on a highway is such that said vehicles engaged in work shall proceed at all times

during all phases of such work with due regard for the safety of all persons, and the vehicles cannot have reckless disregard for the safety of other drivers (*Riley v. County of Broome, supra*).

In order to rebut defendant's prima facie case, plaintiffs, in light of the testimony of the Verizon employees, have the burden to show that the Verizon employees were not actually engaged in work on a highway or that they demonstrated a reckless disregard for the safety of others (*Sullivan v. Town of Vestal*, 30 A.D.2d 824).

To show reckless disregard, plaintiffs must demonstrate that the defendant Verizon 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 the conscious indifference to the outcome (*Saarinen v. Kerr*, 84 N.Y.2d 494; *Levine v. GBE Contracting Corp.*, 2 A.D.3d 596; *Green v. Covington*, 299 A.D.2d 636).

A review of the record herein reveals the absence of reckless disregard for the safety of others by Verizon. Plaintiffs merely present conclusory and speculative assertions that find no support in the record. Plaintiffs' reliance on *Skolnick v. Town of Hempstead*, 278 A.D.2d 481, is misplaced since the lower court was reversed at trial for failure to give a charge on reckless disregard as to standard of care owed by defendant.

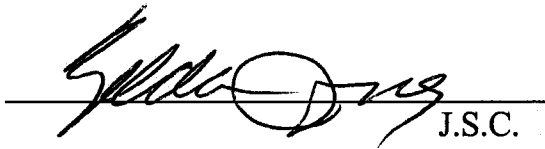
No competent evidence was presented in opposition to the summary judgment to establish that any given regulatory or statutory provision mandated that a flag person be utilized in the Verizon operation, and Verizon has made a *prima facie* showing that the

lack of a flag person was not a proximate cause of the accident (*see, Sega v. Ryder*, 287 A.D.2d 848).

Based on the record herein and the testimony of the Verizon employee, this Court can find no viable contention of recklessness as to the placement of the Verizon vehicles, the signs, safety cones, etc., at the subject intersection.

In conclusion, Verizon is correct in arguing that the reckless disregard standard set forth in VTL § 1103(b) applies to the facts of this case, and it is the standard by which their conduct is to be judged. Verizon has tendered sufficient proof in support of its motion for summary judgment, and plaintiffs having failed to raise a question of fact as to whether Verizon employees' conduct rose to the level of reckless disregard, Verizon's motion for summary judgment must be granted.

Submit judgment on notice.


J.S.C.