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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT:

**Hon. Burton S. Joseph,
Justice.**

EVELYN J. NOBERINI,

Plaintiff,

- against -

SYOSSET FIRE DISTRICT and JOSEPH FASSANO,

Defendants.

Trial/IAS Part 19
Index No. 1621/1998
Motion No. 002
Motion Date 5/8/2001

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Papers Numbered

Notice of Motion, Affidavit & Exhibits Annexed.....	1
Affidavit in Opposition & Exhibits Annexed.....	2
Reply Affirmation.....	3

Upon the foregoing papers and for the following reasons, the motion by Defendants Syosset Fire District and its volunteer firefighter, Joseph Fassano, for summary judgment dismissing the complaint, is granted.

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff Evelyn J. Noberini as a result of a traffic accident with a fire emergency truck owned by the Fire District and operated by Fassano at the intersection of South Woods Road and Jericho Turnpike in Woodbury, New York, on January 15, 1997. According to the Plaintiff, her motor vehicle came into contact with the Defendants' emergency vehicle after it passed through a red light on its way to a car fire emergency. Issue was joined shortly after commencement of the

action by service of a Verified Answer. Discovery proceedings have now concluded and the case is currently awaiting trial assignment.

By Notice of Motion, returnable May 8, 2001, the Defendants move for summary judgment in their favor dismissing the complaint, pursuant to CPLR 3212, on the grounds that the Plaintiff has failed to establish that the Defendants' actions rose to the level of reckless disregard for her safety on the roadway and are, thus, protected and this action barred by qualified immunity pursuant to Vehicle & Traffic Law § 1104. In opposition to the motion, the Plaintiff conclusorily argues that there are triable issues of fact, as to the speed of the Defendants' vehicle and the use of emergency signals, which prevent summary disposition. This Court disagrees.

Vehicle & Traffic Law § 1104 affords the driver of an emergency vehicle a legal privilege to proceed past a steady red light or stop sign after slowing down as may be reasonably necessary for safe operation on the roadway (*compare, Szczerbiak v Pilat*, 90 NY2d 553, 556, with, *Campbell v City of Elmira*, 84 NY2d 505, 510). Liability shall not attach to an emergency services organization unless the plaintiff can prove that the operator drove the vehicle with a "reckless disregard for the safety of others" (Vehicle & Traffic Law § 1104[e]; *Crapazano v County of Nassau*, 272 AD2d 363; *Young v Village of Lynbrook*, 234 AD2d 455, *lv denied* 89 NY2d 812). "Reckless disregard" requires evidence 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" (*Saarinen v Kerr*, 84 NY2d 494, 501; *see, Mulligan v New York City Tr. Auth.*, 245 AD2d 277; *DeLeonardis v Port Washington Police Dist.*, 237 AD2d 322).

Applying these principles to the matter at bar, the Defendants are entitled to summary judgment dismissing the complaint. The record reveals that, even giving the Plaintiff all inferences in her favor, the Defendants did not act with reckless disregard for the safety of hers or others. The driver of Defendants' emergency truck, Mr. Fassano, testified that he came to a complete stop before entering the intersection at issue, and then "inched forward" after seeing westbound traffic yield to his flashing lights and emergency siren. He was waiting for eastbound traffic to clear when the Plaintiff was the only vehicle that did not yield the right of way to him, and struck the rear of his vehicle. The Courts have consistently held that when an emergency vehicle uses flashing lights and siren, and exercises reasonable care upon approaching an intersection, as here, no recklessness can be found (*see, Mulligan v City of New York, supra*, at 278; *Powell v City of Mt. Vernon*, 228 AD2d 572, 573, *lv denied* 89 NY2d 806, 807). Thus, this Court believes that the Defendants have established their defense against liability as a matter of law.

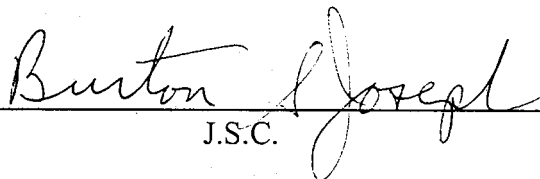
Nor can this Court second guess the split second decision made by the Defendants to go through the red light when traffic was present, as insisted by the Plaintiff. The New York Court of Appeals has held that slight or momentary departures from traffic safety rules made in the field under highly pressurized conditions are pure judgment calls attendant to driving under emergency circumstances and are not the types of actions to which liability for reckless conduct can be reasonably attached (*see, Saarinen v Kerr, supra*, at 502-503). The Plaintiff has failed to raise a triable material issue of fact with admissible evidence which would attach a level of recklessness to the Defendants' actions. Her conclusorily and uncorroborated assertions about, *inter alia*, the existence of another emergency vehicle at the scene and the standing of the

Defendants' vehicle prior to the accident are merely raised to create a "feigned factual issue designed to avoid the consequences of her earlier" testimony and other evidence to the effect that she had heard and seen the Defendants' emergency vehicle at least one minute before the collision (*Novoni v La Parma Corp.*, ___AD2d___, 717 NYS2d 379, 380; *Capraro v Staten Is. Univ. Hosp.*, 245 AD2d 256, 257). Moreover, public policy dictates that the possibility of incurring civil liability for what amounts to a mere failure in judgment could deter emergency personnel, as here involved, from acting decisively and taking calculated risks in order to save life or property (*id.*). Liability cannot be imposed under these circumstances.

Accordingly, the Defendants' motion for summary judgment is granted and the complaint is hereby dismissed in its entirety. This constitutes the decision, order and judgment of the Court.

ENTER:

Dated: Mineola, New York
May 30, 2001



J.S.C.

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ENTERED

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COUNTY CLERK'S OFFICE