SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

LUZ PERALTA and JOSE BOISSARD,

Plaintiff(s),

ORIGINAL RETURN DATE:08/19/11
SUBMISSION DATE: 09/30/11
INDEX No.: 7056/10

-against-

COUNTY OF NASSAU,

MOTION SEQUENCE #1

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Reply.....	3
Plaintiffs' Memorandum of Law.....	4

Motion by defendant (the "County") for an order pursuant to CPLR 3212 granting defendant summary judgment dismissing the complaint is granted.

In her complaint, plaintiff alleges that on January 10, 2009, County truck number 3124 owned and operated by defendant was engaged in snow removal and sanding activities at or near the street area in front of the premises known as 189 Baldwin Road, Hempstead, New York. Plaintiff alleges that she was injured when County truck number 3124 threw off "a metal projectile" that struck plaintiff on her left hand and forehead while standing between two parked cars in the street. The parties refer to the "metal projectile" as a reinforcement bar (rebar) that is approximately one-half inches wide and two and one-half inches long. Plaintiff retrieved the rebar after the accident. A photograph of the rebar, which allegedly struck plaintiff, is annexed as Exhibit A to the Affirmation in Opposition.

Plaintiff does not allege in the complaint that the County had actual or constructive notice of the alleged condition that caused the injury. Plaintiff alleges the County was negligent in that it conducted and operated the sanding/salting operations in a dangerous, hazardous and unsafe manner thereby causing the incident.

In support of the motion, the Equipment Supervisor and Acting Highway Maintenance Supervisor of the Hempstead Garage testified that complaints were routed to him and that he was responsible for investigating complaints. Prior to being Equipment Supervisor and Acting Highway Maintenance Supervisor of the Hempstead Garage, he was an Equipment Operator where he would sand, salt and plow the town roads. He testified that based on his review of the records with regard to January 10, 2009, the date of plaintiff's alleged injury, truck number 3124, a six-yard dump truck, was used for applying salt to the roadways in the area where plaintiff's accident allegedly occurred.

The Operation Sheets for truck number 3124 indicated that in the month prior to plaintiff's alleged incident, the truck was only used for salting and sanding operations. It was not used for any other purpose. Any time a truck is used for any purpose, an Operation Sheet is generated.

He further testified that sometimes clogs occur in the opening to the funnel where the salt exits the vehicle. However, the only clogs he has ever experienced are frozen chunks of salt; and in his supervisory capacity, he never had any drivers bring to his attention a clog in a funnel from anything other than frozen salt.

He also testified that on the date in question, truck number 3124 was carrying 100% salt. The salt was not mixed with any other material. The salt is held in a salt dome at the Hempstead yard and is purchased from a company called Atlantic Salt. After the salt is delivered and dropped off into the salt dome, the only thing done to the salt is to load the salt into the truck.

After being shown the actual alleged piece of metal that plaintiff claims struck her on the date of her accident and photos of the alleged piece of metal identified by plaintiff as what struck her on the date of her accident, the supervisor testified that it looked like a piece of reinforcement bar (rebar) used in construction. He had no idea where it could have come from. He testified that no parts of the truck look like that. He testified that the piece of rebar was about one-half inch in diameter and

two and one-half inches long. He further testified that he had never seen anything like the piece of rebar in question in the salt pile.

The County argues that based on the evidence presented in this case, there is no indication that the piece of metal, which plaintiff claims struck her, came from the County's truck or that it was mixed in with the salt and propelled from the truck. Furthermore, there is no evidence that the piece of metal was somehow mixed in with the salt or that it could have been thrown from the truck in such a way as to strike plaintiff.

The supervisor testified that underneath the truck there is a belt that goes along the entire body of the truck and the salt travels on the belt and then makes its way to the spreader via a funnel in the back of the truck. The salt then gets placed on a spinner, and the spinner discharges the salt out of the back of the truck through a doorway that is normally around an inch and a half to two inches in height.

Plaintiff testified at her examination before trial that at the time of the accident, there were also "regular cars" traveling down the road. She recalled that there were cars on the other side of the street but could not recall whether there were vehicles in front or behind the County salter near the time of her accident. Plaintiff testified that she was shielding her eyes from sand when she saw the County truck about to pass by and that her eyes were closed immediately before the truck passed and that she was looking down at the time of her accident. She first saw the piece of metal after the accident occurred and did not see it come from the truck.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. Defendant has made an adequate *prima facie* showing of entitlement to summary judgment by demonstrating that the truck or spreader was not defective and could not have discharged the piece of metal rebar that struck plaintiff.

In opposition to the motion for summary judgment plaintiff argues that her testimony makes it clear that the rebar which hit her came from the County dump truck.

However, bald conclusory assertions or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact. *Banco Popular North America v Victory Taxi Management*, 1 NY3d 384; *Billordo v E.P. Realty Associates*, 300 AD2d 523. Next, plaintiff asserts that the County knew of prior complaints while acknowledging that defendant did not screen the salt prior to using it. Finally, plaintiff contends the spreader mechanism on the dump truck had a history of mechanical issues. Plaintiff refers to no expert authority that required the salt to be screened or sifted before being placed in the trucks for salting operations. There is no evidence that a piece of rebar was ever seen in the salt prior to the incident.

The records cited by plaintiff show that in December 2008, a few weeks prior to plaintiff's accident, the spreader was repaired. There is no indication that there was anything wrong with the spreader after this repair or at the time of the accident. Plaintiff has not come forward with any evidence to demonstrate that the condition of the truck or spreader was in any way defective or caused or contributed to the happening of the accident. Plaintiff has not submitted any evidence from an expert to indicate that the truck or spreader was in any way defective or could have discharged the piece of metal rebar that allegedly struck plaintiff.

Moreover, Vehicle and Traffic Law § 1103(b) exempts statutorily defined "hazard vehicles" engaged in highway work from the rules of the road and limits the liability of their owner and operators to reckless disregard for the safety of others. Defendant has made a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof that the truck was a hazard vehicle engaged in highway work and that it did not operate the vehicle in reckless disregard for the safety of others. Plaintiff has failed to raise a triable issue of fact as to whether defendant operated the truck in a reckless disregard for the safety of others. *Faria v City of Yonkers*, 84 AD3d 1306; *Bicchetti v County of Nassau*, 49 AD3d 788.

Although summary judgment is a drastic remedy (*Andre v Pomeroy*, 35 NY2d 361), a "court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" *(Assing v United Rubber Supply Co., Inc.*, 126 AD2d 590; *see Rotuba Extruders Ceppos*, 46 NY2d 223, 231) and where there is nothing left to be resolved at trial, the case should be summarily decided (*Andre v Pomeroy,* 35 NY2d at 364).

All proceedings under index number 7056/10 are terminated.

This decision constitutes the order of the court.

HON THOMAS P. PHELAN

Dated: 10-27-11

J.S.C.

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