To commence the 30 day statutory time period 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 PUTNAM

----------X

STEPHEN ABEL and VANESSA ABEL,

Plaintiffs,

-against -

THE TOWN OF CARMEL, COUNTY OF PUTNAM, LAKE SECOR PARK DISTRICT, GERTSEN LANDSCAPING and RYAN GERSTEN, individually and as sole proprietor of Gertsen Landscaping,

Defendants.

----------X

DECISION & ORDER

Index No. 2502-2012

Sequence No. 3

LUBELL, J.

Plaintiffs, Stephen Abel ("Plaintiff') and Vanessa Abel, his wife, bring this action for personal injuries against the Town of Carmel (and the other named defendants none of which are still in the case) in connection with injuries sustained by Plaintiff on August 17, 2009. More particularly, while Plaintiff was walking back home along the shore of Lake Secor after having gone fishing with his non-party sister, he slipped and fell into the lake on "overgrowth" described in his deposition testimony as weeds, pricker bushes, and long grass. The place of occurrence is within the boundaries of the Town of Carmel's thirty-foot wide, one-hundred-foot long storm drainage right-of-way which extends from the shoreline to Lake Shore Drive, the nearest public road.

Although there is a fenced-in playground and beach located at Lake Secor which is open to the public, the area where the accident occurred is not. In fact, there is a "NO TRESPASSING" sign posted near the entrance to the drainage area on adjacent Lake Shore Drive.

Defendant raises multiple grounds upon which dismissal is sought. Since defendant's General Obligations Law §9-103(1)(a) argument has merit, the Court need not go any further.

General Obligations Law §9-103 (1)(a) provides in pertinent

part:

> . . . [A]n owner, lessee or occupant of premises, whether or not posted as provided in section 11-2111[1] of the environmental conservation law, owes no duty to keep the premises safe for entry or use by others for . . . fishing [,among other enumerated activities,]. . . or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes . . .

There is no dispute that Plaintiff entered upon the premises, including onto and through the right-of-way, in order to go fishing[2], plaintiff in fact fished, and the accident took place while Plaintiff was traversing out of the premises back through and onto the right-of-way to return home immediately after having fished.

Upon these facts, the Court finds as a matter of law that the Town of Carmel is immune from liability under General Obligations Law §9-103(a)(1). Plaintiff, having entered upon and used the property of the Town of Carmel in pursuit of one of the statutorily specified recreational categories, with or without permission, did so at his own peril and without potential recourse for damages based on any failure of the property owner to maintain the property (see Guereschi v. Erie Blvd. Hydropower, L.P., 19 A.D.3d 1022[4th Dept 2005] quoting Farnham v Kittinger, 83 NY2d 520, 525 [1994]).

The term "entry" as used in section 9-103(1)(a) can fairly and properly be read as including the act of entering and departing a premises for a statutorily covered purpose especially where, as here, there are no intervening non-covered activities about which

---

[1] ECL 11-2111 pertains to posting lands as fishing and hunting preserves, including "any lands or waters, rights or interests therein owned, leased or otherwise acquired by the state" (ECL 11-2101, subd. 1, par. d, referenced in ECL 11-2111, subd. 1) Sega v State, 60 NY2d 183, 190 [1983]).

[2] There is no dispute that plaintiff entered upon the land with the intent to "fish" within the meaning of the definition contained in the Department of Environmental Conservation rules and regulations (6 NYCRR 197.2[c]) to which reference is made in McCarthy v New York State Canal Corp. (244 AD2d 57, 60 [3d Dept 1998][although section 9-103 does not define "fishing", 6 NYCRR 197.2 is instructive]).

to be concerned [3] (compare Cramer v Henderson (120 AD2d 925 [4th Dept 1986], infra).

> General Obligations Law § 9-103 protects private as well as government landowners from liability against claims for ordinary negligence brought by members of the public who come on their property to engage in certain enumerated activities (see, Albright v Metz, 88 NY2d 656, 661-662; Bragg v Genesee County Agric. Socy., 84 NY2d 544, 546-547), including fishing (see, General Obligations Law § 9-103[1][a]).

(McCarthy v New York State Canal Corp., 244 AD2d 57, 58 [3d Dept 1998]). Its "sole purpose [is] to induce property owners, who might otherwise be reluctant to do so for fear of liability . . ." (Ferres v City of New Rochelle, 68 NY2d 446, 451 [1986]). The existence of a "NO TRESPASS" sign does not warrant a different result (see Bragg v Genesee County Agr. Soc., 84 NY2d 544, 551 [1994][statute applies to landowners who open their land to recreationists and to those who seek to prevent others from using their lands by posting them pursuant to ECL 11-2111]).

The case of McCarthy v New York State Canal Corp. (244 AD2d 57, 60 [3d Dept 1998]), upon which Plaintiff relies, does not require a different result. Since there was no question in McCarthy, supra, that the claimant did not enter upon the premises with the intent to fish, the question was whether claimant could be said to have been engaged in fishing when, at the time of her accident, she was attempting to untangle the fishing line of a child who was engaged in "fishing". The question was answered in the affirmative.

Nor does Cramer v Henderson (120 AD2d 925 [4th Dept 1986]) nor Vogel v Venetz (278 AD2d 489 [2d Dept 2000]) warrant a different result. In Cramer v Henderson, supra, the Court determined that General Obligations Law §9-103(1)(a) did not apply. Whether viewed as in intervening act or not, the Court determined that "[p]laintiff's actions at the time of the accident were sufficiently related and incidental to swimming" which was not then an enumerated activity under General Obligations Law §9-103(1)(a),

---

[3] The "suitability" of the land for purposes of immunity under the statute is not before the Court (see Bragg v Genesee County Agr. Soc., 84 NY2d 544, 551-52 [1994]) and, in any event, does not appear to be a genuine issue.

and not the covered activity of hiking, as defendant had argued.

The case of Vogel v Venetz, supra, deals with a plaintiff who, while a guest at the defendant's motel situated in the Hamlet of Old Forge, New York, was injured when he slipped and fell on ice and snow in the motel parking lot. Although plaintiff was present in Old Forge to snowmobile on designated trails, there is no dispute that the accident allegedly took place as plaintiff was preparing to mount his snowmobile onto a trailer which was still situated in the motel parking lot. Vogel, supra, is not a section 9-103 case and Plaintiff's reliance on same is otherwise misplaced.

Although the Court need not address any of the other grounds advanced for dismissal, it nonetheless notes that equally compelling is movant's alternative argument that it owed no duty to Plaintiff under the circumstances such that summary judgment in movan't favor is otherwise appropriate notwithstanding the applicability of section 9-103. The "overgrowth" is not a defective condition but is merely part of the natural contour of the land and is an open and obvious condition over which Plaintiff voluntarily chose to traverse (see Cometti v Hunter Mtn. Festivals 241 A.D.2d 896, 898 [3d Dept 1997]).

Based upon the foregoing, it is hereby

ORDERED, that this action be and is hereby dismissed as against defendant Town of Carmel.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

The following papers were considered in connection with this motion:

PAPERS	**NUMBERED**
Motion/Affirmation/Exhibits A-L	1A
Memorandum of Law	1B
Affirmation in Opposition/Exhibits A-F	2
Reply Affirmation	3

Dated: Carmel, New York
December 6, 2012

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

TO: John T. Brennan, Esq.
Henderson & Brennan
ATTORNEYS FOR DEFENDANT TOWN OF CARMEL
222 Mamaroneck Avenue
White Plains, New York 10605

Durante, Bock & Tota, PLLC
ATTORNEYS FOR PLAINTIFF
2000 Maple Hill Street, Suite 206
Yorktown Heights, New York 10598

Law Offices of Marc D. Orloff
ATTORNEYS FOR DEFENDANTS GERTSEN LANDSCAPING & RYAN GERTSEN
55 Main Street
PO Box 386
Goshen, New York 10924