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 ORANGE

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ALICIA MERENDA,

Plaintiff,

-against-

VILLAGE OF MONROE, MONROE JOINT FIRE DISTRICT and DEPARTMENT OF PUBLIC WORKS and THE MOMBASHA FIRE COMPANY OF MONROE, N.Y.,

Defendants.

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DECISION AND ORDER

INDEX NO.: EF008537-2017
Motion Date: 5/2/19
Sequence Nos. 1 & 2

SCIORTINO, J.

The following papers numbered 1 to 44 were considered in connection with the applications of the defendants for summary judgment dismissing the complaint and all cross-claims:

PAPERS	NUMBERED
Notice of Motion (Seq. #1)/Affirmation (Waye)/Affidavit (Conklin)/ Affidavit (Baxter)/Exhibits A-P	1 - 20
Notice of Motion (Seq. #2)/Affirmation (Badura)/Exhibits A-K	21 - 33
Affirmation in Opposition to both motions (DelDuco)/Exhibits 1-6	34 - 40
Reply Affirmation (Seq. #1) (Waye)/Affidavit (Dwyer)/Exhibit Q	41 - 43
Reply Affirmation (Seq. #2) (Badura)	44

Background and Procedural History

This action for personal injuries arises out of a trip and fall accident which occurred on September 24, 2016, as plaintiff was viewing the Orange County Volunteer Firemen's Parade on Lake Street in the Village of Monroe. Plaintiff alleges that she tripped and fell over one of several traffic cones placed in vacant parking spaces on Lake Street The cones were placed to prevent cars

from parking in the spaces during the parade. Placement was in accordance with an Events Operation Plan (EOP) prepared by the Village of Monroe Police Department.

Plaintiff served a notice of claim upon the defendants Village of Monroe (Monroe) and its Department of Public Works (DPW) on November 28, 2016. An examination under oath pursuant to General Municipal Law §50-h was held on January 31, 2017. This action was subsequently commenced by the electronic filing of plaintiff's Summons and Verified Complaint on October 20, 2017. A Supplemental Summons and Amended Complaint were filed on December 19, 2017. (Exhibit A[1]) Defendants Monroe Joint Fire District (MJFD) and Mombasha Fire Company of Monroe (Mombasha) filed an answer to the amended complaint on January 11, 2018 (Exhibit D), and then filed an amended answer to the amended complaint on January 31, 2018 (Exhibit E). Monroe and DPW served an answer to the amended complaint on January 2, 2018 (Exhibit D), and by Stipulation, an amended answer to the amended complaint, interposing two cross-claims against MJFD and Mombasha, was filed on July 30, 2018. (Exhibit H) Monroe's demand for a Verified Bill of Particulars was served on January 17, 2018. (Exhibit I)

Plaintiff's Bill of Particulars to Monroe and DPW (Exhibit J) asserts that defendants were negligent in allowing and/or causing a dangerous and unsafe condition to exist in violation of various rules, specifically, the placement of a traffic cone in a vacant parking space along Lake Street and the failure to properly warn of its presence. Plaintiff's Bill of Particulars to MJFD and Mombasha (Exhibit D to Sequence #2) contains the identical language. Examinations before Trial were held on August 17, 2018. (Exhibits M and O; Exhibits H and J to Sequence #2)

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[1]Inasmuch as many of the same exhibits were supplied by all parties, unless otherwise noted, references to Exhibits refer to the Sequence #1 moving papers.

Plaintiff's Deposition

Plaintiff Alicia Merenda testified that Lake Street in Monroe was a two-way street with one travel lane in each direction and parking spaces on both sides. (Exhibit M at 17) There were no vehicles parked on Lake Street when she first arrived for the parade, and she saw cones in the parking spaces. (Exhibit M at 18-19) She and her mother set up their chairs on the sidewalk. (Exhibit M at 21) Plaintiff identified a photograph (Exhibit A) showing her standing with her arms draped over a parking meter and her chair on the sidewalk. (Exhibit M at 22) Two cones on plaintiff's side of the street are visible in Exhibit A, and plaintiff confirmed that they were in the same position in the photograph as they were at the time she arrived. (Exhibit M at 27) At a point, plaintiff left the sidewalk where her chair was to go into the street to take a picture of her son who was marching in the parade. (Exhibit M at 30) She went to the left of the parking meter shown in Exhibit A and passed beyond the point where the cone near the parking meter was located. (Exhibit M at 35) She was in the street for less than a minute. (Exhibit M at 36)

After she walked into the street, she began to take photos of her son. She would take a photo and then move in order to get a better shot. (Exhibit M at 38) She moved sideways from left to right alongside the marchers. (Exhibit M at 39) The tip of the cone, which had already been placed when plaintiff first arrived, is depicted in Exhibit A. The cone. (Exhibit M at 45) Plaintiff was positioning herself to take a photo of her son; looked over her right shoulder to make sure she was not going to bump into anyone, took a step backwards and tripped backwards over the cone. (Exhibit M at 46-47) Her right foot and lower leg came into contact with the cone. (Exhibit M at 48) Plaintiff estimated that 15-30 seconds or a minute may have elapsed from the time she took her first photograph until the time she fell. (Exhibit M at 49)

Village of Monroe

On September 24, 2016, Sergeant Douglas Krauss of the Village of Monroe Police Department was assigned to the intersection of Millpond Parkway and Lake Street. (Exhibit H at 9) He did not witness plaintiff's fall, but was advised that there had been an accident "up the street" and responded to the location. (Exhibit H at 12-13) He testified that the cones in the street had been placed, at his direction, by two officers on the midnight shift. (Exhibit H at 17, 33) The placement of the cones was directed by the event plan, created by the police chief, for traffic control and public safety, so that no one would come into their car during the parade and drive out into the parade route. The area was coned-off temporarily for pedestrian safety (Exhibit H at 18, 33, 37) However, the cones were not meant to stop pedestrians from standing along the route. (Exhibit H at 19) The cones are approximately two and one-half feet tall. (Exhibit H at 22)

MJFD and Mombasha

John M. Karl, III was deposed on behalf of defendants MJFD and Mombasha. He is a past president of the Orange County Volunteer Firemen's Association and either chaired or co-chaired three Firemen's Parades. (Seq. #1 Exhibit O at 7) As chair or co-chair, his job was to oversee the operation among the members of the organization and to work with the various agencies. (Exhibit O at 7) Karl testified that neither he, nor any member of the defendants, had any role in the placement of the cones on Lake Street,. Cones were placed solely by the Monroe Police Department. (Exhibit O at 11) The fire department gave the police no direction as to controlling vehicle traffic on the roadway. (Exhibit O at 12)

MJFD

Thomas P. Sullivan testified on behalf of MJFD, an entity composed of three fire companies within the Town of Monroe. He was the commissioner of MJFD at the time of the accident. (Seq. #2 Exhibit J at 6) MJFD played no role in the planning or execution of the parade on September 24, 2016, apart from granting permission for its fire apparatus to be used in the parade. (Exhibit J at 7-8) MJFD had no role in the parade route, or vehicle or pedestrian control,or in the placement of the cones on the street, or the fact that cones were used. (Exhibit J at 8) MJFD did not submit paperwork to the Village of Monroe for the parade. (Exhibit J at 10)

Motions for Summary Judgment

Village of Monroe (DPW) Sequence #1

By Notice of Motion originally electronically filed on February 21, 2019, Monroe[2] moves for summary judgment dismissing the complaint and all cross-claims asserted against it, or alternatively, granting judgment in its favor on the cross-claims. Monroe first asserts that it is entitled to governmental immunity for any asserted negligence. Moreover, the alleged dangerous and defective condition–the traffic cone–was both open and obvious, not inherently dangerous and therefore not actionable. Even if that were not the case, on December 10, 2015, Mombasha submitted to Monroe a Public Entertainment Event Permit Application (Exhibit N) for the parade. The application contained an indemnity clause requiring Mombasha to hold Monroe, its agents, and employees, harmless against all damages, claims, costs and expenses arising out of the parade.

[2]Although the DPW was sued, it is apparently not contested that it is a sub-unit of the Village of Monroe, and not separately amenable to suit.

David Conklin, former Monroe Chief of Police, avers in his affidavit that his duties included the additional police planning and coordination required for "special events" held in the village. After Mombasha's permit application was granted, Conklin prepared an Event Operations Plan, sometimes known as an Emergency Operations Plan (EOP), a document prepared for all special events. The EOP (Exhibit P) was drafted based on his police experience; professional judgment and discretion; knowledge of the parade route and traffic patterns within the village, and consideration of police resources, including manpower and equipment. The objectives of the EOP were traffic control; safety of parade participants and the ability of emergency vehicles to access affected roads, if necessary. Each police officer assigned to the parade had a copy of the EOP.

The EOP contained pre-parade road closures and parking modifications. It employed traffic control equipment including traffic cones, barricades and signs. The traffic cones in the parking spaces on Lake Street were placed there at about 3:00 a.m. by police officers in anticipation of the parade. The cones were standard, bright orange cones with reflective white stripes. The same cones and "no parking" signs had been used many times before.

Monroe argues that the placement of the cones was a governmental function, undertaken for the protection and safety of the public pursuant to general police powers. As such, Monroe is immune from claims arising from the performance of such a function, even if the action was negligent. Liability under such circumstances may only attach if the plaintiff was owed a "special duty", something neither pleaded nor provable. On that basis, Monroe argues it is entitled to summary judgment dismissing the complaint.

Alternatively, Monroe argues that, even if no immunity attaches, there is no liability for a condition which was open, obvious and not inherently dangerous. Finally, Monroe asserts that, if

summary judgment is denied, it is entitled to dismissal of the cross-claim asserted by defendants MJFD and Mombasha and to contractual indemnity against those entities,

MJFD and Mombasha (Sequence #2)

MJFD and Mombasha rely on the deposition of John M. Karl, chairman of the parade, who testified that neither he nor the Orange County Volunteer Fireman's Association had any role in the type or placement of the cones used, which was controlled by the Monroe Police. In particular, they cite to the plaintiff's Bills of Particulars, which assert that defendants were negligent in allowing the dangerous condition to exist, and that notice was not required because defendants created the condition. Since neither MJFD nor Mombasha had any role in causing or performing the placement of the cones, no cause of action against them can exist. Further, neither of these entities owe any duty to plaintiff; but, even if a duty was owed, the open and obvious nature of the cone would defeat any claim. In this matter, plaintiff was well aware of the cone and saw it prior to her accident. The cone was in the same position as when she first observed it. It was 2-1/2 feet tall and bright orange in color. Her view was not obstructed as she testified that she looked over her shoulder and saw no one there. She simply failed to see the cone.

Plaintiff's Opposition

Plaintiff submits a combined response to both motions. Primarily, plaintiff asserts that Monroe is not entitled to immunity as it was acting in a proprietary, not governmental function. Its dereliction of duty was in failing to maintain its street in a reasonably safe condition despite "overtones of police protection." Nor has Monroe demonstrated that its actions involved any exercise of discretion. Rather, its plan was unreasonable and failed to follow guidelines established by the Manual on Uniform Traffic Devices. As the defect arose from Monroe's failure to maintain its road

in a reasonably safe condition; it was a proprietary role not entitled to immunity.

Plaintiff further argues that the defect (the traffic cones) was a "trap for the unwary" because the crowd and the parade distracted plaintiff from its presence. Even if that were not the case, the question of whether the defect was open or obvious is not appropriate for summary judgment as it goes to comparative negligence only.

The agreement between Monroe and Mombasha was intended to be a contract,in which Monroe agreed to allow Mombasha to use its facilities in exchange for Mombasha's engaging either private security or the village police force to operate the parade. Plaintiff notes that it was the applicant (Mombasha) which was made responsible for maintaining a lane for emergency vehicles, keeping fire hydrants and alarm boxes clear, and posting informational signs. Mombasha is thus liable because it exercised control over the actors in the parade.

Monroe's Reply

The placement of the cones was a direct act in furtherance of traffic control and public safety. Plaintiff acknowledged that placement of the cones was "specifically intended to stop vehicles from parking or interfering with the parade route." It was not highway maintenance in any way. The burden shifted to plaintiff to show a material issue of fact requiring a trial. The attempt to argue road maintenance is inapposite. Nor may plaintiff allege a statutory violation for the first time in opposition to a summary judgment motion when a Demand for a Bill of Particulars sought itemization of any such claim. Finally, Monroe notes that plaintiff's opposition consists solely of the affirmation of its attorney who lacks personal knowledge of the facts and is not qualified as an expert in traffic control devices. Plaintiff has failed to establish either a special duty, an actionable defect, or the circumstances surrounding plaintiff's fall.

MJFD and Mombasha's Reply

Defendants note that plaintiff did not oppose MJFD's motion for summary judgment, as there is no argument that MJFD exercised any control over the subject parade. Nor was Mombasha a lessee of the roads, as plaintiff argues. Rather, as the chair of the parade organizing group testified, neither he nor the Orange County Volunteer Fireman's Association had any role in the placement of the cones or the ability to control that task. Mombasha also takes issue with plaintiff's assertion that an "open and obvious" condition cannot be determined as a matter of law. In this matter, plaintiff simply failed to look for a brightly colored cone which she testified she had seen more than an hour before, and caused her accident by stepping backwards while taking a photograph.

The court has fully considered the submissions before it.

Discussion

For the reasons which follow, the applications of defendants for summary judgment are granted, and the complaint and all cross-claims are dismissed.

Summary Judgment Standards

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact." (*Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 [2d Dept 2011], citing *Alvarez v Prospect Hosp.*, 68 NY 2d 320, 324 [1986])

Civil Practice Law and Rules §3212(b) states, in pertinent part, that a motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court, as a matter of law, to direct judgment in favor of any party. Such a motion shall be denied if any party shows facts sufficient to require a trial of

any issue of fact. The function of the court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The court is obliged to draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995]) Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted. (*Anyanwu v. Johnson*, 276 AD2d 572 [2d Dept 2000])

In the matter at bar, defendants have demonstrated their entitlement to judgment as a matter of law; and plaintiff has failed to demonstrate an issue of fact requiring a trial.

Governmental Immunity

Monroe has sufficiently established its right to immunity from liability based on its performance of a governmental function. The common law doctrine of governmental immunity shields public entities from liability for discretionary actions taken during the performance of governmental functions. (*Valdez v. City of New York*, 18 NY 3d 69, 76 [2011], quoting *Matter of World Trade Ctr. Bombing Litig.*, 17 NY 3d 428 [2011]) The principle of governmental immunity "reflects a value judgment that–despite injury to a member of the public–the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury." (*Valdez*, 18 NY 3d at 76, *quoting, Mon v. City of New York*, 78 NY 2d 309, 313 [1991]) When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose. (*Turturro v. City of New York*, 28 NY 3d 469, 477 [2016], *citing Applewhite v. Accuhealth, Inc.*, 21 NY 3d 420, 425 [2013])

A governmental entity performs a purely proprietary function when its activities are a substitute for or supplement traditionally private enterprises. (*Id., quoting Sebastian v. State of New York*, 93 NY 2d 790, 793 [1999]) In contrast, activities undertaken for the protection and safety of the public pursuant to general police power are governmental functions. (*Id.*) "Police and fire protection are examples of long-recognized, quintessential governmental functions." (*Id.* at 479, *quoting Applewhite*, 21 NY 3d at 425)

The determination of the primary capacity under which the agency was acting turns solely on the acts or omissions claimed to have caused the injury. (*Id., citing, World Trade Ctr. Bombing Litig.*, 17 NY 3d at 447) Regulation of traffic control 'is the exercise of an unquestioned governmental function". (*Giresi v. City of New York*, 125 AD3d 601 [2d Dept 2015], *citing, Cities Service Oil Co. v. City of New York*, 5 NY 2d 110 [1959]) However, a municipality must do more than merely allege its employee was engaged in activities involving the exercise of discretion. (*Valdez*, 18 NY 3d at 79) The Court must analyze the functions and duties of the actor's position, and whether they inherently entail the exercise of some discretion and judgment. (*Id., quoting Mon*, 78 NY 2d at 313)

In the matter at bar, plaintiff does not dispute that the police officers who physically placed the cones in the parking spaces did so pursuant to the EOP prepared by Chief Conklin. The Chief's affidavit, likewise unchallenged by plaintiff, involved his consideration of his knowledge of the parade route, the traffic patterns within the village, and the available resources, including staff and equipment. The EOP itself (Exhibit P), *inter alia*, schedules road closures and detours, identifies emergency facilities, posts assignments and details specific tasks to be performed at specific hours.

Plaintiff argues in opposition that Monroe's failure was in properly maintaining its property in a reasonably safe condition, a proprietary function. (*Wittorf v. City of New York*, 23 NY 3d 473 [2014]) But it is well-established that a municipality's issuance of a parade permit and the monitoring of the parade itself are "rooted in the traditional governmental functions of control over traffic regulation and public safety." (*Caronna v. Macy's East, Inc.*, 6 Misc. 3d 1016(a) [NY Co. 2001], *quoting, New York County Board of the Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 368 [SDNY 1993]) Unlike *Wittorf*, relied upon by plaintiff, Monroe was not engaged in road maintenance at the time of the accident. Rather, Monroe was engaged in the protection of public safety and traffic control related to the exercise of Chief Conklin's discretion.

The Court finds that, as a matter of law, the conduct of Monroe was in the nature of governmental action. Once such a determination has been made, the next inquiry is whether and to what extent the municipality owed a "special duty" to plaintiff. The duty breached must be more than that owed to the public generally. (*Applewhite*, 21 NY 3d 420, 426 [2013], *citing, Valdez*, 18 NY 3d at 75]) A special duty can arise in three situations: (a) plaintiff belonged to a class for whose benefit the statute was enacted; (b) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (c) the municipality took positive control of a known and dangerous safety condition. (*Id., citing Metz v. State of New York*, 20 NY 3d 175 [2012]) It is plaintiff's obligation to prove that the government defendant owed a special duty of care. Where plaintiff fails to meet this burden, the analysis ends and liability may not be imputed to the municipality. (*Id.*) In the matter at bar, plaintiff has neither pled nor proven that any special duty existed between herself and the defendant Monroe. Thus, even if plaintiff had been able to establish the negligence of the village, no liability would attach.

On the basis of the foregoing, the application of Monroe for summary judgment dismissing the complaint and all cross-claims is granted. The application for judgment against MJFD and Mombasha on the cross-claims is denied as academic.

Liability for Dangerous Condition

Of primary note, plaintiff's opposition to the motion of defendants MJFD and Mombasha is directed at Mombasha only. There is no allegation that they are the same entity. Thus, the motion is granted as unopposed with respect to MJFD.

Regarding Mombasha, both the complaint and amended complaint allege that Mombasha was negligent in allowing an unsafe condition to exist, and that it created the condition. Plaintiff's Bill of Particulars as to Mombasha (Exhibit D to Seq. #2) similarly alleges that defendant is not entitled to notice as it created the condition. The particular condition complained of is the placing of cones in the roadway and the failure to use proper signage. Plaintiff asserts that Mombasha had a duty to plaintiff as "the organizer of the parade and lessee of the road on which the plaintiff tripped."

Relying on *Plante v. Hinton*, 271 AD3d 781 [3d Dept 2000], plaintiff argues that Mombasha is liable as it exercised control over the actors. The Court has reviewed that case and does not find that it supports plaintiff's position in any way. Rather, the Third Department found that, even assuming that the defendant breached a duty of care to the plaintiff, in the absence of any evidence of proximate causation, there was no *prima facie* showing of liability. "Mere speculation as to [the existence of proximate cause] will not suffice." (*Id.* at 782)

More importantly, *Plante* supports Mombasha's position. "Beyond obtaining the parade permit from the Village...., the VFW performed only one organizational activity on the day of the parade, that being the presence of one of its members at the point of assembly to assign the marching

order.....The VFW performed no security functions and simply marched in its own segment of the parade. *Clearly, under such circumstances, the VFW did not have the ability to control the conduct of [third parties].*" (*Id.*) There is no allegation that Mombasha itself performed any of the placement of the traffic cones or signs; hence the only duty it could have breached is if it had responsibility for Monroe's acts. *Plante* establishes it did not. While plaintiff's opposing papers outline a list of responsibilities it claims were Mombasha's, none of those includes the placement of traffic control devices.

Even if this Court were to determine that Mombasha had a duty to plaintiff arising out of the parade permit application, no liability would attach to this open and obvious condition. While a landowner has a duty to maintain a reasonably safe premises (*See, Basso v. Miller*, 40 NY 2d 233 [1976]), there is no duty to protect or warn against an open and obvious condition that is not inherently dangerous. (*See, e.g., Bellini v. Gypsy Magic Enterprises, Inc.*, 112 AD3d 867 [2d Dept 2013]) While the question of what is open and obvious may be for the finder of fact to determine, the Court may determine that a risk is open and obvious as a matter of law where clear and undisputed evidence compels such a conclusion. (*Capasso v. Village of Goshen*, 84 AD3d 998 [2d Dept 2011])

Here, Mombasha has met its burden to establish that the traffic cone was not inherently dangerous, and that its placement was both open and obvious. In her deposition, plaintiff acknowledged that a photograph (taken by her mother) showed the cone as it appeared at the time of her accident, and that she had noticed the placement of the cones when first arriving at the scene. Plaintiff's own testimony established the open and obvious nature of the subject cone. (*Bellini*, 112 AD3d at 868; *Bernth v, King Kullen Grocery Co., Inc,*, 36 AD3d 844 [2d Dept 2007])

In opposition, plaintiff failed to raise a triable issue of fact. Instead, plaintiff, by her counsel's affirmation, attempts to raise new theories: first, that the use of the traffic cones was a violation of th Manual on Uniform Traffic Devices; and second, that the cones acted as a "trap for the unwary" plaintiff who was distracted by the crowd and the parade. Even if the Court were inclined to permit plaintiff to raise new theories of liability, unpled in the complaint and unspecified in the Bills of Particulars, the affirmation of counsel, who is neither an expert on the safety issue nor has any personal knowledge of the facts, is insufficient to raise an issue of fact to defeat summary judgment. (*See, Karakostas v. Avis Rent A Car Systems*, 301 AD2d m632 [2d Dept 2003]) Counsel's argument that plaintiff was distracted by the parade or a crowd is nothing more than speculative and conclusory and cannot raise a triable issue of fact. (*Bartholomew v. Sears Roebuck & Co.*, 159 AD3d 786 [2d Dept 2018])

On the basis of the foregoing, the application of defendant Mombasha for summary judgment is granted, and the complaint and all cross-claims as to Mombasha is likewise dismissed.

Conclusion

The applications of all defendants for summary judgment are granted. The Complaint is dismissed. The foregoing constitutes the Decision and Order of the Court.

Dated: July 2, 2019
Goshen, New York

ENTER

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*