SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the 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.

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NFS LEASING, INC.,

Plaintiff,

-against-

CITY OF MOUNT VERNON, NEW YORK,

Defendant.

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DECISION & ORDER

Index No: 61386/2019

Motion Sequence No. 3

The following papers (NYSCEF document nos. 123-172; 176-181; 183-186) were read on the motion by the plaintiff for an order: (a) granting partial summary judgment on the issue of liability on the first, second, and third causes of action asserted in the complaint which are for negligence, conversion, and trespass to chattel; (b) dismissing defendant's first affirmative defense alleging failure to state a cause of action to the sole extent that said affirmative defense applies to the plaintiff's first, second, and third causes of action for negligence, conversion, and trespass to chattel, and dismissing defendant's second and fourth affirmative defenses alleging failure to comply with the terms of an "Equipment Lease and/or the Assignment Agreement" and unclean hands; and (c) severing plaintiff's remaining causes of action.

Notice of Motion-Affidavits-Memorandum of Law-Exhibits (1-7)-Affirmation-Exhibits (1; 1A-1G; 2-31)-Supplemental Affirmation-Exhibits (A-E)
Memorandum of Law in Opposition-Affirmation in Opposition-Exhibit (A)
Reply Memorandum of Law

Upon reading the foregoing papers, it is

ORDERED the motion by the plaintiff is granted, and plaintiff is hereby awarded partial summary judgment on the issue of liability on its causes of action for negligence, conversion, and trespass to chattel, and a trial shall be held on the issue of damages with respect to these causes of action;[1] and it is further

[1] Although plaintiff has established defendant's liability on the aforementioned causes of action, insofar as plaintiff's damages arising from the negligence cause of action are duplicative of the damages sought on the second are third causes of action for conversion

ORDERED the defendant's first affirmative defense, which alleges failure to state a cause of action, is dismissed insofar as said affirmative defense applies to plaintiff's causes of action for negligence, conversion, and trespass to chattel, and defendant's second and fourth affirmative defenses, which allege a failure to comply with the terms of an "Equipment Lease and/or the Assignment Agreement" and unclean hands, are also dismissed; and it is further

ORDERED that plaintiff's remaining causes of action are severed; and it is further

ORDERED the matter is hereby referred to the Settlement Conference Part for a settlement conference. Due to the COVID-19 public health emergency, the Clerk of the Settlement Conference Part shall notify the parties of the date, time, and method of the settlement conference.

By way of background, pursuant to a license agreement with the defendant, City of Mount Vernon (City), non-party, Kela Tennis Inc. (Kela Tennis), operated a tennis center in Memorial Field, which is located within the defendant City. The City owns Memorial Field. Pursuant to an equipment lease agreement entered into by and between Kela Tennis and plaintiff, Kela Tennis leased an air-inflated structure known as a "tennis bubble" from the plaintiff. In a consent and waiver agreement entered into by and between the City, Kela Tennis, and plaintiff, the City acknowledged, *inter alia*, plaintiff's ownership of the tennis bubble. Eventually, a dispute arose between the City and Kela Tennis.[2] Plaintiff alleges that on or about April 30, 2018, counsel for the City sent Kela Tennis a notice of cancellation of the license agreement which provided, *inter alia*, that its license would expire in thirty days and should Kela Tennis remain in possession of the licensed premises on June 1, 2018, the City would re-enter the licensed premises by force if necessary and dispossess Kela Tennis (*see* complaint at ¶¶ 20-21). Plaintiff alleges that the City never sent it a copy of any such cancellation notice in violation of the consent and waiver agreement (*see id.* at ¶¶ 18-19, 22-23). Plaintiff alleges that shortly after midnight on June 1, 2018, and without notice or warning to plaintiff, agents of the City negligently dismantled and damaged the tennis bubble (*see id.* at ¶¶ 24-27). This action by plaintiff for money damages against the City ensued.

As relevant herein, the first three causes of action asserted in plaintiff's complaint are for (1) negligence, (2) conversion, and (3) trespass to chattel. Defendant interposed an

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and trespass to chattel, plaintiff may not recover separate damages on each cause of action as same would result in a windfall to the plaintiff.

[2] The dispute between the City and Kela Tennis is not the subject of this action but the subject of a different action entitled, *Kela Tennis, Inc. v City of Mount Vernon, Figueroa & Son Contracting Co., Inc., and Richard Thomas, Mayor of the City of Mount Vernon*, pending under Westchester County index no. 59091/2018.

answer to the complaint asserting ten affirmative defenses including, the affirmative defenses of failure to state a cause of action, failure to comply with the terms of an "Equipment Lease and/or the Assignment Agreement", and unclean hands.

Following the completion of discovery, plaintiff moves for an order granting partial summary judgment on the issue of liability on its causes of action for negligence, conversion, and trespass to chattel, and severing its remaining causes of action for trial. Plaintiff also moves for an order dismissing three of the defendant's affirmative defenses alleging failure to state a cause of action but only insofar as said affirmative defense applies to plaintiff's negligence, conversion, and trespass to chattel claims, and dismissing defendant's affirmative defenses alleging plaintiff's failure to comply with the terms of an "Equipment Lease and/or the Assignment Agreement", and unclean hands. Defendant opposes plaintiff's motion.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, *prima facie*, the absence of triable issues of material fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If that burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562).

In support of the motion plaintiff proffers, among other things, various affidavits, deposition testimonies, and responses to interrogatories produced during discovery in this action. Based thereon, plaintiff contends that the undisputed evidence demonstrates defendant's liability as a matter of law on plaintiff's causes of action for negligence, conversion, and trespass to chattel.

As to its claim for negligence, plaintiff argues, as an initial matter, that as the owner of Memorial Field, and the licensor of non-party Kela Tennis, the City acted in a proprietary capacity as property owner and landlord when its agents removed the tennis bubble in an attempt to enforce its contractual rights in connection with a business dispute between it (the City) and Kela Tennis. Thus, plaintiff asserts that defendant is not insulated from liability. Plaintiff further contends that defendant owed plaintiff a duty of care because, among other things, defendant was aware that the tennis bubble was owned by plaintiff and that defendant breached its duty by failing to remove the tennis bubble with due care, which proximately caused plaintiff's damages. As such, plaintiff asserts that it is entitled to partial judgment as a matter of law on the issue of liability on its claim for

negligence. As to its claim for conversion, plaintiff argues that the undisputed evidence demonstrates that defendant exercised control over, and destroyed, the tennis bubble in derogation of plaintiff's rights. Thus, plaintiff asserts that it is entitled to partial judgment as a matter of law on the issue of liability on its claim for conversion. As to its cause of action for trespass to chattel, plaintiff argues that the undisputed evidence demonstrates that the defendant intentionally and without justification interfered with the plaintiff's use of the tennis bubble causing plaintiff harm. Thus, plaintiff asserts that it is entitled to partial judgment as a matter of law on the issue of liability on its claim for trespass to chattel. Regarding that portion of its motion for an order granting summary judgment dismissing certain of the defendant's affirmative defenses, plaintiff argues, among other things, that dismissal is warranted insofar as said affirmative defenses are devoid of sufficient factual allegations.

In opposition, defendant argues, among other things, that insofar as its removal of the tennis bubble was a governmental act, it is insulated from liability. Defendant asserts that the removal of the tennis bubble was done in order to comply with New York State environmental regulations enacted for the health and safety of the public. Defendant proffers an "Order on Consent" (Consent Order) entered into by and between the City and the New York State Department of Environmental Conservation (DEC) on May 11, 2017. Defendant contends that the Consent Order required it to obtain test samples of fill illegally deposited onto Memorial Field. Defendant asserts that when Kela Tennis refused to deflate the tennis bubble to allow the City access to take a sample as required by the Consent Order, it had no choice but to deflate the bubble. Based thereon, defendant contends that its act of deflating the tennis bubble was governmental in nature and thus, plaintiff's motion should be denied. Alternatively, defendant argues that issues of fact over the circumstances surrounding the dismantling of the tennis bubble preclude the award of summary judgment in plaintiff's favor.

In reply, plaintiff asserts, among other things, that the overwhelming evidence demonstrates that defendant was acting as a property owner and landlord when it removed the tennis bubble. Thus, plaintiff contends that defendant was acting in a proprietary capacity as a matter of law and is not insulated from liability. Plaintiff argues that the tennis bubble was private property owned by plaintiff, and that plaintiff had never given defendant permission to deflate, remove, or demolish the tennis bubble. Plaintiff asserts that defendant failed to explain how the destruction of private property—the tennis bubble—without the knowledge or consent of its owner—the plaintiff—is a valid governmental function. As to the Consent Order, plaintiff asserts, among other things, that nothing in the order mandated or authorized defendant to demolish the bubble. Rather, plaintiff contends that, as previously averred by the City's former Mayor in an affidavit submitted in connection with a different action, the DEC only required that a single soil sample be taken at the southern end of the tennis court area. Plaintiff further asserts that defendant fails to explain why, months following the request by the DEC and the deadline set forth in the Consent Order, defendant needed to tear down the tennis bubble in the

middle of the night and without notice to plaintiff. Plaintiff also notes that defendant failed to oppose that branch of its motion seeking summary judgment dismissing certain of defendant's affirmative defenses. Based thereon, plaintiff argues that its motion for partial summary judgment should be granted in its entirety.

"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. If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]; *see Granata v City of White Plains*, 120 AD3d 1187, 1188 [2d Dept 2014]). A municipality performs a "purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises" (*Turturro v City of New York*, 28 NY3d 469, 477 [2016] [internal quotation marks omitted]). "These activities include the exercise of maintenance and repair powers traditionally performed by private entities, such as a landlord. [Thus,] [w]hen a [municipality] acts in a proprietary capacity as a landlord, it is subject to the same principles of tort law as is a private landlord" (*Doe v City of New York*, 67 AD3d 854, 856 [2d Dept 2009] [internal citations omitted]; *see Miller v State of New York*, 62 NY2d 506, 511 [1984]).

"In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers" (*Turturro*, 28 NY3d at 477-478 [internal quotation marks omitted]). Governmental functions include the exercise of police and fire powers (*see Doe*, 67 AD3d at 856). "If a municipality was acting in a governmental capacity, then the plaintiff must prove the existence of a special duty. Even if a plaintiff satisfies that burden, a municipality acting in a discretionary governmental capacity may rely on the governmental function immunity defense. That defense provides immunity for the exercise of discretionary authority during the performance of a governmental function" (*Turturro*, 28 NY3d at 478-479 [internal quotation marks and citations omitted]; *Valdez v City of New York*, 18 NY3d 69, 75-77 [2011]). Before a defendant can rely on such a defense, it must be determined that the municipality was acting in a governmental capacity (*see Turturro*, 28 NY3d at 479). "The defense shields public entities from liability for discretionary actions taken during the performance of governmental functions" (*Turturro*, 28 NY3d at 479 [internal quotation marks, brackets, and emphasis omitted]). However, "the defense has no applicability where "the [municipality] has acted in a proprietary capacity, even if the acts of the [municipality] may be characterized as discretionary" (*Connolly v Long Is. Power Auth.*, 30 NY3d 719, 728 [2018] [internal brackets, ellipses, and quotation marks omitted]).

"[I]n light of the fact that the varied functions of a governmental entity can be interspersed with both governmental and proprietary elements, the determination of the primary capacity under which a governmental agency was acting turns solely on the acts

or omissions claimed to have caused the injury" (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 447 [2011]). Put another way, "[i]t is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability, not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred" (*Weiner v Metropolitan Transp. Auth.*, 55 NY2d 175, 182 [1982]; *Salone v Town of Hempstead*, 91 AD3d 746, 747 [2d Dept 2012]).

Here, the court finds that defendant was engaged in a proprietary function in its capacity as property owner and landlord when it directed its agents to deflate the tennis bubble in an attempt to enforce its contractual rights in connection with the dispute between it and Kela Tennis (*see Dick v Town of Wappinger*, 63 AD3d 661, 662 [2d Dept 2009]). The record is devoid of competent evidence demonstrating that defendant's actions were undertaken in a governmental capacity to protect the health and safety of the public. Notwithstanding the fact that defendant was already five months past the deadline set forth in the Consent Order, the Consent Order did not require defendant to deflate the tennis bubble. In fact, Section X. of the Consent Order required defendant "to obtain whatever permits, easements, rights of entry, approvals or authorizations [as] may be necessary in order to carry out its obligations under this Order" (Consent Order, Pechersky aff, exhibit A, p. 6). It is undisputed that defendant, who had previously acknowledged that plaintiff owned the tennis bubble, failed to give notice to plaintiff and failed to obtain plaintiff's consent when it deflated the bubble. Further, the deposition testimonies of defendant's own witnesses demonstrate that there was no emergency basis which required the deflation of the tennis bubble in the middle of the night.

Having found that defendant was engaged in a proprietary function in removing the tennis bubble on June 1, 2018, and, consequently, that ordinary rules of negligence apply, the court next addresses whether plaintiff has established its *prima facie* entitlement to judgment as a matter of law on the issue of liability on its claims for negligence, conversion, and trespass to chattel.

Negligence

Plaintiff demonstrated its *prima facie* entitlement to judgment as a matter of law on the issue of liability on its claim for negligence by establishing "(1) the existence of a duty on the defendant's part as to the plaintiff; (2) a breach of this duty; and (3) an injury to the plaintiff as a result thereof" (*Stukas*, 83 AD3d at 23). Accordingly, the burden of going forward shifted to defendant to raise a triable issue of material fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In opposition, defendant failed to raise a triable issue of material fact on the issue of liability on plaintiff's negligence claim. (*see* CPLR 3212 [b]). Contrary to defendant's contention, as the court found above, the City acted in a proprietary capacity at the time its

agents removed the tennis bubble. Consequently, ordinary rules of negligence apply and it is not necessary to determine whether plaintiff established the existence of a special duty or relationship with defendant (*see Turturro*, 28 NY3d at 478; *Moore v Del-Rich Props., Inc.*, 151 AD3d 1817, 1820 [4th Dept 2017]).

Conversion

Plaintiff demonstrated its *prima facie* entitlement to judgment as a matter of law on the issue of liability on its claim for conversion by establishing its legal ownership of the tennis bubble and the defendant's unauthorized dominion over it to the exclusion of plaintiff's right (*see Giardini v Settanni*, 159 AD3d 874, 875 [2d Dept 2018]; *Eight In One Pet Prods. v Janco Press, Inc.*, 37 AD3d 402, 402 [2d Dept 2007]). Accordingly, the burden of going forward shifted to defendant to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 557).

In opposition, defendant failed to raise a triable issue of material fact on the issue of liability on plaintiff's conversion claim. (*see* CPLR 3212 [b]). Defendant's contention that plaintiff failed to mitigate its damages goes to the issue of damages which is not the subject of plaintiff's motion.

Trespass to Chattel

Plaintiff demonstrated its *prima facie* entitlement to judgment as a matter of law on the issue of liability on its claim for trespass to chattel by establishing that defendant "intentionally, and without justification or consent, physically interfered with the use and enjoyment of personal property in [plaintiff's] possession" (*Jackie's Enters., Inc. v Belleville*, 165 AD3d 1567, 1572 [3d Dept 2018] [internal quotation marks omitted]; *Level 3 Communications, LLC v Petrillo Contr., Inc.*, 73 AD3d 865, 868 [2d Dept 2010]).

In opposition, defendant failed to raise a triable issue of material fact on the issue of liability (*see* CPLR 3212 [b]). Defendant's contention that summary judgment should be denied because there are factual issues surrounding the dismantling of the tennis bubble is without merit. In a trespass to chattel claim, "[l]iability will attach if the possessor is dispossessed of the chattel; the chattel is impaired as to condition, quality, or value; or the possessor is deprived of the use of the chattel for a substantial time. Dispossession may be committed in a variety of ways, including taking the chattel from the possession of another without the other person's consent or destroying the chattel while it is in the other person's possession" (*Hecht v Components Intl., Inc.*, 22 Misc3d 360, 369 [Sup Ct, Nassau County 2008], citing Restatement [Second] of Torts § 217). Here, as indicated above, plaintiff demonstrated its entitlement to judgment as a matter of law by demonstrating that defendant intentionally, and without justification or plaintiff's consent, physically interfered with and damaged the tennis bubble owned by the plaintiff. Defendant's further

contention—that plaintiff failed to mitigate its damages—again, goes to the issue of damages which is not the subject of plaintiff's motion.

Affirmative Defenses

The court next addresses the branch of plaintiff's motion for an order dismissing certain of defendant's affirmative defenses. Plaintiff established its *prima facie* entitlement to judgment as a matter of law dismissing defendant's affirmative defenses alleging failure to state a cause of action insofar as said affirmative defense applies to plaintiff's claims for negligence, conversion, and trespass to chattel, and the affirmative defenses of failure to comply with the terms of the "Equipment Lease and/or the Assignment Agreement", and unclean hands by establishing that these affirmative defenses are unsupported by sufficient factual allegations or evidentiary proof or are otherwise without merit (*see Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]; *cf. Golden Eagle Capital Corp. v Paramount Mgt. Corp.*, 88 AD3d 646, 648 [2d Dept 2011]). Accordingly, the burden of going forward shifted to defendant to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 557).

In opposition, defendant failed to raise a triable issue of material fact by failing to offer opposition to this branch of plaintiff's motion. Accordingly, defendant's affirmative defenses alleging: (1) failure to state a cause of action insofar as said affirmative defense applies to plaintiff's claims for negligence, conversion, and trespass to chattel, (2) failure to comply with the terms of an "Equipment Lease and/or the Assignment Agreement", and (3) unclean hands, are dismissed.

E N T E R,

Dated: White Plains, New York
June 2, 2021

Joan B. Lefkowitz

Digitally signed by Joan B. Lefkowitz
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HON. JOAN B. LEFKOWITZ, J.S.C.