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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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GRACE PLUMITALLO, an infant under the age of 14 years by her parents and natural guardians, LOUIS PLUMITALLO and MICHELLE PLUMITALLO and LOUIS PLUMITALLO and MICHELLE PLUMITALLO, individually,

Plaintiff(s),

-against-

COUNTY OF NASSAU, TOWN OF OYSTER BAY, INCORPORATED VILLAGE OF BAYVILLE and ROBERT MONTAGNESE,

Defendant(s).

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Index No. 20095/09

Motion Submitted: 9/28/11
Motion Sequence: 004

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant Village of Bayville ("Village") moves this Court for an Order granting summary judgment in its favor and dismissing the complaint and all cross claims. Plaintiffs oppose the requested relief, and assert that they are entitled to partial summary judgment in their favor declaring that there is a special relationship created between the Village and the infant plaintiff.

This action arises as the result of injuries sustained primarily by the infant plaintiff during a July 4, 2008 celebration. The celebration took place on a beach in Bayville, New York. A bonfire had been lit and individuals were shooting off fireworks. What has been described as a "ball of flame" by the infant plaintiff's father struck the infant plaintiff on her upper thighs, causing burns.

The complaint in this matter alleges that the Village was negligent in the ownership, operation, management, supervision, maintenance and control of the beach where the bonfire/fireworks occurred, and that as a result of the Village's negligence, the plaintiffs suffered injuries.

The Court has previously granted summary judgment in favor of defendants County of Nassau and Town of Oyster Bay on the grounds that they do not own or maintain the property where the celebration and accident occurred, and that they did not produce a fireworks display at that location.

The Village asserts that it is entitled to summary judgment in its favor because it owed no special duty to plaintiffs and it does not own the property on which the bonfire/fireworks were located.

Plaintiffs assert that, because the Village failed to issue a fireworks display permit, and/or enforce the State's fireworks permit law, a special relationship was created between it and the infant plaintiff.[1] Plaintiffs further allege that the Village was aware of the bonfires/fireworks occurring on the beach, but did nothing to stop the activity by enforcing New York's permit laws. In the alternative, plaintiffs contend that further discovery is necessary pursuant to CPLR § 3212 (f) in order to ascertain whether the Village "endorsed" the bonfire/fireworks.

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

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[1]Plaintiffs assert that the Village has failed to prove that it does not own the beach where the display was located. The Court rejects plaintiffs' argument in light of the affidavit of the Village Administrator, Maria Alfano-Hardy.

The rule of governmental immunity made clear in ***McLean v. City of New York*** (12 N.Y.3d 194, 203, 905 N.E.2d 1167, 878 N.Y.S.2d 238 [2009]) is that, "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from a duty to the public in general." Discretionary acts cannot serve as a basis for municipal liability, even if the conduct is negligent (***McLean, supra***; *see also* ***Donald v. State of New York***, 17 N.Y.3d 389, 395-396, 953 N.E.2d 790, 929 N.Y.S.2d 552 [2011]). Thus, if a governmental action is considered discretionary, there is no need to determine if a special duty or relationship existed between plaintiff and defendant municipality.

A governmental action is considered "discretionary" if it involves "conduct involving the exercise of reasoned judgment . . . . By contrast, ministerial acts mean[ ] conduct requiring adherence to a governing rule, with a compulsory result . . . ." (***Lauer v. City of New York***, 95 N.Y.2d 95, 99, 733 N.E.2d 184, 711 N.Y.S.2d 112 [2000]).

Accordingly, the Court will first address plaintiffs' contention that they are entitled to partial summary judgment pertaining to the existence of a special relationship between the Village and the infant plaintiff.

Plaintiffs assert that the Village failed to enforce New York State's fireworks permit law found in Penal Law § 405.00, and that the Village did not ensure that the requirements outlined in that statute were fulfilled with respect to the bonfire/fireworks that caused injury to the infant plaintiff.

Penal Law § 405.00 is entitled "Permits for public displays of fireworks," although there is authority that it applies to permits for private displays of fireworks as well (2011 N.Y. Op. Atty. Gen. No. 8, 2011 WL 3025685 (N.Y.A.G.); 2010 N.Y. Op. Atty. Gen. (Inf.) 1001, 2010 WL 2644774 [N.Y.A.G.]).

In that same 2011 Opinion, which is cited by plaintiffs, the Attorney General states that "we are of the opinion that the text and structure of the statute [***Penal Law § 405.00***] make approval and issuance of a fireworks display permit a *discretionary act* rather than a ministerial one mandated as a consequence of the successful completion of an application. The Legislature consistently used the term 'may' rather than 'shall' in connection with the issuance of a permit for the display of fireworks" (emphasis added).

Upon review of the statute relied upon by plaintiffs, the Court is in agreement with the Attorney General's Opinion. The statute clearly grants discretion to the permit authority through the use of the word "may," and further vests the permit authority, in this case the Village, to require "such other information as the permit authority may deem necessary to

protect persons and property" (***Penal Law § 405.00 [h]***). Thus, the Village cannot be held liable for the alleged failure to enforce Penal Law § 405.00, and this Court need not determine whether there was a special relationship between the Village and the infant plaintiff.[2]

Accordingly, plaintiffs have failed to establish their entitlement to summary judgment as a matter of law. Thus, plaintiffs' motion for partial summary judgment is denied.

Conversely, and as a matter of law based upon the foregoing analysis, defendants have established their entitlement to summary judgment.

The Village does not have a special duty, or relationship with, the infant plaintiff because the act complained of is not a "ministerial" one (*see* ***Clarke v. City of New York***, 82 A.D.3d 1143, 920 N.Y.S.2d 913 (2d Dept., 2011); ***Santos v. County of Westchester***, 81 A.D.3d 710, 916 N.Y.S.2d 209 (2d Dept., 2011); ***Post v. County of Suffolk***, 80 A.D.3d 682, 915 N.Y.S.2d 124 (2d Dept., 2011); ***Shipley v. City of New York***, 80 A.D.3d 171, 908 N.Y.S.2d 425 (2d Dept., 2010); ***Reid v. City of New York***, 79 A.D.3d 839, 912 N.Y.S.2d 410 [2d Dept., 2010]).

In opposition to the Village's showing, plaintiffs have failed to raise a triable issue of fact. Thus, defendant Village's motion for summary judgment is granted.

Plaintiffs' alternative request for further discovery pursuant to CPLR § 3212(f) is denied. Plaintiffs have failed to demonstrate that further discovery is anything more than a fishing expedition (***Downey v. Schneider***, 23 A.D.3d 514, 517, 806 N.Y.S.2d 657 (2d Dept., 2005); ***Price v. County of Suffolk***, 303 A.D.2d 571, 572, 756 N.Y.S.2d 758 (2d Dept., 2003); ***Greenberg v. McLaughlin***, 242 A.D.2d 603, 604, 662 N.Y.S.2d 100 [2d Dept., 1997]).

The foregoing constitutes the Order of this Court.

Dated: December 8, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.

[2]It is undisputed that the Village did not issue a permit regarding these events of July 4, 2008, and based upon the parties' submission, this Court concludes that no one ever applied for a permit.