Eberhard v Incorporated Vil. of Port Jefferson
2019 NY Slip Op 34246(U)
November 22, 2019
Supreme Court, Suffolk County
Docket Number: Index No: 622656/17
Judge: Vincent J. Martorana
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SHORT FORM ORDER INDEX NO. 622656/17

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

CHRISTINE EBERHARD,

Plaintiff,

- against-

THE INCORPORATED VILLAGE OF PORT JEFFERSON, THE INCORPORATED VILLAGE OF BELLE TERRE, THE INCORPORATED VILLAGE OF POQUOTT, THE INCORPORATED VILLAGE OF OLD FIELD, THE TOWN OF BROOKHAVEN, THE PORT JEFFERSON HARBOR COMPLEX, THE PORT JEFFERSON HARBOR COMMISSION, THE SUFFOLK COUNTY DEPARTMENT OF HEALTH SERVICES, THE COUNTY OF SUFFOLK, STONY BROOK UNIVERSITY HOSPITAL, SNOW SHED, DANFORDS PORT JEFFERSON, LLC, and THE CREST GROUP LLC,

Defendants.

ORIG. RETURN DATE: 6/1/18 (001 & 002); 7/3/18 (003); 9/11/18 (004 & 006); 9/13/18 (005); 10/11/18 (007); 11/29/18 (008); 3/14/19 (009, 010, 011 & 012)
ADJOURNED DATE: 6/27/19
MOTION SEQ. NO.: 001 - MD 002 - MG
003 - MG 004 -WDN 005 - MG
006 - MG 007 - MG 008 - MD 009 - MG
010 - MG 011 - MG 012 - MG

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Upon the following e-filed papers numbered 15-20, 33-45, 52-56, 60-64, 69-78, 80-88, 89-104, 106-227, 229-234, 235-243, 246-261, 263-287, 294-295; it is,

ORDERED that the motion by Stony Brook University Hospital seeking dismissal of Plaintiff's complaint (001) is denied as moot; Plaintiff's motion to remove its claims against Stony Brook University Hospital to the Court of Claims (003) is granted; the motion to dismiss by Snow Shed (002) is granted; the summary judgment motions by Town of Brookhaven (005), The Incorporated Village of Old Field (006), The Incorporated Village of Poquott (007), The Incorporated Village of Belle Terre (009), The Incorporated Village of Port Jefferson (010), Danfords Port Jefferson, LLC and The Crest Group (011) and County of Suffolk (012) are granted; the motion to dismiss or compel by Danfords Port Jefferson, LLC and The Crest Group (008) is denied. All claims and cross claims against Snow Shed, Town of Brookhaven, Village of Old Field, Village of Poquott, Village of Belle Terre, Village of Port Jefferson, Danfords Port Jefferson, LLC, The Crest Group, County of Suffolk and The Suffolk County Department of Health Services are dismissed. All cross-claims against Stony Brook University Hospital are dismissed.

The within action was commenced by Plaintiff seeking to recover damages allegedly sustained as a result of ingesting contaminated water in Port Jefferson Harbor when she fell off a rented paddleboard on August 27, 2016. Plaintiff's claims against defendants Snow Shed, Danfords Port Jefferson, LLC ("Danfords") and The Crest Group LLC ("Crest") arise from a paddleboard rental. Snow Shed maintains a kiosk at or near the area of a marina and docks allegedly owned and maintained by Danfords and Crest. Snow Shed rented a paddleboard to Plaintiff. Plaintiff fell off the paddleboard and ingested water that she asserts was contaminated. She subsequently became ill with a bacterial infection and suffered other medical ailments, having surgery and rehabilitative treatment, incurring medical and hospital expenses and lost time from work. Plaintiff claims that Snow Shed, Danfords and Crest were negligent in failing to inspect the area in and around Port Jefferson Harbor ("Harbor"), in failing to monitor levels of contaminants in the Harbor, in failing to warn the public and Plaintiff about contaminants in the water, failing to erect barricades and warning devices with respect to contaminated water areas and failing to supervise employees. Plaintiff's claims against the remaining defendants is that they were negligent in the ownership operation and maintenance of the harbor, that they failed to properly inspect the Harbor, that they failed to prevent dangerous contamination conditions, they failed to warn the public about said contamination conditions, they failed to prevent the public from accessing contaminated areas, and that they allowed, caused and/or permitted dangerous, hazardous and unsafe conditions to exist in the Harbor and that they failed to comply with laws and ordinances and failed to properly train employees.

Issue has been joined with respect to the Incorporated Village of Port Jefferson ("Port Jefferson"), the Incorporated Village of Belle Terre ("Belle Terre"), the Incorporated Village of Poquott ("Poquott"), the Incorporated Village of Old Field ("Old Field"), the Town of Brookhaven ("Town"), the Suffolk County Department of Health Services, the County of Suffolk, Danfords Port Jefferson, LLC ("Danfords"), and the Crest Group LLC ("Crest"). Cross-claims have been interposed by multiple defendants. Pre-answer motions to dismiss have been brought by Snow Shed and Stony Brook University Hospital. Presently before the Court are (001) Stony Brook University Hospital's motion to dismiss, (002) Snow Shed's motion to dismiss, (003) Plaintiff's motion to remove her claims as against Stony Brook University Hospital to the Court of Claims, (005) Town of Brookhaven's summary judgment motion, (006) Village of Old Field's summary judgment motion, (007) Village of Poquott's summary judgment motion, (008) Danford's and Crest's motion to dismiss or compel, (009) Village of Belle Terre's summary judgment motion, (010) Village of Port Jefferson's summary judgment motion, (011) Danford's and Crest's summary judgment motion, (012) County of Suffolk's summary judgment motion.

Motions 001 and 003

Defendant Stony Brook University Hospital ("SBUH") seeks dismissal of Plaintiff's complaint (mot seq. 001) based upon lack of subject matter jurisdiction and lack of personal jurisdiction. SBUH asserts that, as a State entity, claims seeking money damages against it must be pursued exclusively in the Court of Claims and service of process must be made upon an assistant attorney general at the Attorney General's office or upon the Attorney General. Here, Plaintiff sued SBUH in Supreme Court. No affidavit of service has been provided to demonstrate the method of service. A search of the record reveals filing of an affidavit of service indicating that process was delivered to a person at 101 Nicholls Road in Stony Brook. Plaintiff cross-moves (003) seeking removal of the claims as against SBUH to the Court of Claims pursuant to CPLR §325.

It is undisputed by Plaintiff that the proper forum for a claim seeking money damages against the State is Court of Claims (Court of Claims Act §9; ***Liddy v. DeStaso***, 2 AD3d 792, 793, 769 NYS2d 406 [2d Dept. 2003]; ***Gross v. Perales,*** 72 N.2d 231, 235–37, 527 NE2d 1205 [1988] ; ***Baisley v. Town of Kent, Putnam Cty***., 111 AD2d 299, 300, 489 NYS2d 539 [2d Dept. 1985]; ***Cass v. State***, 58 NY2d 460, 463, 448 NE2d 786 [1983]). Therefore, Plaintiff's motion seeking removal of her claims against SBUH is granted. The question of effectiveness of service is not fully addressed by the parties. No affidavit of service was presented. The Court searched the record and did locate an affidavit of service but no substantive argument for dismissal or propriety of service is made; therefore, the Court will leave the question of personal jurisdiction to be determined by the Court of Claims, should Defendant SBUH choose to raise it there. Defendant SBUH's motion to dismiss Plaintiff's claims on the basis of subject matter jurisdiction is denied as moot. Plaintiff's motion to remove its claims against SBUH to the Court of Claims is granted. All cross claims as against SBUH are dismissed due to lack of subject matter jurisdiction.

Motion 002

Defendant Snow Shed seeks dismissal pursuant to CPLR §3211(a)(1) and (5) asserting that Plaintiff signed a release exculpating Snow Shed from any negligence claims. Such release is offered as a business record attested to by Snow Shed's Secretary Marlene Pollack. Plaintiff argues that the release is void based upon General Obligations Law §5-326, or alternately, that the release did not cover the matters here at issue.

In order for dismissal to be granted based upon documentary evidence pursuant to CPLR §3211(a)(1), a defendant must submit documentary evidence of undisputed and unambiguous authenticity "that resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim" (***Hohwald v. Farm Family Casualty Insurance Company***, 66 NYS3d 316; 155 AD3d 1009 (2d Dept. 2017) quoting ***Botach Mgt. Group v. Gurash***, 138 AD3d 771, 772, 31 NYS3d 80 (2d Dept 2016). Additionally, a valid release is a complete bar to recovery for claims that are the subject of the release (***Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.***, 17 NY3d 269, 276, 952 NE2d 995, 1000 [2011]; ***Pacheco v. 32-42 55th St. Realty***, LLC, 139 AD3d 833, 833, 33 NYS3d 301, 302 [2d Dept 2016]).

The Kayak and Standup Paddleboarding Liability Release signed by Plaintiff when she rented the paddleboard from Defendant Snow Shed reads, in part,

> 1. I acknowledge that standup paddle boarding and kayaking (also referred to as "The Activity") is hazardous and involves a great risk of personal injury, I assume all risks associated with the Activity including, but not limited to, change of weather conditions, change of water conditions, hidden water obstacles, changing and unpredictable currents, drowning, exposure, riptides, undertows and sea life. I acknowledge that Kayaking and standup paddleboarding may involve serious personal injury or even death. I hereby recognize and assume those risks.

2. In consideration of the rental or demo of a standup paddleboard or kayak from The Snow Shed, I agree to release and hold harmless the Snow Shed, DF Marina, LLC dba Danford's Inn, its subsidiaries and affiliates, their respective agents, directors, officers, owners, contractors and employees (collectively the "released parties") from any and all claims I might have as a result of the Activity, including those claims based on negligence or breach of warranty. Additionally, I agree to indemnify the released parties for any other person may cause [sic] while engaged in the Activity.

Contracts intended to insulate a party from the consequences of its own negligence are generally enforceable, with some statutory exceptions, but are subject to close judicial scrutiny (***Gross v. Sweet***, 49 NY2d 102, 106–10, 400 NE2d 306, 308–11 [1979]; ***Abramowitz v. New York Univ. Dental Ctr., Coll. of Dentistry***, 110 AD2d 343, 345–47, 494 NYS2d 721, 723–24 [2d Dept. 1985]; ***Ciofalo v. Vic Tanney Gyms, Inc.***, 10 NY2d 294, 296–97, 177 NE2d 925 [1961]). To be enforceable, the release language must be absolutely clear that the limitation of liability is intended to extend to acts of negligence (although use of the word "negligence" is not specifically required)(***Id.***; *see also* ***Willard Van Dyke Prods., Inc. v. Eastman Kodak Co.***, 12 NY2d 301, 304–05, 189 NE2d 693 (1963); ***Lago v. Krollage***, 78 NY2d 95, 99–101, 575 NE2d 107, 110 [1991]).

A statutory exception to enforceability of a release for negligence claims is set forth in Gen. Oblig. Law § 5-326 in the case of pools, gymnasiums, places of public amusement or recreation and similar establishments. Gen. Oblig. Law§ 5-326 provides:

> Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

Here, Plaintiff rented a paddleboard from a kiosk situated near a public waterway. She then used the paddleboard in the public waterway. Plaintiff asserts that Snow Shed's release is unenforceable because its business is subject to the above statute. However, the Court sees no similarity between facilities open for public amusement or recreation and a kiosk which rents paddleboards. Plaintiff offers no credible support for the application of this statute to the case at bar. Plaintiff also asserts that the release at issue is unclear as to what was covered; however the release language specifically states that the releasor (Plaintiff) agrees to release and hold harmless Snow Shed "...from any and all claims [she] might have as a result of the Activity, including those claims based on negligence or breach of warranty." This unequivocal statement, contained in the second paragraph of the release, satisfies scrutiny on the issue of intentionality. A party is charged with knowledge of the contents of agreements that he or she signs and is presumed to assent to them (***Prompt Mortg. Providers of N. Am., LLC v. Zarour***, 155 AD3d 912, 914, 64 NYS3d 106, 108 [2d Dept. 2017], *leave to appeal denied*, 33 NY3d 907, 127 NE3d 317 [2019]; ***Nerey v. Greenpoint Mortg. Funding, Inc.***, 144 AD3d 646, 648, 40 NYS3d 510, 512–13 [2d Dept. 2016]; ***Holcomb v. TWR Express, Inc.***, 11 AD3d 513, 514, 782 NYS2d 840, 841–42 [2d Dept. 2004]; ***Metzger v. Aetna Ins. Co.***, 227 NY411, 416–17, 125 NE 814, 816 [1920]). It is clear from the language in the release that the parties agreed that Snow Shed would be released from general negligence claims arising from or in connection with use of the paddleboard. Plaintiff's argument that Snow Shed had a duty to inspect the harbor for and to warn patrons about contaminants in the public waterway and that such duty is unrelated to paddleboarding, therefore not covered by the release, is unavailing. Defendant Snow Shed's motion to dismiss Plaintiff's claims is granted. Opposition papers submitted by Defendants Town of Brookhaven and The Incorporated Village of Port Jefferson assert objections to dismissal of their cross claims, based upon General Obligations Law §15-108 . General Obligations Law §15-108

(b) provides: "Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules." However, subdivision (d) provides:

> (d) Releases and covenants within the scope of this section. A release or a covenant not to sue between a plaintiff or claimant and a person who is liable or claimed to be liable in tort shall be deemed a release or covenant for the purposes of this section only if:
> (1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar;
> (2) the release or covenant completely or substantially terminates the dispute between the plaintiff or claimant and the person who was claimed to be liable; and
> (3) such release or covenant is provided prior to entry of judgment.

Co-Defendants Town of Brookhaven and The Incorporated Village of Port Jefferson assert that Plaintiff received no consideration for the release, therefore, pursuant to subsection (d)(1), Defendant Snow Shed is not released from liability as to its co-defendants. Snow Shed asserts that General Obligations Law §15-108 only applies to releases given to effectuate settlement in litigation. Given the procedural history of the adoption and amendment of General Obligations Law §15-108, it is clear that the statute applies to a settling tortfeasor, not a party who executed a release prior to the alleged incident or injury that gave rise to the claim (***Williams by Williams v. Niske by Niske***, 81 NY2d 437, 442–44, 615 NE2d 1003, 1006–07 [1993] (outlining the purpose of the statute as encouraging settlements while ensuring that the non-settling defendants do not pay more than their equitable share); *see also* ***Whalen v. Kawasaki Motors Corp.***, 92 NY2d 288, 291–93, 703 NE2d 246, 248–49 [1998]). Therefore, contrary to Defendants' assertions, General Obligations Law §15-108(d) does not preclude dismissal of their cross-claims. Defendant Snow Shed's motion to dismiss all claims and cross-claims against it is granted.

Motion 004

This motion was previously withdrawn pursuant to correspondence by movant Town of Brookhaven dated August 22, 2018.

Motion 005

Defendant Town of Brookhaven ("Town") seeks summary judgment dismissing Plaintiff's claims against it. The basis of the Town's motion is that the Town does not own, maintain or control the water column, owning only the land beneath the water at issue, and that it was under no duty to test, maintain or control the water quality of Port Jefferson Harbor. In support of its motion, the Town offers affidavits of several employees including Thomas Carrano, Assistant Waterways Management Supervisor. Mr. Carrano avers that, based upon his search of records maintained by the Waterways Division, the Town does not (and did not at the time here at issue) own, maintain or control the water in Port Jefferson Harbor. He further states that the Town owns the bay bottom and issues mooring permits but that it is not the duty of the Town to monitor or maintain contaminant levels in the Harbor. Additionally, Mr. Carrano asserts that the State of New York and County of Suffolk have control over the waters; however, the evidentiary basis of this assertion is unclear and therefore disregarded by the Court. Also annexed to the Town's motion are affidavits of a Bay Constable and a Senior Bay Constable asserting that they have no duty to monitor contaminant levels and that, although they may write summonses for illegal discharge of waste, neither individual has personally done so. Diane Salazar, Clerk Typist with the Town Department of Public Safety, Division of Harbors and Waterways, attests that no illegal discharge of waste summonses were issued in the three years prior to and including the date of loss.

Plaintiff argues that the Town's motion is premature because discovery is outstanding and further argues that

Town has failed to show prima facie entitlement to summary judgment. Alternately, Plaintiff argues that the existence of the Port Jefferson Harbor Complex Management Plan imputes a duty of water quality management to each participant in the Plan: Town of Brookhaven, Port Jefferson, Belle Terre and Poquott. As set forth in Brookhaven Town Code §74-1, the management plan is an intermunicipal agreement intended to coordinate commercial, industrial and recreational uses, enhancing public and vessel safety, improving navigation, minimizing impacts from uses on natural resources and water quality and protecting shellfish resources and private property. Plaintiff further cites several examples which she believes demonstrate the authority that the Town of Brookhaven has over the waters here at issue, concluding that if authority exists then a duty exists. Among the examples cited by Plaintiff is the fact that Bay Constables, as peace officers, have the authority to enforce New York State Navigation and Environmental Conservation Law as well as Brookhaven Town Ordinances. Not mentioned by Plaintiff is the fact that Bay Constables also maintain navigation aids in waterways and respond to emergency calls in bays, harbors and areas in the Long Island Sound. Plaintiff then goes on to cite various laws and regulations relating to discharge of waste and inspection of watercraft toilet pollution control, asserting that the Town had a duty to enforce these laws and regulations. Plaintiff concludes that the Town has failed to issue summonses and otherwise regulate the public waterway with respect to pollution, in breach of its duty. Defendant Town counters that it owed no duty to Plaintiff individually, as no special relationship existed between Plaintiff and the Town.

The threshold issue in any negligence case is whether or not defendant owed a duty to Plaintiff. In the absence of duty, there can be no breach and no liability (***Pulka v. Edelman***, 40 NY2d 781, 782–83, 358 NE2d 1019 [1976] ; ***Muallem v. City of New York***, 82 AD2d 420, 423–25, 441 NYS2d 834 [2d Dept.1981], aff'd, 56 NY2d 866, 438 NE2d 1142 [1982]; ***Miglino v. Bally Total Fitness of Greater New York, Inc.***, 92 AD3d 148, 159–60, 937 NYS2d 63, 71–72 [2d Dept. 2011], *aff'd but criticized on other grounds*, 20 NY3d 342, 985 NE2d 128 [2013]). In the absence of a duty, a claim of negligence must fail (***Darby v. Compagnie Nat'l Air France***, 96 N.Y.2d 343, 347–48, 753 NE2d 160, 162–63 [2001], *opinion after certified question answered sub nom.* ***Darby v. Compagnie Nat. Air France***, 13 F. App'x 37 [2d Cir. 2001]).

Where a Plaintiff asserts a claim of negligence against a municipality in the performance of a governmental function, absent the establishment of a duty of care to an individual though a special relationship, the State or a municipality may not be found liable (***Metz v. State***, 20 NY3d 175, 179–81, 982 NE2d 76 [2012]; ***Philip v. Moran***, 127 AD3d 717, 718, 7 NYS3d 294, 295–96 [2d Dept. 2015]; ***Halberstam v. Port Auth. of New York & New Jersey***, 175 AD3d 1264, 1265–67, 109 NYS3d 111, 114–15 [2d Dept. 2019]). There are three recognized situations in which a special duty can arise: "(1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition (*see e.g. Metz*, 20 NY3d at 180). It is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself (citations omitted)." (***Applewhite v. Accuhealth, Inc.***, 21 NY3d 420, 425–29, 995 NE2d 131 [2013]; *see also* ***Metz***, *supra*). The elements of a special relationship imputing such a duty of care are: "...(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (***Philip***, *supra, (quoting* ***Cuffy v. City of New York***, 69 NY2d 255, 260, 513 NYS2d 372, 505 NE.2d 937). If Plaintiff seeks to advance her claim under a theory that the Town failed to perform its function in policing the waterway, it is this analysis that would apply. If the argument is that the Town owed a duty as landowner (although the Town denies control and ownership), a distinction must be made between governmental and proprietary functions.

A proprietary function is generally one which substitutes for or supplements traditionally private functions

(***Heeran v. Long Island Power Auth.***, 141 AD3d 561, 563–66, 36 NYS3d 165, 169–71 [2d Dept. 2016], *aff'd sub nom.* ***Connolly v. Long Island Power Auth.***, 30 NY3d 719, 94 NE3d 471 [2018]; ***Halberstam***, *supra*). Here, the Town is not exercising a proprietary function of operating a public recreational facility which might subject it to a certain individual duty of care (***Melby v. Duffy***, 304 AD2d 33, 36–37, 758 NYS2d 89 [2d Dept. 2003]). Rather, the subject area is a navigable waterway subject to a public right of easement (***Id.***) Plaintiff's allegations include the assertion that Defendant Town had a duty to warn about hazards created by an unknown third party (or parties). Such an assertion relates back to the governmental functions and would necessarily require analysis under the special relationship framework set forth above (***Melby***, *supra*; *see also* ***Price ex rel. Price v. New York City Hous. Auth.***, 92 NY2d 553, 557–58, 706 NE2d 1167 [1998]; ***Rivera v. City of New York***, 90 AD3d 735, 736, 934 NYS2d 456, 457 [2d Dept. 2011]). This is equally true of Plaintiff's assertions that Defendant Town failed to perform its duties under State Navigation Law and various Town ordinances. Although it should be noted that no private right of action exists against the government arising from failure to enforce provisions of State Navigation Law (***Metz,*** *supra*).

Plaintiff's argument that Defendant Town of Brookhaven's motion should be denied as premature because discovery is outstanding is unavailing. Plaintiff has neither demonstrated how discovery might lead to relevant evidence necessary for opposing Defendant's motion, nor has Plaintiff established that facts essential to opposing the motion are exclusively within Defendant's knowledge or control (***Yu Mei Liu v. Weihong Liu***, 163 AD3d 611, 612–13, 81 NYS3d 75, 76–77 [2d Dept . 2018]; ***Diaz v. Mai Jin Yang***, 148 AD3d 672, 674, 48 NYS3d 485, 487 [2d Dept. 2017]; ***Tsyganash v. Auto Mall Fleet Mgmt., Inc.***, 163 AD3d 1033, 1034, 83 NYS3d 74, 75 [2d Dept. 2018]; see also CPLR§3212(f)). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the plaintiff's motion" (***Niyazov v. Hunter EMS, Inc.***, 154 AD3d 954, 955, 63 NYS3d 457, 459 [2d Dept. 2017]). Therefore, the Court must move to the substantive issues of the instant motion.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Stonehill Capital Mgmt., LLC v. Bank of the West.,*** 28 NY3d 439, 448, 68 NE3d 683, 688 [2016](quoting ***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, 501 NE2d 572). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). However, the court must determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (***Prunty v Keltie's Bum Steer,*** *supra*, citing ***Glick & Dolleck v Tri-Pac Export Corp.,*** 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; ***Columbus Trust Co. v Campolo,*** 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd,* 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

Here, Defendant Town has made a prima facie case that it had no special relationship with Plaintiff and therefore owed her no individual duty of care. All of Plaintiff's assertions regarding Defendant Town's duty relate

to general governmental functions, such as the allocation of law enforcement resources and the duty to warn of hazards created by a third party. Plaintiff has failed in her burden to raise a triable issue of fact. Plaintiff's claims against the Town of Brookhaven are therefore dismissed.

Motion 006 and 007

Defendants Village of Old Field and Village of Poquott seek summary judgment based upon the fact that both Villages are situated about ½ mile away from the subject Cove where the incident occurred, that neither Village had jurisdiction over the water column here at issue, and that neither Village created or had notice of the alleged hazardous condition. Old Field submitted an affidavit of its mayor, Michael Levine and Poquott submitted an affidavit of its long-serving Village Clerk, Joseph Newfield. Poquott and Old Field also assert that any claim that they had a duty to warn Plaintiff of a hazardous condition would fall under a governmental function analysis requiring establishment of a special duty.

Plaintiff's opposition cites similar arguments as those set forth in opposition to Town's summary judgment motion (005). Plaintiff asserts that Old Field and Poquott had a duty to enforce Village Codes and that they had a duty to control and manage the waters and contaminants therein. Plaintiff also argues that the intermunicipal agreement between Old Field, Poquott, Belle Terre and the Town, (whereby the parties agreed to work collaboratively to regulate the speed, operation, anchoring and mooring of water traffic, to track revenues, to seek grants and to propose rules, along with other such activities) does not work to delegate or transfer any of the Villages' responsibilities. Plaintiff also argues that summary judgment is premature because discovery is needed. This last argument fails for the same reasons articulated in the analysis of motion 005.

Here again, as was discussed with respect to motion 005, the threshold issue is whether or not Poquott and Old Field owed a duty to Plaintiff. Since the allegations involve a navigable waterway and exercise of governmental function, the analysis is whether or not either Village had a special relationship with Plaintiff creating an individual duty of care. As set forth above, the elements of a special relationship imputing such a duty of care are: "...(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (***Philip***, *supra,* (*quoting* ***Cuffy v. City of New York***, 69 NY2d 255, 260, 513 NYS2d 372, 505 NE2d 937). Plaintiff asserts only that Old Field and Poquott had a duty to perform certain governmental functions, that they breached their duty by failing to so perform, and that their failure caused her personal injury. A municipality is not liable to an individual in negligence for failing to perform a governmental function absent a special relationship (***Metz***, *supra*). Since Plaintiff has failed to raise the existence of a triable issue of fact as to whether or not such a relationship existed, summary judgment must be granted. Plaintiff's claims against Village of Old Field and Village of Poquott are therefore dismissed.

Motion 008

Defendants Danfords and Crest seek dismissal of Plaintiff's complaint, based upon an alleged failure to provide discovery. Part 23 rules require a pre-motion conference prior to any discovery motions being made. As such, Defendants' motion is denied on this basis. The appropriate course of action for any persisting discovery issues would be to submit a request for preliminary conference.

Motion 009 and 010

Belle Terre seeks summary judgment on the basis that it does not own or control Port Jefferson Harbor and that it had no duty to control or monitor water contamination or to warn the public about any such contamination. Belle Terre's Deputy Mayor, Sheila Knapp, states that the extent of Belle Terre's authority over the waterway is granted by State Navigation Law such as §46-A which vests the Village with the authority to regulate vessels operating within fifteen hundred feet from the shoreline. Ms. Knapp also states that the inter-municipal agreement between the Town and the Villages coordinates the efforts of the municipalities bordering Port Jefferson Harbor, it does not extend their authority to the entirety of Port Jefferson harbor or the water column.

Port Jefferson seeks summary judgment on the basis that it does not own or control Port Jefferson Harbor and that it had no duty to control or monitor water contamination or to warn the public about any such contamination. Port Jefferson also argues that it had no special relationship with Plaintiff, therefore it owed her no duty. Brian McCaffrey, Stormwater Management Program Administrator for Port Jefferson, avers that Port Jefferson monitors stormwater discharge but is not responsible for monitoring water quality standards of the Harbor.

Plaintiff argues that summary judgment is premature because discovery is needed. This argument is rejected for the reasons set forth in the Court's discussion of motion 005. Plaintiff also argues that, based upon State Navigation Law and their respective Village Codes, both Belle Terre and Port Jefferson had an absolute duty to maintain, manage, inspect, advise or warn the public of any contamination within Port Jefferson Harbor. Plaintiff offers no basis for this assertion. To the extent that Belle Terre or Port Jefferson has authority to regulate any of the navigable waters of Port Jefferson Harbor, the exercise of such authority is a governmental function, as is the duty to warn. As such, there is no duty owed to Plaintiff individually outside the establishment of a special duty. The criteria for establishing such a duty are discussed above with respect to motions 005, 006 and 007. The threshold issue in a negligence claim is duty. Belle Terre and Port Jefferson have made a prima facie case that they owed no duty to Plaintiff. Plaintiff has failed to raise a triable issue of fact on this issue. Plaintiff's claims against Belle Terre and Port Jefferson are dismissed.

Motion 011

Danfords and Crest seek summary judgment on the basis that Danford's Hotel had no duty, obligation or responsibility to test, inspect and/or monitor the Port Jefferson Harbor or to warn Plaintiff of the condition of the Harbor and that Crest is a real estate management and development company that has no involvement with the ownership, operation or management of Danford's Hotel or the adjacent docks and marina. Defendants Danfords and Crest assert, by affidavit of Danford F&B, LLC Controller Chrissandra Passafiume, that non-party Crest HM LLC is affiliated with Danford F&B and that Crest HM is real property owner of Danford Hotel, Marina & Spa, which leases the hotel to Danford F&B LLC dba Danford Hotel, Marina & Spa. Defendants assert that the marina and docks are owned by Defendant Town and that non-party Crest HM leases them from the Town and subleases them to Danford F&B LLC dba Danford Hotel, Marina & Spa. Danford and Crest do not own or control Port Jefferson Harbor or Pirate's Cove. Danford Hotel entered into an agreement with A&M Sports, Inc. d/b/a/ Snow Shed for Snow Shed to provide paddleboard and kayak rental services on the dock adjacent to the Danford Hotel. Plaintiff was not a guest of Danford Hotel. Plaintiff argues that Danfords and Crest had a duty to Plaintiff to warn her of Harbor contaminants because Danford Hotel had an agreement with Snow Shed whereby Danfords was to receive a commission on the gross rental proceeds. Plaintiff presents no legal basis for this theory.

As was set forth above, the threshold issue in any negligence case is whether or not defendant owed a duty to Plaintiff. Based upon the evidence before the Court is appears that The Crest Group has no connection to Snow Shed, no ownership or control over Danfords Hotel, the marina or docks and no legal obligation to monitor and warn Plaintiff about any contaminants that may be in Port Jefferson Harbor. Danfords asserts that the release signed by

Plaintiff when she rented the paddleboard also applies to Danfords. The release here at issue applies to "...Snow Shed, DF Marina, LLC dba Danford's Inn, its subsidiaries and affiliates, their respective agents, directors, officers, owners, contractors and employees (collectively the "released parties")." It is unclear whether or not such language applies to Danford's Hotel. However, Danfords makes *prima facie* case for summary judgment by establishing a lack of duty to Plaintiff. Not all relationships give rise to a legal duty (***Pulka v. Edelman***, 40 NY2d 781, 782–83, 358 NE2d 1019 [1976]). "(A)n entity which does not control the area or undertake a particular responsibility to do so has no common law duty to warn, correct, or safeguard others from naturally occurring, even if hidden, dangers common to the waters in which they are found" (internal citations omitted) (***Darby v. Compagnie Nat'l Air France***, 96 NY2d 343, 347–48, 753 NE2d 160, 162–63 [2001], *opinion after certified question answered sub nom. Darby v. Compagnie Nat. Air France*, 13 F. App'x 37 (2d Cir. 2001) quoting *Poleyeff v. Seville Beach Hotel Corp.*, 782 So.2d 422, 424 [Fla.App.3d Dist.]). Here there is no indication that Danfords had any control over Snow Shed or the waters of Port Jefferson Harbor, nor is there any indication of a relationship between Plaintiff and Danfords. Furthermore, Danfords avers that it neither created nor was it aware of any hazardous condition in the waterway. Plaintiff has failed to raise a triable issue of fact as to whether or not any duty was owed by Danfords and Crest to Plaintiff. Without duty, there can be no breach. Without a breach there can be no liability (***Pulka***, supra; ***Miglino***, *supra*). Plaintiff's claims against Danfords and Crest are therefore dismissed.

Motion 012

County of Suffolk seeks summary judgment based upon its assertion that it never had any jurisdiction or control over the maintenance and management of the Port Jefferson Harbor water column, that it has no duty to test the water for bathing suitability, that routine testing showed no indication that there was a risk to humans of contamination or illness as a result of water contact (attested to by Suffolk County Department of Health Services Associate Public Health Sanitarian Michael Jensen) and that the County owed no special duty to Plaintiff. Plaintiff asserts that this motion is premature as additional discovery must be conducted. This argument fails for the reasons previously discussed above. Plaintiff further argues that the County had an absolute duty to "maintain, manage inspect, advise or warn the public of contamination in Port Jefferson Harbor." Plaintiff argues that this duty arises from the County's authority to close contaminated beaches and from the fact that the County routinely tests water quality.

As discussed above (see motion 005 discussion), assuming *arguendo* that the County had any ownership or control over the Port Jefferson Harbor, the area is a navigable waterway subject to a private right of easement. Therefore any control or maintenance of the area would not be a proprietary function. Further assuming *arguendo* that the County had a duty to inspect the waters or warn the public, any such function would be a governmental function subject to the special duty analysis set forth above. A prima facie case has been made that Defendants County of Suffolk and The Suffolk County Department of Health Services owed no duty to Plaintiff. The threshold issue in a negligence claim is the existence of a duty. It was Plaintiff's burden to raise a triable issue of fact with respect to whether or not a special relationship existed between herself and the County imputing an individual duty of care (see discussion regarding motions 005, 006 and 007). Plaintiff has failed in this burden; therefore, Plaintiff's claims against the County of Suffolk and The Suffolk County Department of Health Services are dismissed.

Dated: Riverhead, New York
November 22, 2019

VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ____ FINAL DISPOSITION __XX__ NON-FINAL DISPOSITION (two remaining defendants)