Comen v Town of Carmel
2019 NY Slip Op 34551(U)
April 26, 2019
Supreme Court, Putnam County
Docket Number: Index No. 800001/2018
Judge: Victor G. Grossman
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To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

---X

MICHELLE COMEN,

Plaintiff,

-against -

TOWN OF CARMEL; TOWN OF CARMEL ENGINEERING DEPARTMENT; TOWN OF CARMEL RECREATION AND PARKS DEPARTMENT; COUNTY OF PUTNAM; COUNTY OF PUTNAM SIGN SHOP; COUNTY OF PUTNAM CONSTRUCTION AND MAINTENANCE DIVISION; COUNTY OF PUTNAM PLANNING AND DESIGN DIVISION; COUNTY OF PUTNAM PARKS & RECREATION DIVISION, and LAWS CONSTRUCTION CORPORATION,

Defendants.

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DECISION & ORDER

Index No. 800001/2018
Seq. Nos. 3-5
Motion Date: 3/8/19

GROSSMAN, J.S.C.

The following papers, numbered 1 to 86, were considered in connection with: (1) Defendants County of Putnam, County of Putnam Sign Shop, County of Putnam Construction and Maintenance Division, County of Putnam Planning and Design Division, and County of Putnam Parks & Recreation's Notice of Motion, dated November 27, 2018, seeking an Order, granting summary judgment and dismissing the Complaint; (2) Defendant LAWS Construction Corporation's Notice of Cross Motion, dated January 17, 2019, seeking an Order, pursuant to CPLR §3212, granting summary judgment and dismissing all claims and cross claims against it; and (3) Plaintiff's Notice of Cross Motion, dated January 23, 2019, seeking leave to amend the Verified Bill of Particulars to

23, 2019, seeking leave to amend the Verified Bill of Particulars to County of Putnam.

PAPERS[1]	**NUMBERED**
Notice of Motion (seq. #3)/Affirmation in Support/Exhs. A-I	1-11
Notice of Cross Motion (seq. #4)/Affirmation in Support/ Exhs. A-F	12-19
Notice of Cross Motion (seq. #5)/Affirmation in Opposition to County Defendants' Motion and in Support of Plaintiff's Cross Motion/Exhs. A-W	20-43
County Defendants' Affirmation in Opposition to Plaintiff's Cross Motion (seq. #5) and In Further Support of Motion (seq. #3)/ Exhs. A-B	44-46
Plaintiff's Affirmation in Opposition to LAWS' Motion (seq. #4)/ Exhs. A-X	47-70
Plaintiff's Affirmation in Reply Supporting Cross Motion to Amend Bill of Particulars (seq. #5)/Exhs. A-I	71-80
LAWS Reply Affirmation in Further Support of Cross Motion (seq. #4)/Exhs. G-I	81-84
March 8, 2019 Affidavit of Richard Hughes/Corrected Exh. W	85-86

This is an action for damages for personal injuries sustained by Plaintiff Michelle Comen on May 30, 2015, stemming from an accident in which she struck a wooden bollard, while riding her bicycle along the Putnam County Trailway ("Trailway"), a bike path, near the intersection of Mud Pond Road and Croton Falls Road in the Town of Carmel.

It is undisputed that Defendant LAWS Construction Corporation ("LAWS") installed the bollard. It is also undisputed that Putnam County is the Permittee of the subject section of the Trailway, granted as

[1]Counsel shall familiarize themselves with this Court's Part Rules, which can be found on the OCA website, as parts of this motion and the responsive papers fail to comply with those Rules, to the extent that Plaintiff shall designate exhibits by number, while Defendant shall designate exhibits by letter, and exhibit lettering or numbering shall not begin anew for subsequent papers submitted by the same party. In addition, the parties failed to consistently provide working copies of these voluminous submissions. Any future motions that do not comply with this Court's Part Rules may be rejected or dismissed.

such from the owner, New York State. According to the Permit, the County "is responsible for any repairs, improvements or maintenance work of any kind on the Property at Permittee's expense * * * Permittee is responsible for and maintaining the premises in a safe and clean condition" (Notice of Motion [seq. #3], Exh. I at ¶¶9, 12). And, the County "is responsible to maintain the occupancy in compliance with any and all applicable local, State, and Federal Laws, ordinances, codes, rules and regulations affecting the use of the property" (Notice of Motion [seq. #3], Exh. I at ¶13).

Plaintiff commenced an action against Defendants Town of Carmel, Town of Carmel Engineering Department, Town of Carmel Recreation and Parks Department, County of Putnam, County of Putnam Sign Shop, County of Putnam Construction and Maintenance Division, County of Putnam Planning and Design Division and County of Putnam Parks & Recreation Division (hereinafter "Town of Carmel", and "County" or "County Defendants", respectively) (Putnam County Index No. 725/2016). On June 20, 2016, the Town interposed its Answer, raising three (3) affirmative defenses, and one cross claim against the County for indemnification and apportionment. The County joined issue with the filing of its Answer on June 30, 2016. In that Answer, the County raised ten (10) affirmative defenses and a cross claim against the Town for indemnification.

Plaintiff then commenced an action against LAWS (Putnam County Index No. 500813/2017). LAWS joined issue with the filing of its Answer on November 16, 2017, raising twenty-two (22) affirmative defenses.

Due to common questions of law and fact, and to prevent unnecessary duplication, the Court consolidated the two actions under Putnam County Index No. 725/2016, and the matter is proceeding now as an e-filed matter under Putnam County Index No. 800001/2018.

In response to the County's Demand for a Bill of Particulars, on or about March 25, 2017, Plaintiff served her Verified Bill of Particulars, alleging that the County Defendants (Notice of Cross Motion [seq. #5], Exh. C at ¶5):

> "were negligent in the following respects: in the negligent construction, maintenance, design and lack of appropriate signage on bicycle path, including but not limited to failure to warn of a sharp turn on the bicycle path; negligently design and/or placement of bollard/stanchion; in failing to take necessary precautions to prevent people, and in particular the Plaintiff herein, to be injured by reason of the maintenance of the aforesaid dangerous and defective condition; in causing, permitting and allowing a defective and hazardous condition to exist and remain for an unreasonably long period of time, thereby causing a dangerous and defective condition to be and remain; in that the defendant herein knew of the aforesaid condition or, with the exercise of reasonable care, should have known of the aforesaid condition; in that the Defendant herein failed to take proper precaution and safeguards to warn the public, and the Plaintiff in particular, of the existence of the dangerous condition; in failing to remedy and repair the unsafe condition; in failing and neglecting to make proper and/or repairs; in making improper and/or inadequate repairs; in failing to adhere to generally accepted rules and standards of safety and precaution; in failing to take the necessary care and caution to prevent the occurrence of the accident. Plaintiff reserves the right to rely on the Doctrine of *Res Ipsa Loquitur*; and in being otherwise careless and negligent in the premises, without any negligence on the part of the Plaintiff herein in any way contributing thereto."

Plaintiff states she is "not aware of any actual notice, although the defects are a created condition. However, plaintiff reserves the right to supplement this answer following discovery" (Notice of Cross Motion [seq. #5], Exh. C at ¶7). Plaintiff also alleges that there is constructive notice because Defendants created the condition (Notice of Cross Motion [seq. #5], Exh. C at ¶8). Plaintiff asks the Court to take "judicial notice of all applicable statutes, codes, standards, laws, ordinances, rules and regulations at the time of trial herein" (Notice of Cross Motion, Exh. C at ¶¶13-14).

On or about September 26, 2018, Plaintiff filed the Note of Issue. The Court extended post-Note of Issue discovery until November 30, 2018.

Although Defendants Town of Carmel, Town of Carmel Engineering Department, and Town of Carmel Recreation and Parks Department filed a motion for summary judgment on November 21, 2018 (seq. #2), pursuant to a stipulation signed by all parties, the matter was discontinued as to these Defendants on or about January 24, 2019, and the motion was withdrawn.

Previously, however, on November 27, 2018, the County filed its motion for summary judgment (seq. #3), currently before this Court, arguing that: (1) County Defendants enjoy immunity from Plaintiff's claims pursuant to General Obligations Law §9-103 (New York's Recreational Use statute); (2) the alleged defect that caused Plaintiff's accident was an open and obvious condition and County Defendants owed no duty to warn Plaintiff; and (3) the individually named divisions of Putnam County are not entities that can be sued, and Plaintiff may only maintain a lawsuit against the County.

In support of its motion, the County proffered, inter alia: (1) Plaintiff's March 14, 2018 deposition transcript; (2) the August 9, 2018 deposition transcript of John Pilner, County of Putnam Transportation Planner; (3) photographs; (4) Plaintiff's Verified Bill of Particulars; and (5) the permit between New York State and the County (Notice of Motion, Exhs. A-I).

On January 8, 2019, the Court granted an extension of the briefing schedule for the County's summary judgment motion (seq. #3), setting the date for answering papers to be January 22, 2019, and the new submission date to be January 29, 2019.

Then, on January 18, 2019, LAWS cross moved for summary judgment (seq. #4), arguing that it installed the bollards and signs in accordance with the NYS Department of Transportation's design, that it did not owe Plaintiff any duty, and that, as a matter of law, the subject bollard did not constitute a dangerous condition because it was open and obvious. In support of its motion, LAWS proffered, inter

alia: (1) Plaintiff's March 14, 2018 deposition transcript; (2) the August 9, 2018 deposition transcript of John Pilner; (3) and the September 24, 2018 deposition transcript of Robert Cook, a representative from LAWS (Notice of Cross Motion, Exhs. A-F).

On January 22, 2019, Plaintiff's counsel wrote to the Court, objecting to the late filing of LAWS' cross motion. In response, on January 23, 2019, LAWS responded, asserting that Plaintiff's objections would be better suited in her Opposition, and consenting to any adjournment the Court permits to allow Plaintiff time to oppose. LAWS also maintained that there was good cause for the delay, as the parties had discussed entering into a stipulation to an extension to file summary judgment motions, but never did so, and Defendants filed their respective motions for summary judgment. LAWS asserted that its motion was not made more than 120 days after the filing of the Note of Issue, and therefore, complied with CPLR §3212(a), and that it did not receive any e-filing notice that the summary judgment motions had been filed.

That same day, on January 23, 2019, Plaintiff filed its opposition to the County's motion for summary judgment (seq. #3), arguing that based on her expert's affidavit, the bollards' wood color and lack of markings violated New York State and Federal Law to the extent they were required to have reflectors and/or "exciter colors", and that the County assumed the duty of maintaining the Trailway and assumed the responsibilities for all liabilities or defect in that roadway once the construction was completed. In addition, Plaintiff cross moves for leave to amend her Bill of Particulars (seq. #5) to include specific provisions of state and federal law, as well as those provisions of the Federal Administrative Codes and Regulations that approved the Manual on Uniform Traffic Control Devices (MUTCD), on the ground that these amendments do not constitute any new theory of liability and will not prejudice Defendants. In support of her motion, Plaintiff proffers, inter alia: (1) her deposition transcript and photographs; (2) the

Verified Bill of Particulars; (3) photographs; (4) Pilner's deposition transcript; (5) an expert affidavit from Richard T. Hughes, P.E; (6) Plaintiff's 50-h hearing transcript; (7) the August 9, 2018 deposition transcript of John Lynch, retired County Commissioner of Planning; (8) the proposed Amended Verified Bill of Particulars; and (9) the May 17, 2018 deposition transcript of Mark Rosa, head of Engineering for the Putnam County Department of Highways and Facilities.

Then, on January 28, 2019, in an email to the Court, Plaintiff's counsel sought guidance regarding the timing of LAWS' cross motion. The Court adjourned LAWS' cross motion until February 28, 2019, and reserved "the authority to dismiss it as untimely."

On February 20, 2019, the County filed its reply in support of its motion for summary judgment (seq. #3) and in opposition to Plaintiff's cross motion for leave to amend her Bill of Particulars (seq. #5), asserting that the County was immune from liability, that the bollard was open and obvious, and that the lack of color reflectors on the bollards constitutes a new theory of liability, which was not included in the Notice of Claim and, therefore cannot be considered.

On February 22, 2019, Plaintiff filed her opposition to LAWS' motion for summary judgment (seq. #4), asserting that LAWS' motion was untimely. Plaintiff also argued that there are issues of fact to be resolved by a jury related to whether LAWS was negligent.

On March 7, 2019, Plaintiff submitted her reply in support of her cross motion for leave to amend her Bill of Particulars to the County (seq. #5).

Then, on March 8, 2019, Defendant LAWS filed its reply in further support of its cross motion for summary judgment (seq. #4), arguing, inter alia, that there was a reasonable excuse for the delay in its filing because it never received e-filing notice that the co-Defendants' motion had been filed, and that the motion

was not made past the 120-day deadline set forth in CPLR §3212(a).

Timeliness of LAWS' cross motion (seq. #4 & 5)

To the extent Plaintiff argues that LAWS' cross motion for summary judgment is untimely because it was not brought within sixty (60) days of the filing of the Note of Issue as required by this Court in its Part Rules, the Court is unpersuaded. In light of the extension of post-Note of Issue discovery, the repeated requests for adjournments of the motions on consent of the parties, and the fact that LAWS' cross motion was made within the 120 days permitted pursuant to CPLR §3212(a), the Court will deem it filed timely. See generally Brill v. City of New York, 2 N.Y.3d 648 (2004). Moreover, a significant portion of LAWS' cross motion relies on similar arguments raised by the County in its timely summary judgment motion – i.e., the bollard was open and obvious. See Derrick v. North Star Orthopedics, PLLC, 121 A.D.3d 741, 743 (2d Dept. 2014); Step-Murphy LLC v. B&B Bros. Real Estate Corp., 60 A.D.3d 841, 844-845 (2d Dept. 2009). As such, the Court will consider LAWS' cross motion.

Immunity Argument (seq. #3)

The County argues that it is immune from liability pursuant to New York State's Recreational Use Statute. "Under General Obligations Law 9-103: 'an owner * * * of premises, whether or not posted as provided in * * * the environmental conservation law, *owes no duty to keep the premises safe for entry or use by others* for * * * bicycle riding, * * * *or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes*' (General Obligations Law 9-103[1][a])." Ferres v. City of New Rochelle, 68 N.Y.2d 446, 449 (1986) (emphasis

in original). "The statute further provides that an owner of premises who permits any of the above activities does not thereby: '(1) extend any assurance that the premises are safe for such purpose, or (2) constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.'" Ferres v. City of New Rochelle, supra at 449-450. "The statute's effect in limiting liability is not total. As noted it does not absolve the owner for a 'willful or malicious' act or omission." Ferres v. City of New Rochelle, supra at 450, quoting General Obligations Law §9-103(2)(a). "Nor does it apply in a 'case where permission to pursue any of the activities enumerated in this section was granted for a consideration.'" Ferres v. City of New Rochelle, supra, quoting General Obligations Law §9-103(2)(b). As in Ferres, because neither of those exemptions are relevant, the issue before this Court is the same as in Ferres, which is one of statutory construction – "whether General Obligations Law §9-103 applies to a claim based on a breach of duty by a municipality in the operation of a supervised park like the one here." Ferres v. City of New Rochelle, supra at 450.

As the Court of Appeals stated, "the sole purpose of General Obligations Law 9-§103 is evident – to induce property owners, who might otherwise be reluctant to do so for fear of liability, to permit persons to come on their property to pursue specified activities." Ferres v. City of New Rochelle, supra at 451. "General Obligations Law §9-103 offers two inducements to the property owner to give such permission: (1) the broad grant of immunity from liability conferred in subdivision (1)(a) (absolving the owner of the 'duty to keep the premises safe for entry or use by others' and of the duty 'to give warning of any hazardous condition') and (2) the assurance provided in subdivision (1)(b) (that by giving permission to use his property the owner does not, by that act, assure 'that the premises are safe' or 'constitute the

person to whom permission is granted an invitee to whom a duty of care is owed')." Ferres v. City of New Rochelle, supra at 452. "When determining the statute's applicability to a government landowner, a court must consider the character of the land and 'the role of the landowner in relation to the public's use of the property.'" McKown v. Town of Waterford, 94 A.D.3d 1182, 1182-83 (3d Dept. 2012), quoting Wilkins v. State of New York, 165 A.D.2d 514, 517 (3d Dept. 1991). "It would be contrary to assume that the Legislature could have intended that the statute apply in circumstances where neither the basic purpose of the statute, nor, indeed, any purpose could be served – as in the case of the supervised park * * * where the municipality has already held its recreational facility open to the public and needs no encouragement to do so from the prospective immunity offered by the statute." Ferres v. City of New Rochelle, supra.

In addition, as is the case in here, as it was in Ferres, the Trailway, a public recreational facility, was established for the public by the State and local municipalities. Pilner, Lynch and Rosa all testified that the Trailway is maintained by the County (Pilner EBT at 14-15; Lynch EBT at 13-14; Rosa EBT at 51-52), pursuant to an agreement (Pilner EBT at 12, 14, 28-29), which included replacing signs and bollards (Pilner EBT at 33-34; Lynch EBT at 13-14; Rosa EBT at 22-27, 55). According to Rosa, any recommendations his department would make would be for legal signs that appear in the MUTCD, and there is a section in the MUTCD that pertains to bicycle paths (Rosa EBT at 27, 34-37). The County regularly inspected, maintained, and repaired the Trailway (Pilner EBT at 15, 19-21, 32-34; Rosa EBT at 6, 10-11, 51-52), and its signage (Rosa: EBT at 14-15, 18-20). The County was cloaked with the responsibility of ensuring compliance with safety codes (Pilner EBT at 19).

Based on these facts, the County cannot now, after affirmatively accepting this responsibility as per the Permit, relinquish that duty by asserting immunity. The additional incentive provided by subdivision

(1)(b) "to the property owner by assuring him, among other things, that in giving permission for use of his property he does not 'constitute the person to come permission is granted *an invitee to whom a duty of care is owed*' (General Obligations Law §9-103[1][b]; emphasis added). The Legislature can hardly have intended to grant this additional assurance afforded by subdivision (1)(b) where it would be superfluous and could serve no purpose, i.e., where the owner * * * has already encouraged public use and assumed the duty of reasonable care in the operation of its park." Ferres v. City of New Rochelle, supra.

Stated another way, the statute "does not provide immunity to a municipality, which irrespective of any inducement contained in General Obligations Law §9-103, already operates and maintains a supervised facility, such as defendant's, for use by the public. Nothing in the wording of General Obligations Law §9-103 or its history supports defendant's construction which results in a drastic reduction in a municipality's responsibility in the operation and maintenance of its supervised parks, and serves no discernible public interest, certainly not one consistent with the stated aim of section 9-103: encouraging a landowner to permit persons to come upon his property for the purpose of hunting, fishing and other outdoor recreational activities." Ferres v. City of New Rochelle, supra at 453-54. In short, "General Obligations Law §9-103 does not extend to a municipal park developed and open for public recreational uses, where, as in the instant case, the activity involved" – bicycling – "is a permitted use." Bush v. Village of Saugerties, 114 A.D.2d 176, 180 (3d Dept. 1986); see also Smith v. State of New York, 124 A.D.2d 296 (3d Dept. 1986) (statutory immunity does not extend to state-owned and operated boat landing facility).

Therefore, on the facts before the Court, the evidence establishes that the Trailway is a municipal park developed and open for the public to use, and maintained by the County. Because there is nothing

in this record to establish that bicycle riding on the Trailway was restricted by the County, the Court finds that General Obligations Law §9-103 is inapplicable, and that the traditional standard of ordinary care should apply. As such, this portion of the County's motion for summary judgment is denied.

Leave to Amend County's Bill of Particulars (seq. #5)

"Motions to amend or supplement a bill of particulars are governed by the same standards as those applying to motions to amend pleadings." Scarangello v. State of New York, 111 A.D.2d 798 (2d Dept. 1985). "A party may amend his pleadings at any time by permission of the court and leave is to be freely given." Id. at 798-799, citing CPLR §3025(b); 22 NYCRR §1200.12(b). "While a court has broad discretion in deciding whether leave to amend should be granted, it is considered an improvident exercise of discretion to deny leave to amend in the absence of an inordinate delay and a showing of prejudice to the defendant." Id. at 799. "Prejudice (or the lack thereof) is the critical consideration in determining whether leave to amend is appropriate." Lazzari v. Qualcon Construction, LLC, 62 Misc.3d 1082 (Sup.Ct. [Bronx] January 30, 2019), citing Connors, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR §3025, C3025:6 (main volume). "'Prejudice' in this context means 'that the [party opposing the motion] has been hindered in the preparation of his [or her] case or has been prevented from taking some measure in support of his [or her] position'; mere exposure to greater liability does not constitute prejudice." Lazzari v. Qualcon Construction, LLC, supra, quoting Kimso Apartments, LLC. v. Gandhi, 24 N.Y.3d 403, 411 (2014), quoting Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18, 23 (1981). "The burden of establishing prejudice is on the party opposing the amendment." Kimso Apartments, LLC. v. Gandhi, supra at 411.

Here, the County will not be prejudiced by the proposed amendment that details the various claimed statutory violations. Questions related to the adherence to the MUTCD was raised by Plaintiff during the Pilner, Cook and Lynch depositions where County's counsel was present and participated. Mark Rosa, head of engineering for Putnam County Department of Highway and Facilities, also was asked specific questions about the MUTCD and bike paths. Furthermore, Plaintiff's January 24, 2019 Amended Bill of Particulars as it pertained to LAWS includes these identical specific codes and statutes, and therefore, the County had notice that Plaintiff relied on them as a basis of liability. Plaintiff apparently served them upon the County, as well as LAWS, and filed it as an exhibit to her Opposition to LAWS' motion for summary judgment, which was also served upon all parties.

And to the extent Plaintiff did not specifically allege failure to use appropriate markings on the bollard or paint the bollard a specific color until the County moved for summary judgment, in her Bill of Particulars, she alleged generally that the County failed "to adhere to generally accepted rules and standards of safety and precaution," and failed "to take proper precaution and safeguards to warn the public, and the Plaintiff in particular, of the existence of the dangerous condition," as well as failed "to adhere to generally accepted rules and standards of safety and precaution" (Notice of Cross Motion [seq. #5], Exh. C at ¶5). Moreover, Plaintiff focused on the lack of painting of the bollards during the depositions. Thus, the County cannot claim this is a new theory of liability, but rather Plaintiff is "merely amplify[ing] and elaborat[ing] upon facts and theories already set forth in the original bill of particulars" and depositions. Noetzell v. Park Ave. Hall Hous. Dev. Fund Corp., 271 A.D.2d 231 (1st Dept. 2000); see also Klimowicz v. Powell Cove Assoc., LLC, 111 A.D.3d 605, 607 (2d Dept. 2013).

Finally, to the extent the County asserts that the Notice of Claim was silent about the lack of exciter

colors or exciter signage on the bollards, the Court disagrees. According to the Notice of Claim, which attached color photographs of the area of the accident, including the bollards, the nature of the claim was "[n]egligent construction, maintenance, design and lack of appropriate signage, including but not limited to failure to warn of sharp turn on a bicycle path located at the intersection of * * *" (County's Reply Affirmation, Exh. A). The Court finds that while there was no specific language with respect to the bollards, there was sufficient information with respect to allegations of negligent design and maintenance of the signage at that location to enable the County to investigate. See Brown v. City of New York, 95 N.Y.2d 389 (2000) (pedestrian's notice of claim to city that identified accident site with particularity and fixed location where he tripped on broken and defective portion of sidewalk and curb sufficiently gave notice to city that it was not only curb, but also immediately adjacent sidewalk that caused injuries, even though circles on accompanying photograph of accident site centered on curb and included only small portion of sidewalk).

As such, Plaintiff's cross motion for leave to file an Amended Bill of Particulars (seq. #5), as submitted as an exhibit to her motion (Notice of Cross Motion [seq. #5], Exh. Q), is granted and the proposed Amended Verified Bill of Particulars is deemed served.

Open and Obvious, and Contractor Liability (seq. #3 & 4)

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits. See Millerton Agway Coop. v. Briarcliff Farms, 17 N.Y.2d 57, 61 (1966); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). Initially, "the proponent... 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 issue of fact." However, once a movant makes a sufficient showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers. Id.; see also Fabbricatore v. Lindenhurst Union Free School Dist., 259 A.D.2d 659 (2d Dept. 1999).

"While a property owner has a duty to maintain its property in a reasonably safe condition, it has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous." Calandrino v. Town of Babylon, 95 A.D.3d 1054, 1055 (2d Dept. 2012). "'Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances.'" Id., quoting Atehortua v. Lewin, 90 A.D.3d 794 (2d Dept. 2011) (internal quotation marks omitted). "'A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted.'" Calandrino, supra, quoting Katz v. Westchester County Healthcare Corp., 82 A.D.3d 712, 713 (2d Dept. 2011).

Here, the County has met its initial burden for summary judgment by establishing that the bollard was open and obvious and readily observable by the use of one's senses. Plaintiff testified that it was a sunny, clear day and that there was nothing obstructing her view of the bike path up ahead (Comen EBT at 75, 138-39).

However, in response, Plaintiff proffers an affidavit from Richard T. Hughes, P.E., who attests that the lack of proper signage and painting of the subject bollard, resulted in an issue of whether Plaintiff could

have properly seen that which she should have seen.[2] Plaintiff testified that she was unfamiliar with this portion of the Trailway (Comen EBT at 69, 140). There were no signs or markings on the bollard that day (Comen EBT at 145-46), and there were no warning signs in the area, other than a sign indicating a bike path (Comen EBT at 146). The County's Parks Department was in charge of maintenance or inspection of the bollards and signage (Pilner EBT at 32-33). NYS DOT had been in charge of the design of the Trailway project, and chose the location of where the bollards and signage would be placed on the Trailway (Pilner EBT at 27; Lynch EBT at 12). Taking these facts as a whole, and proffering Hughes' expert opinion, Plaintiff argues that the design and construction of the bollards, in conjunction with the fact that they were not painted an exciter color in direct violation of safety standards, raises a questions of fact. This Court agrees.

But the Court must find a different outcome as it pertains to LAWS. "A contractual obligation, standing alone, does not generally give rise to tort liability in favor of a third party unless one of the three exceptions applies: '(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.'" Castillo v. Port Authority of N.Y. & N.J., 159 A.D.3d 792, 793 (2d Dept. 2018), quoting Espinal v. Melville Snow Contrs., 98

[2] The Court exercises its discretion and considers Hughes' affidavit, especially in light of the fact that the parties engaged in continuing post-Note of Issue discovery. See Rivers v. Birnbaum, 102 A.D.3d 26 (2d Dept. 2012) (party's failure to disclose expert information prior to filing note of issue and certificate of readiness did not divest court of discretion to consider affidavit submitted by party's experts in context of timely motion for summary judgment).

N.Y.2d 136, 140 (2002) (citation and internal quotation marks omitted).

Here, there are no allegations that the second or third exception would apply under the facts of this case. As such, the only exception that could be considered applicable would be the first exception. But, "a claim that a contractor exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found them." Castillo v. Port Authority of N.Y. & N.J., supra at 794 (citation and internal quotation marks omitted). Plaintiff attempts to assign LAWS with the responsibility to adhere to the MUTCD with respect to the signage and painting of the bollards, clearly a design element of the Trailway. But, LAWS' role was to execute the NYS DOT design plans, as they were written. NYS DOT chose the location of where the bollards and signage would be placed on the bikeway (Rosa EBT at 57; Pilner EBT at 27), and there is nothing in the motion papers that establish that LAWS created or exacerbated the purported dangerous condition, and therefore, "launched an instrument of harm." Castillo v. Port Authority of N.Y. & N.J., supra. Rather, like in Castillo v. Port Authority of N.Y. & N.J., LAWS "merely failed to be 'an instrument for good,' which is insufficient to impose a duty of care upon a party not in privity of contract with the injured party." Castillo v. Port Authority of N.Y. & N.J., supra (citation and internal quotation marks omitted). In addition, Robert Cook, a licensed professional engineer with LAWS, which was responsible for the Trailway's construction, explained that LAWS was the contractor on the job, and had no input in the design, only following the design plans created by the NYS DOT, which included the placement of the signs and bollards, as well as the color of the bollards (Cook EBT at 6, 8, 11, 13-14, 21-28, 32-38, 43, 48-49; Rosa EBT at 16, 55, 57; Pilner EBT at 27). As such, LAWS established its prima facie entitlement to judgment as a matter of law on this issue. In opposition, Plaintiff failed to raise a triable issue of fact that the acts or omissions of

LAWS left the bike path more dangerous than they found it. Castillo v. Port Authority of N.Y. & N.J., supra. Accordingly, LAWS' cross motion for summary judgment is granted.

County Sued as One Entity

The County is seeking summary judgment with respect to all the individual agencies that are named in this action, asserting that the individually named divisions of Putnam County are not entities that can be sued, and that Plaintiff may only maintain a lawsuit against the County. "As commonly employed, the motion for summary judgment is based upon the overall merits of the case rather than on an individual defense. It is, however, acceptable practice to move for summary judgment on grounds listed in CPLR §3211(a) when these are asserted as defenses in the answer rather than as bases for dismissal." Houston v. Trans Union Credit Info. Co., 154 A.D.2d 312 (1st Dept. 1989), citing Siegel, New York Practice, §283, pp. 339-40; McKinney's Practice Commentaries, Cons. Laws of N.Y., Book 7B, CPLR §C3212:20, p. 439.

Here, although the County asserted this argument as an affirmative defense in its Verified Answer, neither the County nor Plaintiff directly address it in their respective summary judgment and opposition papers by making substantive arguments, other than the County's fleeting reference to this relief in the second paragraph of counsel's affirmation. But, "[e]ven where there is no opposition to a motion for summary judgment, the court is not relieved of its obligation to ensure that the movant has demonstrated his or her entitlement to the relief requested." Zecca v. Riccardelli, 293 A.D.2d 31, 34 (2d Dept. 2002). Here, the Court will deem the County's failure to elaborate further on this requested relief as a mere oversight, and will address the merits, as the Court is vested with the authority to search the record in a

summary judgment motion. See CPLR §3212(b).

As such, the Court finds that Plaintiff has failed to state a cause of action with respect to the individual County agencies named in the Complaint, as it is well settled that under New York law, "'departments that are merely administrative arms of a municipality do not have a legal identity separate and apart from the municipality and, therefore, cannot sue or be sued.'" Boston v. Suffolk County, New York, 326 F.Supp.3d 1, 18 (EDNY 2018), quoting Davis v. Lynbrook Police Dept, 224 F.Supp.2d 463, 477 (EDNY 2002). Therefore, the Complaint is dismissed as to Defendants County of Putnam Sign Shop, County of Putnam Construction and Maintenance Division, County of Putnam Planning and Design Division, and County of Putnam Parks & Recreation Division.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for leave to amend the bill of particulars (seq. #5) is granted to the extent provided in the proposed Amended Verified Bill of Particulars submitted as Exhibit Q to Plaintiff's cross motion, and is deemed served; and it is further

ORDERED that the portion of the County Defendants' motion for summary judgment as to the individual agencies that are named in this action is granted for the reasons stated herein, and that the remaining portions of the motion are denied (seq. #3); and it is further

ORDERED that the Complaint is dismissed as to Defendants County of Putnam Sign Shop, County of Putnam Construction and Maintenance Division, County of Putnam Planning and Design Division, and County of Putnam Parks & Recreation Division, and the caption is amended accordingly; and it is further

ORDERED that Defendant LAWS' cross motion for summary judgment (seq. #4) is granted and the complaint is dismissed as it pertains to Defendant LAWS Construction Corporation; and it is further

ORDERED that any arguments not directly addressed herein are denied.; and it is further

ORDERED that the remaining parties and counsel are to appear before the undersigned on Wednesday, May 15, 2019 at 9:30 a.m. for a pre-trial conference. The parties and counsel shall be prepared to entertain settlement discussions. No per diem will be permitted, and there will be no adjournments unless for good cause shown.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
April 26, 2019

HON. VICTOR G. GROSSMAN, J.S.C.

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