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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
JUDICIAL DISTRICT OF HARTFORD.
AT HARTFORD.

QUIROS, ISABEL L.
v.
TOWN OF EAST HARTFORD, ET AL

DOCKET NO. HHD-CV-21-6137240-S
|
OCTOBER 6, 2023

MEMORANDUM OF DECISION RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (#134.00)

Rosen, J.

INTRODUCTION

***1** The plaintiff, Isabel L. Quiros, brought a thirteen-count revised complaint against the defendants, the Town of East Hartford (town), its board of education (board), and a number of individual defendants,[1] arising out of an alleged slip and fall on snow or ice in a parking lot at the East Hartford Public High School. The defendants moved for summary judgment, arguing that the plaintiff's claims are barred by the doctrine of **governmental immunity**, that the defective highway statute is inapplicable, and that the plaintiff cannot establish the elements of a nuisance claim against a municipality. For the reasons set forth below, the defendants' motion for summary judgment is granted in its entirety as to all counts of the plaintiff's complaint.

[1] The individual town defendants are John Lawlor (Director of Public Works), Benjamin Whittaker (Former Director of Facilities), Daniel Ford (Facilities Maintenance Manager), and Eric Krauch (Operations Manager). Bryan Hall (board Chairman) was also named individually.

FACTS AND PROCEDURAL HISTORY

In her revised complaint filed on May 3, 2021 (complaint), the plaintiff alleges the following facts. On January 25, 2019, the plaintiff was an enrolled student at East Hartford High School (high school). Water, wet snow and/or ice had accumulated on the ground or pavement the school's parking lots due to prior snowfalls, plowing, and the melting and refreezing of snow piles at the edge of the parking lots utilized by enrolled students. While on the premises the plaintiff stepped over a snow pile and onto the edge of a parking lot when she slipped and fell on snow and/or ice, sustaining a broken ankle and other injuries. The plaintiff alleges in counts I and II of her complaint that the town and/or the board by and through its respective agents, servants, and/or employees, created a public nuisance under General Statutes § 52-557n by creating the snow piles on the edges of the parking lot, which led to the melting and refreezing of the snow piles. Counts III through IX of the complaint allege that the defendants were negligent in failing to, inter alia, remove the accumulated water, wet snow and/or ice on the parking lots, failing to remedy the situation, failing to warn students, and failing to properly inspect or maintain the premises. Counts X and XI of the complaint assert that the town and the board, respectively, must indemnify the defendant employees for their negligent acts. Finally, counts XII and XIII of the complaint assert claims against the town and the board under the defective highway statute, General Statutes § 13a-149.

On April 14, 2023, the defendants filed their motion for summary judgment, together with a supporting memorandum of law. In support of their motion for summary judgment the defendants attach the following exhibits: the plaintiff's revised complaint (Exhibit A); defendant Krauch's deposition transcript (Exhibit B); the plaintiff's deposition transcript (Exhibit C); an affidavit of Allyn Tarbell, Associate Director for the town (Exhibit D); an affidavit of defendant Ford (Exhibit E); aerial photography of the subject location (not labeled with an exhibit letter, but described in their memorandum as Exhibit F); Tarbell's deposition transcript (not labeled with an exhibit letter, but described in their memorandum

as Exhibit G); defendant Lawlor's deposition transcript (Exhibit H); and defendant Ford's deposition transcript (Exhibit I). The defendants argue that they are not liable to the plaintiff for her negligence claims under the doctrine of **governmental immunity** because when and how to address snow and ice conditions at the high school involves discretionary, rather than ministerial, acts. They further contend that the plaintiff's nuisance claims fail because the plaintiff cannot show that the defendants created the condition causing the nuisance by some positive act.

***2** The plaintiff filed her objection to the motion and a memorandum in opposition dated May 31, 2023. In support of her opposition, the plaintiff attaches her affidavit (Exhibit A); purported excerpts of deposition transcripts of "Ferguson," Krauch, Lawlor, Whittaker, and Ford (Exhibits B–F, respectively);[2] and the town's job description for "JOB #328, Head Custodian III" (Exhibit G). The plaintiff contends that the identifiable victim/imminent harm exception to **governmental immunity** applies here, and that the defendants engaged in a positive act by plowing snow from the parking lot and piling it at the edge of the parking lot in the area where the students walked from the grassy field to the school's front door.

[2] The excerpts do not identify the deponent, nor did the plaintiff provide any information as to Ferguson's full name and job title. From context, it appears that Ferguson was a security officer at the high school.

The defendants filed a reply memorandum on June 15, 2023. On July 21, 2023, the plaintiff filed a reply memorandum, together with excerpts of the deposition transcripts of Krauch, Whittaker and Ford (Exhibit A) and climatological data for the Hartford area in January 2019.

The court heard oral argument on the motion for summary judgment at a remote hearing on July 24, 2023. During oral argument, the plaintiff conceded that she was no longer proceeding on her defective highway statute claims. The court will therefore enter summary judgment as to those claims (counts XII and XIII). The court will address the plaintiff's remaining claims.

Additional facts will be set forth below.

DISCUSSION

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018). "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact ... but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 233, 32 A.3d 307 (2011). "[I]ssue-finding, rather than issue-determination, is the key to the procedure." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 222, 131 A.3d 771 (2016).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent.... When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue.... Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue.... It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § 380 [now § 17–45]." (Internal quotation marks omitted.) *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 101, 209 A.3d 629 (2019).

A. Negligence

***3** "In *Ventura* v. *East Haven*, 330 Conn. 613, 629, 199 A.3d 1 (2019), our Supreme Court restated the well established principles that govern the statutory distinction between ministerial and discretionary acts.... Accordingly,

a municipality is entitled to immunity for discretionary acts performed by municipal officers or employees but may be held liable for those acts that are not discretionary but, rather, are ministerial in nature. [O]ur courts consistently have held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion.... Furthermore, this court held previously that evidence of a policy that merely states general responsibilities without provisions that mandate the time or manner in which those responsibilities are to be executed, leaving such details to the discretion and judgment of the municipal employees, is insufficient to show that the act is ministerial.... Therefore, if there is no directive setting forth the manner in which a municipal official is to perform the act, then the act is not ministerial and is therefore discretionary in nature. [Our Appellate] court has already concluded that, in the absence of a directive prescribing the manner in which an official is to remove snow and ice, such an act is discretionary in nature." (Citations omitted; internal quotation marks omitted.) *Kusy* v. *Norwich*, 192 Conn. App. 171, 176–78, 217 A.3d 31, cert. denied, 333 Conn. 931, 218 A.3d 71 (2019). "First, our Supreme Court in *Ventura* stated that, in order for an act to be classified as ministerial, there must be evidence of a directive that compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion.... Second, the trial court's statement in *Finn* [v. *Hamden*, Superior Court, judicial district of New Haven, Docket No. CV-16-6060709-S (September 13, 2017)] that the act of snow and ice removal is ministerial in nature is belied by an examination of the act itself. *The act of snow and ice removal, absent a directive strictly imposing the time and manner in which it is to be done, is inherently a discretionary act because it requires the exercise of judgment.*" (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 179–80.

"[T]he ultimate determination of whether ... immunity applies is ordinarily a question of law for the court ... [unless] there are unresolved factual issues material to the applicability of the defense ... [in which case] resolution of those factual issues is properly left to the jury.... [Accordingly, our Appellate] court has held that it is appropriate for a trial court to grant a municipal defendant's motion for summary judgment if the plaintiff is unable to proffer a directive that would impose a ministerial duty." (Citations omitted; internal quotation marks omitted.) *Kusy* v. *Norwich*, supra, 192 Conn. App. 181.

In the present case, the defendants' evidence establishes that how and when to address snow and ice removal was left entirely to the discretion of the town's employees. Krauch explained there was no policy requiring custodians to walk the school grounds, and that "[i]t's basically up to them." Docket No. 135, Exhibit B, p. 21. Nor was there a policy requiring custodians to conduct more inspections after storms where there may have been a melt and re-freezing. Id., 25. Additionally, Tarbell's department had no policies in place requiring employees to inspect parking lots at board of education facilities for ice and snow. See Docket No. 135, Exhibit G, p. 15. Ford also confirmed that there are no written policies requiring the custodial staff to perform an inspection, but rather "it's a judgment call based on what's happening at that time." See Docket No. 135, Exhibit I, pp. 21–22. Accordingly, the defendants have provided evidence that illustrates "the absence of a directive prescribing the manner in which an official is to remove snow and ice." (Citations omitted; internal quotation marks omitted.) *Kusy* v. *Norwich*, supra, 192 Conn. App. 178. The defendants have therefore met their burden of showing the absence of any mandated policy for snow or ice removal. The burden then shifts to the plaintiff to show the existence of any disputed issue of material fact as to the presence of mandated requirements establishing that performance of snow and ice removal constituted a ministerial duty, rather than a discretionary duty.

In support of her argument, the plaintiff points to the job description of Head Custodian III, which lists two performance responsibilities relevant here: "4. *Supervises, organizes, and conducts snow removal* and landscaping *activities.* ... 7. *Maintains* janitorial, landscaping, *snow removal, and other building-related equipment.*" (Emphasis added.) Docket No. 137, Exhibit G. However, nothing in the job description imposes any duty as to the manner in which snow removal must be conducted, or when. It simply says that snow removal, and maintenance of snow removal equipment, fall within the job responsibilities of the Head Custodian III. The plaintiff failed to identify "any statute, ordinance, policy, or other directive setting forth a clear snow and ice removal policy." *Kusy* v. *Norwich*, supra, 192 Conn. App. 179.

***4** Having found that the acts in question were discretionary rather than ministerial, the court must next address whether the identifiable victim/imminent harm exception to **governmental immunity** applies.

B. Identifiable victim/imminent harm exception to governmental immunity

"[Our Supreme Court] has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm.... This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm.... All three must be proven in order for the exception to apply.... [T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court ... [unless] there are unresolved factual issues ... properly left to the jury." (Internal quotation marks omitted.) *Kusy* v. *Norwich*, supra, 192 Conn. App. 182–83.

There is no doubt that the plaintiff is an identifiable victim. See *St. Pierre* v. *Plainfield*, 326 Conn. 420, 436, 165 A.3d 148 (2017) (holding that students attending public school during school hours are identifiable victims).

As to the imminent harm requirement, "the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." (Internal quotation marks omitted.) *Martinez* v. *New Haven*, 328 Conn. 1, 9, 176 A.3d 531 (2018). Moreover, "[i]n *Williams* v. *Housing Authority*, supra, 159 Conn. App. at 679, 124 A.3d 537, [our Appellate Court] construed *Haynes* [v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014)] as setting forth the following four part test with respect to imminent harm. First, the dangerous condition alleged by the plaintiff must be apparent to the municipal defendant.... We interpret this to mean that the dangerous condition must not be latent or otherwise undiscoverable by a reasonably objective person in the position and with the knowledge of the defendant. Second, the alleged dangerous condition must be likely to have caused the harm suffered by the plaintiff. A dangerous condition that is unrelated to the cause of the harm is insufficient to satisfy the *Haynes* test. Third, the likelihood of the harm must be sufficient to place upon the municipal defendant a clear and unequivocal duty ... to alleviate the dangerous condition. The court in *Haynes* tied the duty to prevent the harm to the likelihood that the dangerous condition would cause harm.... Thus, [our Appellate Court] consider[s] a clear and unequivocal duty ... to be one that arises when the probability that harm will occur from the dangerous condition is high enough to necessitate that the defendant act to alleviate the defect. Finally, the probability that harm will occur must be so high as to require the defendant to act immediately to prevent the harm." (Citations omitted; internal quotation marks omitted.) *Washburne* v. *Madison*, 175 Conn. App. 613, 630, 167 A.3d 1029 (2017), cert. denied, 330 Conn. 971, 200 A.3d 1151 (2019).

***5** In the present case, the plaintiff failed to establish the prerequisites for a finding of imminent harm. As Tarbell averred, "[a]ny snow was plowed onto the grassy field located between the subject parking lot and the Forbes Street, in East Hartford, Connecticut, is piled there to remove it from the anticipated paths of travel of students." Docket No. 135, Exhibit D, para. 9. Additionally, the plaintiff stated that she walked across the grassy field rather than using the sidewalk. Docket No. 135, Exhibit C, p. 40. She stepped over a snow mound and onto the parking lot when she lost her footing. The plaintiff did not establish that "it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." *Martinez* v. *New Haven*, supra, 328 Conn. 9. Nor did she show that the allegedly dangerous condition was apparent to the defendants and was not latent or otherwise undiscoverable by a reasonably objective person in the defendants' position.[3]

[3] The plaintiff's evidence demonstrated a general awareness that students taking the city bus frequently walk across the grassy field during the school year, against the advice of the defendants. However, there was no evidence of any similar incident occurring that would have alerted the defendants that additional precautions were required. Compare *Haynes* v. *Middletown*, supra, 314 Conn. 325 (finding that school officials knew that horseplay in the locker rooms was an ongoing issue, and that the locker was in a dangerous condition seven months before the injury occurred), with *Martinez* v. *New Haven*, supra, 328 Conn. 11–12 (unlike *Haynes*, the defendants had not experienced any problems with student behavior in the auditorium and had no reasonable way to anticipate that a student would be cut while attempting to pick up safety scissors in the auditorium at the same time as another student).

Having failed to establish imminent harm, the plaintiff cannot satisfy the identifiable person/imminent harm exception to governmental immunity. See *Martinez* v. *New Haven*, supra, 328 Conn. 8. ("All three [requirements] must be proven in order for the exception to apply.")[4] Accordingly, the court grants summary judgment in favor of the defendants on the plaintiff's

negligence counts (counts III through IX), and the concomitant indemnification claims (counts X and XI).

[4] Given that the plaintiff did not satisfy the imminent harm requirement, the court need not address the third element of the identifiable person/imminent harm exception to **governmental immunity** (a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm).

C. Nuisance

"[A] plaintiff must prove four elements to succeed in a nuisance cause of action: (1) the condition complained of had a natural tendency to create danger and inflict injury [on] person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of the plaintiffs' injuries and damages.... In addition, when the alleged tortfeasor is a municipality, our common law requires that the plaintiff also prove that the defendants, *by some positive act, created the condition constituting the nuisance.*" (Citations omitted; emphasis in original; internal quotations marks omitted.) *Read* v. *Plymouth*, Superior Court, judicial district of New Britain, Docket No. CV-05-5000158-S (July 26, 2010, *Trombley, J.*) (50 Conn. L. Rptr. 423). "[A] municipality is only liable in the event that, if the condition constituted a nuisance, it was created by some positive act of the municipality." *Lukas* v. *New Haven*, 184 Conn. 205, 209, 439 A.2d 949 (1981). The "failure to remedy a condition not of the municipality's own making is not the equivalent of the required positive act in imposing liability in nuisance upon a municipality." Id., 210.

As discussed above, the defendants established that the snow mounds between the grassy field and the parking lot were created when the defendants removed snow from the anticipated paths of travel of students. Docket No. 135, Exhibit D, para. 9. According to the plaintiff, she lost her balance *after stepping over the snow mound* and onto ice in the parking lot. See Docket No. 135.00, Exhibit C, p. 46; Docket No. 137.00, Exhibit A, para. 14 (stating in her affidavit that "at the edge of the grassy field and the parking lot in front of the High School, I stepped over a snow bank and slipped on ice in the parking lot, fell and fractured my ankle.") The plaintiff's fall on ice was not a condition of the defendants' making and did not constitute a positive act creating a nuisance. See *Lukas* v. *New Haven*, supra, 184 Conn. 209–10. The defendants' motion for summary judgment on the nuisance counts (counts I and II) is therefore granted.

CONCLUSION

***6** For the foregoing reasons, the defendants' motion for summary judgment is granted as to all counts of the revised complaint.

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All Citations

Not Reported in Atl. Rptr., 2023 WL 6578900

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