DOCKET NO: HHD-CV-22-6159015-S	:	SUPERIOR COURT
EMMA FICHERA	:	J.D. OF HARTFORD
V.	:	AT HARTFORD
TOWN OF WEST HARTFORD	:	MAY 7, 2024

MEMORANDUM OF DECISION RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (# 117)

INTRODUCTION

In the present action, the plaintiff alleges that she was injured when she tripped and fell on pool equipment at a municipal pool owned and operated by the defendant. The defendant moved for summary judgment on the ground that as a governmental entity it is immune from liability. For the reasons set forth below, the defendant's motion is granted.

FACTS AND PROCEDURAL HISTORY

The plaintiff, Emma Fichera, filed a one count negligence complaint on August 2, 2022, against the defendant, the Town of West Hartford (town), alleging the following facts. On or about July 31, 2020, at approximately 10 a.m., the plaintiff was walking on the premises of Fernridge Pool located at 567 Fern Street, West Hartford, when she tripped and fell on a piece of pool maintenance equipment that was lying in and obstructing the path of those walking on the premises, resulting in injury. (Complaint ¶¶ 3, 5, 8-9.) The town filed its answer and special defenses on October 13, 2022, denying the material allegations of the complaint and alleging as special defenses the doctrine of governmental immunity pursuant to General Statutes § 52-557n and the common law, and comparative negligence. (Answer, pp. 2-3.)

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On August 30, 2023, the town filed a motion for summary judgment and supporting memorandum of law, asserting that it is entitled to summary judgment as a matter of law because the plaintiff's claim is barred by governmental immunity. In support of its motion the town submitted as exhibits excerpts of the plaintiff's deposition testimony and an affidavit of Marc Blanchard, the town's manager of leisure services. (Docket no. 118, Exhibits A, B.)

On September 19, 2023, the plaintiff filed her objection to the motion, arguing that governmental immunity is inapplicable because the town's duties are ministerial, the town had a pecuniary interest in the pool's operation, and the identifiable person-imminent harm exception to governmental immunity applies. In support of her argument, the plaintiff submitted an affidavit of counsel attaching excerpts of the town's interrogatory answers; certain town ordinances; a copy of Connecticut Public Health Code § 19-13-B33b; and a fee schedule for the Fernridge pool from the town's website. (Docket no. 120, Exhibits A through D, respectively.) On October 3, 2023, the defendant filed its reply memorandum. (Docket no. 121.)

The court conducted oral argument on the motion at a remote hearing on November 27, 2023, and thereafter requested supplemental briefing with respect to the town's ordinances and the alleged operation of the pool for a pecuniary benefit. The plaintiff and the town filed supplemental memoranda on December 5 and 11, 2023, respectively. (Docket nos. 122, 123, respectively.) On March 8, 2024, the town filed a second supplemental memorandum together with a second Blanchard affidavit. (Docket no. 125, Exhibit A.) The court conducted further oral argument at a remote hearing on March 11, 2024.

Additional facts will be discussed 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). "The test [for summary judgment] is whether a party would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *Fernandez* v. *Mac Motors, Inc.*, 205 Conn. App. 669, 673, 259 A.3d 1239 (2021).

"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).

I. Governmental Immunity

The town argues that it is immune from liability pursuant to General Statutes § 52-557n. The version of that statute in effect at the time of the incident provides, in relevant part: "(a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit. . . . (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

A. Discretionary Versus Ministerial Duty

"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." (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).

"[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." (Internal quotation marks omitted.) *Kusy* v. *Norwich*, supra, 192 Conn. App. 181.

The town argues that governmental immunity applies because its acts in maintaining and inspecting the pool are discretionary, and there is no written policy, rule, or directive creating a ministerial duty. The plaintiff points to the provisions of the town ordinances and State regulations she submitted with her memorandum that she contends creates a ministerial duty. For example, she argues that pursuant to town ordinance § 159-17, the pool deck was required to be free of litter and articles unnecessary to the pool's operation, and under the Connecticut Public Health Code § 19-13-B33b, deck accessories and equipment were required to be properly maintained and stored.

The town counters that the cited provisions do not dictate the specific manner in which the pool deck was to be maintained and pool equipment stored, and that duties involving inspection, maintenance, repair and supervision consistently have been found to be discretionary, rather than ministerial, acts. (Docket no. 117, pp. 10-15.)

In *Mills* v. *Solution, LLC*, 138 Conn App. 40, 50, 50 A.3d 381, cert. denied, 307 Conn. 928, 55 A.3d 570 (2012), the Appellate Court determined that General Statutes § 7-284 addressed discretionary, rather than ministerial acts. The statute provides that "[w]hen police protection is necessary or required at any . . . place of public amusement . . . the amount of such protection necessary shall be determined and shall be furnished by . . . the chief of . . . the police department . . . ." The court found that "[a]lthough the word 'shall' can connote a mandatory command, the language of the statute, read as a whole, involves discretionary acts." Id., 51.

In *Grignano* v. *Milford*, 106 Conn. App. 648, 943 A.2d 507 (2008), the Appellate Court addressed several town ordinances. "Section 16-91 (b) of the Milford Code of

Ordinances provides in relevant part: 'It shall be the responsibility of the owner, licensee, or operator, of any marina, repair yard, or other maritime facility located within any harbor, waterway, or other maritime facility, to maintain the physical improvements under his jurisdiction in a safe . . . condition at all times . . . .'" *Grignano* v. *Milford*, supra, 106 Conn. App. 656-57. The court found that what is reasonable and proper inspection and maintenance requires discretion. Id., 657.

In contrast, the court found that the duty to warn in Milford Code of Ordinances § 16-173 involved ministerial, not discretionary acts. That ordinance provides: "Whenever any buildings, structures or floating facilities within a harbor or marine facility either on land or water are found to be defective or damaged so as to be unsafe or dangerous to persons or property, it shall be the duty of the owner, agent, lessee, operator, or person in charge thereof to immediately post a proper notice and/or fence or barricade and at night to adequately light such unsafe area or areas, and such unsafe area or areas shall be kept posted and lighted and/or fenced or barricaded until the necessary repairs are made." *Grignano* v. *Milford*, supra, 106 Conn. App. 657-58. The court found that the duty to warn was ministerial because the ordinance specifically described both when to carry out the duty to warn (immediately upon a determination of an unsafe condition) and how to carry it out. Id., 658-60.

In the present case, the court finds that the duties to inspect and maintain the pool deck, without any directive prescribing when and how to execute these duties, are discretionary rather than ministerial. Blanchard's affidavit confirms that "[t]here are no written ordinances, regulations, directives or policies within the [t]own . . . mandating the

specific manner in which the [t]own is to maintain the pool deck or any of the related areas, including the pool deck." (Docket no. 118, Exhibit B, ¶ 8.) Blanchard further averred that town employees had the discretion how to maintain the pool and any of its associated areas, including the pool deck and any pool equipment. (Id., ¶ 9.)

The town has satisfied its burden that there is no genuine issue of material fact as to whether its duties are discretionary.

B. Pecuniary Interest

The plaintiff argues that if the town derives a pecuniary interest in operating the pool it cannot rely on governmental immunity. Here, however, there is no genuine issue of material fact that at the time that the plaintiff alleges that she was injured the town did not charge a fee for use of the pool, a fact the plaintiff conceded at her deposition. (Docket no. 118, Exhibit A, p. 15.) Blanchard confirms that in 2020 "there was no charge for use of outdoor pools." (Docket no. 125, Exhibit A, ¶ 8.) The town argues that free public use of the pool is sufficient to show that the operations were for a public function. The plaintiff counters that despite the fact that she was not required to pay a fee on the day she was injured, the town's fee schedule shows that in prior years it charged an entry fee, and in fact charged non-residents more, thus evidencing a profit motive.

General Statutes § 52-557n (a) (1) (B) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit . . . ."

"In *Considine* v. *Waterbury*, 279 Conn. 830, 837-48, 905 A.2d 70 (2006), we undertook a comprehensive analysis of § 52-557n (a) (1) (B). We concluded that the statutory provision codifies the common-law rule that municipalities are liable for their negligent acts committed in their proprietary capacity, as opposed to in their governmental one. . . . Liability for proprietary acts means that a municipality is liable to the same extent as in the case of private corporations or individuals . . . . To determine whether the defendant is subject to such liability in the present case, we analyze whether the defendant derives a special corporate profit or pecuniary benefit from the function of operating its pool, in other words, whether that function is proprietary." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *St. Pierre* v. *Plainfield*, 326 Conn. 420, 427-28, 165 A.3d 148 (2017).

"We have concluded previously that a municipality may . . . charge a nominal fee for participation in a governmental activity and it will not lose its governmental nature as long as the fee is insufficient to meet the activity's expenses. . . . " (Internal quotation marks omitted.) *St. Pierre* v. *Plainfield*, supra, 326 Conn. 429-30. "[A] proprietary function has been found where the municipality is act[ing] very much like private enterprise . . . ." (Citations omitted; internal quotation marks omitted.) Id., 431.

In the present case, the plaintiff was not charged any fee for using the pool the day she was injured, and under *St. Pierre* v. *Plainfield*, supra, even if the town had charged a nominal fee it would still be entitled to governmental immunity. The plaintiff failed to show that the town derived a pecuniary benefit from operating the pool, and therefore this exception to governmental immunity is inapplicable.

II. Identifiable Person, Imminent Harm Exception

The court turns next to the issue of whether the identifiable person, imminent harm exception applies.

"[T]he identifiable person, imminent harm exception . . . requires three elements: (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 . . . . If the plaintiffs fail to establish any one of the three prongs, this failure will be fatal to their claim that they come within the imminent harm exception." (Internal quotation marks omitted.) *St. Pierre* v. *Plainfield*, supra, 326 Conn. 435.

"Generally, we have held that a party is an identifiable person when he or she is compelled to be somewhere. . . . Outside of the schoolchildren context, we have recognized an identifiable person under this exception in only one case that has since been limited to its facts. Beyond that, although we have addressed claims that a plaintiff is an identifiable person or member of an identifiable class of foreseeable victims in a number of cases, we have not broadened our definition." (Footnote omitted.) *St. Pierre* v. *Plainfield*, supra, 326 Conn. 436-37.

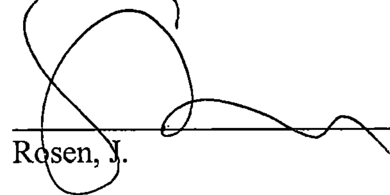
In *St. Pierre*, the plaintiff slipped and fell at a public pool while attending an aqua therapy session provided by Eastern Connecticut Rehabilitation Center, Inc. (Eastern). The court found that "the plaintiff was in no way compelled to attend" the sessions and instead "voluntarily decided to use Eastern's services" and therefore the identifiable person, imminent harm exception did not apply. *St. Pierre* v. *Plainfield*, supra, 326 Conn. 438.

As in *St. Pierre*, the plaintiff in the present case chose to do aqua aerobics at the town pool. (Docket no. 118, Exhibit A, p. 14.) She was not in any way compelled to be at the pool. Accordingly, the identifiable person, imminent harm exception does not apply, and the defendant is therefore immune from liability.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is granted based on governmental immunity.

BY THE COURT



Rosen, J.

Checklist for Clerk

Docket Number: HHD CV22-6159015

Case Name: Fichera v. Town

Memorandum of Decision dated: 5/7/2024

File Sealed: **Yes** **No** X

Memo Sealed: **Yes** **No** X

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Comments

HHD-CV22-6159015-S **FICHERA, EMMA v. TOWN OF WEST HARTFORD**

Prefix: HD6 **Case Type:** T12 **File Date:** 08/02/2022 **Return Date:** 09/13/2022

Information Updated as of: 05/07/2024

Case Information

Case Type: T12 - Torts - Defective Premises - Public - Other
Court Location: HARTFORD JD
List Type: JURY (JY)
Trial List Claim: 10/14/2022
Last Action Date: 03/08/2024 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date:
Disposition:
Judge or Magistrate:

Party & Appearance Information

Party		No Fee Party	Category
P-01	**EMMA FICHERA** **Attorney:** GOFF LAW GROUP LLC (438704) File Date: 08/02/2022 433 S MAIN STREET SUITE 328 WEST HARTFORD , CT 06110		Plaintiff
D-01	**TOWN OF WEST HARTFORD** **Attorney:** HOWD & LUDORF LLC (028228) File Date: 08/24/2022 100 GREAT MEADOW ROAD SUITE 201 WETHERSFIELD , CT 061091121		Defendant

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