UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MICHAEL MAROM,

Plaintiff,

-against-

TOWN OF HEMPSTEAD, SUPERVISOR KATE MURRY, CODE ENFORCEMENT OFFICERS JON LIPINSKY and MARTIN SMITH,

Defendants.
----------X

**OPINION AND ORDER**
14-cv-3005 (SJF)(ARL)

FEUERSTEIN, District Judge:

On May 13, 2014, *pro se* plaintiff Michael Marom ("Plaintiff") commenced this action against defendants the Town of Hempstead (the "Town"), Supervisor Kate Murray ("Supervisor Murray"),[1] and Code Enforcement Officers Jon Lipinsky ("Lipinsky") and Martin Smith ("Smith") (the Town, Supervisor Murray, Lipinsky, and Smith, collectively "Defendants"). (*See generally* Complaint ("Compl.") (Dkt. 1)). This litigation arises out of Smith's entry onto Plaintiff's property in Baldwin, New York on September 21, 2013, while a real estate company was hosting an open house for the purpose of selling Plaintiff's home, and the Town's subsequent enforcement proceedings against Plaintiff for certain municipal building code violations.

Plaintiff asserts two federal claims: that all Defendants violated his Fourth Amendment right to be free from unreasonable searches and seizures, pursuant to 42 U.S.C. § 1983 (first cause of action); and a municipal liability claim against the Town based upon its alleged failure

[1] Plaintiff misspelled defendant Murray's name in the caption as "Murry," and the caption has not been amended to reflect the proper spelling.

to train and supervise its building-code-enforcement employees, pursuant to 42 U.S.C. § 1983 and *Monell v. Dept. of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978) (fourth cause of action). Plaintiff also asserts two state law claims: a trespassing claim against Officer Lipinsky (second cause of action); and a negligence claim against Officers Smith and Lipinsky (third cause of action). The Court has original federal-question jurisdiction over the section 1983 claims pursuant to 28 U.S.C. § 1331, but would need to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a) to adjudicate those claims on their merits. Defendants have moved for summary judgment on each of Plaintiff's claims pursuant to Federal Rule of Civil Procedure 56 (Dkt. 47), and Plaintiff has also moved for summary judgment (Dkt. 51). For the following reasons, Defendants' motion for summary judgment is granted with respect to Plaintiff's federal section 1983 claims, Plaintiff's motion for summary judgment is denied in its entirety, and the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims.

## I. BACKGROUND [2]

### A. The Parties, Relevant Non-Parties, and the Town's Building Code Inspection Regime

The Town is a municipal corporation organized under the laws of the State of New York. (Def. Stmt. ¶ 7). Plaintiff and his wife own and reside in a home located at 2574 Central Avenue (the "Home") in Baldwin, New York, a hamlet within the Town's jurisdiction. (*Id.* ¶ 11; *see* Compl. at 2). Supervisor Murray is the Supervisor of the Town. (Def. Stmt. ¶ 8). Smith is a Code Enforcement Officer ("CEO") I employed by the Town's Building Department (the "Department"). (*Id.* ¶ 10). Lipinsky is a CEO II employed by the Department. Rick West ("West") is a CEO I employed by the Department. (*Id.* ¶ 13). John Rottkamp ("Rottkamp"), who Plaintiff deposed in connection with this litigation, is the Commissioner of the Department, overseeing approximately 120 Department employees. (*Id.* ¶¶ 12, 23). Rottkamp has worked for the Town since 1998 and has been the Department's Commissioner since 2008. (*Id.* ¶¶ 14, 15). As Commissioner, Rottkamp interviews and hires new CEOs. (*Id.* ¶ 26).

[2] The following facts are taken from the parties' pleadings, affidavits, and statements and counterstatements pursuant to Local Civil Rule 56.1, along with the accompanying exhibits, and are undisputed unless otherwise noted. (*See generally* Complaint ("Compl.") (Dkt. 1); Defendants' Rule 56.1 Statement ("Def. Stmt.") (Dkt. 47-3); Plaintiff's Affirmation in Support of Summary Judgment ("Pl. Aff.") (Dkt. 61); and Defendants' Rule 56.1 Counterstatement ("Def. Cnt. Stmt.") (Dkt. 51-6). Where the same fact is asserted or admitted by both Plaintiff and Defendants, only one source is noted. Citations to paragraphs within a counterstatement encompass both the original statement and the opposing party's response, as well as the supporting exhibits cited therein. The Court has considered whether the parties' statement of facts are supported by admissible evidence. If a statement of fact is unsupported by any evidence in the record or is premised entirely upon inadmissible evidence – hearsay, for example – it is disregarded. If a proffered fact that is supported by admissible evidence is disputed only with inadmissible or irrelevant evidence, the Court treats that fact as undisputed. *See, e.g.*, *Spiegel v. Schulmann*, 604 F.3d 72, 81 (2d Cir. 2010) ("It is well established that … the district court in awarding summary judgment[ ] may rely only on admissible evidence.") (internal citations and quotations omitted); *Scotto v. Brady*, 410 Fed. Appx. 355, 361 (2d Cir. 2010) ("We observe that a district court deciding a summary judgment motion has broad discretion in choosing whether to admit evidence, and that the principles governing admissibility of evidence do not change on a motion for summary judgment.") (internal quotations and citations omitted); *see also Burlington Coat Factory Warehouse Corp. v. Espirit De Corp.*, 769 F.2d 919, 924 (2d Cir. 1985) (a party "cannot rely on inadmissible hearsay in opposing a motion for summary judgment"). Where a statement of fact is controverted with a legal argument rather than a factual statement, the Court disregards the argumentative objection and treats the underlying fact as admitted. *See, e.g., Amalgamated Lithographers of America v. Unz & Co. Inc.*, 670 F. Supp. 2d 214, 217 (S.D.N.Y. 2009).

As CEOs in the Department's "housing and zoning enforcement section," Smith and Lipinsky are responsible for enforcing the Town's housing and building codes. (*Id.* ¶ 25). There are 17 CEOs in the Department's housing and zoning section. (*Id.* ¶ 35). Under written and/or unwritten Department guidelines,[3] CEOs have the authority to issue summonses requiring a resident to appear in court and/or pay a fine anytime the CEOs "feel" there is a violation of the Town's building code, apparently without regard to objective facts, such as the precise length, width, or depth of a structure; if the local court ultimately determines that there was no violation, it can dismiss a summons. (*Id.* ¶¶ 34, 95-100; Def. Cnt. Stmt. ¶ 35).

New CEOs receive six months to a year of training, which involves classroom work and on-the-job training with senior CEOs. (Def. Stmt. ¶¶ 27, 28, 32). Despite the fact that they will be inspecting buildings for code violations, CEOs are not trained in building trades such as plumbing, electrical work, or air conditioning. (Def. Cnt. Stmt. ¶ 27). New CEOs are assigned weekend days as part of their regular work schedule, with two CEOs working on Saturday and two working on Sunday. (*Id.* ¶¶ 29, 36). Though their first priority is to respond to calls from residents reporting potential building code and/or public safety violations, CEOs working on the weekends are also instructed to locate and visit homes that are opened to the public by homeowners and/or real estate firms for the purpose of sale (an "open house"), and to inspect those homes for all variety of violations, from the life-threatening to the technical. (*Id.* ¶¶ 30-32, 38-40, 44, 55-56). Weekend CEOs split the Town in half; one CEO visits open houses on the west side of the Town and the other CEO visits open houses on the east side. (*Id.* ¶ 41).

[3] While Rottkamp, Smith, and Lipinksy testified regarding the general inspection practices of CEOs, the precise genesis of these practices is unclear and nether Plaintiffs nor Defendants have provided the Court with any written Department policies governing CEO conduct.

During his deposition, Rottkamp estimated that CEOs collectively conduct about five to six open house inspections per month, and issue about two to three tickets / summonses per month as a result of open house inspections. (*Id.* ¶¶ 37, 42). The Department does not instruct CEOs to follow any particular protocols when performing open house inspections. (*Id.* ¶¶ 47-50; Def. Cnt. Stmt. ¶ 18). Whereas CEOs are required to wear Department uniforms during typical inspections, they are not required to wear uniforms or to otherwise identify themselves as Department employees when conducting open house inspections. (Def. Stmt. ¶ 31; Def. Cnt. Stmt. ¶ 21). Though CEOs are not instructed to enter false names and/or phone numbers in open house visitor logs, many do because they do not want to be contacted by real estate agents. (Def. Stmt. at ¶¶ 49-50). The Department began conducting open house inspections in or about 2000. (Def. Stmt. ¶ 45). Rottkamp testified that he has never discussed the Department's practice of conducting open house inspections with Supervisor Murray or any previous Town Supervisor, or with the Town Board. (*Id.* ¶ 47).

As of April 10, 2015, the date of his deposition, Smith had been conducting open house inspections on the weekends for approximately six years, viewing an average of three open houses every Saturday during that time period. (*Id.* ¶¶ 53, 59). Whenever he is asked to enter his name and phone number in an open house's visitor log, Smith uses the alias "Martin Edmond" – his two middle names – and enters a fictitious telephone number. (*Id.* ¶¶ 50, 72, 73; Def. Cnt. Stmt. ¶ 14). Whenever Smith observed a violation during a weekend open house visit, he reported the violation to his direct supervisor, Amy Strawgate, and wrote a summons when he returned to work on the next business day. (Def. Stmt. ¶¶ 54, 56, 60). Lipinski has also performed open house inspections in the past. (*Id.* ¶ 62). When Lipinski was assigned to

weekend duty, he would review the Multiple Listing Service Long Island website (www.mlsli.com) to find open houses happening that day prior to venturing out. (*Id.* ¶ 63).

**B. Building Code Enforcement Activities against Plaintiff**

Plaintiff and his wife have owned and lived in the Home since 1994. (*Id.* ¶¶ 64, 66). On Saturday, September 21, 2013, Sailing Home Realty (the "Realtor"), a real estate firm that Plaintiff had engaged for the purpose of selling the Home, hosted an open house at the Home with Plaintiff's knowledge and approval. (*Id.* ¶¶ 67, 68). Plaintiff and his wife left the Home prior to the start of the open house, allowing Realtor to conduct the open house independently. (*Id.* ¶ 70). At some point during the open house, Smith entered the Home for the purpose of conducting an inspection. (*Id.* ¶ 71, 74). He did not inform Realtor of his affiliation with the Department or request the Realtor's permission to inspect the Home, and he entered the pseudonym "Martin Edmond" and a fictitious phone number on the visitor log. (*Id.* ¶¶ 50, 72; Def. Cnt. Stmt. ¶ 14). Posing as a potential buyer and/or member of the general public, Smith spent approximately 15 to 20 minutes inspecting the Home. (Def. Stmt. ¶¶ 74, 76; Def Cnt. Stmt. ¶ 25).

While conducting his inspection, Smith observed a sauna in the basement of the Home, which he viewed from the outside for approximately two or three minutes without entering it. (Def. Stmt. ¶ 76; Def. Cnt. Stmt. ¶ 26). Though the sauna in the Home was "dry," and thus did not have or need any plumbing, Smith mistakenly believed that all saunas required plumbing and a plumbing permit from the Town. (Def. Stmt. ¶¶ 77, 78; Def. Cnt. Stmt. ¶¶ 32, 33). On September 24, 2013, Smith issued an "appearance ticket" directing Plaintiff's wife to appear in the Second District Court of the County of Nassau (the "Town Court") on February 6, 2014 to

answer for the offense of "plumbing w/o permit sauna in basement" in violation of Article 86, Section 10(A)(1) of the Town's Building Code (the "First Summons"). (Def. Stmt. ¶¶ 79, 80).[4]

Baldwin, where the Home is located, is an area that is assigned to Lipinsky for code enforcement purposes. (*Id.* ¶ 81). On December 12, 2013, Lipinsky went to the Home for the purpose of serving the First Summons. (*Id.* ¶ 82). While approaching the Home, Lipinsky observed a manmade pond in the front yard, which did not contain water at the time. (*Id.* ¶¶ 85-87). Lipinsky knocked on the front door and Plaintiff's wife answered. (*Id.* ¶ 84). Lipinsky identified himself, served Plaintiff's wife with the First Summons, and requested permission to enter the Home so that he could view the sauna. (*Id.*). Plaintiffs' wife refused Lipinsky's request. (*Id.*). Lipinsky then asked Plaintiff's wife if she had a permit for the pond in the front yard and she answered that she did not know. (*Id.* ¶ 85). Lipinsky returned to his car and, after conducting some research, determined that Plaintiff did not have a permit for the pond in the front yard. (*Id.* ¶ 88). Without measuring the depth of the pond, Lipinsky wrote an "appearance ticket" directing Plaintiff's wife to appear in the Town Court on February 6, 2014 to answer for the offense of "pond in front yard" in violation of Article 86, Section 9(A)(1) of the Town's Building Code (the "Second Summons"), which the parties seem to agree prohibits water-holding structures exceeding 18 inches in depth absent a permit. (*Id.* ¶¶ 88-90, 93-94).[5] Lipinsky served Plaintiff's wife with the Second Summons. (*Id.* ¶ 90). Soon after Lipinsky

[4] Article 86, Section 10(A)(1) of the Town's Building Code provides that "[i]t shall … be unlawful for any property to be maintained with any plumbing or drainage work in a building or structure, for which a plumbing permit is required under the laws of the Town of Hempstead … unless and until a plumbing permit has been duly issued therefor." (Def. Stmt. ¶ 80).

[5] Article 86, Section 9(A)(1) of the Town's Building Code provides that "[i]t shall … be unlawful for any property to be maintained with any building, structure, or other improvement for which a building permit is required under the laws of the Town of Hempstead … unless and until a building permit and any required certificate of completion or occupancy, has been duly issued therefor." (Declaration of Donna Napolitano, Ex. G). Neither Plaintiff nor Defendants reference the source of the putative 18-inch threshold and the Court declines to undertake its own search for the answer.

served the First Summons and the Second Summons, Plaintiff and Lipinsky spoke about the pond, and Lipinsky advised Plaintiff that the pond would be in compliance with the Town's Building Code if Plaintiff were to reduce its depth to less than 18 inches. (*Id.* ¶ 94).

Plaintiff appeared in Town Court eight or nine times in connection with the First and Second Summonses and/or his own motions; he moved for the appointment of counsel, which the Town Court denied, and then filed multiple motions for reconsideration. (*Id.* ¶ 103). The Town Court ordered the Department to return to the Home to determine whether the sauna did in fact require plumbing and to measure the depth of the pond. (*Id.* ¶ 96, 98). In the presence of Plaintiff, West re-inspected the sauna and determined that no plumbing, and hence no plumbing permit, was required. (*Id.* ¶ 97). West also measured the pond and determined that it was deep enough to necessitate a permit. (*Id.* ¶ 99). The First Summons was dismissed, and Plaintiff pled guilty and paid a $50 fine in connection with the Second Summons. (*Id.* ¶¶ 100, 102).

## II. STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, 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," *Globecon Group, LLC v. Hartford Fire Ins. Co.*, 434 F.3d 165, 170 (2d Cir. 2006) (quoting Fed. R. Civ. P. 56(c)), and "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Belton v. City of New York*, 629 Fed. Appx. 50, 50 (2d Cir. 2015) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A district court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty*

*America v. Town of West Hartford*, 361 F.3d 113, 122 (2d Cir. 2004) (internal quotations omitted).

In order to defeat a motion for summary judgment, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts… [She] must come forward with specific facts showing that there is a *genuine issue for trial*." *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002) (quoting *Matsushita*, 475 U.S. at 586-87) (emphasis in original); *see also R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 77 (2d Cir. 1984) ("opposing party must provide concrete particulars showing that a trial is needed") (internal quotations omitted). "It is not sufficient merely to assert a conclusion without supplying supporting arguments or facts." *BellSouth Telecommunications, Inc. v. W.R. Grace & Company-Conn.*, 77 F.3d 603, 615 (2d Cir. 1996) (internal quotations omitted).

## III. DISCUSSION

### A. Section 1983 Claims

Plaintiff asserts two claims under 42 U.S.C. § 1983, which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

42 U.S.C. § 1983. Section 1983 does not itself confer any substantive rights, but it serves as a mechanism by which a plaintiff may vindicate federal rights conferred elsewhere. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v.*

*Atkins*, 487 U.S. 42, 48 (1988). Phrased differently, the "two essential elements" of a section 1983 claim are: "(1) the defendant acted under color of state law; and (2) as a result of the defendant's actions, the plaintiff suffered a denial of her federal statutory rights, or her constitutional rights or privileges." *Annis v. Cnty. of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998) (internal citation omitted).

**1. Fourth Amendment**

Plaintiff's first section 1983 claim is that, as a result of Smith's inspection of the Home during the open house on September 21, 2013, "Plaintiff's Constitutional rights under the fourth amendments [sic] to the United states [sic] Constitution were violated; Freedom from the search and seizure." (Compl. ¶ 13). Plaintiff also alleges, albeit under the heading of "trespass on private property," that Lipinsky violated Plaintiff's Fourth Amendment rights by entering his driveway and front yard on December 12, 2013. (*See id.* ¶¶ 16-18). Though Plaintiff purports to assert his Fourth Amendment claim against all Defendants, individual defendants may only be liable under section 1983 if they are personally involved in the alleged constitutional deprivations. *See Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994). Nothing in the record suggests that Supervisor Murray was personally involved in any entry into the Home or onto the property surrounding it, thus Plaintiffs' Fourth Amendment claim is dismissed as a matter of law as to Supervisor Murray.

As to Smith, Defendants do not contest the fact that he was operating under the color of state law when, on behalf of the Department, he inspected the Home on September 21, 2013. Plaintiff's section 1983 claim against Smith thus turns on whether or not his inspection of the home violated Plaintiff's Fourth Amendment rights. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The Fourth Amendment is enforceable against the states via the Fourteenth Amendment. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 655 (1961). "The basic purpose of [the Fourth] Amendment … is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court of City of San Francisco*, 387 U.S. 523, 528 (1967). While the vast majority of Fourth Amendment cases involve searches and seizures by law enforcement in connection with criminal investigations and prosecutions, the Supreme Court has held that the Fourth Amendment's protections also apply to regulatory inspections of homes and businesses. *See Camara*, 387 U.S. at 534; *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 323-25 (1978).

In most circumstances and subject to limited exceptions, prior to conducting a regulatory inspection of a private home, a government officer must either obtain the homeowner's or tenant's permission, or obtain a warrant if permission is refused. *See Camara*, 387 U.S. at 539-40 ("[A]s a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry."); *Cf. Black v. Village of Park Forest*, 20 F. Supp. 2d 1218, 1230-31 (N.D. Ill. 1998) (tenants renting single family houses had right to demand that village inspectors obtain warrant prior to conducting housing code inspections, and village could not levy administrative fee on those who exercised right to demand warrant). However, the

circumstances of this case are anomalous. Rather than seeking the homeowner's permission or, absent the homeowner's consent, obtaining a warrant, the Department has a seemingly unwritten, and perhaps unorthodox, policy of sending its inspectors into homes that are for sale during the relatively brief windows of time that those homes are held open to the public in connection with the sales process.

"[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)). On the other hand, "a Fourth Amendment search does *not* occur – even when the explicitly protected location of a *house* is concerned – unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.' " *Id.* (quoting *California v. Ciraolo*, 476 U.S. 207, 211 (1986)) (emphasis and alteration in original). Plaintiff opened the Home to the public on September 21, 2013 by vacating the Home with his wife and allowing Realtor to conduct an open house. In such circumstances, Plaintiff had no reasonable expectation of privacy, and thus no Fourth Amendment protection. *See, e.g., Katz,* 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection."); *U.S. v. Titemore*, 437 F.3d 251, 256 (2d Cir. 2006) ("[A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."); *accord California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (no reasonable expectation of privacy where something is left "in an area particularly suited for public

inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it") (internal quotations omitted).

Plaintiff does not argue that he had a reasonable expectation of privacy when he and his wife left the Home to allow Realtor to display it to any interested member of the public who happened to stop by. Rather, Plaintiff focuses on the fact that Smith failed to disclose his affiliation with the Department by wearing plain clothes and entering fictitious information on the visitor log. (*See* Plaintiff's Opposition to Summary Judgment (Dkt. 48) at 4). Plaintiff argues that Smith "entered [the] [H]ome with the purpose to conduct a search for code violations and not for the purpose of buying real estate." (*Id.* at 5). However, Smith's failure to disclose his true intentions does not restore Plaintiff's expectation of privacy for Fourth Amendment purposes. Plaintiff opened the Home to the public without any limitations and assumed the risk that someone with intentions other than purchasing real estate may have entered. *See Lewis v. United States*, 385 U.S. 206, 211 (1966) ("A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant."); *accord United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987) (no expectation of privacy when suspect opened door in response to knock, despite police subterfuge).

Plaintiff also alleges, in connection with his state "trespass on private property" cause of action, that Lipinsky violated Plaintiff's Fourth Amendment rights by entering his driveway and front yard on December 12, 2013 to serve the First Summons despite the fact that the yard / driveway "is protected by a 'NO Trespass' sign." (Compl. ¶¶ 15, 17-18). The record reflects only that Lipinsky entered Plaintiff's driveway and front yard for the purpose of serving Plaintiff's wife with the facially valid First Summons, and that he spotted an unpermitted pond in

the front yard when he was there, for which he wrote the Second Summons. This does not give rise to a viable Fourth Amendment claim. *See United States v. Reyes*, 283 F.3d 446, 465 (2d Cir. 2002) ("[W]e have found no Fourth Amendment violation based on a law enforcement officer's presence on an individual's driveway when that officer was in pursuit of legitimate law enforcement business.") (citing *Krause v. Penny*, 837 F.2d 595, 596 (2d Cir. 1996)); *Rogers v. Vicuna*, 264 F.3d 1, 2-3, 5 (1st Cir. 2001) (no reasonable expectation of privacy in a driveway visible to the occasional passerby; IRS agents lawfully entered driveway pursuant to valid tax collection levy to seize vehicles parked there); *Nasca v. County of Suffolk*, No. 05-CV-1717 (JFB)(ETB), 2008 WL 53247, at *5-8 (E.D.N.Y. Jan. 2, 2008) (no Fourth Amendment violation where police officer entered plaintiff's driveway in order to issue a summons for a traffic violation). The fact that Plaintiff may have posted a "no trespass" sign on a fence near the driveway makes no difference for Fourth Amendment purposes. *See Oliver v. United States*, 466 U.S. 170, 179-84 (1984) (no reasonable expectation of privacy with respect to marijuana plants growing in open field notwithstanding "no trespassing" signs erected around the property). Thus, Plaintiff does not have a viable Fourth Amendment claim against Lipinsky.

In sum, Plaintiff had no reasonable expectation of privacy when he opened the Home to the public on September 21, 2013, and the fact that Smith did not identify himself as being affiliated with the Department or announce his purpose does not alter the analysis in Plaintiff's favor. Moreover, Lipinsky did not violate Plaintiff's Fourth Amendment rights when he entered the Home's driveway and front yard on December 12, 2013 for the purpose of serving the First Summons. Defendants' motion for summary judgment is granted with respect to Plaintiff's section 1983 Fourth Amendment claim.

**2. *Monell***

Plaintiff's second section 1983 claim aims to establish municipal liability against the Town for its alleged failure to adequately train or supervise its employees so as to avoid the deprivation of Plaintiff's federally-protected rights. (*See* Compl. ¶¶ 23-27). While a municipal entity may not be held vicariously liable for the actions of its employees, it may be liable under section 1983 where a plaintiff demonstrates that his constitutional rights were violated as a result of the municipality's "policy or custom." *Monell*, 436 U.S. 658, 694 (1978). "The policy or custom need not be memorialized in a specific rule or regulation." *Kern v. City of Rochester*, 93 F.3d 38, 44 (2d Cir. 1996). A policy or custom may be inferred where " 'the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction.' " *Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 226 (2d Cir. 2004) (quoting *Kern*, 93 F.3d at 44).

In order to establish *Monell* liability based upon a municipality's deliberate indifference, a plaintiff must show that (1) "a policymaker knows 'to a moral certainty' that [municipal] employees will confront a particular situation"; (2) "the situation either presents the employee with 'a difficult choice of the sort that training or supervision will make less difficult' or 'there is a history of employees mishandling the situation' " and (3) "the wrong choice by the [municipal] employee will frequently cause the *deprivation of a citizen's constitutional rights*." *Wray v. City of New York*, 490 F.3d 189, 195-96 (2d Cir. 2007) (quoting *Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992)) (emphasis added). The Supreme Court has indicated that "[a] pattern of similar *constitutional violations* by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Connick v. Thompson*, 563 U.S. 51, 62 (2011) (internal quotations omitted). Pertinently here, one must first establish that

the actions of a municipal employee violated his constitutional rights in order to have a viable *Monell* claim against the municipal employer. Given that neither Smith's inspection of the Home during the open house nor Lipinksy's entry onto the Home's driveway and front yard for the purpose of serving the First Summons violated Plaintiff's Fourth Amendment rights, Plaintiff does not have a viable *Monell* claim against the Town. Accordingly, Defendants' motion for summary judgment is granted with respect to Plaintiff's section 1983 *Monell* claim.

**B. The Court Declines to Exercise Supplemental Jurisdiction over Plaintiff's State Law Claims**

Plaintiff asserts two causes of action under New York State law. First, Plaintiff alleges that Lipinsky trespassed when he entered the Home's driveway and front yard on December 12, 2013 to serve the First Summons "without Plaintiff['s] consent and without probable cause." (Compl. ¶ 15). Second, Plaintiff asserts a negligence claim against Lipinsky based upon his failure to measure the depth of the pond in Plaintiff's front yard before issuing the Second Summons, and against Smith, ostensibly based upon his mistaken belief that Plaintiff's sauna required a plumbing permit. (*See* Compl. ¶¶ 2, 6, 19-22).

While a federal district court may exercise supplemental jurisdiction over a plaintiff's state law claims pursuant to 28 U.S.C. § 1367(a), supplemental jurisdiction is " 'a doctrine of discretion, not of plaintiff's right.' " *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). The discretionary nature of supplemental jurisdiction is reflected in section 1367(c), which provides, in pertinent part, that a district court "may decline to exercise supplemental jurisdiction over a claim … if … [it] has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). "Once a district court's discretion is triggered under § 1367(c)(3), it balances the traditional 'values of judicial economy, convenience, fairness, and comity' … in deciding

whether to exercise jurisdiction." *Kolari*, 455 F.3d at 122 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)).

"[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the [supplemental] jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Cohill*, 484 U.S. at 350 n. 7. This is such a usual case. Though courts often decline to exercise supplemental jurisdiction at the motion to dismiss stage rather than the summary judgment stage, Defendants did not move to dismiss Plaintiff's complaint, so this is the first opportunity the Court has had to consider the merits of Plaintiff's claims. Additionally, there is no reason to believe that either party will be prejudiced or unduly inconvenienced if they are compelled to litigate Plaintiff's remaining state claims in state court. Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiff's trespass and negligence claims, and dismisses those claims without prejudice to Plaintiff pursuing them in state court.

## IV. CONCLUSION

For the foregoing reasons, the Defendants' motion for summary judgment is granted as to Plaintiff's section 1983 claims, and Plaintiff's motion for summary judgment is denied in its entirety. The Court declines to exercise supplemental jurisdiction over Plaintiff's trespass and negligence claims, and dismisses those claims without prejudice to Plaintiff pursuing them in state court. The Clerk of the Court is directed to close this case.

**SO ORDERED.**

*s/ Sandra J. Feuerstein*
Sandra J. Feuerstein
United States District Judge

Dated: March 22, 2017
Central Islip, New York