

**Samuel v City of Saratoga Springs**

2012 NY Slip Op 33915(U)

April 11, 2012

Supreme Court, Saratoga County

Docket Number: 2011-161

Judge: Robert J. Chauvin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT COUNTY OF SARATOGA

JENNIFER SAMUEL,

Plaintiff,

-against-

CITY OF SARATOGA SPRINGS, KIMBERLY INN,  
GARY DOWNIE, as Successor Trustee of the INGE  
DOWNIE TESTAMENTARY TRUST, BEATRICE  
STRAVETS, ENTERPRISE RENT-A-CAR and  
ENTERPRISE HOLDINGS, INC.,

Defendants.

**DECISION AND ORDER**

**Index No: 2011-161**  
**RJI No: 45-1-2011-0426**

2012 APR 13 AM 10:34  
SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

FILED

**Appearances:**

For Plaintiff:

James W. Shuttleworth, III, Esq.  
Finkelstein & Partners

For Defendant City of Saratoga Springs:

William Scott, Esq.  
Fitzgerald, Mooris Baker Firth P.C.

For Defendants, Kimberly Inn and Gary Downie, as Successor Trustee of the Inge Downie Testamentary Trust:

Daniel J. Stewart, Esq.  
Brennan & White LLP

For Defendant, Beatrice Stravets:

Dianne C. Bresee, Esq.  
O'Connor, O'Connor, Bresee & First P.c.

For Defendants, Enterprise Rent-a-Car and Enterprise Holdings, Inc.:

**Before:**

Hon. Robert J. Chauvin, J.S.C.

By Notice of Motion and supporting Affirmation, both dated March 29, 2011, the Defendant, City of Saratoga Springs, moves for judgment, pursuant to Section 3211 of the CPLR, dismissing any and all claims of the Plaintiff against said Defendant. In support of such

motion the Defendant submitted various documents including an Affidavit of Paul Male, City Engineer for the City of Saratoga Springs, dated March 22, 2011; a copy of the Summons and Verified Complaint; a copy of the Notice of Claim; a copy of the transcript of examination of the Plaintiff April 2, 2010; a copy of a deed and recording receipt; and correspondence dated April 8, 2010.

In response to the initial moving papers the Plaintiff submitted an Affirmation in Opposition dated July 29, 2011. Annexed to such affirmation were copies of various property maps; copy of a survey; copy of the Summons and Verified Complaint; a copy of the Verified Answer on behalf of Defendant, Beatrice Stravets; a copy of the Verified Answer on behalf of Defendants, Enterprise-Rent-A-Car and Enterprise Holdings, Inc.; and a copy of the Verified Answer on behalf of Defendants, Kimberly Inn and Gary Downie, as successor trustee of the Ingie Downie Estate.

Defendants Kimberly Inn and Gary Downie submitted an Affidavit of counsel in opposition dated August 24, 2011 and the Affidavit of Defendant, Gary Downie, dated August 11, 2011, along with an annexed copy of a deed (Ironically being the same deed submitted by the movant).

Defendant Beatrice Stravets submitted an Affidavit of counsel in opposition dated August 23, 2011.

Following submission of papers in opposition, the Defendant, City of Saratoga Springs, submitted a further Affirmation in Reply dated August 29, 2011 along with a copy of a portion of the Saratoga Springs Code and the Affidavit of Anthony Scirocco, Commissioner of Public Works for the City of Saratoga Springs, dated August 26, 2011.

Finally, as the Reply Affirmation on behalf of the Defendant, City of Saratoga Springs, presented a new basis for the relief requested, all parties were provided an opportunity to submit additional papers, until on or before March 9, 2012, and the Plaintiff submitted a further Affirmation in Reply dated March 2, 2012 with annexed copies of various Freedom of Information Law requests and responses thereto.

It should be noted that based upon certain correspondence between the parties, the initial

motion was taken off the Court's calendar in August, 2011. Upon reassignment it was determined that the motion was in fact still pending and thus the matter was returned to the calendar with a new return date of February 10, 2012, and an extension for the filing of additional papers on or before March 9, 2012, as set forth above.

The action herein is for personal injuries alleged to have been sustained by the Plaintiff in October, 2009, when she fell and was injured, while walking in an alleyway in the City of Saratoga Springs, on and between several adjoining properties and streets. Such action is premised upon the allegation that the defective and/or dangerous condition of the property caused the Plaintiff to fall and sustain various physical injuries. The action has been brought against the Defendant, City of Saratoga Springs, and various other property owners in and around the location of the accident.

In bringing this action the Plaintiff has expressly alleged in her complaint, alternatively, that each defendant owned and maintained the premises upon which the underlying accident occurred, including the Defendant, City of Saratoga Springs (par. 56-59). Further the Plaintiff has expressly alleged in her complaint that the Defendant, City of Saratoga Springs, as well as the other Defendants, had actual and/or constructive notice of the dangerous or defective condition of the premises which was the proximate cause of the underlying accident (par.89).

The motion herein seeks a judgment dismissing Plaintiff's claims herein as against the Defendant, City of Saratoga Springs, pursuant to Section 3211 of the CPLR, prior to the submission of an Answer on behalf of said Defendant. Factually the motion is premised upon the contention that the Defendant, City of Saratoga Springs, did not own nor maintain the premises upon which the underlying accident herein occurred and, irrespective, that the City was never provided notice nor had constructive notice of the underlying dangerous or defective condition of the premises which is alleged to have caused the underlying accident. As set forth above the Defendant, City of Saratoga Springs, has submitted various forms of proof, affidavits, prior testimony and a deed, in support of this motion.

Section 3211 (a) expressly sets forth specific bases for dismissal of a cause of action prior to the joinder of issue. In this case, although not specified in the moving papers, the only

applicable subdivisions of Section 3211 (a) are (1) documentary evidence and/or (7) failure to state a cause of action.

First, the Court notes that a motion pursuant to Section 3211 (a) (1) must be made upon evidence which is documentary in nature and standing on its own is determinative of the factual issue(s) presented. Such evidence must “utterly refute” the allegations within the plaintiff’s complaint and definitively dispose of the allegations in the complaint. In reviewing such the Court must construe the allegations in the complaint liberally and afford such allegations every possible favorable inference. Goshen v Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (July, 2002); 511 West 232<sup>nd</sup> Owners Corp. V Jennifer Realty Co., 98 N.Y.2d 144 (June, 2002); Ozdemir v Caithness Corp., 285 A.D.2d 961 (Third Dept., June, 2002); Fern v International Business Machines Corp., 204 A.D.2d 907 (Third Dept., May, 1994).

As set forth above the Plaintiff has expressly alleged ownership, in the alternative, as against each defendant, including the City of Saratoga Springs. Interestingly in response, each answering Defendant has denied ownership.

However the only, per se, documentary evidence submitted by the Defendant, City of Saratoga Springs, herein is the one deed annexed to their moving papers and the Court finds it less than determinative of the ownership of the premises where the accident occurred and/or who, if anyone, maintained such premises. Likewise such does not provide any affirmative evidence of who does own the premises. Wright v C.H. Martin of White Plains Road, Inc., 23 A.D.3d 295 (First Dept., 2005); Liso v City of New York, 8A.D.3d 103 (First Dept., 2004). Further it has no bearing on the issue of actual or constructive notice.

Additionally, even if the Court were to consider any of the affidavits or other evidence submitted as documentary evidence, such are not determinative, as a matter of law, of the issues of ownership, maintenance and/or notice, all as alleged in the Plaintiff’s Complaint.

Second, in regard to any basis for the motion pursuant to subdivision (a)(7), failure to state a cause of action, the Court notes that despite the submission of the numerous affidavits and prior testimony, the instant motion has been brought pursuant to Section 3211, not 3212, of the CPLR and no party has requested that the Court treat this motion as a motion for summary

judgment as permitted by 3211©. Nor has the Court provided notice of such an intention, in that, the Court declines to do so at the present time within the proceedings.

As such, it has been held that despite the fact that affidavit and other forms of proof may be submitted upon a motion pursuant to Section 3211, unless the Court gives notice and treats the motion as one for summary judgment, such affidavits are not relevant to the determination of the motion. Rather the Court is limited to a review of the pleadings to determine the sufficiency of the allegations contained therein. Rovello v Orofino Realty co., Inc., 40 N.Y.2d 633 (1976); FYM Clinical Laboratory, Inc. v Perales, 147 A.D.2d 840 (Third Dept., Feb., 1988); Board of Educ., Lakeland Central School Dist. Of Shrub Oak v State Educ. Dept. of State of New York, 116 A.D.2d 939 (Third Dept., Jan., 1986).

In addition, as these issues may be capable of determination following further proceedings, the Court notes, of particular significance in this matter are the further holdings that if a motion pursuant to Section 3211 is not treated by the Court as a motion pursuant to Section 3211, the determination of the motion does not carry any res judicata or collateral estoppel effect upon further litigation or motions following further discovery and proceedings. Amsterdam Savings Bank v Marine Midland Bank, N.A., 140 A.D.2d 781 (Third Dept., 1988); Deacon's Bench, Inc. v Hoffman, 101 A.D.2d 971 (Third Dept., 1984).

Again, in the present case the Plaintiff has plead, in the alternative, that each of the Defendants, including the Defendant, City of Saratoga Springs, both owned and/or maintained the premises wherein the incident occurred. In addition, the Plaintiff has expressly alleged that the Defendants, including the Defendant, City of Saratoga Springs, had actual and/or constructive notice of the dangerous or defective condition. Thus based upon the pleadings there remain issues of fact, and the Complaint does set forth a sufficient cause of action.

Further, even if the Court were to treat this motion as one for summary judgment pursuant to Section 3212 of the CPLR, the proof is less than determinative. Above and beyond the pleadings, there remains controversy as to the ownership of the property where the incident occurred. No party has submitted any affirmative proof of ownership. Rather they have each only submitted conclusory denials of ownership, i.e. the affidavits submitted in support of the

Defendant, City of Saratoga Springs. Such is less than determinative of ownership. Wright v C.H. Martin of White Plains Road, Inc., 23 A.D.3d 295 (First Dept., 2005); Liso v City of New York, 8A.D.3d 103 (First Dept., 2004).

The simple fact that each answering Defendant has denied ownership is illustrative of the issue of fact.

Likewise, above and beyond the pleadings herein, there remains an issue of fact concerning who maintained the property. The Plaintiff has alleged in her Complaint that the Defendant, City of Saratoga Springs, maintained such property, and, as such, the allegation is sufficient in this respect. Further, if the Court were to consider the other forms of proof, the Defendant, Downie, has submitted proof that the City did in fact perform acts of maintenance upon the property.

Further counsel for Defendant, Downie, has specified records which may, upon further disclosure, establish such maintenance. This alone would require denial of the instant motion. Jones v Town of Delaware, 251 A.D.2d 876 (Third Dept., June, 1998); Pampris v Egnosher, 20 A.D.3d 746 (Third Dept., July, 2005).

Again, the City has only submitted a conclusory affidavit that the City does not own the property and has no maintenance contract with any owner of the property.

This is also true of the dichotomy of the Defendant, City of Saratoga Springs, affidavit denying receipt of any notice of a dangerous condition, but at the same time indicating in FOIL responses that no such notice records are or were maintained. Although the failure to maintain such records does not preclude the Defendant from alleging such a defense, the failure to maintain such records would clearly establish an issue of fact and require, at the very least, the obligation and opportunity to conduct further discovery proceedings in regard thereto. Jones, supra.

In accordance herewith, the Defendant's motion pursuant to Section 3211 of the CPLR, dismissing the action herein, is denied.

This shall constitute the Decision and Order of the Court herein. The original Decision and Order and the underlying papers are being delivered directly to the Saratoga County Clerk for

filing. The signing of this Decision and Order and the delivery of this Decision and Order to the Saratoga County Clerk shall not constitute Notice of Entry under CPLR Section 2220 and the parties are not relieved from the applicable provisions of that Rule respecting service of Notice of Entry.

DATED: April 14<sup>th</sup>, 2012  
Saratoga Springs, NY  
ENTERED  
Kathleen A. Marchione  
*Kathleen A. Marchione*  
Saratoga County Clerk

*[Signature]*  
HON. ROBERT J. CHAUVIN  
SUPREME COURT JUSTICE

2012 APR 13 AM 10:34  
SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

ENTERED

The following papers were read and considered on the Defendant, City of Saratoga Springs' Motion to dismiss any and all claims of the Plaintiff against said Defendant:

1. Defendant, City of Saratoga Springs' Notice of Motion dated March 29, 2011; attached Affirmation of William A. Scott, Esq. Dated March 29, 2012; attached Affidavit of Paul Male dated March 22, 2011 and Exhibits "A" through "E" attached thereto;
2. Affirmation in Opposition of Plaintiff's Counsel, James W. Shuttleworth, III, Esq. dated July 29, 2011 with Exhibits "A" through "F" attached thereto;
3. Affidavit of Defendants, Kimberly Inn and Gary Downie, as Successor Trustee of the Inge Downie Testamentary Trust's counsel, Daniel J. Stewart, Esq. dated August 24, 2011 with Exhibit "A" attached thereto;
4. Affidavit in Opposition of Defendant, Beatrice Stravets' counsel, Dianne C. Bresee, Esq. Dated August 23, 2011;
5. Affirmation in Reply of Defendant's counsel, William A. Scott, Esq. Dated August 29, 2011 with Exhibit "A" attached thereto;
6. Affidavit of Anthony Scirocco, as Commissioner of Public Works for Defendant, City of Saratoga Springs, dated August 26, 2011; and
7. Affirmation in Reply of Plaintiff's Counsel, James W. Shuttleworth, III, Esq. Dated March 2, 2012 with Exhibits "A" through "D" attached thereto.