

Samuel v City of Saratoga Springs

2012 NY Slip Op 33916(U)

August 13, 2012

Supreme Court, Saratoga County

Docket Number: 2011-0161

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-

DECISION AND ORDER

Index No: 2011-0161
RJI No: 45-1-2011-0426

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.

ORIGINAL

Appearances:

For Plaintiff:

James W. Shuttleworth, III, Esq.
Finkelstein & Partners
1279 Route 300-P.O. Box 1111
Newburgh, NY 12551

For Defendant City of Saratoga Springs:

William Scott, Esq.
Fitzgerald, Morris, Baker, Firth P.C.
16 Pearl Street-P.O. Box 2017
Glens Falls, NY 12801

For Defendants, Kimberly Inn and Gary Downie, as Successor Trustee:

Daniel J. Stewart, Esq.
Brennan & White LLP
163 Haviland Road
Queensbury, NY 12804
(Attorney of record - no appearance on Motion)

For Defendant, Beatrice Stravets:

Dianne C. Bresee, Esq.
O'Connor, O'Connor, Bresee & First, P.C.
20 Corporate Woods Blvd.
Albany, NY 12211
(Attorney of record - no appearance on Motion)

For Defendants, Enterprise Rent-A-Car and Enterprise Holdings, Inc.

Kathleen A. Barclay, Esq.
Maynard, O'Connor, Smith & Catalinotto LLP
6 Tower Place
Albany, NY 12203
(Attorney of record - no appearance on Motion)

2012 AUG 15 PM 2:50
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

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

By Notice of Motion dated May 10, 2012 the defendant, City of Saratoga Springs, has moved for permission to renew and/or reargue, pursuant to Section 2221 of the CPLR, the denial of a prior motion made for summary judgment, pursuant to Section 3211 of the CPLR, dismissing plaintiff's claims as against the said defendant. In support of such motion, defendant City of Saratoga Springs submitted an affirmation of counsel dated May 10, 2012, a copy of the initial Notice of Motion and supporting documents, the various affirmations, affidavits and other documents submitted in opposition and the prior Decision and Order of this Court dated April 11, 2012. Further by letter dated May 16, 2012 defendant submitted the affidavit of Joseph C. Scala, City Attorney.

Such motion was returnable June 15, 2012.

In response and opposition thereto plaintiff submitted an affidavit of counsel dated June 8, 2012, along with attached correspondence.

UNDERLYING ACTION

Once again, 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). The Plaintiff also has alleged that the defendant, City of Saratoga Springs, as well as the other defendants did actually cause and/or create the dangerous condition (par. 84). 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).

Prior to interposing an Answer, the defendant, City of Saratoga Springs, by Notice of Motion dated March 29, 2011, brought a motion to dismiss pursuant to Section 3211 of the CPLR. Such motion was, in part, clearly and expressly premised upon the contention that the municipal defendant had not received any prior written notice of the dangerous defect or condition herein. Such was factually premised upon an affidavit of the Commissioner of Public Works for the defendant in which he indicated that the city had not received any such prior written notice.

INSTANT MOTION

The motion herein seeks to renew and/or reargue the denial of the defendant's, City of Saratoga Springs, prior motion dismissing plaintiff's claims pursuant to Section 3211 of the CPLR. Although the Notice of Motion indicates that it is a motion to renew and the affirmation of counsel in support of the motion indicates that it is a "Motion to Renew and Reargue", as it is based upon the same factual basis as the prior motion, the Court finds that the instant motion is a motion to reargue pursuant to Section 2221 (d). However, despite this finding and the fact that a motion pursuant to Section 2221 of the CPLR should be clearly designated, the Court will address the insufficiency of the instant motion pursuant to both subdivisions (d) and (e) of Section 2221.

A motion to reargue pursuant to Section 2221 (d) must be based upon matters of fact or law which were misapprehended or overlooked by the Court in its initial determination and is not a vehicle by which to provide the unsuccessful party an opportunity to again argue the very questions previously decided. Amato v Lord & Taylor, Inc., 10 A.D.3d 374 (Second Dept., Aug., 2004); Pro Brokerage, Inc. v Home Ins. Co., 99 A.D.2d 971 (First Dept., March, 1984); Foley v Roche, 68 A.D.2d 558 (First Dept., June, 1979).

In this regard, the defendant's legal and factual contentions concerning a lack of prior written notice were not misapprehended or overlooked. Rather such contentions were expressly addressed by the Court within the context of the prior motion. Again, the prior motion was made, prior to joinder of issue, pursuant to Section 3211 of the CPLR, and not Section 3212 of the CPLR. Again, upon such a motion 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). Moreover, in direct application to a motion to dismiss pursuant to Section 3211 of the CPLR, the Court of Appeals has clearly held that, "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." EBC I, Inc. v Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (June, 2005).

In regard to the contention that the action should be dismissed as against the defendant, City of Saratoga Springs, for a lack of prior written notice, the Court expressly ruled that the plaintiff's Complaint clearly and expressly set forth that the defendant, City of Saratoga Springs, had actual and/or constructive notice of the dangerous or defective condition of the premises, and, as such, the motion was denied.

In addition, the Court notes, as set forth above, that the plaintiff's Complaint also clearly and expressly sets forth that the defendant, City of Saratoga Springs, created and/or caused the dangerous or defective condition, thereby providing a further basis for the denial of the motion.

In accordance therewith, again, the prior motion was denied and, likewise, there has not been presented a sufficient basis to reargue said motion, pursuant to Section 2221 (d).

A motion to renew, pursuant to Section 2221(e), must be premised upon new facts or a change in the law that would dictate a different result. In this particular matter there has been no contention of a change in the applicable law, as such, the defendant's motion must be premised upon new facts. Brady v Executive Dept., Div. Of Parole, 114 A.D.2d 659 (Third Dept., Oct., 1985); Hooker v Town Bd. Of Town of Guilderland, 60 A.D.2d 684 (Third Dept., Dec., 1977).

Further it has been held that if such facts existed at the time of the prior motion, the movant must also set forth a justifiable excuse for not having presented such facts upon the prior motion. Tibbits v Verizon N.Y., Inc., 40 A.D.3d 1300 (Third Dept., May, 2007).

In this regard, the only further factual basis for the motion presented is the affidavit of the City Attorney that the city had not received any prior written notice. However such factual contention was clearly and expressly presented upon the first motion herein. The defendant specifically submitted an affidavit of the Public Works Commissioner, alleging such factual basis. Thus the affidavit of the City Attorney, reiterating the lack of any prior notice, does not present any new facts and/or basis for the instant motion, as a motion to renew pursuant to

Section 2221 (e).

Further, even if the Court were to somehow treat the affidavit of the City Attorney as some new fact, the Court is again limited in its review. There has been no explanation for the failure to present such affidavit upon the initial motion and the issue was before the Court in any event.

Thus, again, there has not been presented a sufficient basis for a motion to renew pursuant to Section 2221 (e).

Essentially the motion herein presents the same issue(s) and the same facts which were determined in the prior motion and, as such, the defendant's motion is in all respects denied, with costs.

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: August 13, 2012
Ballston Spa, New York

Kathleen A. Marchione

Kathleen A. Marchione

Saratoga County Clerk

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

2012 AUG 15 PM 2:50
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED

The following papers were read and considered:

1. Defendant, City of Saratoga Springs' Notice of Motion to Renew/Reargue dated may 10, 2012;
2. Affirmation in Support of William A. Scott dated May 10, 2012 with Exhibits "A" through "G" annexed thereto;
3. Affidavit of Joseph Scala, Esq. dated May 7, 2012; and
4. Affirmation in Opposition of Plaintiff's counsel, James W. Shuttleworth, III dated June 8, 2012 with Exhibits "A" through "D" annexed thereto.