

**Samuel v City of Saratoga Springs**

2013 NY Slip Op 34130(U)

April 26, 2013

Supreme Court, Saratoga County

Docket Number: 2011-0161

Judge: Robert J. Chauvin

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF SARATOGA

**ORIGINAL**

JENNIFER SAMUEL,

Plaintiff,

**DECISION AND ORDER**

-against-

**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, ENTERPRISE  
HOLDINGS, INC. and TURF SPA & MOTEL, INC.

Defendants.

**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

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SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

FILED

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)

For Defendant, Turf Spa & Motel, Inc.

Thomas Johnson, Esq.  
Bailey, Kelleher & Johnson, P.C.  
Pine West Plaza, Suite 507  
Albany, NY 12205  
(Attorney of record - no appearance on motion)

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

By notice of motion, dated January 8, 2013, the defendant, Beatrice Stravets, seeks an order of summary judgment, pursuant to CPLR § 3212, dismissing plaintiff's complaint and all cross-claims against said defendant in the above matter. In support of such motion defendant submitted the affirmation of Dianne C. Bresee, Esq., dated January 8, 2013, along with annexed exhibits "A" through "K", including copies of the summons and verified complaint; verified answers and/or amended answers on behalf of each named defendant; the summons and verified complaint in a consolidated action; the verified answer in said consolidated action; stipulation of consolidation; demand for a verified bill of particulars; notice to admit (which also included copies of a map, survey and deed); and response to notice to admit. The defendant further submitted the affidavit of defendant, Beatrice Stravets, dated December 13, 2012, along with exhibits "A" through "D", including copies of two deeds; an addendum to a lease agreement, extension of lease agreement and lease agreement; and photos.

In response and opposition plaintiff submitted the affirmation in opposition of James W. Shuttleworth, III, Esq., dated February 12, 2013, along with annexed exhibits "A" through "D", including copies of survey maps and two prior decisions and orders of this court. Likewise defendant, City of Saratoga Springs, submitted the affirmation in opposition of William A. Scott, Esq., dated February 11, 2013. Defendants Kimberly Inn, Gary Downie, Enterprise Rent -A-Car, Enterprise Holdings, Inc. and Turf Spa & Motel, Inc., have not submitted any opposition to the instant motion.

Thereafter the defendant, Beatrice Stravets, submitted the further affirmation of George J.

Hoffman, Esq., dated February 19, 2013, and memorandum of law also dated February 19, 2013.

The motion was initially returnable January 29, 2013. Upon agreement of all parties such motion was adjourned until February 19, 2013.

### UNDERLYING ACTION

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, Beatrice Stravets, 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, Beatrice Stravets. In turn each defendant, which includes each adjoining land owner and the municipality, have denied ownership and/or maintenance. Further each codefendant has interposed a cross claim alleging the negligence and culpable conduct of each other codefendant and seeking contribution as against each other codefendant. In addition defendant, Stravets, has brought two specific cross claims against the defendants Enterprise Rent-A-Car and Enterprise Holdings, Inc. (hereinafter referred to as the Enterprise defendants), premised upon a lease of her property to such defendants.

There is no question nor is it contested that the defendant, Beatrice Stravets, at the very least owns property which abuts the alleyway where the incident occurred. However defendant, Stravets, contends that the deeds, map and surveys submitted in support of the motion herein conclusively establishes that she did not own the premises upon which the accident occurred nor did she owe any duty to maintain or repair such premises. In this regard the court notes that prior motions premised upon the contention of lack of ownership and submitted upon the basis of similar proof have been denied by the court.

However, upon the instant motion, the court also notes that the movant has submitted an affidavit and copies of lease documents which establish that at the time of the accident herein she leased the first floor of the building upon her property and exterior premises to ELRAC D/B/A Enterprise Rent-A-Car. Although the defendant, Stravets, retained a right of reentry for purposes

of inspection, it is clear that the tenant had taken possession of the first floor of such building and the exterior premises, in 2002, long before the accident herein and had assumed an express duty to maintain the premises in good order and repair and expressly agreed to maintain all exterior landscaping and parking area and pave the parking lot in areas where such was needed.

Defendant, Stravets, has also submitted an affidavit in which she sets forth that she owns the subject premises as rental property and that she resides with her husband in the metropolitan area of the city of New York, rarely visiting the premises. She further swore that she did not create the dangerous condition at issue nor did she exercise any control over the area where the accident occurred. She also expressly states that she had no notice of any dangerous condition upon her premises or the adjoining premises.

#### UNDERLYING MOTION

As set forth above the defendant, Stravets, seeks an order of summary judgment, pursuant to CPLR § 3212, dismissing the plaintiffs action as against her, and dismissing the cross claims of the other codefendants. The plaintiff and the defendant, City of Saratoga Springs, oppose such motion upon the contention that the evidence submitted and discovery conducted in the matter thus far does not establish conclusively who owned and/or maintained the premises herein. The plaintiff also opposes such motion upon a contention that the premises owned by defendant, Stravets, enjoyed some special use of the alleyway where the incident occurred, and that she has liability in that regard.

First, the court notes that it is well settled that in order to be entitled to summary judgment, the moving party must establish its defense or cause of action sufficiently to warrant a court's directing judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Crowley's Milk Co. v Klein*, 24 AD2d 920 [3d Dept 1965]; *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Further, with the exception of limited uses to defeat a motion for summary judgment, the evidence presented in support of a motion for summary judgment must be in admissible form (*Phillips v Kantor & Co.*, 31 NY2d 307, 311-312 [1972]; *Raybin v Raybin*, 15 AD2d 679 [1st Dept 1962]). On the other hand, once such is presented, the party opposing the motion, must produce proof sufficient to require a trial of material questions of fact on which the opposing claim rests (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988], citing *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

To begin with, and as previously determined by this Court, the mere submission of the defendant's deed and a survey map are not conclusive evidence of ownership and/or maintenance of the premises where the accident occurred. Upon such submissions the court cannot conclusively determine who owned or maintained the premises where the plaintiff fell. Such is clearly exemplified by the very fact that the plaintiff has plead alternate ownership and/or maintenance of such premises, by each adjoining property owner and municipality, and, in turn, each adjoining property owner and municipality, has denied such ownership and/or maintenance. As such the defendant's motion upon that basis is denied.

However, as pertinent to the matter herein, it has also clearly been held that an out of possession landlord is not subject to liability for injuries resulting from a dangerous condition upon such property after possession has been transferred to the tenant. The primary exceptions to such rule of law are where the landlord maintains control of the premises, has a contractual obligation to maintain and/or repair the premises, has assumed such obligation for maintenance and/or repair through past conduct or has affirmatively created a dangerous condition *Patrick v Grimaldi*, 100 AD3d 1320, 1320-1321 [3d Dept 2012]; *Vanderlyn v Daly*, 97 AD3d 1053, 1055 [3d Dept 2012], *lv. denied* 20 NY3d 853 [2012]; *Najera v King David Dev. Co., L.P.*, 72 AD3d 594 [1stDept 2010]; *O'Gorman v Gold Shield Sec. & Investigation*, 221 AD2d 325, 326 [2d Dept 1995]). Further it has specifically been held that the act of the landlord reserving a right of reentry upon the premises, without more, does not form a basis of liability (*Ferro v Burton*, 45 AD3d 1454, 1454-1455 [4thDept 2007]; *Chery v Exotic Realty, Inc.*, 34 AD3d 412, 413 [2d Dept 2006]; *Lowe-Barrett v City of New York*, 28 AD3d 721, 722-723 [2d Dept 2006]).

In the present case the defendant, Stravets, has presented clear and uncontested proof that at the time of the accident herein and for a long period beforehand, she had leased the first floor of the building and the exterior premises of her property to the so called Enterprise defendants. Further it is clear and uncontested that pursuant to the express language of such lease that said defendants had taken possession of such premises long before the accident herein and had assumed a duty to maintain the premises in good and proper order, specifically assuming a duty of maintaining the external landscaping and parking areas. In addition, the defendant, Stravets, has expressly stated that she did not maintain any control over the area where the incident occurred nor did she create the hazard which caused the fall. Such has not

been rebutted, nor has there been any proof submitted that she did maintain any control, had a contractual obligation or an assumed obligation to maintain her premises, let alone the adjoining alleyway.

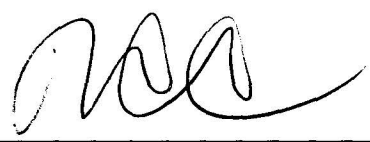
Thus, irrespective of ownership, the defendant, Stravets, has clearly established that at the time of the accident herein she was an out of possession landlord, and, as such, she has no liability for the incident even if it did occur upon and/or was the result of a dangerous condition upon her property. Likewise she cannot be held liable for an incident that occurred upon adjoining property and/or was the result of a dangerous condition upon such adjoining property.

Furthermore, although in somewhat of a conclusory manner, the defendant, Stravets, in any case, has sworn that she had no notice of any such dangerous condition which is alleged to have caused the incident herein, and, such has not been rebutted.

As such the defendant's motion is in all respects granted. The court further notes that defendants Kimberly Inn, Gary Downie, Enterprise Rent-A-Car, Enterprise Holdings, Inc. and Turf Spa & Motel, Inc. did not oppose such motion and as such, the cross claims interposed on their behalf are also dismissed upon such lack of opposition.

This memorandum shall constitute the decision and order of the court. 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 § 2220, and the parties are not relieved from the applicable provisions of that rule regarding service of notice of entry.

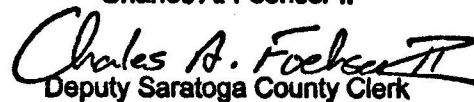
DATED: April 26, 2013  
Ballston Spa, NY



HON. ROBERT J. CHAUVIN  
SUPREME COURT JUSTICE

ENTERED

Charles A. Foehner II

  
Deputy Saratoga County Clerk

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SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

ENTERED

The following papers were read and considered:

1. Notice of Motion dated January 8, 2013;
2. Attorney Affirmation of Dianne C. Bresee, Esq dated January 8, 2013 with attached exhibits "A" through "K";
3. Affidavit of Beatrice Stravets dated December 13, 2012 with attached exhibits "A" through "D";

4. Affirmation in Opposition of James W. Shuttleworth, III, Esq. dated February 12, 2013 with attached exhibits "A" through "D";
5. Affirmation in Opposition of William A. Scott, Esq. dated February 11, 2013;
6. Attorney Reply Affirmation of George J. Hoffman, Jr., Esq dated February 19, 2013; and
7. Memorandum of Law dated February 19, 2013.