Samuel v City of Saratoga Springs
2014 NY Slip Op 33845(U)
September 29, 2014
Supreme Court, Saratoga County
Docket Number: 2011-0161
Judge: Robert J. Chauvin

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

Defendants.

DECISION AND ORDER

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

Appearances:

For Plaintiff:

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For Defendant City of Saratoga Springs:

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16 Pearl Street-P.O. Box 2017
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(Attorney of record-no appearance upon motion)

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

Daniel J. Stewart, Esq.
Brennan & White LLP
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Queensbury, NY 12804

For Defendant, Beatrice Stravets:

Dianne C. Bresee, Esq.
O'Connor, O'Connor, Bresee & First, P.C.
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(Attorney of record-no appearance on motion)

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

Alexander L. Stabinski, Esq.
Maynard, O'Connor, Smith & Catalinotto LLP
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For Defendant, Turf Spa & Motel, Inc.

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Bailey, Kelleher & Johnson, P.C.
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(Attorney of record - no appearance on motion)

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

By notice of motion dated June 26, 2014 defendants, Enterprise Rent-A-Car and Enterprise Holdings, Inc., (hereinafter referred to as Elrac), have moved for summary judgment, pursuant to CPLR § 3212, dismissing plaintiff's complaint and all cross-claims. In support of such motion said defendants submitted the affirmation of Alexander L. Stabinski, Esq. and a memorandum of law, both dated June 26, 2014. Such affirmation and memorandum expressly relied upon the submission of numerous exhibits thereafter submitted by defendants, Kimberly Inn and Gary Downie, as successor trustee of the Inge Downie testamentary trust, and an affidavit submitted by defendant, Beatrice Stravets, upon a prior motion for summary judgment.

By notice of motion dated July 3, 2014 defendants, Kimberly Inn and Gary Downie, as successor trustee of the Inge Downie testamentary trust,(hereinafter referred to as Kimberly Inn and Gary Downie) have also moved for summary judgment pursuant to CPLR § 3212. In support of such motion said defendants submitted the affirmation of Daniel Stewart, Esq. dated June 20, 2014, with annexed exhibits marked "A" through "Y". As there is a list of such exhibits set forth in counsel's affirmation the court will not herein also list such exhibits except to indicate that such contained copies of all pertinent pleadings, copies of certain deeds and survey maps and portions of transcripts of depositions conducted herein. The defendants also submitted a memorandum of law dated July 3, 2014, as well as, the affidavit of Robert J. Sneeringer, Esq., dated June 30, 2014.

In opposition to such motions the plaintiff submitted the affirmation of James W. Shuttleworth, III, Esq. dated July 17, 2014.

In reply the defendants, Elrac, submitted the further affirmation of Alexander L. Stabinski, Esq. dated July 23, 2014. The defendants, Kimberly Inn and Gary Downie, submitted the further affidavit of Daniel Stewart dated July 28, 2014.

Both motions were returnable July 24, 2014 and the matter was completely submitted upon receipt by the court of the reply affidavit on behalf of defendants, Kimberly Inn and Gary Downie, on August 7, 2014.

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 between several adjoining parcels of property in the City of Saratoga Springs. 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 was brought against the various property owners in and around the location of the accident. In bringing this action the plaintiff expressly alleged in her complaint, alternatively, that each defendant owned, occupied, controlled and/or maintained the premises upon which the underlying accident occurred. In turn each defendant, which includes each adjoining land owner and the municipality, denied ownership, occupancy, control and/or maintenance. Further each co-defendant interposed a cross claim alleging the negligence and culpable conduct of each other co-defendant and seeking contribution as against each other co-defendant.

As a preliminary matter the court notes that by prior decision and order of the court dated April 26, 2013, the action herein was dismissed as against the defendant, Beatrice Stravets. Such action was dismissed upon the ruling of the court that, although the defendant owned property abutting the area where the plaintiff fell, at the time of the accident she leased the premises to the defendants, Elrac, who pursuant to such lease assumed the duty of maintenance of the outside premises. As such the court found said defendant to, at most, be an out of possession landlord with no duty to maintain the premises. In addition, as there was no opposition concerning the dismissal of the various cross-claims, such were dismissed, as well.

Also since such ruling the plaintiff has discontinued the action as against defendant, City of Saratoga Springs, by stipulation filed August 4, 2014, and as against defendant Turf Spa & Motel, Inc., by stipulation filed August 7, 2014. Again pursuant to such stipulations any and all cross-claims were also dismissed.

Since the initiation of the action and through the various discovery proceedings conducted herein, it is uncontested that the plaintiff appears to have fallen in the area of a depression in the alleyway adjoining the various parcels of property. Specifically the plaintiff has admitted the preparation of a survey map which depicts the location where the plaintiff fell in respect to the alleyway and the adjoining properties. The court notes that the area of the fall is located in the alleyway directly between the parcel of property owned by defendants, Kimberly

Inn and Gary Downie, on the one side, and the parcel of property owned by defendant, Turf Spa and Motel, Inc., on the other side. Further such survey map reflects that the property owned, at the time, by defendant, Stravets, and leased by defendants, Elrac, abuts the alleyway some distance from the location of the fall.

At the time of the accident the defendant, Gary Downie, operated a bed and breakfast, the Kimberly Inn, upon his property. Such property abutted the alleyway wherein the plaintiff fell. At the time of the accident the defendants, Kimberly Inn and Gary Downie, utilized the alleyway for purposes of ingress and egress to the parking area for the bed and breakfast.

Upon the instant motion defendants, Kimberly Inn and Gary Downie, have presented the affidavit of Robert J. Sneeringer, Esq. an attorney with over twenty-five(25) years of experience in real estate law and specifically in performing title searches. Such individual has reviewed various deeds and exhibits herein, specifically the survey map utilized in discovery proceedings which by admission locates the specific area and depression where the plaintiff fell and the deed of the Kimberly Inn property. Based upon such he has affirmatively stated that the defendants, Kimberly Inn and Gary Downie, do not own the premises upon which the plaintiff fell.

Further, as noted above, at the time of the accident, the defendants, Elrac, leased property owned by defendant, Beatrice Stravets, for the operation of a rental car business. Such property also abutted the subject alleyway where the plaintiff fell. As the defendants, Kimberly Inn and Gary Downie, Elrac utilized the alleyway for purposes of ingress and egress of the parking area of their business. Just as the defendant's, Kimberly Inn and Gary Downie, Elrac alleges that they did not own or lease the premises upon which the plaintiff fell. In this regard the court does note that the defendants, Elrac, clearly did not own the premises, but rather only leased such premises at the time of the accident. Further the court notes the prior affidavit submitted by defendant, Stravets, in which she affirmatively stated that she did not own the premises where the fall occurred nor in any manner maintain such premises.

In addition, the court notes that there is proof from the deposition of defendant, Gary Downie, that the defendants, Elrac, or someone acting on their behalf, may have from time to time cleared snow and ice from the subject alleyway during the relevant time frame. However there is also proof presented by the deposition of Marc J. McMahon, a representative of defendants, Elrac, that during the relevant winter months, the defendants, Elrac, contracted for the removal of snow and ice from their parking area, on their property, and that any contract

for such snow and ice removal did not include removal from any area of the subject alleyway.

Based upon the foregoing the two remaining defendants have now moved for summary judgment. Such motions in both respects contend that the respective defendants did not own the property where the plaintiff fell nor have any other duty to maintain such property arising from any other form of occupancy or control of the premises, any specific ordinance or statute or from any special use of the premises. The plaintiff opposes such motion upon the contention that, at the very least, the defendants had a duty to maintain such premises in that they utilized the alleyway for purposes of ingress and egress and garbage removal and that the defendants, Elrac, exercised control over such premises by way of occasional snow removal.

MOTIONS

As pertinent to the motions herein, as the proponents for a motion for a summary judgment, defendants are required to make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact and their entitlement to judgement, as a matter of law. Failure to make such a prima facie showing requires denial of such motion, irregardless of the sufficiency of the responding papers. (*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]).

However, 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]).

Further the court notes that in reviewing the evidence presented upon a motion pursuant to CPLR § 3212, the court must view such evidence in a light most favorable to the opposing party and provide the opposing party the benefit of every reasonable inference (*Beckerleg v Tractor Supply Co.*, 107 AD3d 1208, 1209 [3d Dept 2013]).

As specific to premises liability actions, a duty to maintain the subject premises must be premised upon one of three bases, that being the ownership, occupancy or control of the subject premises, a specific ordinance or statute imputing such a duty to maintain the premises or the benefit of a special use of such premises (*Moons v Wade Lupe Constr. Co., Inc.*, 43 AD3d 501, 501-503 [3d Dept 2007]).

In this regard it has specifically been held that in order to establish a special use that it must be shown that the premises were either constructed in a special manner for the benefit of the abutting landowner or that the abutting landowner derives a unique benefit therefrom. *Oles v City of Albany*, 267 AD2d 571, 571-572 [3d Dept 1990]). Further the use of the premises for purposes of ingress and egress to an adjoining parking area, particularly where it is not for the sole benefit of the abutting property owner, has been deemed not to create a special use (*Moons*, 43 AD3d 501).

As concerns a duty arising from the occupancy or control of premises, the court notes that although it has been held that such may be established by the assumption of a duty to maintain such premises, such as the removal of snow and ice (*Silverberg v Palmerino*, 61 AD3d 1032, 1034-1035 [3d Dept 2009]), at the same time the occasional removal of snow, in and of itself, may be insufficient to establish control over such premises (*Hamlin v Town of Chateaugay*, 100 AD3d 1330, 1331-1332 [3d Dept 2012]).

Upon the instant motion there is no question but that the defendants, Kimberly Inn and Gary Downie, have presented proof, by way of documents, as well as, affidavit, that they do not own the premises upon which the underlying accident occurred. Further they have denied, and there has been no proof presented, that they controlled such premises by way of any act of maintenance or otherwise. Finally, despite the contentions of the plaintiff, this court finds that they did not benefit from a special use of the premises. In this regard the court specifically notes that there has been no proof that the alleyway where the accident occurred was designed, constructed or maintained for their unique benefit and the mere use of the alleyway for purposes of ingress and egress does not in and of itself create such a special use or benefit. This is particularly applicable, where as in the present case, more than one business, i.e. the defendants, Elrac, also utilized such alleyway for purposes of ingress and egress. As such there was no duty to maintain the premises by defendants, Kimberly Inn and Gary Downie, and their motion for summary judgment is granted.

In so granting said motion the court notes that the other remaining defendants, Elrac, presented no opposition to the defendants, Kimberly Inn and Gary Downie, nor presented any evidence of a duty to maintain said premises, and, as such, any and all cross-claims on behalf of defendants, Elrac, as against the defendants, Kimberly Inn and Gary Downie, are also dismissed.

Turning next to the motion made by defendants, Elrac, the court takes notice of the prior affidavit of defendant, Stravets, the owner of the property leased by said defendants at the time of the accident. In such affidavit Ms. Stravets clearly and unequivocally stated that at that time she did not own any portion of the alleyway wherein the plaintiff fell nor maintained such premises. In addition, the court notes that the survey map prepared by the plaintiff depicts the fall occurring in the area of the alleyway some distance from where the property owned by Ms. Stravets abutted the alleyway. Further the plaintiff has not presented any evidence to rebut the alleged lack of ownership. As such the court does find that the defendants, Elrac, have shown that they did not have any duty to maintain the subject premises based upon Ms. Stravets ownership of the premises.

In this regard the court specifically notes that the instant motion is brought pursuant to CPLR § 3212, not CPLR § 3211, and, as such, the plaintiff cannot merely rely upon the allegations set forth in the complaint in order to sufficiently rebut the evidence presented by the defendants, as in earlier motions in this action.

In addition, in accordance with that set forth above, the defendants, Elrac, have shown that they did not enjoy or benefit from any special use of the abutting alleyway and did not have a duty to maintain such premises based thereon.

However there has been evidence presented, by way of testimony, that either the defendants, Elrac, or someone acting on their behalf, may have from time to time removed snow from the area of the alleyway where the plaintiff fell. Further it is noted that the representative of the defendants, Elrac, did state in his deposition testimony that they did in fact contract for snow removal from their parking area. However he also clearly stated that any contract for snow removal only included the parking area upon their leased property and not the subject alleyway.

In this regard the court first notes that the accident herein occurred in October and there is no contention that snow or ice was an issue at the time. The accident is alleged to have been due to a pothole or depression in the alleyway. Thus the only manner in which the removal of snow and ice from the alleyway could have even contributed to the dangerous condition would have been the creation of the depression and there has been no evidence submitted in that regard.

Further the court notes the testimony of Mr. McMahon, which establishes that, if anything, the defendants, Elrac, only contracted for snow removal from their premises and that if the contractor removed snow from other areas, such cannot be a foundation from which it can be

established that Elrac somehow exercised control over the premises or thereby assumed a duty to maintain such premises. In addition, the court notes that the occasional removal of snow is not sufficient to establish such a duty and that nothing that they did, or contracted services for, created or increased the dangerous condition complained of herein.

Moreover, notwithstanding the fact that such was not expressly argued by said defendants, there is nothing in the record to establish any form of notice of such dangerous condition, on the part of defendants, Elrac, or that snow plowing or removal created the complained of condition.

As such the defendants, Elrac's, motion for summary judgment is granted.

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: September 29, 2014
Ballston Spa, New York

HON. ROBERT J. CHAUVIN
SUPREME COURT JUSTICE

The following papers were read and considered:

1. Notice of Motion dated June 26, 2014;
2. Affidavit of Alexander L. Stabinski Esq. dated June 26, 2014;
3. Memorandum of Law dated June 26, 2014;
4. Notice of Motion dated July 3, 2014;
5. Affidavit of Daniel J. Stewart, Esq. dated June 20, 2014 with attached exhibits "A" through "Y";
6. Memorandum of Law dated July 3, 2014;
7. Affidavit of Robert J. Sneeringer, Esq. dated June 30, 2014 with attached exhibits "1" through "3";
8. Affirmation in Opposition of James W. Shuttleworth, III Esq. dated July 17, 2014;
9. Reply Affirmation of Alexander L. Stabinski, Esq. dated July 23, 2014;
10. Reply Affidavit of Daniel J. Stewart, Esq. dated July 28, 2014;