

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18517
G/prt

_____AD3d_____

Submitted - February 15, 2008

HOWARD MILLER, J.P.
JOSEPH COVELLO
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2006-10217

DECISION & ORDER

Luis Treminio, respondent,
v Manuel Argueta, appellant.

(Index No. 17899/03)

Baxter, Smith, Tassan & Shapiro, P.C., Hicksville, N.Y. (Anne Marie Garcia of counsel), for appellant.

Malone, Tauber & Sohn, P.C., Freeport, N.Y. (Stuart T. Spitzer of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from a judgment of the Supreme Court, Nassau County (Martin, J.), dated October 23, 2006, which, upon, inter alia, a jury verdict on the issue of liability finding him 35% at fault in the happening of the accident, the denial of his application pursuant to CPLR 4401 for judgment as a matter of law, and an order entered September 11, 2006, granting the plaintiff's motion to confirm an arbitration award on the issue of damages, is in favor of the plaintiff and against him in the principal sum of \$87,500.

ORDERED that the judgment is affirmed, with costs.

The plaintiff testified at trial that he fell in a house owned by the defendant as he descended a staircase connecting the first floor to the basement, where his leased room was located. The plaintiff further testified that about six months prior to the accident, he noticed that one of the steps was broken, and mentioned that to the defendant, but the defendant never fixed the problem. The plaintiff stated that there was no lighting for this staircase, and that he had also discussed that issue with the defendant about six months prior to his accident. The plaintiff stated that he fell when he attempted to step on the defective step.

March 25, 2008

Page 1.

TREMÍNIO v ARGUETA

The Supreme Court properly denied the defendant's application pursuant to CPLR 4401 for judgment as a matter of law. To be entitled to such relief, the movant must demonstrate that "there is no rational process by which the fact finder could base a finding in favor of the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556; *see Poulakis v Town of Orangetown*, 29 AD3d 882, 883). In determining the motion, the evidence must be viewed in the light most favorable to the nonmoving party (*see Robinson v 211-11 Northern, LLC*, 46 AD3d 657; *Poulakis v Town of Orangetown*, 29 AD3d at 883). The evidence in this case, viewed in the light most favorable to the plaintiff, was sufficient to make out a prima facie case of negligence against the defendant (*see Robinson v 211-11 Northern, LLC*, 46 AD3d 657).

Any error in preventing the defendant from impeaching the credibility of the nonparty witness with a prior inconsistent statement was harmless (*see CPLR 2002; Baccarato v Camp Bauman Buses*, 217 AD2d 677, 678; *Walker v State of New York*, 111 AD2d 164, 165).

The parties' remaining contentions are without merit.

MILLER, J.P., COVELLO, ENG and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court