

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

D27685
W/kmb

_____AD3d_____

Argued - October 12, 2011

DANIEL D. ANGIOLILLO, J.P.
RUTH C. BALKIN
CHERYL E. CHAMBERS
JEFFREY A. COHEN, JJ.

2009-04451

DECISION & ORDER

Konstanto Rizos, respondent, v Galini
Seafood Restaurant, et al., appellants.

(Index No. 20450/06)

Lewis Brisbois Bisgaard & Smith, LLP, New York, N.Y. (Nicholas P. Hurzeler,
Gregory S. Katz, and Robyn J. Gellert of counsel), for appellants.

Dinkes & Schwitzer, New York, N.Y. (Frank A. Ross and Naomi J. Skura of
counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Queens County (Lane, J.), dated March 20, 2009, which denied their motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is granted.

The plaintiff, who was then 85 years of age, allegedly slipped and fell at the defendants' restaurant while walking down a staircase consisting of three steps. The defendants established their prima facie entitlement to judgment as a matter of law by submitting the plaintiff's deposition testimony, in which she was unable to identify the cause of her accident without engaging in speculation (*see Dalinedesroches v Lazard*, 70 AD3d 626; *Bolde v Borgata Hotel Casino & Spa*, 70 AD3d 617; *Morgan v Windham Realty, LLC*, 68 AD3d 828, 829; *Reiff v Beechwood Browns Rd. Bldg. Corp.*, 54 AD3d 1015; *Teplitskaya v 3096 Owners Corp.*, 289 AD2d 477, 478). The

defendants also established that they did not create a dangerous or defective condition, and did not have actual or constructive notice of the existence of any such condition for a sufficient length of time to discover and remedy it, as required in an action alleging premises liability (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837; *Shindler v Warf*, 66 AD3d 762, 763; *Crawford v AMF Bowling Ctrs., Inc.*, 18 AD3d 798, 799; *Gloria v MGM Emerald Enters.*, 298 AD2d 355).

The admissible evidence which the plaintiff submitted in opposition to the defendants' motion failed to raise a triable issue of fact as to the cause of the accident (*see Dalinedesroches v Lazard*, 70 AD3d at 626; *Morgan v Windham Realty, LLC*, 68 AD3d at 829; *Teplitskaya v 3096 Owners Corp.*, 289 AD2d at 478). The affidavit of a nonparty witness relating to the defendants' notice of the alleged dangerous condition could not be considered in determining the motion, as the witness was not properly disclosed as a notice witness (*see Muniz v New York City Hous. Auth.*, 38 AD3d 628; *Williams v ATA Hous. Corp.*, 19 AD3d 406, 407).

Accordingly, the Supreme Court should have granted the defendants' motion for summary judgment dismissing the complaint.

ANGIOLILLO, J.P., BALKIN, CHAMBERS and COHEN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court