

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

D32317
C/prt

_____AD3d_____

Argued - September 6, 2011

MARK C. DILLON, J.P.
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
JEFFREY A. COHEN, JJ.

2010-06549

DECISION & ORDER

John A. Healy, et al., respondents, v
Mafalda Bartolomei, et al., appellants.

(Index No. 6128/07)

McCabe & Mack, LLP, Poughkeepsie, N.Y. (Lorenzo L. Angelino of counsel), for
appellant Mafalda Bartolomei.

Boeggeman, George & Corde, P.C., White Plains, N.Y. (Cynthia Dolan of counsel),
for appellants Timothy Rozelle and Heidi Rozelle.

Keith S. Rinaldi, P.C., Poughkeepsie, N.Y., for respondents.

In an action to recover damages for personal injuries, etc., the defendant Mafalda Bartolomei appeals, as limited by her brief, from so much of an order of the Supreme Court, Dutchess County (Wood, J.), dated June 29, 2010, as denied her motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against her, and the defendants Timothy Rozelle and Heidi Rozelle separately appeal, as limited by their brief, from so much of the same order as denied their cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

ORDERED that the order is affirmed, with one bill of costs payable to the plaintiffs by the defendants appearing separately and filing separate briefs.

The Supreme Court properly denied the motion of the defendant Mafalda Bartolomei for summary judgment dismissing the complaint and all cross claims insofar as asserted against her,

September 27, 2011

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and the cross motion of the defendants Timothy Rozelle and Heidi Rozelle (hereinafter together the Rozelles) for summary judgment dismissing the complaint and all cross claims insofar as asserted against them. An out-of-possession landlord generally will not be responsible for injuries occurring on its premises unless the landlord “has a duty imposed by statute or assumed by contract or a course of conduct” (*Alnashmi v Certified Analytical Group, Inc.*, ___ AD3d ___, 2011 NY Slip Op 06465). Here, Bartolomei failed to establish, prima facie, that she was an out-of-possession landlord with no such duty, such that liability could not be imposed upon her. Moreover, Bartolomei and the Rozelles, the tenants living at the subject property, failed to establish, prima facie, on their motion and cross motion, respectively, that they neither created nor had actual or constructive notice of the icy condition which allegedly caused the accident (*see Gordon v American Museum of Natural History*, 67 NY2d 836). Additionally, Bartolomei and the Rozelles failed to eliminate all triable issues of fact as to whether the lighting in the walkway where the accident occurred was adequate and, if not, whether the lighting was a proximate cause of the accident (*see Warfield v Shan Assoc. of Syosset, LLC*, 69 AD3d 708, 708; *Gestetner v Teitelbaum*, 52 AD3d 778, 778). Since Bartolomei and the Rozelles failed to meet their respective burdens, we need not address the sufficiency of the plaintiffs’ opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

DILLON, J.P., ANGIOLILLO, DICKERSON and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court