| **DeFino v Interlaken Owners, Inc.** |
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| 2014 NY Slip Op 33798(U) |
| May 5, 2014 |
| Supreme Court, Westchester County |
| Docket Number: 30139/10 |
| Judge: Orazio R. Bellantoni |
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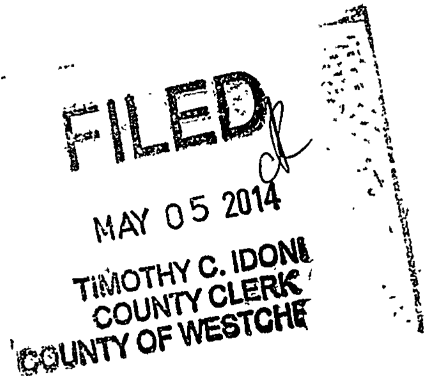
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

PRESENT:

**HON. ORAZIO R. BELLANTONI**
**JUSTICE OF THE SUPREME COURT**

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RICHARD DEFINO,

Plaintiff,

- against -

INTERLAKEN OWNERS, INC.,

Defendants.

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**ORDER**
Index No.: 30139/10
Motion Date: 4/9/14

Plaintiff moves for an order, pursuant to CPLR 2221, granting plaintiff leave to renew and/or reargue defendant's prior motion for summary judgment. Plaintiff also moves for a transfer of this action due to a conflict of interest.

The following papers were read:

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| Notice of Motion, Affirmation, Exhibits (3), and Affidavit of Service | 1-6 |
| Affirmation, Exhibits (5), and Affidavit of Service | 7-13 |
| Reply Affirmation and Affidavit of Service | 14-15 |

By way of background, plaintiff alleges that he suffered personal injuries when he slipped and fell as a result of a wet and slippery surface on a stairway on defendant's property. As a result, plaintiff allegedly fell to the bottom of the stairway. Plaintiff's accident allegedly occurred on February 24, 2010 at approximately 5 p.m. By order, dated December 23, 2013, the Court granted summary judgment in favor of defendant. Plaintiff now moves to renew/reargue that motion.

A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and [] shall contain reasonable justification for the failure to present such facts on the prior motion" (*see* CPLR 2221 [e] [2] & [3]). Plaintiff presents neither "new facts" nor a change in the law that would alter the Court's prior determination. Accordingly, plaintiff's motion to renew is denied.

By contrast, CPLR 2221 provides that a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (*see* CPLR 2221 [d] [2]).

In support of his motion to reargue, plaintiff argues that the Court improperly considered the deposition transcripts of plaintiff, Andrew Wade, Christopher Reynolds, and Kurt Cavataio because defendant failed to demonstrate that these unsigned transcripts were previously forwarded to the witnesses. Noting that the Court is obliged to view the evidence in the light most favorable to the non-moving party, plaintiff cites to various portions of plaintiff's deposition testimony wherein he testified that he was caused to fall because of wetness at the subject location. Bolstering this position, plaintiff notes that he submitted the affidavit of Claudia DeFino who saw the same wetness at 11 a.m. (*i.e.*, approximately six hours prior to plaintiff's accident). Plaintiff asserts that it is simply too high of a burden to require a plaintiff to observe the cause of his or her fall under all circumstances. Plaintiff further contends that defendant failed to make out a *prima facie* showing because it failed establish that it did not cause or have constructive notice of the alleged defective condition. Plaintiff further argues that the issue of wetness on the subject staircase is a recurrent condition. The Court addresses these points in order.

The issue of the unsigned deposition transcript was and is irrelevant to the resolution of defendant's motion for summary judgment. As the Second Department has made clear, "[a]lthough unsigned, the deposition transcripts were certified by the reporter and the plaintiff did not raise any challenges to their accuracy. Thus, the transcripts qualified as admissible evidence for purposes of the [dispositive] motion" (*see Boadu v City of New York*, 95 AD3d 918, 919 [2d Dept 2012]). In particular, the Court notes that plaintiff does not challenge the accuracy of his own deposition transcript.

Plaintiff repeated assertion that "wetness" caused him to slip and fall is nothing more than speculation. As noted in the Court's prior order, plaintiff testified that he did not observe the condition on the step that allegedly caused him to fall prior to, during, or after the accident (see Def.'s Aff'n in Support; Ex. A, 103:4-7; 103:18-20; and 108:3-7). As a result, Ms. Delfino's affidavit is of no value. That there was "wetness" on the subject stair

approximately six hours prior to plaintiff's accident is not evidence that the same "wetness" was the cause of plaintiff's accident. For similar reasons, that there was a recurrent condition is irrelevant as there is no evidence that the alleged recurrent condition was the cause of plaintiff's accident.

Regarding defendant's *prima facie* showing, the Court notes that defendant was not required to establish that it did not cause or have constructive notice of the alleged defective condition. As such, the cases cited by plaintiff relating to constructive notice are inapposite. Here, defendant "established its *prima facie* entitlement to summary judgment by demonstrating that the plaintiff could not identify the cause of [his] fall" (*see Patrick v Costco Wholesale Corp.*, 77 AD3d 810, 811 [2d Dept 2010]). The underlying reason for this rule is that, if a plaintiff cannot identify the cause of his or her fall, then "'the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation'" (*see Batts v IBEX Const.*, LLC, 112 AD3d 765 [2d Dept 2013], quoting *Louman v Town of Greenburgh*, 60 AD3d 915, 916 [2d Dept 2009]). Although this may seem to impose a high burden on this particular plaintiff, the Court finds no basis to carve out an exception based on the facts before it.

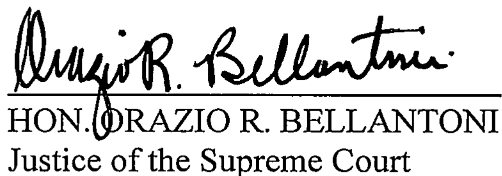
As the Court did not overlook or misapprehend any of the facts outlined above or misapply the controlling law in this area, plaintiff's motion to reargue is denied.

In addition to the motion to renew/reargue, plaintiff also requested that the Court recuse itself from this case because plaintiff's firm represents a plaintiff in an action in the Supreme Court, Queens County wherein one of the defendants is named Allison Bellantoni. Plaintiff asserts that Allison Bellantoni is the daughter of the undersigned judge. Plaintiff is mistaken. The person identified in the unrelated lawsuit as Allison Bellantoni is not the daughter of the Hon. Orazio R. Bellantoni nor is the Court aware of any consanguinity between the undersigned and Allison Bellantoni. Indeed, the undersigned has never even heard of Allison Bellantoni. As plaintiff's counsel offers no explanation as to how he reached this conclusion, the Court is left to assume that this rather strange contention is based solely on a shared name. While Bellantoni is certainly not the most popular name in this country, the Court does not believe it is so rare that anyone possessing it must be related.

The Second Department has explained that "[a]bsent a legal disqualification under Judiciary Law § 14, a court is the sole arbiter of the need for recusal, and this discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of 'nonjuridical data'" (*see People v Moreno*, 70 NY2d 403, 405 [1987]; *see also Silber v Silber*, 84 AD3d 931, 932 [2d Dept 2011]). The mere fact that the undersigned judge possesses the same last name as a litigant in an unrelated matter does not give rise to the appearance of impropriety. Accordingly,

plaintiff's motion for recusal is denied.

Dated: May 5, 2014
White Plains, New York



HON. ORAZIO R. BELLANTONI
Justice of the Supreme Court

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