

**Morales v Meyer**

2019 NY Slip Op 34020(U)

October 25, 2019

Supreme Court, Saratoga County

Docket Number: 2016300

Judge: Thomas D. Nolan

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**ORIGINAL**

STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

ANDREA MORALES,

Plaintiff,

**DECISION AND ORDER**

-against-

**RJI No. 45-1-2017-1297****Index No. 2016300**

KATHLEEN MEYER and JAMES MEYER,

Defendants.

**PRESENT: HON. THOMAS D. NOLAN, JR.**  
**Supreme Court Justice**APPEARANCES: Walter Glibowski, Esq.  
c/o Victor Carr & Associates  
Attorneys for Plaintiff  
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Mineola, New York 11501Barclay Damon, LLP  
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Plaintiff alleges that at about 10:00 p.m. on March 17, 2013, she tripped and fell while exiting from the main entry door of defendants' residence and broke her left ankle. In this action to recover damages for her injury, plaintiff alleges that defendants' property was in a defective condition of which defendants had actual or constructive notice and, as now germane, plaintiff contends in her verified bill of particulars that defendants "failed to provide [her] with a safe place to walk."

Discovery has been completed, a note of issue and statement of readiness have been filed,

and a trial date has been set.

Defendants' motion for an order seeking summary judgment dismissing the complaint is supported by the pleadings, plaintiff's bill of particulars, three depositions of the plaintiff, the depositions of defendants, and two photographs depicting the entrance to the residence.

In opposition, plaintiff submits two affidavits of her attorneys.

In reply, defendants submit an affidavit of their attorney.

Before discussing the substance of defendants' motion and plaintiff's opposition, the court sets forth the underlying facts in greater detail. In 2013, plaintiff split her time between her permanent residence in Saratoga County and Suffolk County where she worked three or four days a week and stayed there with friends. During the afternoon of March 17, 2013, plaintiff was socializing with friends at a tavern in Baldwin, New York and encountered Michael Meyer, a longtime acquaintance and the adult son of the defendants with whom he lived. Plaintiff and Meyer left the tavern in Meyer's vehicle and at about 6:00 p.m. arrived at defendants' residence where defendants were watching television in the living room . Meyer introduced plaintiff to his parents and the couple retired to Meyer's first floor bedroom where Meyer fell asleep. Plaintiff testified that she watched television for a while and also slept for a few hours. According to plaintiff, at about 9:00 p.m. she decided to leave; Meyer was asleep and she called a taxi to take her to her friend's house. When the taxi arrived, plaintiff testified that she walked into the living room, observed that the defendants were not there, and that all of the lights and the television in the room were off. She testified that she didn't know where to turn the lights on. Guided only by the light given by her cell phone, plaintiff testified that she walked through the living room and opened the front door and screen door when:

[i]ntially I think there was like a door jam thing or like with a rug. There was like-they had a bunch of-they had a thing for shoes and I'm not quite sure because it was a long time ago. I just remember there was something there like a door stub and that my - as I was walking out my front foot caught on it, I stumbled.

According to plaintiff and the defendants, Michael Meyer heard plaintiff yelling, got up, and found her sitting on the porch, and the plaintiff was taken to the hospital.

Michael Meyer has not been deposed and no party has provided an affidavit from him.

Defendant Kathleen Meyer testified that when she and her husband retired for the night at about 10:00 or 10:30 p.m. to their bedroom on the second floor, they did not turn off the living room lights but left them on because they knew there was a guest in the house.

Defendant James Meyer in his deposition essentially confirms his wife's recollection.

Both defendants deny that they were aware of any defects in the entry door, its threshold, or on the one step leading to a brick or stucco porch.

In her opposition, plaintiff appears to have abandoned all claim that there was a physical defect in the door/landing area and concentrates her opposing arguments on a claim that, when she left the first floor bedroom, all of the living room lights were off, and it was dark when she attempted to exit the residence and that she "stumbled" on the door's threshold. Plaintiff further contends that defendants' motion improperly relies on unsigned and unsworn deposition transcripts and that such evidence is inadmissible and cannot be considered to support a motion for summary judgment.

In reply, defendants' counsel argues that plaintiff's opposing papers were untimely filed and should not be considered by the court. Next, defendants' counsel asserts that the claim plaintiff now raises as the cause of the accident, namely that the living room was not adequately

illuminated, is not included in her bill of particulars and thus is improperly asserted in opposition to the motion.

The general principles governing summary judgment motions in negligence actions follow. Since summary judgment is a drastic remedy which if granted deprives a party of a full presentation of evidence before a trier of fact, the burden is on the moving party, here the defendants, to tender sufficient evidence to demonstrate the absence of any material issue of fact, and in reviewing the motion, the facts must be viewed in the light most favorable to the party opposing the motion, here the plaintiff. Friends of Thayer Lake, LLC v Brown, 27 NY3d 1039, 1043 (2016); Vega v Restani Constr. Corp., 18 NY3d 499 (2012). And in negligence actions, summary judgment is “rarely granted”, but the court need not “ferret out” speculative issues to get the case to a jury. Andre v Pomeroy, 35 NY2d 361, 364 (1974). Once defendants meet their threshold burden, the plaintiff must produce “affirmative proof to demonstrate that the matters are real and capable of being established upon trial”. Nelson v Lundy, 298 AD2d 689, 690 (3<sup>rd</sup> Dept 2002). And, when there is conflicting evidence over a material issue, the court is precluded from assessing credibility and must leave that task to the factfinder. Ferrante v American Lung Assoc., 90 NY2d 623 (1997).

First, a preliminary issue. Following plaintiff's filing of the note of issue, the action was scheduled for a pre-trial conference on May 13, 2019 and the conference was adjourned at plaintiff's request first to May 28, 2019 and then to June 27, 2019. On June 10, 2019, defendants' motion was filed with a return date of June 28, 2019. At plaintiff's request, the conference was rescheduled to July 25, 2019, but, plaintiff, at the time, did not request that the motion be adjourned. Following its standard practice, the court notified defendants' counsel to submit on

notice to plaintiff an order granting the motion based on the lack of opposition. After the order was submitted, plaintiff's counsel realized that he had not requested, when he sought to reschedule the conference, that the motion also be rescheduled. Plaintiff's opposition affidavits were then filed on July 24, 2019. The conference was held on July 25, 2019.

Under the circumstances and based on the general policy that courts should decide cases, whenever possible, on the merits, plaintiff's late papers in opposition will be considered. Defendants suffer no prejudice and they have interposed a reply affidavit addressing plaintiff's opposing arguments.

Next considered is the plaintiff's argument that the unsigned, unsworn depositions of the plaintiff and defendants cannot be considered and therefore defendants do not demonstrate a prima facie showing warranting dismissal of the complaint. Although all the transcripts relied on by the defendants are unsigned, they have been certified as accurate by the reporter. Moreover, defendants establish that the plaintiff's three transcripts were submitted to her for signature but never signed and that the defendants' transcripts are submitted on their own behalf thus making all transcripts admissible under CPLR 3116(a). Defendants are correct. David v Lee, 106 AD3d 1044, 1045 (2nd Dept. 2013); Sass v TMT Restoration Consultants, Ltd., 100 AD3d 443 (1st Dept. 2012).

Now the merits. In a trip and fall action of this nature, the property owners bear the initial burden of demonstrating that they maintained their premises in a reasonably safe condition and that they neither created nor had actual nor constructive notice of the allegedly dangerous condition. Mulligan v R&D Properties of New York, Inc., 162 AD3d 1601 (3<sup>rd</sup> Dept 2018); McGrath v George Weston Bakeries, Inc., 117 AD3d 1303 (3<sup>rd</sup> Dept 2014).

Defendants meet their initial burden showing that there was no known dangerous condition in their entry/exit doorway.

In opposition, again plaintiff abandons all claims of a physical defect and asserts only that the defendants' failed to have the lights on in their living room when she decided to leave and that she had to rely solely on the light generated by her cell phone to guide her to the front door and that lack of illumination resulted in her "stumbling" on the threshold.

Once again, defendants testified that when they retired for the night, the living room lights were left on since they knew their son had a guest. Plaintiff testified that when she exited the first floor bedroom, the living room was dark and all lights were off and that she "stumbled" on the "like a door stub" and then "tripped again ... I don't know if it was like a mat that they had outside or a rug or something like that."

To be sure, inadequate lighting may constitute a dangerous condition, Peralta v Henriquez, 100 NY2d 139 (2003), but prior to this motion, plaintiff raised no such claim either in her complaint or her bill of particulars. A bill of particulars should detail the specific acts of negligence attributed to the defendants in order to narrow the issues so that a reasonable defense can be prepared, Stoddard v. New York Oncology Hematology, P.C., 172 AD3d 1504 (3rd Dept. 2019). Plaintiff's bill of particulars, again raises no claim based on the lack of adequate lighting nor for that matter does it identify any specific defect in the defendants' premises. Therefore, the claims of inadequate illumination may not be interjected at this juncture.

Even if the court were to consider the newly asserted claim, the evidence, unrefuted, discloses that by using the illumination generated by her cell phone, plaintiff was able to safely reach the front door and fell in the process of exiting. Thus, the lack of lighting is not a

proximate cause of her fall. Moreover, plaintiff fails to demonstrate that the defendants' premises, specifically the main entrance/or exit door, was defective or dangerous in any other specific way. Plaintiff thus is unable to identify the cause of her fall, a flaw fatal to her negligence cause of action. See, Mulligan v R&D Properties of New York Inc., 162 AD3d 1601 (3rd Dept. 2018).

Defendants' motion is granted and the plaintiff's complaint is dismissed, without costs.

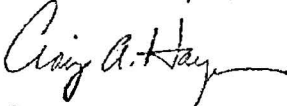
This constitutes the decision and order of the court. The original decision and order and all original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. The signing of this decision and order and the delivery of this decision and order to the Saratoga County Clerk shall not constitute notice of entry under CPLR Section 2220, and the defendants are not relieved from the applicable provisions of that rule regarding service of notice of entry.

So Ordered.

DATED: October 25, 2019  
Saratoga Springs, New York



HON. THOMAS D. NOLAN, JR.  
Supreme Court Justice

ENTERED  
Craig A. Hayner  
  
Saratoga County Clerk

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