To commence the 30 day 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

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ANGELA ZADRA,

Plaintiff,

-against-

BONEFISH GRILL, LLC,

Defendants,

----------X

DECISION AND ORDER
Index No.: 50102/2016
Motion Seq.: 1

ROONEY, J.

Defendant BONEFISH GRILL, LLC ("BONEFISH" or "Defendant") makes an application pursuant to N.Y. CIV. PRAC. L& R ("CPLR") § 3212 seeking summary judgment as against ANGELA ZADRA ("ZADRA" or "Plaintiff") and dismissal of the Complaint in its entirety.

In connection with this application, the Court read the following papers:

	PAPERS NUMBERED
Notice of Motion/Affirmation in Support/ Exhibits A-J	1-19
Affirmation in Opposition	20-28
Reply Affirmation/Exhibit A	29-34

By way of background, this action was commenced by Plaintiff by the filing of a Summons and Complaint dated December 28, 2016. Defendant joined issue on or about February 3, 2017 by filing and serving an Answer. Discovery proceeded, and a Note of Issue was filed on July 6, 2018. Subsequently, Defendant filed the instant motion for summary judgment seeking dismissal of the Complaint in its entirety.

The basis of this action is an accident which occurred on August 15, 2015, at the Bonefish Grill restaurant located at 2185 South Road, in Poughkeepsie, New York. Plaintiff alleges that as she was being escorted to her table by a host at the restaurant, she was caused to

slip and fall on a liquid-like substance. Plaintiff contends in her Complaint that Defendant failed to maintain the restaurant in a good and safe condition, and by reason of Defendant having caused and/or permitted a hazardous condition to exist on the premises, she sustained personal injuries.

Defendant argues in the instant motion that Plaintiff cannot identify the proximate cause of her fall and that as a result, Plaintiff is unable to establish that Defendant either created, or had actual or constructive notice of the condition. As a result, Defendant contends that summary judgment is appropriate.

The remedy of summary judgment is a drastic one and it should only be granted when it is clear no triable issue of material fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). On a motion for summary judgment, the proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez*, *supra*. The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 A.D.2d 497, 503 N.Y.S.2d 591 (2d Dep't 1986); *Gitlin v. Chirkin*, 98 A.D.3d 561, 949 N.Y.S.2d 712 (2d Dep't 2012). As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even "arugable", the motion *must* be denied. *Phillips v. Kantok & Co.*, 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1982); *Andre*, *supra*.

To impose liability on a defendant for a slip and fall on an allegedly dangerous condition on its premises, there must be some evidence that the condition existed, and that the defendant either created the condition or had actual or constructive notice of the condition and failed to remedy same. *Farren v. Board of Edu. of City of New York*, 119 A.D.3d 518, 988 N.Y.S.2d 684 (2d Dep't 2014); *Gatanas v. Picnic Garden BBQ Buffet House*, 305 A.D.2d 457, 761 N.Y.S.2d 77 (2d Dep't 2003). A defendant may establish *prima facie* entitlement to summary judgment as a matter of law in a slip and fall case by submitting evidence that the plaintiff is unable to

identify the cause of his or her slip and fall. *Alabre v. Kings Flatland Car Care Ctr. Inc.*, 84 A.D.3d 1286, 924 N.Y.S.2d 174 (2d Dep't 2011); *Patrick v. Costco Wholesale Corp.*, 77 A.D.3d 810, 909 N.Y.S.2d 543 (2d Dep't 2010). "'A plaintiff's inability to identify the cause of her fall is fatal to a claim of negligence in a slip-and-fall case because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation'" *Trapani v. Yonkers Racing Corp.*, 124 A.D.3d 628-29, 1 N.Y.S.3d 299 (2d Dep't 2015) (internal citation omitted). Moreover, where it is just as likely that another factor, such as a misstep or loss of balance, could have caused a slip and fall, any determination by the Court as to causation would be based upon conjecture. *See*, *Alabre*, *supra* at 1287; *Goldberg v. Village of Mt. Kisco*, 125 A.D.3d 929, 5 N.Y.S.3d 149 (2d Dep't 2015).

Here, the Defendant has submitted the Plaintiff's deposition transcript in support of its motion. Plaintiff testified that on the date of the accident, she and her daughter went to the Bonefish Grill restaurant in order to eat. She testified that a host led them to their table. It appears from Plaintiff's testimony that she was walking behind both her daughter and the host, as she followed them to the table. As she walked towards her table, Plaintiff testified that her leg went out from underneath her and hit something hard, causing her to fly back on the floor. The Plaintiff testified that despite the fact she was walking slowly and glancing at the floor, she did not see anything on the floor that would have caused her to fall. Plaintiff specifically testified that she saw no liquid, debris, paper or any other object on the floor before she fell. Although Plaintiff testified that she was "pretty sure" that there was an employee cleaning a booth in the vicinity of where Plaintiff fell, she did not testify that she saw any liquid or any debris spill or fall on the floor while the employee was cleaning the booth. In sum, the Plaintiff was unable to identify any specific cause of her fall.

In addition to the Plaintiff's deposition, Defendant submits the deposition transcripts of three BONEFISH employees all present at the time of the accident, specifically the manager, the "front of house" manager, and the host who was leading Plaintiff to her table at the time she fell. The manager and "front of house" manager inspected the area where the fall took place after the accident and neither employee observed any liquid or debris. The floor where Plaintiff fell was clean and dry. Neither manager received any complaints about spills or other messes in the area where Plaintiff fell on the evening of the incident. The host testified at his deposition that although he did not witness the fall, as his back was to the Plaintiff at that exact moment, he

inspected the area where she fell immediately after it happened and observed no liquid, debris or other object on the floor such that would have caused Plaintiff's fall. Additionally, the host testified that there were no spills or clean ups in that area prior to Plaintiff's fall.

The manager working at BONEFISH on the night of the accident testified that the floors are never waxed. They are mopped every day at the beginning of the shift and they are mopped every other day with a solution. The tables are all covered with vinyl table cloths, and the manager testified that no liquids or sprays are used in cleaning them, but rather, dry cloths are used to wipe them down. On the evening of the incident, the manager had received no complaints that the floor was slippery. The floor house manager who testified explained that the area where Plaintiff fell is a highly trafficked area, and that he would have walked over this area in excess of 100 times during the course of a shift. On the night of the incident, the floor house manager saw no dirt, debris or anything else on the floor in the area where Plaintiff fell.

Plaintiff's daughter, Shari Zadra, was following her to the table at the time Plaintiff slipped and fell. Shari Zadra also was deposed, and her deposition transcript is submitted in support of the instant motion. As previously indicated, Shari Zadra was *in front of* Plaintiff while they were being led to their table on the evening of the accident. Shari Zadra testified that she had no trouble walking without incident over the same area where Plaintiff fell. Although Shari Zadra was not looking at the floor as she walked, she testified that after her mother fell she did not notice any liquid or other substance on the floor at the time of the fall, nor did she observe anything being cleaned up from the area after the fall, or notice any employee clearing tables in the vicinity of the fall. Shari Zadra testified that it was not until later on the evening of the fall, or possibly the next day, that Plaintiff indicated to her she fell on some type of liquid.

The adduced evidence reveals that Plaintiff is unable to identify any cause of the slip and fall which forms the basis of the instant Complaint. Thus, the Court determines that Defendant has established its *prima facie* entitlement to summary judgment. *See*, *Alabre, supra; see also*; *Patrick v. Costco Wholesale Corp.*, *supra.*

In opposition to the motion, Plaintiff's counsel contends that a triable issue of fact has been raised. Plaintiff's counsel indicates that although Plaintiff was unable to identify any liquid, oil or other condition which caused the fall, her testimony, albeit circumstantial in nature, should be sufficient to permit a reasonable inference that the employee Plaintiff saw cleaning a nearby booth spilled something on the floor that ultimately caused Plaintiff to slip and fall.

With this, the Court disagrees. Plaintiff testified that there may have been an employee cleaning or wiping down a *table* in the vicinity of the accident location. This is refuted testimony. Notwithstanding, Plaintiff did not observe any liquid on the table being cleaned, nor did she see anyone spill or drop anything onto the floor. In sum, Plaintiff was unable to identify any substance on the floor, either before or after her fall, that may have caused the fall. Plaintiff requests that the Court deny Defendant's summary judgment motion based on the *possibility* that there was an employee clearing a nearby table, and that the employee dropped or spilled something during the cleaning of said table that somehow caused Plaintiff's fall. This theory of negligence is pure speculation, and is insufficient to raise a triable issue of fact in response to Defendant's motion.

Further, Plaintiff's reliance on *Simion v. Franklin Center for Rehabilitation & Nursing* (157 A.D.3d 738, 69 N.Y.S.3d 64) (2d Dep't 2018)) is misplaced. In *Simion*, the Appellate Division, Second Department, held that the lower court was correct in deciding that the Defendant had failed to meet its burden on the summary judgment motion. *Simion* is based on a slip and fall in a nursing home. What distinguishes *Simion* from the instant case is that in *Simion*, there was evidence that a nurse washed the Plaintiff's roommate every morning, and that Plaintiff had personally observed water spill on the floor when the baths would take place. *Id.* at 739. Additionally, on at least ten occasions, the Plaintiff had complained to the nursing home about the water spilling as a result of the nurse bathing Plaintiff's roommate. *Id.* Thus, even though the evidence of causation was circumstantial, the Court determined that the Plaintiff had enough evidence to permit a reasonable inference as to the cause of the fall. *Id.* The same cannot be said here, where there has been no evidence of any BONEFISH employee spilling anything, both at/around the time of the incident, or on prior instances where employees would clean or wipe down the booths. In fact, to the contrary, the manager who was deposed indicated that when cleaning the booths, no liquids are used, and that the employees are trained to wipe down tables with dry cloths.

Further, even if there was evidence that indicated there was a dangerous condition that existed on the floor which caused Plaintiff's fall and resulting injuries, there has been no evidence that this condition was caused by Defendant, or that Defendant had actual or constructive notice of same. *See*, *Gatanas*, *supra* (summary judgment is properly granted when

there is no proof the defendant created the alleged dangerous condition or had actual or constructive notice of same). In opposing the instant motion, Plaintiff does not argue otherwise.

Plaintiff's contention that a spill resulting from the cleaning of a booth in the vicinity of where she fell caused her fall is simply not supported by the adduced evidence. Mere conclusions and unsubstantiated allegations are insufficient to raise triable issues of fact. *Zuckerman*, *supra*, at 557; *Perez v. Grace Episcopal Church*, 6 A.D.3d 596, 774 N.Y.S.2d 785 (2d Dep't 2004).

As such, it is hereby:

ORDERED, that the Defendant's motion is granted in its entirety; and it is further

ORDERED, that the Plaintiff's Complaint is dismissed; and it is further

ORDERED, that the parties are no longer required to appear on Monday, January 14, 2019, at 10:30 a.m. for a settlement conference.

This shall constitute the Decision and Order of this Court.

Dated: Carmel, New York
January 4, 2019

James T. Rooney

Hon. James T. Rooney
A.J.S.C.

To: Zlotolow & Associates, P.C.
Attn: Scott Zlotolow, Esq.
Attorneys for Plaintiff
270 West Main Street
Sayville, NY 11782

Ahmuty, Demers & McManus, Esqs.
Attn: Robert Ferreri, Esq.
Attorneys for Defendant
199 Water Street, 16th Floor
New York, NY 10038