

**Estate of Alessandro v Alessandro**

2020 NY Slip Op 35636(U)

April 24, 2020

Supreme Court, Bronx County

Docket Number: Index No. 21692/2018E

Judge: Wilma Guzman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

Index No. 21692/2018E  
Motion Calendar No. 16  
Motion Date: 8/15/16

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ESTATE OF ROCCO ALESSANDRO, by NICOLINA A.  
ALESSANDRO, in her capacity as the duly appointed  
Administrator,

Plaintiffs,

-against-

**DECISION/ ORDER**  
**Present:**  
**Hon. Wilma Guzman**

CARMINE ALESSANDRO,

Defendants.

-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's  
complaint:

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion, Affirmation in Support,</b>	
<b>Exhibits Thereto .....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Reply Affirmation.....</b>	<b>3</b>

Motion decided as follows: Upon deliberation of the application duly made by defendant, herein, by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, granting Defendant summary judgment, dismissing plaintiffs' Complaint, is heretofore granted.

This is an action for personal injuries and wrongful death of plaintiff-decedent ROCCO ALESSANDRO (hereinafter referred to as "Decedent") from an incident that occurred on January 2, 2017 at 53 Stratton Avenue, Yonkers, New York (hereinafter the "Subject Premises"). Plaintiff alleges that Decedent was going up the stairs when he slipped and fell on ice and snow and struck his head on the concrete landing, causing his death; and that Defendant was negligent in failing to remove the snow and ice from the steps. Defendant argues that (1) defendant did not have a duty to clear the steps during a storm, (2) plaintiff did not suffer any pecuniary loss, and that (3) decedent did not suffer any conscious pain and suffering.

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law, by presenting, sufficient evidence to negate any issue of material fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1983). If the

movement meets this burden, the opponent must rebut the *prima facie* showing by submitting evidence in admissible form demonstrating the existence of factual issues needing to be determined by a trier of fact. *See* Zukerman v. City of New York, 49 NY.2d 557 (1980). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. Winegrad, 64 N.Y.2d at 853.

In order to make out a *prima facie* case of negligence, plaintiff must establish: (1) a duty owed by the defendant to use reasonable care so as not to cause injuries or unreasonable risks to others; (2) a breach of that duty; (3) a close causal connection between the breach and the resulting injuries; and (4) an actual loss or damage. *See* Gordon v. Muchnick, 579 N.Y.S.2d 745 (1992).

There is no dispute that Defendant owns the Subject Premises and that there was a rain/snow mix on January 2, 2017, the day Decedent died. There is no dispute that the precipitation on the day of the Decedent's demise, started at or about 8 am and continued through the time of Decedent's fall several hours later.

Defendant submitted certified weather records showing that the snow/rain precipitation began the day of Decedent's fall. *See*, CPLR §4528; Daley v. Janel Tower, L.P., 89 AD3D 408. Further, Mr. Pimentel, the upstairs tenant, testified that when he entered the Subject Premises at approximately 10:30pm on January 1, 2017, the night before Decedent's fall, the ground and the steps on which Decedent allegedly fell were "clear" and "dry" which is consistent with the certified weather records Defendant submitted to support his claim for entitlement to summary judgment.

There was no testimony by any of the witnesses that Defendant was ever put on notice of the snow/ice condition on the steps until the time of the incident. Decedent's sister, Catherine Alessandro, in fact testified that she and Decedent went down those same steps earlier that morning and that Decedent only fell upon returning to the Subject Premises several hours later. Even assuming *arguendo* that it snowed the day prior, a property owner will not be held liable in negligence for a plaintiff's injuries sustained as a result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter. *See*, Solazzo v. New York City Transit Authority, 6 NY3d 734(2005) *citing* Valentine v. City of New York, 86 AD2d 381(1<sup>st</sup> Dept. 1982). Defendant has made *prima facie* showing of entitlement to summary judgment.

As Defendant has made, a *prima facie* showing entitlement to summary judgment, plaintiff must come forth with some issue of fact that would preclude this Court from granting summary judgment at this time.

Plaintiff argues that the snow and ice condition existed prior to January 2nd, and in fact was created by snow fall on the days leading up to Decedent's fall, giving Defendant ample time to clean the accumulation of snow and ice. Plaintiff's submission of an unaffirmed report from a weather reporting company, not accompanied by any certified weather records or admissible climatological reports, cannot be considered. Morabito v. 11 Park Place LLC, 107 AD3d 472(1<sup>st</sup> Dept. 2013) *citing* Zuckerman v. City of New York, 49 NY2d 557, 562.

Plaintiff further relies on the conflicting testimony of Catherine Alessandro, the only actual witness to the incident, who stated that she initially told EMS that Decedent had suffered a seizure at the time of his fall down the steps then subsequently said it was the ice on the steps that caused Decedent to fall down the stairs striking his head on the landing, attributing the discrepancy to her shock and confusion at the time of the incident. There was no testimony from any of the deponents controverting Mr. Pimentel's testimony that there was not snow on the steps the evening before the incident occurred.

There are also questions with regards to the actual cause of death. The autopsy lists the cause of death as cardiac arrest however it remains to be determined if the cardiac arrest was caused by the fall or an epileptic seizure or an underlying coronary condition as evidenced by the Holter Decedent was wearing to monitor a possible arrhythmia.

Defendant further argues that Plaintiff did not suffer a pecuniary loss. It is undisputed Decedent was on Social Security, had no dependents and that no one was dependent on him for monetary support.

In opposition, Plaintiff is claiming pecuniary loss for uncompensated support such as cooking, cleaning, garbage disposal, accompanying Plaintiff to appointments, and, helping daily around the house, which a jury could potentially assign a monetary value to at trial. De Long v. County of Erie, 60 NY2d 296(1983). This claim is supported by the testimony of Plaintiff, Catherine Alessandro and Defendant. The issue however is that the Complaint does not plead pecuniary loss as stated above but rather for "large sums of money for medical care, hospitalization, and other services for Rocco to become healed and cured of said injuries and funeral expenses." Plaintiff failed to put forth any evidence in support of her pleadings.

Defendant further argues that Decedent did not suffer any conscious pain and suffering. On a motion for summary judgment, the defendants bear the initial burden of showing that the decedent did not suffer conscious pain and suffering. *See*, Kevra v. Vladagin, 96 AD3d 805(2<sup>nd</sup> Dept. 2012) *citing* Phiri v. Joseph, 32 A.D.3d 922, 822 N.Y.S.2d 573; Schild v.

Kingsley, 5 A.D.3d 103, 104, 773 N.Y.S.2d 20; Massey v. New York City Hous. Auth., 230 A.D.2d 601, 602, 646 N.Y.S.2d 105. Here, the defendant satisfied his initial burden. In particular, he submitted evidence that the Decedent did not make any sound or movement, and that he appeared not to be breathing, during the approximately one hour in between the occurrence and admission to the hospital when he was put on a respirator machine.

In opposition, the plaintiff failed to raise a triable issue of fact. “Without legally sufficient proof of consciousness following an accident, a claim for conscious pain and suffering must be dismissed”. *See*, Cummins v. County of Onondaga, 84 N.Y.2d 322, 325, 618 N.Y.S.2d 615, 642 N.E.2d 1071. Mere conjecture, surmise, or speculation is insufficient to sustain a cause of action to recover damages for conscious pain and suffering (*id.*). Furthermore, there was no evidence that the decedent experienced “pre-impact terror”. *See*, Anderson v. Rowe, 73 A.D.2d 1030, 1031, 425 N.Y.S.2d 180; Carlson v. Porter, 53 A.D.3d 1129, 861 N.Y.S.2d 907; cf. Lang v. Bouju, 245 A.D.2d 1000, 1001, 667 N.Y.S.2d 440). Any finding that the Decedent perceived grave injury or death, to justify making an award for “pre-impact terror,” would be based on impermissible speculation. *See*, Phiri v. Joseph, 32 A.D.3d at 923, 822 N.Y.S.2d 573. Due to the foregoing, the Court finds that there was no duty breached by Defendant and grants summary judgment in favor of Defendant.


Accordingly, it is:

ORDERED that the application by Defendant Carmine Alessandro, pursuant to CPLR §3212, for an Order granting them summary judgment and dismissing plaintiffs’ Complaint, is heretofore granted. It is further

ORDERED that Defendant Carmine Alessandro shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: April 24, 2020

  
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HON. WILMA GUZMAN  
J.S.C.