

**Franklin v Columbia N.Y. 41st St. Off. Props., LLC**

2024 NY Slip Op 34711(U)

January 31, 2024

Supreme Court, Kings County

Docket Number: Index No. 519086/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 519086/2019  
Motion Date: 10-16-23  
Mot. Seq. No.: 3, 4

-----X  
LATOYA D. FRANKLIN, AS ADMINISTRATOR OF  
THE GOODS, CHATTELS AND CREDITS WHICH  
WERE OF SPENCER FRANKLIN, DECEASED,

Plaintiff,

-against-

COLUMBIA NEW YORK 41ST STREET OFFICE  
PROPERTIES, LLC and DOS TOROS TAQUERIA,

Defendants.  
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DECISION/ORDER

KINGS COUNTY CLERK  
FILED  
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The following papers, which are e-filed with NYCEF as items 44-125 were read on these motions:

In this action to recover damages for personal injuries, the defendant, Dos Toros Taqueria, moves for and order pursuant to CPLR § 3212 granting it summary judgment dismissing all claims and cross-claims asserted against it (Motion Sequence # 3). Defendant Columbia New York 41st Street Office Properties, LLC moves for the same relief (Motion Sequence # 4). Both defendants claim that they are entitled to summary judgment dismissing the amended complaint since the plaintiff cannot identify the sidewalk defect that caused the injuries suffered by plaintiff's decedent.

On March 11, 2019, at 4 p.m., Spencer Franklin (hereinafter the decedent) allegedly sustained injuries when he tripped and fell on a sidewalk abutting premises located at 119 W. 40th Street, New York, New York, which is owned by defendant Columbia New York 41st Street Office Properties, LLC ("Columbia"). Plaintiff commenced this action against Columbia and Dos Toros Taqueria ("Dos Toros") claiming that the accident was due to their negligence. Dos Toros leased space on the ground floor of the building and operated a restaurant.

The decedent was alive at the time the action was commenced but died before the action was resolved. The decedent's daughter, Latoya D. Franklin, the administrator of his estate was

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substituted in his place after his death. The decedent did not appear for a deposition prior to his death.

In a premises liability case, a defendant moving for summary judgment can establish its prima facie entitlement to judgment as a matter of law by showing that the plaintiff cannot identify the cause of his or her accident without engaging in speculation (*see Gaither–Angus v. Adelphi Univ.*, 180 A.D.3d 875, 116 N.Y.S.3d 581; *Kerzhner v. New York City Tr. Auth.*, 170 A.D.3d 982, 96 N.Y.S.3d 298; *Gani v. Avenue R Sephardic Congregation*, 159 A.D.3d 873, 72 N.Y.S.3d 561). “Although proximate cause can be established in the absence of direct evidence of causation [and] ... may be inferred from the facts and circumstances underlying the injury, [m]ere speculation as to the cause of a fall, where there can be many causes, is fatal to a cause of action” (*Manning v. 6638 18th Ave. Realty Corp.*, 28 A.D.3d 434, 435, 814 N.Y.S.2d 178 [internal quotation marks omitted]; *see Hahn v. Go Go Bus Tours, Inc.*, 144 A.D.3d 748, 749, 40 N.Y.S.3d 549; *Viviano v. KeyCorp*, 128 A.D.3d 811, 811–812, 9 N.Y.S.3d 154; *Racines v. Lebowitz*, 105 A.D.3d 934, 963 N.Y.S.2d 348). Indeed, a plaintiff’s inability to identify the cause of a fall is fatal to the cause of action because a finding that a defendant’s negligence, if any, proximately caused the plaintiff’s injuries would be based on speculation (*see Palahmuk v. Tiro Rest. Corp.*, 116 A.D.3d 748, 749, 983 N.Y.S.2d 603; *DeForte v. Greenwood Cemetery*, 114 A.D.3d 718, 980 N.Y.S.2d 499; *Deputron v. A & J Tours, Inc.*, 106 A.D.3d 944, 945, 964 N.Y.S.2d 670).

This does not mean that a plaintiff must have personal knowledge of the cause of a fall. It means only that a plaintiff’s inability to establish the cause of the fall, whether by personal knowledge or by other admissible proof, is fatal to a cause of action based on negligence (*see Izaguirre v. New York City Tr. Auth.*, 106 A.D.3d 878, 878, 966 N.Y.S.2d 122; *see McRae v. Venuto*, 136 A.D.3d 765, 766, 24 N.Y.S.3d 745; *Pol v. Gjonbalaj*, 125 A.D.3d at 955, 5 N.Y.S.3d 186).

Here, in support of their motions for summary judgment dismissing the amended complaint, the defendants demonstrated, prima facie, that the plaintiff is unable to identify the cause of the decedent’s fall (*see Harris v. Live, Play & Bounce Corp.*, 164 A.D.3d 880, 82 N.Y.S.3d 106; *Mauskopf v. 1528 Owners Corp.*, 102 A.D.3d 930, 931, 958 N.Y.S.2d 759). Even

viewing the evidence in the light most favorable to the plaintiff and according her the benefit of all reasonable inferences (*see DiLorenzo v. S.I.J. Realty Co., LLC*, 115 A.D.3d 701, 702, 981 N.Y.S.2d 590), plaintiff's theory that the decedent tripped on non-trivial sidewalk defect rests entirely on speculation (*see Kloepfer v. Aslanis*, 106 A.D.3d 956, 966 N.Y.S.2d 151; *Raghu v. New York City Hous. Auth.*, 72 A.D.3d 480, 482, 897 N.Y.S.2d 436).

While the plaintiff submitted proof that the decedent fell on the sidewalk in front of the building, plaintiff did not submit any proof as to what caused him to fall. While the photographs taken by Mr. Garcia, who observed the plaintiff lying on the sidewalk in front of the building following the accident, depict some conditions on the sidewalk by the entranceway to the building which a jury may conclude were unsafe, for a jury to conclude that the decedent was caused to trip on one of these conditions would require sheer speculation. Even though there are statements in the hospital and ambulance records to the effect that the decedent said he tripped on a crack in the sidewalk, these statements constitute inadmissible hearsay, as they relate to the manner of the accident and were not germane to the plaintiff's diagnosis and treatment (*see Carcamo v. Stein*, 53 A.D.3d 520, 521, 861 N.Y.S.2d 755, 756; *Williams v. Alexander*, 309 N.Y. 283, 287, 129 N.E.2d 417; *Cuevas v. Alexander's, Inc.*, 23 A.D.3d 428, 429, 805 N.Y.S.2d 605) and do not identify the specific crack. Likewise, these statements do not rule out that possibility that the crack the plaintiff was referring to was trivial in nature.

Finally, contrary to the plaintiff's contention, the *Noseworthy* doctrine (*see Noseworthy v. City of New York*, 298 N.Y. 76, 80, 80 N.E.2d 744) does not apply in this case, since the moving defendants' knowledge as to the cause of the accident is no greater than that of the plaintiff (*see Hod v. Orchard Fields, LLC*, 111 A.D.3d 794, 794, 975 N.Y.S.2d 162; *Knudsen v. Mamaroneck Post No. 90, Dept. of N.Y.-Am. Legion, Inc.*, 94 A.D.3d at 1059, 942 N.Y.S.2d 800; *Miles v. County of Dutchess*, 85 A.D.3d 878, 879, 925 N.Y.S.2d 349; *Kuravskaya v. Samjo Realty Corp.*, 281 A.D.2d 518, 721 N.Y.S.2d 836).

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment are GRANTED and the action is dismissed.

This constitutes the decision and order of the Court.

Dated: January 31, 2024

**PPS**

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KINGS COUNTY CLERK  
FILED



**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020