

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**

**Justice**

**BRITTANY HIGGINS,**

**TRIAL/IAS PART 2**

**INDEX NO. 605983/19**

**Plaintiff(s),**

**MOTION SEQUENCE  
NO. 1**

**- against -**

**23 NORTH AVENUE PUB INC., d/b/a KASEYS  
AMERICAN GRILL, ROOF TOP 32 & BARJALT  
LLC, THOMAS M MCNICHOLAS JR. and  
ANTHONY GERACI,**

**MOTION SUBMISSION  
DATE: April 30, 2021**

**Defendant(s).**

**The following papers read on this motion:**

**Notice of Motion  
Affirmation  
Affidavit**

**X  
XXX  
XXX**

Upon the foregoing papers, the motion by the defendants for an Oder pursuant to CPLR §3212 dismissing the plaintiff's Summons and Complaint, is determined as hereinafter provided:

The Court initially observes that the plaintiff has discontinued this action as to the defendants Thomas M. McNicholas, Jr and Anthony Geraci.

This personal injury action arises out of an incident that occurred on August 18, 2018 at approximately 10:30 pm on an exterior staircase at the rear of the defendant Kasey's Roof Top Bar located at 23 North Park Avenue, Rockville Centre, NY. At that time as the plaintiff was descending the stair she slipped and fell from a puddle of water on the third fligh of stairs that had accumulated as a result of rain that evening. As a result of the plaintiff's slip and fall, the plaintiff suffered physical injuries.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient

evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

The non party William Murphy at his September 18, 2020 deposition set forth that he had met the plaintiff at her apartment at 6 or 7 pm (see deposition transcript at pg 9). Mr. Murphy further set forth that " ... it was definitely wet out or it had rained earlier in the past maybe earlier that day" (see deposition transcript at pg. 14). While at the plaintiff apartment they both had a glass of wine (see deposition transcript at pg. 11). Subsequently they decided to go to the defendant Kasey's. At the defendant Kasey's they used the exterior stair to go to the roof top bar. After staying for a while they decided to leave and Mr. Murphy did not recall if the stairs were wet and if there was a light (see transcript at pg. 19) . There after Mr. Murphy recalled that when they arrived the stairs were wet (see deposition transcript at pg. 35). While descending the stair the plaintiff slipped and fell see transcript at pg. 20).

Jonathan Dillon testified at his June 19, 2020 examination before trial that he was "working the door" (see deposition transcript at pg. 8). Mr. Dillon stated that he saw the plaintiff fall "in the corner of my eye and that it was raining (see deposition transcript at pg. 12) . He went to the plaintiff and "she looked pretty impaired" (see deposition transcript at pg. 16). Mr. Dillon testified that there is " a lot of lighting" on the stairs and there was a light above where the plaintiff fell (see deposition transcript at pg. 19) .

The plaintiff at the plaintiff's March 3, 2020 examination before trial. The plaintiff at pg. 23 set forth that prior to leaving for the defendant Kasey's, it was raining but then stopped. The plaintiff and Mr. Murphy went to the rear of the building and used the stairs to get to the roof top. After approximately 2 to 2½ hours the plaintiff and Mr. Murphy decided to leave and as they were descending the stairs the plaintiff slipped on the stairs (see deposition transcript at pg. 39). The plaintiff stated that she fell in a puddle of water (see deposition transcript at pg. 36) and that it was "pitch black" (see deposition transcript at pg. 45). Mr. Dillon, a bouncer for the defendant Kasey's set forth at is deposition that at the time of the plaintiff's fall it was raining (see deposition at pg. 12).

Based upon all of the foregoing, the moving defendants have established that the puddle on the stairs was a transient conditions and that the defendants neither created the condition or had actual or constructive notice of the condition (see **Gordon v American Museum of Natural History**, 67 NY2d 836).

In opposition to the defendants' application the plaintiff has not established that the defendants either created the condition or had actual or constructive notice of its existence.

Based upon all of the foregoing, the defendants motion for an Order pursuant to CPLR §3212 dismissing the plaintiff's Summons and Complaint, is **granted**.

SO ORDERED.

DATED: 7/12/2021

.....  
Riy S. Maham  
.....  
J.S.C.