

PART 04

Case Disposed	<input checked="" type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

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

-----X
DIPLAN, VILMARIELIS

Index No. **0305980/2014**

-against-

Hon. **HOWARD H. SHERMAN,**

ERGAS, ENRIQUE
-----X

Justice Supreme Court

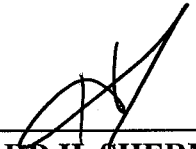
The following papers numbered 1 to 5 Read on this motion, **SUMMARY JUDGEMENT DEFENDANT**
Noticed on **August 14 2017** and duly submitted as No. _____ on the Motion Calendar of 8/14/17

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause ^{A-G} Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits Affidavit in Opp.	3	
Replying Affidavit and Exhibits Affirmation	4	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law	2, 5	

Upon the foregoing papers this *motion for summary judgment*
is decided in accordance with the
accompanying decision and order filed herewith

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 6/25/18

Hon. 
HOWARD H. SHERMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 4

Vilmarelis Diplan,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 305980/14

Enrique Ergas and Joscelyn Ergas,

Defendants

Howard H. Sherman

JSC

Defendants move for summary judgment dismissing the complaint pursuant to CPLR 3212 on the grounds that they neither created nor had pre-accident notice of the transitory causative condition alleged here. Plaintiff submits written opposition.

Plaintiff commenced this action seeking damages for personal injuries alleged to have been sustained on July 11, 2014 when she slipped and fell on a wet condition on the floor of a garage on residential premises owned by defendants ¹ located in in Southamptn, New York .

The Note of Issue was filed on May 25, 2017.

It is undisputed that the source of the wet condition on the floor was one or two bags of ice cubes that had been placed in the garage by an adult child of the defendants.

In support of the motion, defendant submits copies of the pleadings and the bills of particulars [Exhibits A-D], and transcripts of the deposition testimony of plaintiff and Enrique Ergas [Exhibits E,F], and his affidavit, and that of his wife and co-defendant. Though unsigned, the transcripts are admissible, as they are certified by the court reporter, and that of plaintiff is accompanied by a letter in conformity with CPLR § 3116, and their respective

¹Defendants and their children are the sole beneficiaries of a trust that owns the home.

accuracy is unchallenged here (see, *Chao v. Chao*, 161 A.D.3d 564[1st Dept. 2018], *Franco v. Rolling Frito–Lay Sales, Ltd.*, 103 A.D.3d 543, 962 N.Y.S.2d 54 [1st Dept. 2013]; CPLR 3116[a]).

The facts here are largely undisputed.

Plaintiff testified that for three years she had been employed by defendants on a seasonal basis four days-a -week as a live-in housekeeper [EBT 7-8], and on the day of the incident she and the other housekeeper were preparing a meal for the family and their visitors [16-17]. She went to the attached garage for the first time that day in order to get soda from the refrigerator there, and before reaching it, she stepped on water, and fell on to the cement floor [24]. After falling she observed that there was a puddle of water and “that there were two bags with ice, and they were melting”, and the two bags “still have the ice melting, and they still are leaking.” [22:2-6] The bags were positioned on the floor of the garage, and she observed neither the bags nor the puddle before her fall [23], nor had she ever before seen bags of ice in the garage [Id.].

Enrique Ergas testified that he was in the kitchen when he heard plaintiff screaming, and went to the garage, and observed her sitting on the floor [17]. He also observed a bag of ice cubes “on like a little shelf on the right side of the door []” [20:15-16] about three feet from the floor [24].² He saw that “there was some water that had fallen to the ground [30:13-14], described as a “little puddle “ [31:14], and he thought that water appeared to be dripping from the shelf to the floor [31:7-9]. After the incident, Ergas spoke to his adult daughter who advised that she had put the ice in the garage “while she went to get something.” [27:18-19;30] He did

²He could not recall if there was more than one bag [24:20].

not know what she went to get, nor for how long she was gone [35]. He also testified that the garage was air-conditioned [35], and that bags of ice were never kept there [20].

In affidavits defendants each attest that they had not placed the ice on the shelf, nor, before the incident, were they aware that they were there, nor on the day of the incident, had either defendant been in the garage before plaintiff fell.

Discussion and Conclusions

Upon consideration of the record here, with the facts viewed in the light most favorable to the plaintiff, and every available inference drawn in her favor (see, *Jacobsen v. New York City Health & Hosps. Corp.*, 22 NY3d 824, 833, 11 N.E.3d 159 (2014); *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475, 982 N.Y.S.2d 813, 5 N.E.3d 976 [2013]), the court finds that defendants have met their burden to demonstrate as a matter of law that they did not create the causative dangerous condition, and that before the accident, they neither knew nor should have known that unrefrigerated bags of ice were melting onto the garage floor.

In opposition to this showing, plaintiff comes forward with no proof to raise an issue of fact that defendants caused the condition, or knew before the accident, that ice was melting on to the floor of the garage, or to raise a question that the puddle was visibly apparent for a sufficient length of time, for its source to be discovered, and the condition remedied (compare, *Demaille v. Trump Castle*, 283 A.D.2d 361, 725 N.Y.S. 40 [1st Dept. 2001] - [size of puddles and of partially-melted ice cubes relative to size of those produced by nearby ice machine permitted reasonable inference that ice spilled sufficient period pre-accident to be discovered and remedied]). It is noted that the name of the family member with personal knowledge of the purchase of the ice, and more crucially of its timing, and of the circumstances surrounding its

presence in the garage was known to plaintiff for a year before the Note of Issue was filed, yet it would appear that during the intervening period , no attempt was made to secure the non-party's deposition.

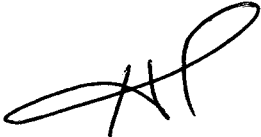
Accordingly, it is

ORDERED that the motion be and hereby is granted, and it is

ORDERED that summary judgment be entered in favor of defendants dismissing the complaint .

This shall constitute the decision and order of this court.

Dated: June 25, 2018

A handwritten signature in black ink, appearing to be 'H. Sherman', written in a cursive style.

Howard H. Sherman