Xin Li v Mercy Med. Ctr.
2018 NY Slip Op 34387(U)
January 5, 2018
Supreme Court, Nassau County
Docket Number: Index No. 601689/17
Judge: Randy Sue Marber

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 9

X

XIN LI,

Plaintiff,

Index No.: 601689/17
Mot. Seq. No...01, 03
Motion Date...10/18/17

-against-

MERCY MEDICAL CENTER, NORTH SHORE UNIVERSITY HOSPITAL AMBULANCE SERVICES, JONATHAN BRISMAN, M.D., TIMBERLY BOOKER, M.D., CORNELLIA HA, M.D., DR. VINDA, SUSAN KRAUTHAMER, R.P.A., KESHA THORPE, R.N., L. CRACI, R.N., "JOHN/JANE' ASHA, R.N., and JOHN DOE MEDICAL PROVIDERS #1-10, and KJSS CORP. d/b/a KASHI SUSHI AND STEAKHOUSE,

Defendants.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 01).....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Notice of Motion (Mot. Seq. 03).....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Sur-Reply Affirmation.....x
Reply Affirmation to Sur-Reply.....x

Upon the foregoing papers, the motion (Mot. Seq. 01) by the Defendants, MERCY MEDICAL CENTER ("MERCY") and KESHA THORPE, R.N. ("THORPE"), seeking an Order pursuant to CPLR §3211 (a)(5), CPLR §3211(a)(7), and CPLR §205(a), dismissing the Plaintiff's Complaint and all claims asserted against them; and the motion (Mot. Seq. 03) by the Defendant, KJSS CORP. d/b/a KASHI SUSHI AND STEAKHOUSE ("KASHI"), seeking an Order pursuant to CPLR §3212, granting summary judgment and dismissing the Plaintiff's Complaint, are decided as hereinafter provided.

In this action, the Plaintiff alleges that on May 6, 2013, he sustained personal injuries when he was caused to slip and fall on water in the bathroom of KASHI restaurant located at 222 Sunrise Highway, Rockville Centre, New York. The Plaintiff was transported by ambulance from KASHI to the Emergency Department at MERCY where he received care and treatment on the night of May 6, 2013 and early morning hours of May 7, 2013. Thereafter, he was transferred to Winthrop University Hospital during the early morning hours of May 7, 2013.

The procedural history of this case is pertinent. The Plaintiff originally commenced an action in federal court against KASHI on February 10, 2015, asserting a cause of action for negligence based on KASHI's failure to keep the premises in reasonably safe condition and/or creating a hazardous condition which caused his fall and resultant injuries [*See* Exhibit "A" to Defendant KASHI's Notice of Motion]. The Defendant, KASHI, interposed an answer in the federal action on or about September 14, 2015. Depositions of all parties were held and discovery was completed. Following completing

of discovery, KASHI filed a motion for summary judgment in the federal action. While said motion was pending, the federal action against KASHI was discontinued without prejudice to refile in State Court.

The Plaintiff originally filed a medical malpractice action against the moving Defendants, MERCY and THORPE, on November 9, 2015 [*See* Exhibit "B" annexed to Defendant MERCY's Notice of Motion]. It is undisputed that November 9, 2015 was the last day to file an action against these Defendants based on the applicable statute of limitations within which to file a medical malpractice claim. The Proposed Summons filed by the Plaintiff against MERCY and THORPE was rejected by the federal court and a new Proposed Summons was not filed by the Plaintiff until November 29, 2015 [*See* Federal Court Docket annexed as Exhibit "A" to Defendant MERCY's Notice of Motion]. Pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 4, counsel for the Plaintiff mailed copies of the Summons and Complaint together with a Waiver of Service form to be completed by MERCY and THORPE. It is undisputed that MERCY never returned the Waiver of Service form; and that the Plaintiff's counsel did not effectuate service of the Summons and Complaint upon MERCY until April 2016, which was concededly outside the 120-day time period allowable to serve same. Following service upon MERCY, the Plaintiff's counsel also neglected to file the Affidavit of Service with the federal court pursuant to applicable federal rules.

The Defendant, THORPE, however, timely completed and returned the Waiver of Service form. The Plaintiff's counsel also neglected to file the Waiver with the federal court until May 10, 2016.

At a pre-motion conference in federal court in or about June 2016, the moving Defendants, MERCY and THORPE, sought permission to file a motion to dismiss the case for lack of subject jurisdiction, and for lack of personal jurisdiction due to the Plaintiff's failure to properly and timely serve the Complaint pursuant to FRCP Rule 4. By Order dated June 29, 2016, the federal court directed limited discovery on the threshold issue of subject matter jurisdiction, following which the parties were directed to confer and propose a briefing schedule. Notably, the federal court further directed that "the remaining grounds for dismissal proposed by defendants shall be held in abeyance, with all parties' rights reserved, including the right to make a motion after the Court issues a ruling on subject matter jurisdiction." [*See* Federal Court Order dated June 29, 2016, annexed to Defendant MERCY's Notice of Motion as Exhibit "C"].

Following the completion of discovery on the issue of subject matter jurisdiction, all parties agreed to discontinue the action without prejudice to recommence the action in State Court pursuant to CPLR §205 [*See* Stipulation dated November 15, 2016, annexed to Defendant MERCY's Notice of Motion as Exhibit "D"]. The specific terms of the Stipulation are noteworthy. The parties stipulated and agreed that the Plaintiff will discontinue the federal action on the following conditions:

- That upon discontinuance, all parties will have all the rights that the parties would have had the case been dismissed for

> lack of subject matter jurisdiction by order of this Court, which includes all of the rights granted and allowed to all parties by New York's CPLR §205;
>
> - That execution of this stipulation is not to be construed as defendants' concession that plaintiff is granted and allowed rights under CPLR §205; and
> - That defendants reserve any and all rights to move for appropriate relief upon recommencement of the action in state court.
>
> [*Id.*]

Following removal from federal court in or about January 2017, the Plaintiff commenced the instant action on February 10, 2017, naming essentially the same medical provider defendants that were named in the federal action [*See* Summons and Complaint, dated February 10, 2017, annexed to Defendant MERCY's Notice of Motion as Exhibit "E"]. In lieu of answering, the Defendants, MERCY and THORPE, filed the instant motion to dismiss based on the expiration of the statute of limitations and inapplicability of the tolling provisions afforded by CPLR §205.

On July 6, 2017, the Plaintiff's counsel filed an Amended Complaint which, *inter alia*, added the Defendant, KASHI [*See* Verified Amended Complaint, annexed to Defendant KASHI's Notice of Motion as Exhibit "E"]. On July 7, 2017, the Defendant, KASHI, interposed an Answer and the instant summary judgment motion followed.

MERCY and THORPE's Motion to Dismiss

Counsel for the moving Defendants, MERCY and THORPE, asserts that, pursuant to FRCP Rule 4(m), the Plaintiff was required to serve the movants within 120 days of the filing of the Complaint. Rule 4(m) further provides for dismissal of an action

without prejudice if service of the summons and complaint is not timely made. However, if good cause is shown, the federal court "shall extend the time for service for an appropriate period." Fed. R. Civ. P. 4(m). As to Defendant THORPE, counsel asserts that completing and returning a Waiver of Service pursuant to FRCP Rule 4(d)(5) does not waive any objection to personal jurisdiction or venue. Counsel further avers that pursuant to Rule 4(d)(4), filing of the Waiver obviates the need for filing proof of service and Rule 4 applies as if the Summons and Complaint "had been served at the time of filing the waiver".

Counsel for the moving Defendants argues that, based upon the Plaintiff's failure to comply with the provisions of FRCP Rule 4 in failing to timely serve MERCY and in failing to timely file the THORPE Waiver, personal jurisdiction was never obtained over the moving Defendants. As such, counsel submits that since service was never effectuated over the moving Defendants in the federal court action, the Plaintiff does not get the benefit of CPLR §205. In this regard, counsel posits that the predicate for applying CPLR §205(a) is that the terminated action must have been "timely commenced" which necessarily mandates that personal jurisdiction was obtained over the defendant(s) within the limitations period.

In opposition, the Plaintiff proffers irrelevant arguments concerning the difference between treatment of cases pre-1992 and those filed thereafter the 1992 amendment which changed the "commencement" of an action to filing process as opposed to service of process. The Plaintiff primarily rests his opposition on the assertion that the

prior federal action was timely commenced since the federal complaint was filed within the limitations period. Specifically, the Plaintiff asserts that the requirements of CPLR §205(a) have been met because the plaintiff timely commenced the action by filing the summons and complaint and the case was not dismissed for the failure to serve process on the defendants, but rather, was dismissed for lack of subject matter jurisdiction.

Counsel for the Plaintiff further submits that this Court should undergo an analysis of whether the Plaintiff would have been granted an extension of time to serve the federal complaint pursuant to Rule 4(m). In so considering, the Plaintiff's counsel asserts that good cause exists for late service of process upon the Defendant, MERCY, "[g]iven plaintiff's counsel ongoing experience with defendants providing waivers, in fact, never having an experience otherwise, counsel believed a waiver was forthcoming, particularly when another defendant represented by the same firm provided one." [*See* Plaintiff's Counsel's Affirmation in Opposition at ¶¶16-17].

While the Plaintiff's counsel asserts that a request was made in the federal action to deem service made upon MERCY on April 19, 2016 "as good service", no such letter is annexed to the Plaintiff's opposition papers herein. Rather, the Plaintiff's counsel only proffered a letter dated March 28, 2016 wherein it was stated that only the Defendant, THORPE, returned a signed Waiver (although it was yet to be filed), and as to the remaining Defendants, that "the undersigned will arrange for personal service at the expense of the defendants." [*See* Exhibit "G" annexed to Plaintiff's Affirmation in Opposition]. In any event, the Plaintiff's counsel asserts that a subsequent letter was

submitted in opposition to the moving Defendants' request to file a motion for, *inter alia*, lack of personal jurisdiction, wherein the Plaintiff asked the federal court to deem the April 19, 2016 service upon MERCY "good service." [*See* Plaintiff's Affirmation in Opposition at ¶16].

Moreover, counsel for the Plaintiff urges this Court to find that the federal court would have allowed for late service despite lack of good cause shown under the criteria generally considered by federal courts, including (i) whether the applicable statute of limitations would bar the filed action; (ii) whether the defendant had actual notice of the claims asserted in the complaint; (iii) whether the defendant attempted to conceal the defect in service; and (iv) whether the defendant would be prejudiced by allowing late service.

Notably, the Plaintiff concedes that MERCY was not served in the prior federal action until approximately six (6) weeks after the 120-day limitations period expired. The Plaintiff further concedes that THORPE's executed waiver was untimely filed on May 10, 2016, but claims that such does not affect the validity of service.

Lastly, the Plaintiff's counsel asks this Court to apply a disability toll pursuant to CPLR §208 based on the Plaintiff's purported disability at the time the cause of action accrued. In support, the Plaintiff proffers the expert affirmation of David J. Bronster, M.D., who opines, within a reasonable degree of medical certainty, that when the Plaintiff left MERCY, he was suffering from neurological dysfunction [*See* Bronster Affirmation, annexed to Plaintiff's Affirmation in Opposition as Exhibit "H"]. Dr. Bronster opines that the Plaintiff's deficits include, *inter alia*: significant cognitive

deficit; memory loss; greatly compromised ability to communicate in writing as he is able to write some things but not others; responding to questions in a slow manner; and inability to provide his address or write his address in English or Chinese upon examination [*Id.*]. The remainder of Dr. Bronster's affirmation largely opines as to the Plaintiff's physical deficits. It is noteworthy that Dr. Bronster does not conclude that the Plaintiff is totally incapacitated.

Legal Analysis

When an action that has been timely commenced is later dismissed, CPLR §205 (a) contains a savings clause which provides that, even if the Statute of Limitations has or will run, a new action may be commenced within six months of the termination, except if the termination was "by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits ... provided that the new action would have been timely commenced at the time of the commencement of the prior action."

The requisite predicate for the application of this section is that the terminated action must have been "timely commenced". The crucial factor in determining timely commencement is whether personal jurisdiction was obtained within the period of limitations [*Markoff v. South Nassau Community Hosp.*, 61 N.Y.2d 283 (1984)].

Here, it is undisputed that the Plaintiff failed to effectuate service within 120 days of filing the Complaint in the terminated federal action. This holds true for both moving Defendants, MERCY and THORPE. As to MERCY, no attempts were made to

effectuate service within the limitations period, nor did Plaintiff file an application to enlarge the time to serve. As to THORPE, service was never effectuated as the executed Waiver was not filed with the Court within the limitations period. Thus, personal jurisdiction was never obtained over the moving Defendants.

Based on the record before this Court, it is clear that the Plaintiff failed to show good cause for neglecting to timely serve the Summons and Complaint in the prior action. A delay in service of a complaint resulting from the mere inadvertence, neglect, or mistake of a litigant's attorney does not constitute "good cause" for extending the 120 period for service pursuant to FRCP Rule 4(m). [*AIG Managed Market Neutral Fund v. Askin Capital Management, L.P.*, 197 F.R.D. 104 (S.D.N.Y. 2000)].

Moreover, the Court declines to make the significant assumption that the federal court would have exercised its discretion in permitting the Plaintiff additional time to serve, particularly where, as here, the Plaintiff neglected to make any attempts to serve within the applicable time period, failed to move to enlarge the time to serve, and failed to proffer a reasonable excuse for the delay. Indeed, the Proposed Summons which was filed with the Complaint on the very last day to commence a medical malpractice action against the moving Defendants was rejected by the federal court and not refiled until approximately twenty (20) days later. Given the nature and extent of the Plaintiff's failures to properly and timely effectuate service within the limitations period, this Court finds it unlikely that the federal court would have excused such deficiencies, and we decline to excuse them here.

The case of *Southern Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, relied upon by the Plaintiff, is inapposite as it involved a prior action that was not considered a dismissal on the merits. [104 A.D.3d 613 (1st Dept. 2013)]. In that case, the appellate court afforded plaintiffs the benefit of CPLR § 205(a) because the prior action was dismissed due to the plaintiffs' failure to comply with a condition precedent contained in the parties' subject agreements. To the contrary, the issue presented here is whether the Plaintiff timely and properly effectuated service of the Summons and Complaint in the federal action.

The case of *Bishop v. Uno Pizza*, 188 Misc.2d 142 (New York County 2001), also relied upon by the Plaintiff, likewise fails to support the Plaintiff's arguments. In fact, the *Bishop* case is strikingly similar to the case at bar and supports dismissal of the Plaintiff's case. In *Bishop*, the court found that the plaintiff could not avail the savings provision of CPLR §205 because service had never been effectuated in the prior federal action. There, the plaintiff requested the defendant to waive service by mailing the notice pursuant to FRCP Rule 4(d), just as the Plaintiff's counsel did here. However, the defendant in *Bishop* did not execute such waiver and in order to acquire personal jurisdiction over the defendant, the plaintiff was required to effect service in the normal manner pursuant to FRCP Rule 4. The *Bishop* court found that jurisdiction was never acquired over the defendant in the prior federal action, and hence, was not commenced within the meaning of CPLR §205. The *Bishop* court held that "[t]he mailing of a request

for a waiver of service of process is...not a means of acquiring jurisdiction." [*Id.* at 145; *see also Meneely v. Hitachi Seiki USA*, 175 A.D.2d 111 (2d Dept. 1991)].

Lastly, counsel's attempt to claim that the Plaintiff was under a disability at the time the cause of action accrued is unavailing. As correctly noted by the moving Defendants' counsel in reply, difficulty in functioning is not sufficient to establish insanity for purposes of the disability toll under CPLR §208. The Plaintiff testified at an examination before trial in the federal action against KASHI where was able to provide his address, living circumstances, length of time he resided at his address, names of family members, ages of his children and his educational background. Further, the Plaintiff was able to protect his legal rights by retaining an attorney, conferring with his attorney prior to his deposition, and engaging in other pre-trial discovery. As such, the Court finds Dr. Bronster's Affirmation conclusory and insufficient to warrant applicability of a disability toll.

Here, just as in *Bishop*, the Plaintiff is not permitted to invoke the protections of CPLR §205 to save the time-barred claim. Accordingly, the motion by the moving Defendants, MERCY and THORPE, is **GRANTED**.

KASHI's Summary Judgment Motion:

At the outset, the Court will not consider the Plaintiff's Sur-Reply Affirmation as same was submitted without permission of the Court. Any responsive papers to the Plaintiff's improperly filed Sur-Reply will also not be considered as moot.

The Defendant, KASHI, moves for summary judgment based on Plaintiff's failure to identify what caused him to fall, and based on evidence that the Plaintiff fell due to intoxication, rather than some act or omission of the Defendant. Counsel for KASHI claims that there is no evidence in the closed record from which a jury could infer that the Plaintiff slipped on water. Moreover, KASHI's counsel submits that KASHI did not have actual or constructive notice of the alleged wet condition in the restroom.

In support of KASHI's motion, counsel proffers the deposition testimony of the Plaintiff which was conducted in the federal action [*See* Plaintiff's Deposition Transcript annexed to Defendant KASHI's Notice of Motion as Exhibit "G"]. The Plaintiff persistently testified that he had no memory of the incident and no recollection of what occurred that evening. The Plaintiff attested that he was told by friends that he was injured as a result of being beat up by someone in the restroom [*Id.* at pp. 33-15].

KASHI's counsel also submits the deposition testimony of Mae Ling Yam, a manager at KASHI on the date of the incident [*See* Ling Deposition Transcript annexed to Defendant KASHI's Notice of Motion as Exhibit "H"]. Ms. Ling testified with respect to cleaning protocol and procedure, explaining that the bussers check the bathroom about every half hour to make sure it is dry, and that paper towels and soap are stocked [*Id.* at p. 39]. In the event the bathroom floor is wet, the bussers use dry mops to clean the bathrooms and a floor fan with a caution sign to speed up the drying process [*Id.* at p. 117]. Ms. Ling also personally inspects the women's restroom and sends other employees to check the condition of the men's restroom. She recalled sending "Andy" to the men's

restroom prior to 6:00 p.m. on the date of the incident [*Id.* at pp. 40-41]. The bussers are only required to inform Ms. Ling that they checked the bathroom if a problem arises [*Id.* at pp. 42-43].

Ms. Ling first learned of the incident when she was approached by nonparty, Simon Wong, who informed her that someone was on the bathroom floor [*Id.* at pp. 53-54]. She proceeded to the bathroom where she found the Plaintiff lying on the floor near the urinal. Ms. Ling put her finger to the Plaintiff's nose to check if he was breathing and observed that he was nonresponsive. Ms. Ling then left the bathroom and went to the Plaintiff's table to inform the other guests in his party that the Plaintiff was on the floor. She asked one of the Plaintiff's friends to check on the Plaintiff while she called "911" [*Id.* at pp. 53-54, 75-78, 81-85]. Ms. Ling also testified as to the condition of the bathroom floor. She observed that there was no water on the floor. Ms. Ling testified that if it was wet at the time of the incident, she would have noticed because she was sitting on the restroom floor for a portion of the time near the Plaintiff while wearing a skirt.

Ms. Ling also testified that the Plaintiff's friends did not want him to be removed and sent by ambulance to the hospital. Per Ms. Ling, they insisted that the Plaintiff was just intoxicated and would be okay. Ms. Ling observed the Plaintiff's friends arguing with the paramedics who were trying to remove him from the restaurant also insisting that the Plaintiff was just intoxicated, needed some air and would be fine [*Id.* at pp. 87-90].

Counsel for the Defendant, KASHI, also proffers the deposition testimony of nonparty witness, Simon Wong, who witnessed the Plaintiff's fall [*See* Wong Deposition Transcript, annexed to Defendant KASHI's Notice of Motion as Exhibit "I"]. Mr. Wong testified that the Plaintiff and his group were seated two (2) seats away from him. At Mr. Wong's deposition, counsel for KASHI showed the witness relevant portions of video surveillance from the night of the incident. Mr. Wong identified himself on the video walking towards the bathroom just prior to the incident, and shortly thereafter walking towards the front desk to inform KASHI management what had occurred [*Id.* at pp. 24-26]. Mr. Wong then identified himself and Ms. Ling on the video surveillance walking together towards the restroom. As to the incident itself, Mr. Wong testified that when he entered the restroom, he observed the Plaintiff standing against the urinal leaning towards the right against a panel or wall used to cover the urinal. He then observed the Plaintiff fall backwards. Mr. Wong further testified that the floor was not slippery at the time of the Plaintiff's fall; nor did he observe any water on the floor when he entered the restroom [*Id.* at pp. 44-45]. He also believed the Plaintiff was intoxicated because his face was very flushed.

Based on the foregoing, counsel for KASHI argues that summary judgment is warranted as the evidence adduced establishes nothing more than a possibility that the Plaintiff's fall was caused by a wet condition on the floor. It is further asserted that without evidence on causation, the jury would necessarily engage in impermissible speculation as to the cause of the fall and as to whether the fall proximately caused the

Plaintiff's claimed injuries. Counsel cites to a legion of cases where summary judgment was granted to the defendant under similar circumstances. Of note is an Appellate Division, Second Department case in which the plaintiff's complaint was dismissed where the plaintiff's memory problems prevented her from identifying the cause of her fall [*Hartman v. Mountain Valley Brew Pub, Inc.*, 301 A.D.2d 570 (2d Dept. 2003)].

Alternatively, counsel argues that KASHI did not create or have actual or constructive notice of any water on the bathroom floor that allegedly caused the accident.

In opposition, counsel for the Plaintiff submits the affidavit of nonparty witness, Lu Kang, sworn to in the State of Massachusetts[1] [*See* Kang Affidavit, sworn to on October 19, 2016, annexed to Plaintiff's Opposition as Exhibit "A"]. Preliminarily, the Court notes that the Affidavit is not in admissible form as it fails to contain a Certificate of Conformity pursuant to CPLR § 2309. Notwithstanding the procedural defect in the Affidavit, the Court will consider the substantive statements contained therein.

Ms. Kang attests that on the day of the incident she was dining at KASHI restaurant with the Plaintiff and two (2) others, Chris Xu and Yanqi Chen. At some point prior to the Plaintiff's fall, Chris Xu used the men's restroom and returned to the table. Sometime thereafter, the Plaintiff went to use the restroom and did not return. She attests that a female restaurant employee ran to their table and informed them that the Plaintiff fell in the bathroom. Ms. Kang and Chris Xu then went to the restroom and observed the

[1] The Court notes that the Kong Affidavit erroneously refers to the Commonwealth of Massachusetts as a "State".

Plaintiff on the floor. Ms. Kang attests that she "almost sprained [her] ankle when [she] bent down to [her] knees to reach [the Plaintiff] because the floor was wet and slippery. She further attests that, upon seeing the Plaintiff and the wet floor, Chris Xu "acknowledged that the wetness on the floor was present when he went to the restroom earlier." [*Id.* at ¶12]. Ms. Kang denied that anyone in their group was intoxicated, but admitted that they had a bottle of wine with dinner. She also denied telling anyone that the Plaintiff was intoxicated; nor did she hear Chris Xu or Yanqi Chen tell anyone that the Plaintiff was intoxicated.

Counsel for the Plaintiff concedes that the Plaintiff had no recollection of the circumstances of his fall. It is claimed that the Plaintiff was also unable to provide responses to most questions that required more than just a "yes" or "no" response, which counsel claims is "consistent with neurological deficit that [the Plaintiff] suffered as a result of the fall" based upon Dr. Bronster's affirmation [*See* Plaintiff's Affirmation in Opposition at ¶32]. Counsel relies on the cases of *Peterson v. P. Ballantine & Sons,* 205 N.Y. 29 (1912) and *Lynn v. Lynn* 216 A.D.2d 194 (1st Dept. 1995), for the proposition that where it can be shown that a plaintiff is unable to be a witness on his own behalf due to the injuries sustained as a result of the accident, courts permit greater latitude in drawing an inference of negligence.

As to the surveillance video, the Plaintiff's counsel confirms the timeline of events, which, in pertinent part, reveals that Chris Xu used the restroom at 7:18 p.m. and the Plaintiff went to the restroom at 7:31 p.m.

The Plaintiff's counsel argues that the moving Defendant failed to establish its *prima facie* entitlement to summary judgment based upon, *inter alia*, the Defendant's failure to address the allegation in the Plaintiff's complaint that KASHI employees misled the paramedics who arrived at the scene by providing false and unfounded information that the Plaintiff was intoxicated thereby causing a delay in the Plaintiff obtaining proper medical treatment from the paramedics and from the Defendant, MERCY. Counsel further posits that, in any event, the Plaintiff's evidence proffered in opposition creates genuine issues of material facts that would permit a reasonable jury to infer that (i) there was liquid accumulated on the bathroom floor; (ii) the Plaintiff's clothes were wet at the location where the liquid was accumulated; and (iii) KASHI's employees had actual notice where they are shown on the video surveillance entering the restroom immediately prior to the Plaintiff's fall.

While acknowledging that Ms. Kang's statement that she heard Chris Xu claim that the liquid on the floor he observed immediately following the Plaintiff's fall was the same liquid he had observed thirteen (13) minutes earlier is hearsay, the Plaintiff's counsel makes the attenuated argument that Xu's statement is either a spontaneous declaration, an excited utterance, or not being offered for the truth of the matter asserted. In this regard, counsel posits that "Xu's statement is being used to show that the restaurant *had notice of the wet floor* – not that [the Plaintiff] slipped on the liquid." [*See* Plaintiff's Affirmation in Opposition at ¶49].

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it (*Sillman v. Twentieth Century Fox Films Corp.*, 3 N.Y.2d 395, 404 [1957]). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]; *Fox v. Wyeth Labs., Inc.*, 129 A.D.2d 611 [2d Dept. 1987]; *Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 132 [2d Dept. 1986]).

The Defendant, KASHI, established its *prima facie* entitlement to judgment as a matter of law by demonstrating that none of its acts or omissions were a substantial cause of the events which produced the Plaintiff's injury. [*Derdiarian v. Felix Contr. Co.*, 51 N.Y.2d 308 (1980)].

In this matter, there are several possible causes of the Plaintiff's fall, one or more of which the Defendant, KASHI, is not responsible. As such, the Plaintiff cannot defeat the Defendant's motion for summary judgment.

The Plaintiff also failed to raise an issue of fact as to whether KASHI had actual or constructive notice of the alleged defective condition. Indeed, Chris Xu used the men's restroom shortly before the Plaintiff's fall and did not notify KASHI management of the purported wet condition of the floor. There exists no admissible evidence in the record before this Court that establishes the Defendant, KASHI, had any notice, actual or constructive, of the alleged defective condition with sufficient time to remedy same.

Moreover, the Plaintiff's request that this Court allow a lower burden of proof due to the Plaintiff's alleged neurological deficits must be denied based on *Lynn v. Lynn*, a case cited by the Plaintiff's counsel. The facts presented here are far more compelling for dismissal than the facts in *Lynn* where the Plaintiff there suffered from amnesia as to the events surrounding her fall [*Lynn*, 216 A.D.2d at 194]. The appellate court in Lynn reversed the trial court's denial of summary judgment and dismissed the plaintiff's complaint despite her inability to testify as to what happened, how it happened, or what caused it to happened [*Id.* at 195]. The appellate court found that a lesser burden of proof was not warranted based on the plaintiff's failure to establish that the defendant's negligence was a substantial cause of the injury causing event. [*Id.*].

Just as in *Lynn*, in this matter, the Court similarly finds that summary judgment is warranted in favor of the Defendant, KASHI.

Accordingly, it is hereby

ORDERED, that the motion (Mot. Seq. 01) by the Defendants, MERCY MEDICAL CENTER and KESHA THORPE, R.N., seeking an Order pursuant to CPLR §3211 (a)(5), CPLR §3211(a)(7), and CPLR §205(a), dismissing the Plaintiff's Complaint and all claims asserted against them, is **GRANTED**; and it is further

ORDERED, that the motion (Mot. Seq. 03) by the Defendant, KJSS CORP. d/b/a KASHI SUSHI AND STEAKHOUSE, seeking an Order pursuant to CPLR §3212, granting summary judgment and dismissing the Plaintiff's Complaint, is **GRANTED**; and it is further

ORDERED, that the remaining parties shall appear for the scheduled Certification Conference before the Hon. Randy Sue Marber on **April 12, 2018 at 9:30 a.m**.

This constitutes the decision and Order of the Court.

Dated: Mineola, New York
January 5, 2018

HON. RANDY SUE MARBER, J.S.C.

ENTERED

JAN 11 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. RANDY SUE MARBER