At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of May 2023.

PRESENT: CARL J. LANDICINO, J.S.C.

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ERCILIO VALERIO,

Plaintiff,

- against -

MUSIALOWKSI INC. and LUZ MUSIALOWSKI as managing agent,

Defendants.

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Index No.: 515697/2017

DECISION AND ORDER

Motion Sequence #3

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	44-55,
Opposing Affidavits (Affirmations)	95-98,[1]
Reply Affidavits (Affirmations)	
Affidavit of Service	56.

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The nature of this action concerns the Plaintiff, Ercilio Valero's (the "Plaintiff") claim for alleged personal injuries sustained on January 7, 2017. Plaintiff alleges that he slipped and fell due to the unsafe condition of a stairwell located at 156 South First Street (the "Premises") owned and managed by the Defendants Musialowski Inc. and Luz Musialowski (collectively the "Defendants"). The Defendants move (motion sequence #3) for summary judgment pursuant to CPLR 3212(b) and dismissal of the action in its entirety.

Defendants, in support of their motion, contend that Plaintiff is unable to raise an issue of fact because, by Court order dated August 2, 2019, he is precluded from offering an affidavit in support or opposition to a dispositive motion. This decision was reached because the Plaintiff

[1] In so far as Plaintiff apparently retained counsel, the opposition papers, albeit late, will be considered for the purposes of this motion. The Defendants did file reply papers.

apparently violated several Court Orders to appear for deposition. Additionally, Defendants contend that they had no actual or constructive notice of the alleged condition and did not create same. Defendants proffer Plaintiff's incomplete deposition transcript, the Court Order dated August 2, 2019, the affidavit of Ada Cosme (the manager for Defendant Musialowski Inc.), and the affidavit of Luz Musialowski in support of their motion.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing

papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. However, "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case..." if they can show "...that the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the motion, the Court finds that the Defendants' motion (motion sequence #3) should be granted. On August 2, 2019, the Hon. Paul S. Wooten, J.S.C. issued an Order that held that "Plaintiff is precluded from testifying at trial or offering an affidavit in support or opposition to a dispositive motion based upon this Court's 7/12/19 Order." A preclusion order that prevents a Plaintiff from making out their own *prima facie* case can be the basis of a Court's granting of a summary judgment motion in favor of the moving Defendants.

> The defendant demonstrated his prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiffs could not make out a prima facie case at trial because they were precluded from testifying as to liability and damages. The plaintiffs failed to raise a triable issue of fact in opposition to the motion, as it is undisputed that they will not be able to move forward with their case at trial. Given that the preclusion order prevents the plaintiffs from offering any evidence in support of their claim, summary judgment in the defendant's favor, as a matter of law, should have been awarded.

-*Meslin v. George*, 119 AD3d 915, 915–16, 989 N.Y.S.2d 901 [2d Dept 2014].

> The defendants demonstrated their prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiffs could not establish a prima facie case at trial because they were precluded from offering any evidence on the issue of damages pursuant to the September 3, 2015, order.

-*Ciampa Org., LLC v. Vergara*, 171 AD3d 695, 696, 97 N.Y.S.3d 700, 702 [2d Dept 2019].

> It is undisputed that the plaintiff failed to respond to the defendant's demand for a bill of particulars and its discovery demands and notices, and was thus precluded by the November 20, 2014, order from presenting any evidence at trial regarding the matters addressed in those demands and notices. As such, the defendant demonstrated its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff could not make out a prima facie case at trial as to liability or damages (*see Meslin v. George,* 119 A.D.3d 915, 989 N.Y.S.2d 901). The plaintiff, by failing to respond to the motion, failed to raise a triable issue of fact.

-*Piemonte v. JSF Realty, LLC,* 140 AD3d 1145, 1146–47, 36 N.Y.S.3d 146, 148 [2d Dept 2016]; see also *Calder v. Cofta*, 49 AD3d 484, 485, 853 N.Y.S.2d 596, 597 [2d Dept 2008] *State Farm Mut. Auto. Ins. Co. v. Hertz Corp.,* 43 AD3d 907, 908, 841 N.Y.S.2d 617, 619 [2d Dept 2007].

The Plaintiff failed to show that he could make a prima facie case notwithstanding the preclusion of his testimony at trial. Accordingly, Defendants' motion is granted.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendants' motion (motion sequence #2) for summary judgment is granted and the action is dismissed. The Defendants shall settle a judgment on notice (by certified mail), together with a copy of this decision and order within 60 days of entry hereof.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.