

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HONORABLE ALAN L. HONOROF
Justice

PAUL ZIMMERMAN and DOROTHY ZIMMERMAN,

Plaintiff(s),

-against-

JEFFREY YUSKEVICH, SUSAN YUSKEVICH,
ANTHONY J. LEOTTA, NORA LEOTTA,
EDWARD EHRBAR, INC. and EDWARD AHERN
a/k/a EDWARD AHERNE a/k/a EDWARD AHEARN,

Defendant(s).

PAUL ZIMMERMAN and DOROTHY ZIMMERMAN,

Plaintiffs,

-against-

BARBARA M. WIELANDT as Executrix of the Estate
of FREDERICK M. WIELANDT, deceased

Defendants,

TRIAL/IAS, PART 35
NASSAU COUNTY

INDEX No. 23505/98

MOTION SUBMISSION
DATE: February 25, 2004

Motion Sequence Nos. 002,
009

INDEX No. 007365/00

The following papers read on this motion:

Notice of Motion/ Order to Show Cause
Answering Affidavits
Replying Affidavits
Briefs: Plaintiff's/Petitioner's
Defendant's/Respondent's

X

The motions by defendant Wielandt in Action #2 (seq #2) and defendants Yuskevich in Action #1 (seq. #9) for summary judgment dismissing the complaint are granted.

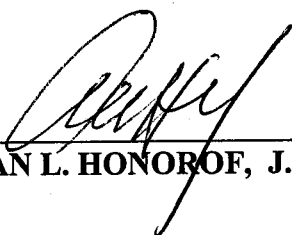
By short form order of June 24, 2002, this court denied motions for summary judgment by the four named defendants in this action for personal injuries arising out of a fall. Two of the defendants (Leotta and Ehbar) appealed, movants did not. On June 16, 2003, the Appellate Division Second Department reversed (Zimmerman v. Yuskevich, 306 AD2d 403). On October 15, 2003, a motion to reargue and leave to appeal to the Court of Appeals was denied. In reversing, the Appellate Division found that "the alleged cause of plaintiff's fall was based on speculation." By the present motions, the non-appealing defendants seek to renew their previous motions. Plaintiff's opposition is premised solely on the fact that defendants Yuskevich and Wielandt did not see fit to appeal the court's prior ruling. Plaintiff has not offered additional evidence which would indicate what caused him to fall.

Renewal of a motion for summary judgment is within the discretion of the court (Scannell v. Mt. Sinai Medical Center, 256 AD2d 214). Defendants' failure to appeal from the prior denial of summary judgment does not preclude the making of the present motions (Baker v. R. T. Vanderbilt Co., Inc., 260 AD2d 750). Under the circumstances, defendants should be permitted to seek the relief requested. In that regard, it should be pointed out that were the present motions denied solely on the grounds that renewal was inappropriate, the only purpose served would be to have this matter proceed to trial where the result would be inevitable.

In the absence of any additional evidence as to what caused plaintiff to fall, the determination by the Appellate Division that plaintiff's claims were based on "speculation" is binding on this court and the motions to dismiss the complaint must and hereby are granted. The Clerk is directed to enter judgment in accordance with this determination.

This order concludes the within action.

ENTER


ALAN L. HONOROF, J.S.C.

Dated: April 22, 2004

ENTERED

MAY 14 2004

**NAASAU COUNTY
COUNTY CLERK'S OFFICE**