

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Procopio v. Eichle

2026 NY Slip Op 02682 · No. 2022-00757 · Decided April 29, 2026

SUMMARY

The Appellate Division, Second Department, affirmed an order granting Kim Eichle summary judgment in a personal-injury action arising from an assault outside a New Year's Eve party at her home. The court held that Eichle established she did not furnish or procure alcohol for the minors and that the injured plaintiff could not identify whether an icy sidewalk contributed to his fall without speculation. The court also affirmed dismissal of the relevant claims against Eichle arising under New York's Dram Shop Act and premises-liability theories.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Valerie Brathwaite Nelson, J.P.; William G. Ford, J.; Deborah A. Dowling, J.; Elena Goldberg Velazquez, J.
JURISDICTION	New York Supreme Court, Appellate Division, Second Department
DECIDED	April 29, 2026
DOCKET	2022-00757
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed from an order granting Kim Eichle summary judgment dismissing the amended complaint against her and granting Joseph Russo summary judgment on the first and second causes of action insofar as asserted against Eichle.
STANDARD OF REVIEW	Summary judgment is warranted where the movant establishes entitlement to judgment as a matter of law; the nonmoving party must then raise a triable issue of fact. In a premises-liability trip-and-fall case, the defendant may establish prima facie entitlement by showing that the plaintiff cannot identify the cause of the fall without speculation.
PRECEDENTIAL VALUE	Published intermediate appellate decision; the opinion states that it was published by the New York State Law Reporting Bureau, but is

uncorrected and subject to revision before publication in the Official Reports.

PARTIES

Joseph Procopio, as parent and natural guardian of the infant, and individually v. Kim Eichle, Joseph Russo, third-party defendant

TOPICS

dram shop liability

premises liability

summary judgment

personal injury

appellate procedure

PRACTICE AREAS

torts

premises liability

dram shop liability

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether Eichle was entitled to summary judgment on the causes of action alleging violations of New York General Obligations Law §§ 11-100 and 11-101.
2. Whether Eichle was entitled to summary judgment on the premises-liability cause of action because the infant could not identify the cause of his fall without speculation.
3. Whether the branches of Russo's motion seeking summary judgment dismissing the first and second causes of action insofar as asserted against Eichle were properly granted.

HOLDINGS

1. Eichle established prima facie entitlement to judgment as a matter of law by demonstrating that she did not serve alcohol to any visibly intoxicated individual and did not procure or furnish alcohol to any minor at her home, including Russo. Plaintiff failed to raise a triable issue of fact.
2. Eichle established prima facie entitlement to summary judgment because the infant could not identify whether the allegedly icy sidewalk caused or contributed to his fall without engaging in speculation. Plaintiff failed to raise a triable issue of fact.
3. The Supreme Court properly granted the branches of Russo's motion seeking dismissal of the first and second causes of action insofar as asserted against Eichle, and the order was affirmed insofar as appealed from.

KEY QUOTATIONS

"[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation"
([*2])

FACTUAL BACKGROUND

In the early morning of January 1, 2018, the infant plaintiff was injured outside a New Year's Eve party hosted at Kim Eichle's home. After exchanging words outside the home, Joseph Russo punched the infant, causing him to fall onto a concrete sidewalk and strike his head. The plaintiff alleged that Eichle violated New York's Dram

Shop Act and was liable under a premises-liability theory. The infant's deposition testimony did not identify whether an allegedly icy sidewalk contributed to the fall except through speculation.

PROCEDURAL HISTORY

Plaintiff commenced a personal-injury action alleging violations of New York General Obligations Law §§ 11-100 and 11-101. After depositions, plaintiff amended the complaint to add a premises-liability cause of action. Eichle commenced a third-party action against Russo, and both defendants moved for summary judgment. The Supreme Court, Suffolk County, granted the relevant motions, and the Appellate Division affirmed insofar as appealed from.

DISPOSITION

affirmed

CASES CITED

- Ferber v. Olde Erie Brew Pub & Grill, LLC, 161 A.D.3d 1142, 1143
- Sherman v. Robinson, 80 N.Y.2d 483, 487-488
- Filc v. 221 Someplace Else, Ltd., 219 A.D.3d 1487, 1488
- Heins v. Vanbourgondien, 180 A.D.3d 1019, 1025
- Simmons v. Vecchiano, 233 A.D.3d 724, 725
- Flynn v. Bulldogs Run Corp., 171 A.D.3d 1136, 1137
- Franco v. Half Moon Riv. Club, LLC, 214 A.D.3d 956, 957
- Soler v. Jaccarino, 189 A.D.3d 1106, 1107
- Fantuzzo v. Attridge, 291 A.D.2d 871, 872
- Grande v. Won Hee Lee, 171 A.D.3d 877, 878
- Mitgang v. PJ Venture HG, LLC, 126 A.D.3d 863, 863-864
- Lucas v. Genting N.Y., LLC, 227 A.D.3d 795, 795
- Osmolska v. Giuseppa Morreale Family Trust, 230 A.D.3d 594, 595

OPINION

Procopio v. Eichle 2026 NY Slip Op 02682

PER CURIAM.

<div>Procopio v Eichle - 2026 NY Slip Op 02682 <div> skip to main content </div> <div> <p>It appears you are using Adblock. Please disable Adblock to best experience our website.</p> </div> <div> <header> <div> </div> <div> Law Reporting
Bureau Thomas J.K. Smith, State Reporter <nav> Court Decisions Resources About </nav> </div> <div> </div> </header> </div> <nav> Home All Court Decisions Decisions </nav>

Procopio v Eichle 2026 NY Slip Op 02682 April 29, 2026 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This decision is uncorrected and subject to revision before publication in the Official Reports.

Joseph Procopio, etc., appellant, v John Eichle, defendant, Kim Eichle, defendant-respondent; Joseph Russo, third-party defendant-respondent.

Supreme Court of the State of New York, Appellate Division, Second Judicial Department Decided on April 29, 2026 2022-00757, (Index No. 616028/18) Valerie Brathwaite Nelson, J.P. William G. Ford Deborah A. Dowling Elena Goldberg Velazquez, JJ.

Glynn Mercep Purcell and Morrison, LLP, Stony Brook, NY (A. Craig Purcell of counsel), for appellant. Goldberg, Miller & Rubin, P.C., New York, NY (Warren D. Holland of counsel), for defendant-respondent. Bennett, Bricklin & Saltzburg LLC, New York, NY (Stephen Trzcinski of counsel), for third-party defendant-respondent.

DECISION & ORDER

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Linda J. Kevins, J.), dated January 18, 2022. The order, insofar as appealed from, granted the motion of the defendant Kim Eichle for summary judgment dismissing the amended complaint insofar as asserted against her and granted those branches of the third-party defendant's motion which were for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant Kim Eichle.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

In the early morning of January 1, 2018, the plaintiff's son (hereinafter the infant) allegedly was injured after being punched outside of a New Year's Eve party hosted at the home of the defendant Kim Eichle (hereinafter the defendant). After leaving the party, and while outside the defendant's home, the infant and the third-party defendant, Joseph Russo, exchanged words, after which Russo punched the infant causing him to fall onto the concrete sidewalk and hit his head.

The plaintiff, as parent and natural guardian of the infant, and individually, commenced this action against the defendant, and another defendant, alleging, inter alia, that the defendant violated New York General Obligations Law §§ 11-100 and 11-101. After depositions were held, the plaintiff amended the complaint to add an additional cause of action alleging premises liability. The defendant commenced a third-party action against Russo, alleging, among other things, that Russo was negligent during the confrontation with the infant and that if the defendant was found liable for the infant's injuries, the defendant was entitled to contribution from Russo.

Russo subsequently moved, inter alia, for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant. The defendant then moved for summary judgment dismissing the amended complaint insofar as asserted against her. In an order dated January 18, 2022, the Supreme Court, among other things, granted the defendant's motion and those branches of Russo's motion. The plaintiff appeals.

General Obligations Law § 11-101(1), otherwise known as the Dram

Shop Act, provides that "[a]ny person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, . . . shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication." The Legislature supplemented the Dram Shop Act by adding General Obligations Law § 11-100, which imposes liability "only on a person who knowingly causes intoxication by furnishing alcohol to (or assisting in the procurement of alcohol for) persons known or reasonably believed to be underage" (*Ferber v Olde Erie Brew Pub & Grill, LLC*, 161 AD3d 1142, 1143, quoting *Sherman v Robinson*, 80 NY2d 483, 487-488; *see* *Filc v 221 Someplace Else, Ltd.*, 219 AD3d 1487, 1488; *Heins v Vanbourgondien*, 180 AD3d 1019, 1025). "[F]or a defendant to establish its prima facie entitlement to judgment as a matter of law dismissing a cause of action under the Dram Shop Act, it is required to establish either that it did not serve alcohol to the person while he or she was visibly intoxicated or that its sale of alcohol to him or her had no reasonable or practical connection to the resulting damages" (*Simmons v Vecchiano*, 233 AD3d 724, 725, quoting *Flynn v Bulldogs Run Corp.*, 171 AD3d 1136, 1137).

Here, the defendant established her prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging a violation of the Dram Shop Act by demonstrating that she did not serve alcohol to any visibly intoxicated individual, nor did she procure or furnish alcohol to any of the minors at her home, including Russo (*see* *Franco v Half Moon Riv. Club, LLC*, 214 AD3d 956, 957; *Soler v Jaccarino*, 189 AD3d 1106, 1107; *Fantuzzo v Attridge*, 291 AD2d 871, 872). In opposition, the plaintiff failed to raise a triable issue of fact.

"Ordinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. However, a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*Grande v Won Hee Lee*, 171 AD3d 877, 878, quoting *Mitgang v PJ Venture HG, LLC*, 126 AD3d 863, 863-864). "[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Lucas v Genting N.Y., LLC*, 227 AD3d 795, 795).

Here, the defendant established her prima facie entitlement to judgment as a matter of law by submitting a transcript of the deposition testimony of the infant, which demonstrated that the infant was unable to identify if the allegedly icy sidewalk played a role in his fall without engaging in speculation (*see* *Osmolska v Giuseppa Morreale Family Trust*, 230 AD3d 594, 595). In opposition, the plaintiff failed to raise a triable issue of fact.

The plaintiff's remaining contention is improperly raised for the first time on appeal.

Therefore, the Supreme Court properly granted the defendant's motion for summary judgment

dismissing the amended complaint insofar as asserted against her and those branches of Russo's motion which were for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant.

BRATHWAITE NELSON, J.P., FORD, DOWLING and GOLDBERG VELAZQUEZ, JJ., concur.

ENTER:

Darrell M. Joseph

Clerk of the Court

Court Decisions

All Court Decisions Official Reports Service Bound Volumes Decision Search

Resources

RSS Feeds Style Manual Citation Tools Opinion Formatting & Privacy Guidelines Opinion Selection Criteria Legal Research Portal Site Index

About

About the Law Reporting Bureau About our Operations Contact Us Twitter

Quick Contact Info

17 Lodge Street

Albany, NY 12207

Phone: (518) 453-6900

Links to or from other sites do not signify endorsement or relationship with them.

PER CURIAM.

Procopio v Eichle - 2026 NY Slip Op 02682

skip to main content

It appears you are using Adblock. Please disable Adblock to best experience our website.

Law Reporting Bureau

Thomas J.K. Smith, State Reporter

Court Decisions Resources About

Home All Court Decisions Decisions

Procopio v Eichle

2026 NY Slip Op 02682

April 29, 2026

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

This decision is uncorrected and subject to revision before publication in the Official Reports.

Joseph Procopio, etc., appellant,

v

John Eichle, defendant, Kim Eichle, defendant-respondent; Joseph Russo, third-party defendant-respondent.

Supreme Court of the State of New York, Appellate Division, Second Judicial Department

Decided on April 29, 2026

2022-00757, (Index No. 616028/18)

Valerie Brathwaite Nelson, J.P.

William G. Ford

Deborah A. Dowling

Elena Goldberg Velazquez, JJ.

Glynn Mercep Purcell and Morrison, LLP, Stony Brook, NY (A. Craig Purcell of counsel), for appellant.

Goldberg, Miller & Rubin, P.C., New York, NY (Warren D. Holland of counsel), for defendant-respondent.

Bennett, Bricklin & Saltzburg LLC, New York, NY (Stephen Trzcinski of counsel), for third-party defendant-respondent.

DECISION & ORDER

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Linda J. Kevins, J.), dated January 18, 2022. The order, insofar as appealed from, granted the motion of the defendant Kim Eichle for summary judgment dismissing the amended complaint insofar as asserted against her and granted those branches of the third-party defendant's motion which were

for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant Kim Eichle.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

In the early morning of January 1, 2018, the plaintiff's son (hereinafter the infant) allegedly was injured after being punched outside of a New Year's Eve party hosted at the home of the defendant Kim Eichle (hereinafter the defendant). After leaving the party, and while outside the defendant's home, the infant and the third-party defendant, Joseph Russo, exchanged words, after which Russo punched the infant causing him to fall onto the concrete sidewalk and hit his head.

The plaintiff, as parent and natural guardian of the infant, and individually, commenced this action against the defendant, and another defendant, alleging, inter alia, that the defendant violated New York General Obligations Law §§ 11-100 and 11-101. After depositions were held, the plaintiff amended the complaint to add an additional cause of action alleging premises liability. The defendant commenced a third-party action against Russo, alleging, among other things, that Russo was negligent during the confrontation with the infant and that if the defendant was found liable for the infant's injuries, the defendant was entitled to contribution from Russo.

Russo subsequently moved, inter alia, for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant. The defendant then moved for summary judgment dismissing the amended complaint insofar as asserted against her. In an order dated January 18, 2022, the Supreme Court, among other things, granted the defendant's motion and those branches of Russo's motion. The plaintiff appeals.

General Obligations Law § 11-101(1), otherwise known as the Dram Shop Act, provides that "[a]ny person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, . . . shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication." The Legislature supplemented the Dram Shop Act by adding General Obligations Law § 11-100, which imposes liability "only on a person who knowingly causes intoxication by furnishing alcohol to (or assisting in the procurement of alcohol for) persons known or reasonably believed to be underage" (*Ferber v Olde Erie Brew Pub & Grill, LLC*, 161 AD3d 1142, 1143, quoting *Sherman v Robinson*, 80 NY2d 483, 487-488; *see* *Filc v 221 Someplace Else, Ltd.*, 219 AD3d 1487, 1488; *Heins v Vanbourgondien*, 180 AD3d 1019, 1025). "[F]or a defendant to establish its prima facie entitlement to judgment as a matter of law dismissing a cause of action under the Dram Shop Act, it is required to establish either that it did not serve alcohol to the person while he or she was visibly intoxicated or that its sale of alcohol to him or her had no reasonable or practical connection to the resulting damages" (*Simmons v Vecchiano*, 233 AD3d 724, 725, quoting *Flynn v Bulldogs Run Corp.*, 171 AD3d 1136, 1137).

Here, the defendant established her prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging a violation of the Dram Shop Act by demonstrating that she did not serve alcohol to any visibly intoxicated individual, nor did

she procure or furnish alcohol to any of the minors at her home, including Russo (*see* *Franco v Half Moon Riv. Club, LLC*, 214 AD3d 956, 957; *Soler v Jaccarino*, 189 AD3d 1106, 1107; *Fantuzzo v Attridge*, 291 AD2d 871, 872). In opposition, the plaintiff failed to raise a triable issue of fact.

"Ordinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. However, a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*Grande v Won Hee Lee*, 171 AD3d 877, 878, quoting *Mitgang v PJ Venture HG, LLC*, 126 AD3d 863, 863-864). "[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Lucas v Genting N.Y., LLC*, 227 AD3d 795, 795).

Here, the defendant established her prima facie entitlement to judgment as a matter of law by submitting a transcript of the deposition testimony of the infant, which demonstrated that the infant was unable to identify if the allegedly icy sidewalk played a role in his fall without engaging in speculation (*see* *Osmolska v Giuseppa Morreale Family Trust*, 230 AD3d 594, 595). In opposition, the plaintiff failed to raise a triable issue of fact.

The plaintiff's remaining contention is improperly raised for the first time on appeal.

Therefore, the Supreme Court properly granted the defendant's motion for summary judgment dismissing the amended complaint insofar as asserted against her and those branches of Russo's motion which were for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant.

BRATHWAITE NELSON, J.P., FORD, DOWLING and GOLDBERG VELAZQUEZ, JJ., concur.

ENTER:

Darrell M. Joseph

Clerk of the Court

Court Decisions

All Court Decisions

Official Reports

Service Bound Volumes

Decision Search

Resources

RSS Feeds

Style Manual

Citation Tools

Opinion Formatting & Privacy Guidelines

Opinion Selection Criteria

Legal Research Portal

Site Index

About

About the Law Reporting Bureau

About our Operations

Contact Us

Twitter

Quick Contact Info

17 Lodge Street

Albany, NY 12207

Phone: (518) 453-6900

Links to or from other sites do not signify endorsement or relationship with them.

PER CURIAM.

Procopio v Eichle - 2026 NY Slip Op 02682 skip to main content It appears you are using Adblock. Please disable Adblock to best experience our website. Law Reporting Bureau Thomas J.K. Smith, State Reporter Court Decisions Resources About Home All Court Decisions Decisions Procopio v Eichle 2026 NY Slip Op 02682 April 29, 2026 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This

decision is uncorrected and subject to revision before publication in the Official Reports. Joseph Procopio, etc., appellant, v John Eichle, defendant, Kim Eichle, defendant-respondent; Joseph Russo, third-party defendant-respondent. Supreme Court of the State of New York, Appellate Division, Second Judicial Department Decided on April 29, 2026 2022-00757, (Index No. 616028/18) Valerie Brathwaite Nelson, J.P. William G. Ford Deborah A. Dowling Elena Goldberg Velazquez, JJ. Glynn Mercep Purcell and Morrison, LLP, Stony Brook, NY (A. Craig Purcell of counsel), for appellant. Goldberg, Miller & Rubin, P.C., New York, NY (Warren D. Holland of counsel), for defendant-respondent. Bennett, Bricklin & Saltzburg LLC, New York, NY (Stephen Trzcinski of counsel), for third-party defendant-respondent. [*1] DECISION & ORDER In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Linda J. Kevins, J.), dated January 18, 2022. The order, insofar as appealed from, granted the motion of the defendant Kim Eichle for summary judgment dismissing the amended complaint insofar as asserted against her and granted those branches of the third-party defendant's motion which were for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant Kim Eichle. ORDERED that the order is affirmed insofar as appealed from, with one bill of costs. In the early morning of January 1, 2018, the plaintiff's son (hereinafter the infant) allegedly was injured after being punched outside of a New Year's Eve party hosted at the home of the defendant Kim Eichle (hereinafter the defendant). After leaving the party, and while outside the defendant's home, the infant and the third-party defendant, Joseph Russo, exchanged words, after which Russo punched the infant causing him to fall onto the concrete sidewalk and hit his head. The plaintiff, as parent and natural guardian of the infant, and individually, commenced this action against the defendant, and another defendant, alleging, inter alia, that the defendant violated New York General Obligations Law §§ 11-100 and 11-101. After depositions were held, the plaintiff amended the complaint to add an additional cause of action alleging premises liability. The defendant commenced a third-party action against Russo, alleging, among other things, that Russo was negligent during the confrontation with the infant and that if the defendant was found liable for the infant's injuries, the defendant was entitled to contribution from Russo. Russo subsequently moved, inter alia, for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant. The defendant then moved for summary judgment dismissing the amended complaint insofar as asserted against her. In an order [*2] dated January 18, 2022, the Supreme Court, among other things, granted the defendant's motion and those branches of Russo's motion. The plaintiff appeals. General Obligations Law § 11-101(1), otherwise known as the Dram Shop Act, provides that "[a]ny person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, . . . shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication." The Legislature supplemented the Dram Shop Act by adding General Obligations Law § 11-100, which imposes

liability "only on a person who knowingly causes intoxication by furnishing alcohol to (or assisting in the procurement of alcohol for) persons known or reasonably believed to be underage" (*Ferber v Olde Erie Brew Pub & Grill, LLC* , 161 AD3d 1142 , 1143, quoting *Sherman v Robinson* , 80 NY2d 483, 487-488 ; see *Filc v 221 Someplace Else, Ltd.* , 219 AD3d 1487, 1488 ; *Heins v Vanbourgondien* , 180 AD3d 1019, 1025). "[F]or a defendant to establish its prima facie entitlement to judgment as a matter of law dismissing a cause of action under the Dram Shop Act, it is required to establish either that it did not serve alcohol to the person while he or she was visibly intoxicated or that its sale of alcohol to him or her had no reasonable or practical connection to the resulting damages" (*Simmons v Vecchiano* , 233 AD3d 724 , 725, quoting *Flynn v Bulldogs Run Corp.* , 171 AD3d 1136 , 1137). Here, the defendant established her prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging a violation of the Dram Shop Act by demonstrating that she did not serve alcohol to any visibly intoxicated individual, nor did she procure or furnish alcohol to any of the minors at her home, including Russo (see *Franco v Half Moon Riv. Club, LLC* , 214 AD3d 956, 957 ; *Soler v Jaccarino* , 189 AD3d 1106, 1107 ; *Fantuzzo v Attridge* , 291 AD2d 871, 872). In opposition, the plaintiff failed to raise a triable issue of fact. "Ordinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. However, a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*Grande v Won Hee Lee* , 171 AD3d 877 , 878, quoting *Mitgang v PJ Venture HG, LLC* , 126 AD3d 863, 863-864). "[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Lucas v Genting N.Y., LLC* , 227 AD3d 795 , 795). Here, the defendant established her prima facie entitlement to judgment as a matter of law by submitting a transcript of the deposition testimony of the infant, which demonstrated that the infant was unable to identify if the allegedly icy sidewalk played a role in his fall without engaging in speculation (see *Osmolska v Giuseppa Morreale Family Trust* , 230 AD3d 594 , 595). In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff's remaining contention is improperly raised for the first time on appeal. Therefore, the Supreme Court properly granted the defendant's motion for summary judgment dismissing the amended complaint insofar as asserted against her and those branches of Russo's motion which were for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant. BRATHWAITE NELSON, J.P., FORD, DOWLING and GOLDBERG VELAZQUEZ, JJ., concur. ENTER: Darrell M. Joseph Clerk of the Court

Court Decisions All Court Decisions Official Reports Service Bound Volumes Decision Search Resources RSS Feeds Style Manual Citation Tools Opinion Formatting & Privacy Guidelines Opinion Selection Criteria Legal Research Portal Site Index About About the

Law Reporting Bureau About our Operations Contact Us Twitter Quick Contact Info 17 Lodge Street Albany, NY 12207 Phone: (518) 453-6900 Links to or from other sites do not signify endorsement or relationship with them.

Retrieved from lawtools.ai · <https://lawtools.ai/cases/state/new-york-supreme-court-appellate-division-second-department-supreme-court-of-the-state-of-new-york-a/2026/procopio-v-eichle-30pq8d4l>