

**Cameron v Palmeri**

2023 NY Slip Op 34710(U)

February 28, 2023

Supreme Court, Westchester County

Docket Number: Index No. 51948/2020

Judge: Alexandra D. Murphy

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.**

----- x  
MICHAEL CAMERON,

Plaintiff,

Index No. 51948/2020

– against –

**DECISION AND ORDER**

ANNE PALMERI a/k/a ANNIE PALMERI,

Sequence No. 2<sup>1</sup>

Defendant.  
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In an action to recover damages for personal injuries, the defendant moves for summary judgment dismissing the complaint.

**Papers Considered**

**Motion Seq. 2 NYSCEF Doc. No. 36-50; 52-66; 68-72**

1. Notice of Motion/Affirmation of Michael S. Horn, Esq./Exhibits A-H/Affidavit of Anne Palmeri/Memorandum of Law in Support;
2. Affidavit of Michael Cameron/Affirmation of Glen A. Kurtis, Esq. in Opposition/Expert Affidavit of Eugene J. West/Exhibits A-X;
3. Reply Affirmation of Michael S. Horn, Esq./Exhibits A-B/Reply Memorandum of Law.

**Factual and Procedural Background**

On January 10, 2020, the plaintiff Michael Cameron allegedly sustained personal injuries due to a fire at the premises located at 2 Suncliff Road, Glenford, New York, where he resided. The defendant Anne Palmeri a/k/a Annie Palmeri is the owner of the premises.

On February 7, 2020, the plaintiff commenced this action against defendant asserting causes of action for common law negligence and gross negligence.

<sup>1</sup> This matter was previously assigned to Justice Everett and was transferred to this Court on January 3, 2023.

*Deposition Testimony**Defendant:*

The defendant testified that she allowed the plaintiff to reside at the premises so that he could save money and become more financially stable and testified that she did not intend to charge him rent.

The defendant testified that as of 2016, when she acquired the premises, the only electrician she used was Joseph Kennoch. She testified that Kennoch installed new sleeves in the electric baseboard heating in the dining room. She testified that he was going to come back and replace the sleeves in other parts of the house when he had the time. Other than changing the sleeves, the defendant had no plans to make any other upgrades to the electrical or heating system. She testified that Kennoch did not say anything to her about the electrical wiring in the house, including that it was dangerous.

The defendant testified that there was no electricity in the plaintiff's bedroom. She testified that there were outlets in his room, but they did not work. She testified that the breaker to that room was turned off and had been turned off for fifteen years. The defendant testified that the plaintiff plugged his own extension cord into an outlet in the living room for electricity in his bedroom.

The defendant testified that the plaintiff never told or showed her that sparks came out of the outlets when he used them. The defendant testified that the plaintiff never made any complaints about the living conditions at the house.

*Kennoch:*

Kennoch testified that he is licensed as a master electrician and has been an electrician for twenty years.

Kennoch testified that when he was working at a neighboring property, the plaintiff asked him to do some electrical work at the premises located at 2 Suncliff Road. He testified that she wanted him to look at the heaters because electric bill was high.

Kennoch testified that during his first visit to the house, the plaintiff showed him the heaters. He testified that the heaters were fine, but that they were probably fifteen to twenty years old and used a lot of electricity. He testified that he told her to order new heaters. He testified that he returned to the house and installed two out of ten or eleven new heaters. He testified that he only installed two because he was very busy and she was not in any rush to replace the remaining heaters. He testified that he used the existing wiring, which was "perfectly fine" and the panel was a "top-of-the-line panel". He testified that he looked at the wiring connected to the panel and the heaters, but he did not look at any other wiring throughout the house. He testified that the part of the house where the heaters were installed did not burn down. He testified that he looked at the condition of the electrical system in the house, which was also fine.

He testified that he did not speak to anyone else about the heating or electrical condition in the house, and that he did not observe any extensive use of extension cords in the house.

*Plaintiff.*

The plaintiff testified that on one occasion, a wall outlet in his bedroom sparked when he touched it and that the defendant told him not to go near it. He also testified that there were a few outlets in the living room that were overloaded, the kitchen electricity went out on a weekly basis, and the living room power strips were overloaded, old and full. He testified that the breaker in the living room tripped at least once per month, the power strip was old, and the electricity tripped all the time.

The plaintiff testified that Kennoch replaced the electrical base heater in the living room, located by the front door, two or three months before the fire. He testified that Kennoch said that everything had to be completely replaced and that it was old and dangerous. He testified that Kennoch told him the wire insulation for the breaker box was old and made of cloth. He testified that when he asked Kennoch what he was going to do, Kennoch responded that he was waiting for the defendant to give him an answer.

The plaintiff testified that the night before the fire, there were no problems with the electricity in his bedroom and he was not aware of any problems with any of the electrical outlets. He testified that the air conditioning unit in his bedroom was plugged into a new heavy-duty extension cord, which was plugged into an outlet in the living room. He testified that one of the outlet receptacles was dedicated to his extension cord and the air conditioning unit, and an aquarium and lights were plugged into the other receptacle. The plaintiff testified that there were no problems with the air conditioning unit, other than it making noise, and that the only complaint he made about it was that it was old. He did not recall any incidents in which it tripped or broke down.

The plaintiff testified that on the morning of the fire, he woke up at approximately 10:00 a.m., turned the air conditioning unit on and walked out the front door. He testified that he believed it was safe the morning of the fire. He testified that other than the air conditioning unit in his bedroom, no other electrical appliances were on and operating at the time of the fire. He testified that when he was walking up the path to the mailbox, he saw flames coming out of the air conditioning unit. He testified that the flames were on the portion of the air conditioning unit that was outside of the window. He testified that when he saw the flames, he went back into the house as quickly as he could, unplugged and kicked the air conditioning unit out of the window and poured a bucket of water on it. He testified that he was able to put the fire out completely and that he waited one minute after pouring the water onto unit to ensure that there were no flames or smoke, which there were not. He testified that at that time, there was smoke, but no flames in the living room. He testified that the first time he went into the house after seeing the air conditioning unit on fire, there were no flames in his bedroom, the bedroom door was not hot, and no smoke was emanating from underneath the bedroom door.

The plaintiff testified that when he left his bedroom, there was no fire. He testified that when he returned to pour a second bucket of water onto the air conditioning unit, he opened the bedroom door and saw flames. He testified that the smoke was in the living room when he first entered the house and was there the entire time.

### *Motion*

The defendant moves for summary judgment dismissing the complaint, arguing that the plaintiff cannot establish causation for his injuries or that she created the allegedly defective condition or had notice of it. The defendant argues that there were no issues with the electricity in her home and that the fire occurred only after the plaintiff plugged the air conditioning unit into an extension cord that he purchased. The defendant argues that the plaintiff's failure to identify the cause or source of the fire is fatal to his complaint.

The defendant submits an affidavit that reiterates many of the statements she made during her deposition. The defendant attests that the plaintiff never made any complaints to her that the air conditioning unit, the home or the living condition was dangerous and unsafe. She attests that no more than three months before the fire, Kennoch inspected the breaker box and the heaters, replaced the insulation and/or wrappers in the breaker with new ones and installed two new heaters. She attests that Kennoch did not replace any electrical wiring or advise her to change the wiring in the home. She also attests that he told her that there was nothing wrong with her older heaters and that she had no reason to believe that the wiring or any appliance at the premises posed any danger or could cause a fire. She attests that she never saw any outlet in the plaintiff's bedroom spark. She attests that on the morning of January 10, 2020, there were no issues with the electrical system or heating in her home and that she has no knowledge of the cause of the fire.

The defendant submits the West Hurley Fire Department Incident Report, which states that the cause of the ignition was undetermined and that the area of fire origin was the front door. She also submits the Ulster County Fire Investigation Unit Report, which states that the fire classification was undetermined and that the origin of the fire was near the front door in the living room.

In opposition, the plaintiff argues that the defendant should not be permitted to use the plaintiff's deposition testimony because it was not provided to the plaintiff "within 60 days of his deposition so it could be reviewed and corrected, according to CPLR §3116(a)".

The plaintiff argues that at his deposition, he testified that there were issues with the electricity in his bedroom, the power strips in the living room were overloaded, and Kennoch told him that everything had to be completely replaced because it was old and dangerous. The plaintiff argues that defendant admitted that she never made any repairs to the premises and that Kennoch admitted that he did not inspect the wiring throughout the house, including the outlet that caused the fire. The plaintiff also argues that the West Hurley Fire Department's Incident Report, which states that the area of fire origin was the

front door, and the Ulster County Fire Investigation Unit's Report, which states that the fire origin was "near front door, inside living room", are consistent with the findings of the plaintiff's expert and the plaintiff's explanation of the events.

The plaintiff argues that the defendant was on notice of the dangerous condition of the electrical system in the house, including the sparking issues and the lack of electricity in the plaintiff's bedroom, the overloaded and dangerous outlet she instructed the plaintiff to use in the living room, the tripping of electrical circuits on a weekly basis, and the sub-standard electrical wiring throughout the house.

The plaintiff submits an affidavit that reiterates many of the statements he made during his deposition. He also attests that he informed the defendant that there was no electricity in his bedroom and that the defendant instructed him to use an extension cord from the living room into his bedroom. He attests that the living room outlet was overloaded and dangerous, which he told the defendant on many occasions, but she insisted that he use it. He attests that Kennoch informed the defendant that the entire electrical system was unsafe and had to be replaced and that Kennoch refused to do more extensive work with the wiring in its condition. He attests that the electricity in his bedroom was not turned off and that it was inoperable, dangerous and unsafe. He attests that he immediately informed the defendant of the dangerous condition. The plaintiff attests that Kennoch told him and the defendant that the wiring of the entire home had to be replaced because it was too old to sustain the new heaters and was therefore too dangerous to install the new heaters with the existing wiring, but the defendant refused to make the necessary repairs to make the home safe. He attests that the breakers tripped on a regular basis, including the breaker servicing the outlet outside his bedroom. He attests that any discrepancy between his affidavit and his deposition testimony is due to the defendant's failure to provide him with a copy of the deposition transcript prior to the filing of her motion, which prevented him from making any corrections.

The plaintiff submits the expert affidavit of Eugene J. West, Vice President of Guardian Investigations Group, Inc., a private fire and arson consulting firm specializing in fire cause and origin investigations, fire scene reconstruction, fire operations analysis, applicability of fire codes, and fire protection.

West asserts that he conducted two physical examinations of the fire scene, one on October 1, 2020, and one on December 8, 2020. He asserts that in preparing his affidavit, he interviewed the plaintiff and reviewed documents related to this action.

West asserts that the Ulster County Fire Investigation Unit and Ulster County Fire Investigation Task Force reports have limited informational value and should not be considered as competent fire origin and cause case reports because they contain no formal interviews, the photographs of the incident scene are inadequate for fire investigation purposes, there were no follow-up investigative efforts or the gathering of essential fire investigation information, and there was no attempt to properly examine the fire scene to determine a specific area of fire origin or the cause of the fire.

West opines that based on his analysis of fire and heat patterns, fire vectors, smoke demarcation lines, ventilation factors and damage assessment during his two scene examinations, coupled with his analysis of the fire scene photographs, the fire originated in the front portion of the living room. He determined that the specific area of origin was the electrical wall outlet at the base of the northeast corner of the east wall in the living room. He observed that the fire damage in the plaintiff's bedroom was significantly less severe than the fire damage in the living room.

West asserts that during both physical examinations of the fire scene, he observed a distinct "V" burn pattern extending upwards from the aforementioned outlet in the living room. He asserts that the outlet and receptacle at the base of the "V" pattern were heavily damaged by fire and that there was physical evidence of extension cords plugged into the receptacle when the fire occurred. He also observed exposed prongs and conductors of a grounded electrical cord plug in the debris under the outlet.

West opines that there is no evidence that a mechanical or electrical fault involving the air conditioning unit was the cause of the fire because the evidence shows that the fire did not originate in the plaintiff's bedroom.

Relying on, *inter alia*, the plaintiff's deposition testimony that the circuit breakers tripped frequently and that there were sparks from the outlets in his bedroom, the defendant's testimony that there was no electrical power in the plaintiff's bedroom, and West's own examinations and observations, West opines that the heat from an electrical fault in the area of the electrical wall outlet located in the area of fire origin was the cause of the fire. He opines that the electrical fault that was the ignition source for the fire resulted from a sub-standard and inadequate electrical circuit condition that was known to the defendant, and the condition was exacerbated by connecting an extension cord to an already overloaded wall outlet in the living room.

In reply, the defendant argues that the plaintiff was mailed a copy of the deposition transcript with a letter dated October 13, 2021, via certified mail. The defendant submits a copy of the letter and a certified mail return receipt, which indicates that delivery was made on October 22, 2021.

The defendant also argues that the plaintiff's affidavit should not be considered because it directly contradicts his prior deposition testimony without an explanation for the disparity.

The defendant also argues that West's expert affidavit is inconsistent and unsupported by the record. The defendant argues that since no definitive evidence shows the actual cause of the fire, any finding of liability cannot be sustained against the defendant.

The defendant submits the expert affidavit of Thomas D. Schneiders, a Certified Fire and Explosion Investigator.

Schneiders attests that he performed two physical examinations of the fire scene, one on October 1, 2020, and one on December 8, 2020. He attests that in preparing his affidavit, he reviewed the documents related to this action and the National Fire Protection Association Guide for Fire and Explosion Investigation #921 (2021 Edition).

Schneiders attests that West's conclusions as to the origin of the fire are not based upon standards acceptable in the area of fire investigation and go beyond his area of expertise. He attests that West's affidavit regarding the standard of care for a licensed electrician and electrical causation is not proper because West is not a licensed electrician or an electrical engineer.

Schneiders also attests that West's conclusions regarding the origin of the fire are speculative. He attests that West's affidavit contradicts the plaintiff's deposition testimony. He attests that West based his electrical fault analysis on two new statements in the plaintiff's affidavit, which are inconsistent with his deposition testimony, and that West ignored the plaintiff's testimony that the air conditioning unit was the only device in use via the extension cord powered by the living room outlet when the plaintiff left the house. As such, Schneiders attests that West cannot conclude with scientific certainty that there is no evidence that the air conditioning unit played a role in, was a factor in and/or was actually on fire.

Schneiders concludes that due to the severe damage caused by the fire, a cause of the fire cannot be established to any degree of scientific certainty. He attests that at best, only an area of origin can be determined, and that a cause of the fire or a point of origin cannot be determined.

Finally, the defendant argues that she did not breach a duty to the plaintiff because he was merely a guest in her home.

## **Discussion**

### *Compliance with CPLR 3116:*

CPLR 3116(a) provides that:

The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.



CPLR 3116(b) provides, in relevant part, that: “The officer before whom the deposition was taken shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall list all appearances by the parties and attorneys. . .”

“The party seeking to use an unsigned deposition transcript bears the burden of demonstrating that a copy of the transcript had been submitted to the deponent for review and that the deponent failed to sign and return it within 60 days” (*Franzese v Tanger Factory Outlet Centers, Inc.*, 88 AD3d 763, 763 [2d Dept 2011]; *Palumbo v Innovative Communications Concepts*, 175 Misc2d 156, 157-158 [Sup Ct, New York County 1997]). However, unsigned deposition transcripts that are certified by the reporter and to which the witness does not raise any challenges to their accuracy qualify as admissible evidence (*Boadu v City of New York*, 95 AD3d 918, 919 [2d Dept 2012]; *Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept 2012]). Moreover, a party’s unsigned deposition is admissible if it is submitted by the party himself, acknowledging its accuracy (*Gallway v Muintir, LLC*, 142 AD3d 948, 949 [2d Dept 2016]; *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 [1st Dept 2013]).

Here, the defendant submitted an unsigned but certified copy of the plaintiff’s deposition testimony in support of her motion. She has demonstrated that she served the plaintiff with a copy of the deposition testimony on October 13, 2021. However, the defendant filed her motion on December 3, 2021, prior to the expiration of the 60 days provided for by CPLR 3116(a). Although the defendant did not demonstrate compliance with CPLR 3116(a), the plaintiff’s deposition testimony is admissible, as he himself submitted and makes use of it in his opposition papers, which acknowledges its accuracy (*Gallway* at 949; *Franco* at 543).

*Negligence:*

“The elements of negligence are ‘(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom’” (*Abbott v Johnson*, 152 AD3d 730, 732 [2d Dept 2017]; *Comack v VBK Realty Associates, Ltd.*, 48 AD3d 611, 612 [2d Dept 2008]).

“An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition” (*Hernandez v Conway Stores, Inc.*, 143 AD3d 943, 944 [2d Dept 2016]). “In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon the property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence” (*Singer v St. Francis Hosp.*, 21 AD3d 469, 469 [2d Dept 2005]; *Rosas v 397 Broadway Corp.*, 19 AD3d 574, 574 [2d Dept 2005]). “To constitute constructive notice, ‘a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it’” (*Hernandez* at 944).

“Gross negligence ‘differs in kind, not only degree, from claims of ordinary negligence’. ‘To constitute gross negligence, a party’s conduct must smack [] of intentional wrongdoing or evince[] a reckless indifference to the rights of others’”. Generally, the question of gross negligence is a matter to be determined by the trier of fact” (*Bennett v State Farm Fire and Casualty Company*, 161 AD3d 926, 929 [2d Dept 2018]; *Federal Ins. Co. v Automatic Burglar Alarm Corp.*, 208 AD2d 495, 496 [2d Dept 1994]). “Stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence” (*Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [2d Dept 2011]).

Here, the defendant has demonstrated prima facie entitlement to summary judgment dismissing the complaint. She has demonstrated that there were no issues with the electricity before the fire and that the cause of the fire is undetermined. As such, she has demonstrated that the plaintiff cannot establish proximate cause for his injuries or that she created or had notice of the allegedly defective condition of the premises.

However, in opposition, the plaintiff has raised issues of fact warranting a denial of the motion. As a preliminary matter, the Court has not considered the portions of the plaintiff’s affidavit submitted in opposition to the defendant’s motion which make assertions contrary to his deposition testimony because the plaintiff has not provided any explanation for the disparity. The Court notes that the plaintiff’s alleged inability to review the deposition transcript does not properly explain why some of the testimony in the affidavit contradicts the testimony given during his deposition (*Freiser v Stop & Shop Supermarket Co., LLC*, 84 AD3d 1307, 1308-1309 [2d Dept 2011] [holding that the plaintiff’s affidavit, which stated details and observations that were different from her deposition testimony, constituted an attempt to create a feigned issue of fact designed to avoid the consequences of the earlier deposition testimony]; *Russ v Fried*, 73 AD3d 1153, 1154 [2d Dept 2010]; *Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007] [“Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, ‘creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment’”]).

Nevertheless, even without considering those portions of the plaintiff’s affidavit which contradict his deposition testimony, the plaintiff has raised issues of fact. In his deposition testimony, the plaintiff testified, *inter alia*, that a wall outlet in his bedroom sparked when he touched it, that a few outlets in the living room were overloaded, that the power strips in the living room were overloaded, old and full, that the electricity frequently tripped, and that Kennoch told him that everything had to be replaced and that it was old and dangerous. The defendant’s deposition testimony also demonstrates that there was no electricity in the plaintiff’s bedroom at the time of the fire and for the prior fifteen years and that the plaintiff had to use an extension cord to plug into the living room for electricity in his bedroom. This is sufficient to raise an issue of fact as to whether the defendant had notice of the allegedly defective condition.

Moreover, West's expert affidavit sufficiently opines that the electrical fault in the living room outlet was the cause of the fire. Contrary to the defendant's arguments, West's affidavit is not only based on the new assertions in the plaintiff's affidavit, but upon the plaintiff's deposition testimony, the defendant's deposition testimony, and the observations West made during the two physical examinations of the fire scene. As such, West's affidavit is neither so conclusory or speculative, nor without basis in the record, as to render it inadmissible. Any purported shortcomings merely go to the weight of the opinion (*Espinal v Jamaica Hosp. Medical Center*, 71 AD3d 723, 724 [2d Dept 2010]; *Erbstein v Savasatit*, 274 AD2d 445, 446 [2d Dept 2000]).

Furthermore, that West is not a licensed electrician does not automatically result in the dismissal of his opinion, as case law is well settled that "[a] witness may be qualified as an expert based upon '[l]ong observation and actual experience, though without actual study of the subject" and that "[n]o precise rule has been formulated and applied as to the exact manner in which such skill and experience must be acquired" (*Meiselman v Crown Heights Hospital*, 285 NY 389, 398 [1941]; *Steinbuch v Stern*, 2 AD3d 709, 710 [2d Dept 2003]). Here, West submitted his curriculum vitae, which lists his extensive experience, certifications and licenses and his education and/or specialized trainings, including training in electrical fire cause determination. As such, West's affidavit may be considered. The extent of his qualifications is an issue for the jury to determine and weigh in making their determination (*Espinal v Jamaica Hosp. Medical Center*, 71 AD3d 723, 724 [2d Dept 2010]).

Finally, the defendant's argument that the complaint should be dismissed because she did not owe a duty to the plaintiff was raised for the first time in reply, and as such, cannot be considered. Although the defendant mentions in her moving papers that the plaintiff was a guest, the defendant did not move for dismissal of the complaint on that basis or elaborate on the issue as she did in her reply (*Lee v Law Offices of Kim & Bae, P.C.*, 161 AD3d 964, 965-966 [2d Dept 2018] ["The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion."]; *Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept 2008]; *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

Accordingly, it is

**ORDERED** that the defendant's motion for summary judgment dismissing the complaint is **DENIED**.

Counsel for all parties are directed to virtually appear for a **Settlement Conference on May 11, 2023 at 2:00 P.M.** A Teams link will be sent by the part clerk, Brenda Jordan Williams, prior to the conference.

Dated: White Plains, New York  
February 28, 2023



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HON. ALEXANDRA D. MUPRHY, J.S.C.