SHORT FORM ORDER

INDEX NO. 05-1105
CAL. NO. 06-00081-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-5-06 (#002)
ADJ. DATE 6-16-06 (#003)
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - MD; CASEDISP

ISABELLA CONTACESSA, Plaintiffs, – against – EDDY'S TRAILER SALES, INC. and RBSL REALTY, Defendants.	JOSEPH B. FRUCHTER, ESQ. Attorney for Plaintiff 140 Fell Court Suite 301 Hauppauge, NY 11788
	McELROY, DEUTSCH et al. Attorneys for Defendant Eddy's Trailer 88 Pine Street 24th Floor New York, NY 10005
	O'CONNOR, O'CONNOR et al. Attorneys for Defendant RBSL Realty One Huntington Quadrangle Suite 3CO1 Melville, NY 11747

Upon the following papers numbered 1 to 29 read on this motion and cross motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 15 - 22; Answering Affidavits and supporting papers 23 - 25; Replying Affidavits and supporting papers 26 - 27; 28 - 29; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the cross motion by defendant Eddy's Trailer Sales, Inc. for summary judgment dismissing the complaint is granted; and it is

ORDERED that the motion by defendant RBSL Realty for an order granting summary judgment in its favor on the complaint and on the cross claim for indemnification is denied, as moot.

On June 2, 2004, plaintiff Isabella Contacessa allegedly fell on commercial premises located at 3160 Horseblock Road, Medford, New York, while walking from a sidewalk to a parking lot area. The premises are owned by defendant RBSL Realty and leased by defendant Eddy's Trailer Sales, Inc. Plaintiff, who was 85 years old at the time of the accident, had been brought to the property by her daughter, Joanne Edwards, to sign papers for the purchase of a motor home. According to deposition testimony, plaintiff fell as she and her daughter were walking arm in arm from the sales office towards the shop area where the new camper was located.

Subsequently, plaintiff commenced this negligence action to recover damages for the various injuries she sustained as a result of the fall. The bill of particulars alleges that plaintiff's fall was caused by "cracked concrete" on the premises. It alleges that defendants were negligent, among other things, in failing to maintain and repair the premises, in allowing an unsafe and inherently dangerous condition to exist on the premises, and in failing to warn of such condition. Cross claims for breach of contract, contribution, and indemnification were interposed by RBSL Realty against Eddy's Trailer Sales.

RBSL Realty now moves for summary judgment dismissing the complaint against it on the ground that it is an out-of-possession landlord and, therefore, owed no duty of care to plaintiff. RBSL Realty also seeks an order granting conditional summary judgment in its favor on its cross claims for indemnification. RBSL Realty's submissions in support of its motion include copies of the pleadings, the written lease agreement with Eddy's Trailer Sales, and transcripts of the parties' deposition testimony. Eddy's Trailer Sales opposes the application for conditional summary judgment against it on the claims for indemnification, and cross moves for an order dismissing the complaint on the ground that plaintiff is unable to establish that the alleged defective condition was a proximate cause of her fall. Plaintiff opposes both motions, arguing that her inability to identify where she fell and other details during her deposition is not fatal to her claim, as her daughter is able to testify how and where the accident occurred.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see*, ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Proving that an accident occurred, or that the conditions existed for such an accident, is insufficient to establish negligence. "'Proof of negligence in the air, so to speak, will not do'" (***Martin v Herzog***, 228 NY 164, 170, 126 NE 814 [1920], *quoting* Pollock, Torts (10 th Ed.), p. 472). And while proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must establish prima facie that the defendant's negligence was a substantial cause of the event which produced his or her injury (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see*, ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]; ***Forman v City of White Plains***, 5 AD3d 434, 773 NYS2d 102 [2d Dept 2004]).

Further, to establish a prima facie case based solely on circumstantial evidence, a plaintiff must present facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see*, ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Bardi v City of New York***, 293 AD2d 505, 739 NYS2d 747 [2d Dept], *lv denied* 98 NY2d 611, 749 NYS2d 2 [2002]). A plaintiff is not required to prove the exact nature of the defendant's negligence (*see*, ***Gayle v City of New York***, 92 NY2d 936, 680 NYS2d 900 [1998]), or to exclude every other possible cause for the injury-producing event (*see*, ***Burgos v Aqueduct Realty Corp.***, 92 NY2d 544, 550, 684 NYS2d 139 [1998]; ***Bernstein v City of New York***, 69 NY2d 1020, 517 NYS2d 908 [1987]; ***Schneider v Kings Hwy. Hosp. Ctr.***, *supra*) to meet this burden. Rather, a plaintiff must offer evidence showing that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency (***Gayle v City of New York***, *supra*, at 937, 680 NYS2d 900; *see*, ***Grob v Kings Realty Assocs.***, 4 AD3d 394, 771 NYS2d 384 [2d Dept 2004]; ***New York Tele. Co. v Harrison & Burrowes Bridge Contrs.***, 3 AD3d 606, 771 NYS2d 187 [3d Dept 2004]; ***Collins v City of New York***, 305 AD2d 529, 759 NYS2d 349 [2d Dept 2003]). Plaintiff's evidence must be sufficient for a jury to determine, based on logical inferences drawn from such evidence, that causes for the injury other than the defendant's negligence are sufficiently remote (*see*, ***Gayle v City of New York***, *supra*; ***Bernstein v City of New York***, *supra*; ***Bardi v City of New York***, *supra*).

Eddy's Trailer Sales established its entitlement to judgment as a matter of law by submitting pretrial deposition testimony showing that plaintiff is unable to identify what caused her to fall or the area of the parking lot where the fall occurred (*see*, ***Pluhar v Town of Southampton***, 29 AD3d 975, 816 NYS2d 176 [2d Dept 2006]; ***Manning v 6638 18th Ave. Realty Corp.***, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]; ***Rodriguez v Cafaro***, 17 AD3d 658, 794 NYS2d 113 [2d Dept 2005]; ***LaFemina v Brambell***, 2 AD3d 409, 767 NYS2d 795 [2d Dept 2003]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; ***Bongiorno v Penske Auto Ctr.***, 289 AD2d 520, 735 NYS2d 617 [2d Dept 2001]). The burden, therefore, shifted to plaintiff to raise a triable issue as to whether defendants' alleged negligence was a proximate cause of plaintiff's accident (*see*, ***Derdiarian v Felix Contr. Corp.***, *supra*; ***Hartman v Mountain Val. Brew Pub***, *supra*; *see generally*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Plaintiff failed to submit evidence showing that other possible causes for the fall, like a simple misstep or loss of balance, were sufficiently remote (*see*, ***O'Connor v Lakeview Assocs., LLC***, 306 AD2d 518, 761 NYS2d 858 [2d Dept 2003]; ***Holliday v Hudson Armored Car & Courier Serv.***, 301 AD2d 392, 753 NYS2d 470 [1st Dept], *lv dismissed in part, denied in part* 100 NY2d 636, 769 NYS2d 196 [2003]; *cf.*, ***Stanojevic v Scotto Bros. Rest. Enters.***, 16 AD3d 575, 792 NYS2d 147 [2d Dept 2005]). Here, plaintiff's daughter testified that immediately prior to the accident she was walking arm in arm with plaintiff and looking straight ahead at a garage. She testified that after the accident occurred she observed that the concrete curb located

alongside the accident site was broken and "crumbly," that there was a "big gouge" in the curb, and that she did not see this defect before her mother's fall. Moreover, plaintiff's daughter testified that both she and plaintiff lost their balance immediately before the subject incident, and that she was able to stop herself, but not plaintiff, from falling.

Thus, as there is no evidence from which a jury could rationally conclude that plaintiff's fall was more likely due to the alleged defective condition of the curb than to a sudden loss of balance or a misstep, the cross motion by Eddy's Trailer Sales for summary judgment dismissing the complaint against it is granted (*see*, ***Manning v 6638 18th Ave. Realty Corp.***, *supra*; ***Hennington v Ellington***, 22 AD3d 721, 804 NYS2d 395 [2d Dept 2005]; ***Rygel v 8750 Bay Parkway, LLC***, 16 AD3d 572, 792 NYS2d 160 [2d Dept 2005]; ***Bitterman v Grotyohann***, 295 AD2d 383, 743 NYS2d 167 [2d Dept 2002]; *cf.*, ***DeJesus v City of New York***, 199 AD2d 139, 605 NYS2d 253 [1st Dept 1993]). In view of this determination, the Court also grants summary judgment dismissing the complaint against RBSL Realty (*see*, CPLR 3212 [b]). The motion by RBSL Realty for summary judgment, therefore, is denied as moot.

Dated: OCT 18 2006

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION