SHORT FORM ORDER

INDEX No. 05-9701
CAL. No. 07-00832-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 6-26-07 (002)
8-14-07 (003)
ADJ. DATE 8-31-07
Mot. Seq. # 002 - MG
003 - MG CASEDISP

CONSTANCE TOCCI, Plaintiff, - against - ANTHONY TOCCI, SUZANNE TOCCI and LA-Z BOY INCORPORATED, Defendants.	WALLACE, WITTY, FRAMPTON, et al. Attorneys for Plaintiff 600 Suffolk Avenue, Suite A Brentwood, New York 11717 DEVITT SPELLMAN BARRETT, LLP Attorneys for Defendants Tocci 50 Route 111 Smithtown, New York 11787 TODTMAN NACHAMIE SPIZZ & JOHNS Attorneys for Defendant LA-Z Boy 425 Park Avenue New York, New York 10022

Upon the following papers numbered 1 to 49 read on this motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 26 - 32; Replying Affidavits and supporting papers 33 -42; Other 43 - 49; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion for summary judgment by defendants Anthony Tocci and Suzanne Tocci is granted.

ORDERED that the motion for summary judgment by defendant La-Z-Boy Incorporated is granted.

This is an action for personal injuries sustained by plaintiff Constance Tocci on May 4, 2002 while baby sitting for her granddaughter in the living room of defendants' home in Holbrook, New York. Plaintiff allegedly fell as she rose from a La-Z-Boy recliner chair located in defendants' home. Specifically, the plaintiff has alleged that her son and daughter-in-law positioned the chair on uneven flooring such that it posed a danger to anyone who might use it. In addition, plaintiff claims that the chair itself was dangerous an/or defective in its design and construction.

The Tocci defendants have moved for summary judgment on the grounds neither of them created any sort of dangerous and/or defective condition in positioning the chair, nor did they have any actual or constructive notice of any danger posed. In support, they rely on the pleadings, the deposition testimony of plaintiff and of the Tocci defendants, the deposition testimony of La-Z-Boy's representative, Mark Bullock, photographs, and documents pertaining to the operation of the chair.

La-Z-Boy has moved for summary judgment on the grounds the chair is safe and there is no evidence that any defect or failure to warn caused the accident. They rely on essentially the same evidence offered by the Toccis.

Plaintiff Constance Tocci testified she was 59 years old at the time of this incident. She was not employed at the time, other than working for her husband's business out of the home. She described the house as a one-story ranch style house with a basement. After entering through the front door, there is a "partition" to the right and a wall to the left; the "partition" was used to create a hallway that separated the living room from the rest of the home. The bedrooms were located past the left wall, while the dining area and kitchen were straight ahead. She estimated there was approximately a seven foot opening between the partition and the far wall of the living room allowing people to walk back and forth between the living room and the hallway. The living room was carpeted, while the hallway had a synthetic wood floor. A wood saddle separated the carpet from the wood floor. Plaintiff had visited her son's home on a regular basis, approximately twice per week and she would sometimes babysit for her granddaughter. At no time during any of her visits did the plaintiff ever have any problems walking out of the living room into the hallway. She estimated the recliner at two years old. It was always kept in the living room, directly behind the wall partition. Plaintiff testified that she "always" sat in the chair when she rocked the baby or at other times. She was aware the chair had a mechanical foot-rest but was unsure if she had ever used it before. She stated the chair was in good working order prior to her accident. On the date of the accident, plaintiff and her husband were visiting the defendants so that plaintiff's husband could help her son Anthony with some yard work while she watched her grandchild Cecilia. Suzanne Tocci was out running errands. In order to help plaintiff keep Cecilia confined to one room, Anthony Tocci took the chair from its original place in the living room and placed it between the living room and the hallway. After the chair was placed, plaintiff sat in the recliner without difficulty for approximately 10 to 15 minutes. During that time, she did not use the foot rest, though she did rock back and forth without experiencing any problems. At one point, plaintiff got up. She claims she felt her shoe pulling and fell to the floor. In May 2004, she and her husband moved into defendants' residence.

On October 12, 2006, defendant Anthony Tocci testified that he and his wife purchased the chair from a La-z-boy store in 2001. The chair was delivered and assembled approximately six to eight months before his mother's accident. Tocci stated the chair came with a set of instructions but he does not remember ever reading them. At no time did Anthony Tocci disassemble or perform any maintenance on the chair. On the day of the accident his parents came to the house. Anthony Tocci moved the chair to a location between the living room and hallway. He testified that at one point he heard his mother yelling for help from inside the house. He went in and found her face down on the floor with her feet positioned close to the front of the chair. When he asked his mother what happened, she indicated that her foot "got caught" and she tripped and fell when she "reclined the chair closed".

Defendant La-z-boy Incorporated appeared for an examination before trial on October 12, 2006, represented by Mark Bullock. At the time he was deposed, Bullock was employed by La-z-boy as a "continuous improvement manager", while at the time of the accident, he was a CAD manager. His responsibilities as a continuous improvement manager include reducing the costs of products while improving quality. He testified the chair was a rocker-recliner with a manual handle to open up a leg-rest. Bullock noted he was personally involved in designing the frame for this style chair while he was working as a CAD technician. He testified that this particular chair does come with operating instructions, however, he was unaware of any warnings issued with respect to this chair, or any instructions as to where to place the chair or what flooring surfaces were appropriate.

Defendant La-z-boy also offers the affidavit of Christopher Knabusch, test laboratory manager for La-Z-boy. He avers there were 330,692 model 10-561 units (the model owned by the Toccis) produced by La-Z-Boy from April 1999 through April 2007. Other than plaintiff, there was never a single report or claim that the chair caused a fall, that the chair caught anyone's foot, or that the chair tipped over forward. Further, before the model in question was released to the market, it underwent extensive testing and quality control including durability tests, a stability test, a balance test and a strength test. The chair met or exceeded all quality and safety standards.

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*).

The Toccis have established their entitlement to judgment as a matter of law. The pre-trial deposition testimony shows that plaintiff is unable to explain how or where her foot became trapped or "caught" in the chair, leaving it to conjecture to suggest that the accident occurred as a result of the chair's placement. (*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]). Thus, as there is no evidence from which a jury could rationally conclude that plaintiff's fall was more likely due to the alleged negligent placement of the chair than to a sudden loss of balance or a misstep, the motion by the Toccis 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]).

Further, to prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). 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 the defendant's employees to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [2d Dept 1994]).

Here, the testimony of plaintiff does not suggest that the chair's placement created a dangerous condition which caused her fall. Plaintiff testified she sat in the recliner in that location, without difficulty, for approximately 10 to 15 minutes. Plaintiff did not note any difficulties when she rocked back and forth. Further, she could not describe the position of the chair vis-a-vis the different flooring

surfaces. Finally, there is no evidence to suggest that defendants Anthony and Suzanne Tocci had either actual or constructive notice of any dangers posed by the chair or its placement. Accordingly, the motion for summary judgment by the Toccis dismissing the complaint and all cross-claims against them is granted.

With respect to the motion for summary judgment by co-defendant La-Z-Boy, it is well settled that a manufacturer is under a nondelegable duty to design and produce a product that is not defective (*see*, ***Denny v Ford Motor Co.,*** 87NY2d 248, 639 NYS2d250 [1995]; ***Sage v Fairchild-Swearingen Corp.***, 70NY2D 579, 523 NYS2d 418 [1987]) and that a defectively designed product is one which is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use.(*see*, ***Robinson v Reed-Prentice Div. of Package Mach. Co.***, 49 NY2d 471, 426 NYS2d 717[1980]).

Here, plaintiff has not provided any proof that the chair was defective. The adduced evidence demonstrates that millions of chairs have been used for the past ten years without incident. This model was subjected to extensive quality control testing and passed rigorous stability tests. Plaintiff has failed to identify any defect in the chair and has provided no basis to believe that any injury she suffered was due to any defect in the chair. Accordingly, the motion by defendant La-Z-Boy for summary judgment is granted in its entirety.

Dated: OCT 10 2007

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**