SHORT FORM ORDER

INDEX No. 16-618444
CAL. No. 19-00257OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 7-2-19
ADJ. DATE 10-3-19
Mot. Seq. # 001 - MG; CASEDISP

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JUSTIN MERCURIO and KRISTIN MERCURIO,

Plaintiffs,

- against -

JONATHAN R. DAYTON,

Defendant.

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FABER & TROY, ESQS.
Attorney for Plaintiffs
180 Froelich Blvd.
Woodbury, New York 11797

BELLO & LARKIN
Attorney for Defendant
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated May 29, 2019; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by plaintiff s, dated September 26, 2019; Replying Affidavits and supporting papers by defendant, dated October 2, 2019; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Jonathan Dayton dismissing plaintiffs' complaint against him is granted.

Plaintiffs commenced this action to recover damages for injuries allegedly sustained by plaintiff Justin Mercurio as a result of an accident that occurred on premises owned by defendant Jonathan Dayton known as 24 Sag Harbor Turnpike, East Hampton, New York. The accident allegedly occurred on June 25, 2014, when plaintiff rolled his ankle on a brick walkway leading to defendant's house as he was delivering packages there. By the bill of particulars, plaintiffs allege that defendant created a dangerous condition and failed to properly maintain the brick walkway. Plaintiff's wife, Kristin Mercurio, asserts a derivative cause of action.

Defendant Dayton moves for summary judgment dismissing plaintiffs' complaint on the ground that plaintiff is unable to identify what caused him to roll his ankle. Defendant also argues that he did not create or have notice of the alleged dangerous condition. In support of the motion, defendant submits copies of the pleadings, transcripts of the parties' deposition testimony, and a photograph of the brick walkway. Plaintiffs oppose the motion, arguing that plaintiff Justin Mercurio has sufficiently established that his injury was due to the unevenness of the walkway. Plaintiff further argues that defendant's lack of expert evidence evidences a clear failure to meet their prima facie burden. In opposition, plaintiffs submit an affidavit of Jordan Ruzz, an engineer, and photographs of the brick walkway.

At his examination before trial, plaintiff Justin Mercurio testified that at the time of the accident he was making a delivery to defendant's house. The delivery consisted of two packages that measured two feet by two feet. The defendant's house was set back from the street and there was a 20 to 30 foot brick path which lead to the house. He testified that while he observed the bricks to be uneven, he took that path instead of walking on the grass as the grass was high, not level, and not maintained. Plaintiff took about 15 to 20 steps when he rolled his ankle, but he did not fall. Plaintiff testified that he "can't remember the exact spot" where he rolled his ankle and that he was looking straight ahead at the time. He testified that when he rolled his ankle, he screamed, dropped the packages and limped back to his vehicle. He reported the accident to his supervisor and attempted to continue on his delivery route. Plaintiff testified that he returned to the accident site with his supervisor, who asked him where the accident occurred, and he said that he did not know the exact spot but that it was somewhere in the brick path.

At his examination before trial, defendant testified that deliveries are usually made to the back door of his house and that there is a brick walkway that leads to it. He testified that the brick walkway was installed 40 years ago, no maintenance has been necessary and no one has fallen on the walkway in the 40 years he has lived there. The defendant testified he has never received a citation due to the condition of the walkway, and no one has complained about the condition of the walkway.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

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 demonstrate 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, 684 NYS2d 139 [1998]; ***Bernstein v City of New York***, 69 NY2d 1020, 517 NYS2d 908 [1987]; ***Schneider v Kings Highway 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 Assoc.***, 4 AD3d 394, 771 NYS2d 384 [2d 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*).

Defendant has established his entitlement to summary judgment as a matter of law by submitting deposition testimony showing that plaintiff is unable to identify what caused him to fall (*see* ***Capasso v Capasso***, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]; ***DeSantis v Lessing's, Inc.***, 46 AD3d 742, 849 NYS2d 580 [2d Dept 2007]; ***Pluhar v Town of Southampton***, 29 AD3d 975, 816 NYS2d 176 [2d Dept 2006]). The burden, therefore, shifted to plaintiffs to raise a triable issue as to whether defendant's alleged negligence was a proximate cause of plaintiff's accident (*see* ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; *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]).

In opposition, plaintiffs 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., Inc.***, 16 AD3d 575, 792 NYS2d 147 [2d Dept 2005]). Contrary to the assertion of plaintiffs' counsel, plaintiff Justin Mercurio was unable to identify what caused him to roll his ankle. In his deposition testimony, while he testified that he observed the walkway to be "uneven," he did not testify what caused him to roll his ankle and could not testify as to the location where he rolled his ankle. The adduced evidence establishes nothing more than a possibility that plaintiff's injury was caused by the uneven brick walkway and would require the trier of fact to base a finding of proximate cause upon nothing more than speculation (*see* ***Thompson v Commack Multiplex Cinemas***, 83 A.D3d 929, 921

NYS2d 304 [2d Dept 2011]; ***Cangro v Noah Bldrs., Inc.***, 52 Ad3d 758, 861 NYS2d 121 [2d Dept 2008]). Accordingly, the motion by defendant for summary judgment dismissing the complaint against him is granted.

Dated: March 12, 2020

HON. GEORGE NOLAN, J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**