[Cite as *Mahmoud v. Dennis*, 2005-Ohio-3610.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Zeinab Mahmoud, et al.

Appellants

v.

Patrick Dennis

Appellee

v.

Ali Mahmoud

Appellant

Court of Appeals No. L-04-1183

Trial Court No. CI-2002-03482

DECISION AND JUDGMENT ENTRY

Decided: June 30, 2005

* * * * *

Michael A. Bruno, for appellants, Zeinab Mahmoud, et al.

Mark P. Seitzinger, for appellee.

Christopher F. Parker, for appellant, Ali Mahmoud.

* * * * *

GLASSER, J.

{¶1} This case comes to us from a judgment issued by the Lucas County Court of Common Pleas granting summary judgment in favor of appellee Patrick Dennis and denying appellant Ali Mahmoud's motion for relief from judgment. For the reasons that follow, this court affirms the judgment of the trial court.

{¶2} The undisputed facts relevant to the issues on appeal are as follows. On June 18, 2000, appellant Zeinab Mahmoud was injured when she fell at the bottom of the stairs leading to the basement of the home her son Ali Mahmoud rented from appellee Patrick Dennis. On June 17, 2002, Zeinab Mahmoud and her husband Mohamad filed a personal injury action against Dennis. Dennis filed a timely answer. On April 10, 2003, Dennis filed a third-party complaint against Ali Mahmoud alleging breach of lease and seeking indemnification. Ali Mahmoud did not file an answer and on July 16, 2003, Dennis filed a motion for default judgment which the trial court granted on July 29, 2003. Ali Mahmoud filed a motion for relief from judgment on July 30, 2003. On February 27, 2004, Dennis filed a motion for summary judgment in regard to the claims of Zeinab and Mohamad Mahmoud.

{¶3} On July 11, 2004, the trial court filed its opinion and judgment entry in which it denied Ali Mahmoud's motion for relief from judgment and granted summary judgment in favor of Dennis. It is from that judgment that Mr. and Mrs. Mahmoud and Ali Mahmoud separately appeal.

{¶4} Appellants Zeinab and Mohamad Mahmoud set forth one assignment of error in which they assert that the trial court erred by granting Dennis' motion for summary judgment. Third-party defendant/appellant Ali Mahmoud sets forth a single assignment of error in which he asserts that the trial court erred by denying his motion for relief from judgment.

{¶5} In reviewing a summary judgment, this court must apply the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts*. (1989), 61 Ohio App.3d 127, 129,

572 N.E.2d 198. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶6} Additionally, a ruling by a trial court on a Civ.R. 60(B) motion to vacate will be upheld on appeal absent an abuse of discretion. *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271.

{¶7} In considering appellants' assignments of error and supporting arguments pursuant to the standards of review set forth above, this court examined the record of this case, all applicable and relevant law, and the decision of the trial court. After doing so, we conclude that the trial court correctly considered the pertinent facts and issues in dispute, correctly applied the law to the facts, and rendered judgment accordingly as to appellee Dennis' motion for summary judgment and as to appellant Ali Mahmoud's motion for relief from judgment. Accordingly, we find first that summary judgment was properly granted in favor of appellee Patrick Dennis and second that the trial court did not abuse its discretion by denying Ali Mahmoud's motion for relief from judgment. We, therefore, adopt the well-reasoned decision of the Honorable Charles J. Doneghy as our own. (See *Mahmoud, et al. v. Dennis* (June 11, 2004), Lucas C.P. No. CE0200203482, attached hereto as Appendix A.)

{¶8} Appellants' assignments of error are therefore found not well-taken. On consideration whereof, this court finds that substantial justice has been done the parties complaining and the judgment of the Lucas County Court of Common Pleas is affirmed.

Appellants are ordered to pay the costs of this appeal for which sum judgment is rendered against appellants on behalf of Lucas County and for which execution is awarded. See App.R. 24.

JUDGMENT AFFIRMED.

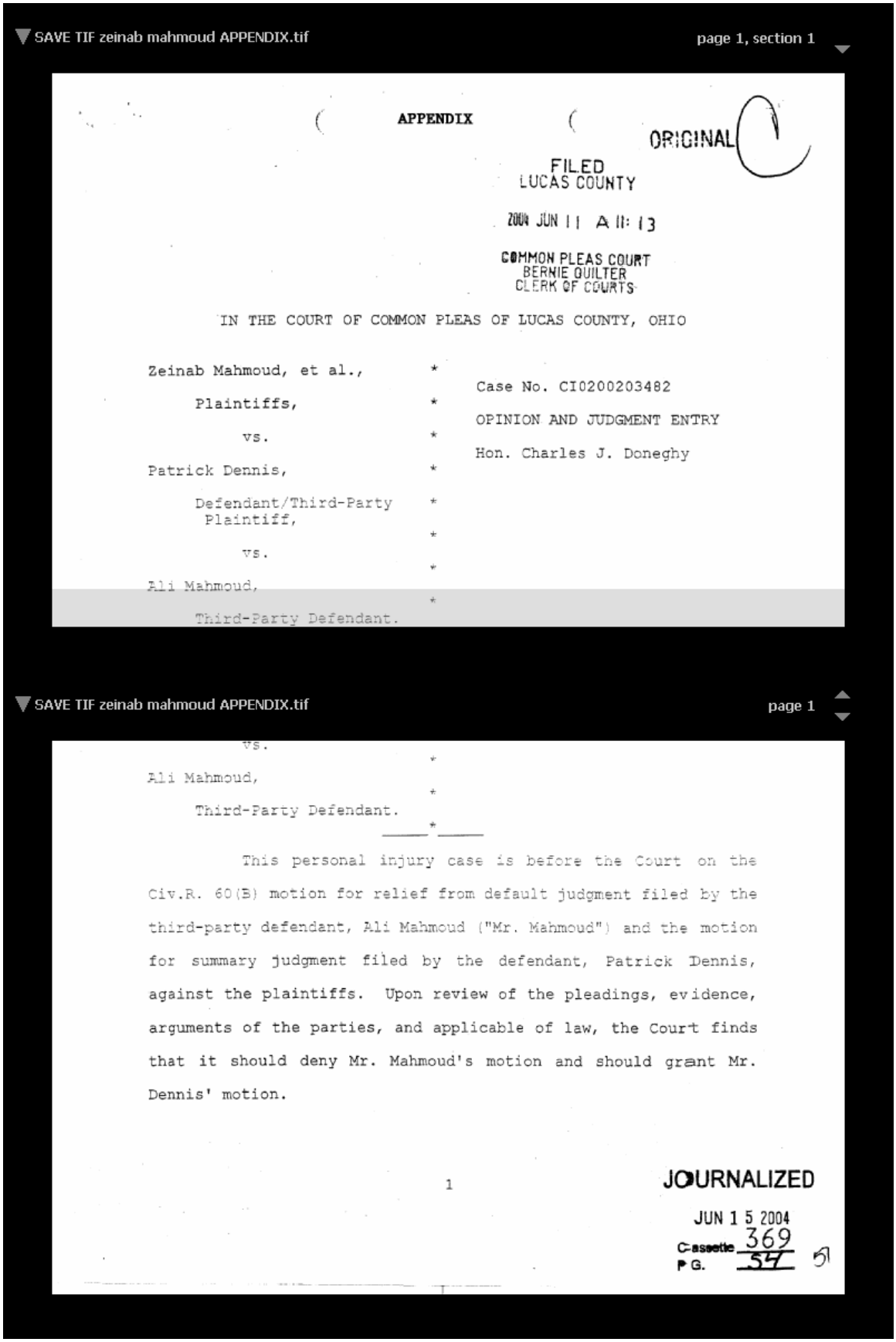
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Mark L. Pietrykowski, J. _____
JUDGE

William J. Skow, J. _____
JUDGE

George M. Glasser, J. _____
CONCUR.
JUDGE

Judge George M. Glasser, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.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IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO
Zeinab Mahmoud, et al.,
Plaintiffs,
vs.
Patrick Dennis,
Defendant/Third-Party Plaintiff,
vs.
Ali Mahmoud,
Third-Party Defendant.
Case No. CI0200203482
OPINION AND JUDGMENT ENTRY
Hon. Charles J. Doneghy
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vs.
Ali Mahmoud,
Third-Party Defendant.
This personal injury case is before the Court on the Civ.R. 60(B) motion for relief from default judgment filed by the third-party defendant, Ali Mahmoud ("Mr. Mahmoud") and the motion for summary judgment filed by the defendant, Patrick Dennis, against the plaintiffs. Upon review of the pleadings, evidence, arguments of the parties, and applicable of law, the Court finds that it should deny Mr. Mahmoud's motion and should grant Mr. Dennis' motion.
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I. FACTS

On or about June 18, 2000, plaintiff Zeinab Mahmoud sustained personal injuries in a fall on a basement stairway at the home of her son Mr. Mahmoud. Mr. Mahmoud leased the home from Mr. Dennis. On the day of her fall, Ms. Mahmoud was going down the stairs to retrieve a food item from a basement freezer. As she placed her foot on the basement floor she felt accumulated water. The basement had accumulated water on 4 previous occasions in 2000. Upon noticing the water, Ms. Mahmoud turned and then fell immediately.

On other occasions when water would accumulate in the basement, Mr. Mahmoud would call Mr. Dennis. Mr. Dennis then would call a plumbing professional to eliminate the water. On June 18, 2000, neither the Mahmouds nor Mr. Dennis were aware of the water until Ms. Mahmoud's fall.

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call a plumbing professional to eliminate the water. On June 18, 2000, neither the Mahmouds nor Mr. Dennis were aware of the water until Ms. Mahmoud's fall.

On or about June 17, 2002, the plaintiffs, Ms. Mahmoud and her husband Mohamad Mahmoud, filed the instant personal injury action against Mr. Dennis. Mr. Dennis filed a timely answer. Mr. Dennis then filed a motion for summary judgment on February 27, 2003. Later, on or about April 10, 2003, Mr. Dennis filed a third-party complaint against Mr. Mahmoud alleging breach of lease and seeking indemnification. Mr. Mahmoud did not file an answer to the third-party pleading. Subsequently, on or about July 16, 2003, Mr. Dennis filed a motion for default judgment which the Court granted

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on July 28, 2003. Mr. Mahmoud then filed his motion for relief from judgment on July 30, 2003.

Both motions are ripe for resolution.

II. CIV.R. 60 (B) -- RELIEF FROM JUDGMENT

A. RELIEF FROM JUDGMENT STANDARD

The standard applicable to Civ.R. 60(B)[1] is set forth in GTE Automatic Elec., Inc. v. ARC Industries, Inc. (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus.

> "To prevail on a motion brought under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) or

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(3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) or

[1] Civ.R. 60(B) reads as follows:

"(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation." (Emphasis added.)

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(3), not more than one year after the judgment, order or proceeding was entered or taken." (Emphasis added.)

See, also, Cuyahoga Support Enforcement Agency v. Guthrie, 84 Ohio St.3d 437, 440, 1999-Ohio-362, 705 N.E.2d 318 (citing GTE Automatic Elec., Inc.). The movant must demonstrate these elements by "operative facts" presented in evidentiary material. East Ohio Gas Co. v. Walker (1978), 59 Ohio App.2d 216, 222, 394 N.E.2d 348. See, also, Garwood v. Johnson (Apr. 15, 1994), 6th Dist. No. L-93-031, 1994 WL 138434. "Such evidence should be in the form of affidavits, depositions, written admissions, written stipulations, answers to interrogatories, or other sworn testimony." East Ohio Gas Co. v. Walker, 59 Ohio App.2d at 221, 394 N.E.2d 348. It is the movant who has the burden of establishing these "operative facts," and should any of the three elements remain unsatisfied

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the movant who has the burden of establishing these "operative facts," and should any of the three elements remain unsatisfied relief must be denied. Ergo Plastic Products v. Cleveland (1984), 15 Ohio St.3d 389, 391, 474 N.E.2d 328.

B. DISCUSSION

Mr. Mahmoud bases his motion for relief on Civ.R. 60(B)(1) and (5). In his motion, Mr. Mahmoud states that he is entitled to relief from judgment because: he has a meritorious defense (the dangerous condition causing Ms. Mahmoud's injury resulted from defendant Mr. Dennis' negligence); he is entitled to relief under at least one of the grounds stated in the rule (Civ.R. 60[B][1] "mistake, inadvertence, surprise or excusable neglect" and [B][5] "any other reason justifying relief from the judgment"); and

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he has brought his motion within a reasonable time (within days of the default judgment).

The Court finds that Mr. Mahmoud has sufficiently established two of the three elements from GTE Automatic Elec., Inc. v. ARC Industries, Inc. First, the Court finds there is no dispute that Mr. Mahmoud's motion for relief is timely. Second, regarding meritorious defense, the Court notes that a "movant need only allege a meritorious defense, not prove that he will prevail on that defense." Badalamenti v. Natl. City Bank, 11th Dist. No. 2001-P-0122, 2002-Ohio-4815, 2002 WL 31053844, at ¶17. Thus, the Court finds that Mr. Mahmoud has a meritorious defense suggesting, at the least, that he would be entitled to have the trier of fact compare his alleged negligence to that of Mr. Dennis. The remaining and critical issue is whether Mr. Mahmoud is entitled to

compare his alleged negligence to that of Mr. Dennis. The remaining and critical issue is whether Mr. Mahmoud is entitled to relief under one of the grounds listed in Civ.R. 60(B)(1)-(5).

Mr. Mahmoud raises two principal arguments to suggest his failure to timely answer the third-party complaint was due to mistake or excusable neglect. First, he contends that the green certified-mail return receipt was signed by an unknown signatory. The receipt was signed by a "V. Villareal" at 3016 Pinehurst, Toledo, Lucas County, Ohio, 43613. Implicit in this argument is that Mr. Mahmoud was unaware of the complaint. However, Mr. Mahmoud has testified that the Pinehurst address is his address. (Mr. Mahmoud Feb.6, 2003 Depo. p.3.) Additionally, "[v]alid

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service of process is presumed when the envelope is received by any person at the defendant's address; the recipient need not be an agent of the defendant." Kaufman & Cumberland v. Jalisi, 8th Dist. No. 80389, 2002-Ohio-4087, 2002 WL 1823030, at ¶16. Evidence of non-service may be sufficient to invalidate a default judgment. United Home Fed. v. Rhonehouse (1991), 76 Ohio App.3d 115, 124, 601 N.E.2d 138. The Court notes that Mr. Mahmoud does not offer any evidence, such as affidavit testimony, averring he was unaware of the complaint. Thus, Mr. Mahmoud is presumed to have been properly served.

Second, Mr. Mahmoud argues that he believed he had insurance in place to cover the injury to his mother and thus he relied on the defense that is normally tendered by an insurer when a claim is presented. (Mahmoud Motion Brief p.4.) In support of

relied on the defense that is normally tendered by an insurer when a claim is presented. (Mahmoud Motion Brief p.4.) In support of this argument, Mr. Mahmoud cites to a passage from Colley v. Bazell (1980), 64 Ohio St.2d 243, 416 N.E.2d 605, quoted in Griffey v. Rajan (1987), 33 Ohio St.3d 75, 79, 514 N.E.2d 1122. In that passage, the Colley court observed that "the concept of 'excusable neglect' must be construed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally construed." Colley v. Bazell, 64 Ohio St.2d at 248, 416 N.E.2d 605. The Colley court concluded that, where default judgment had been entered within one week after the defendant failed to timely answer, "the inaction of the defendant had not ripened to the point where it

could be labeled as a 'complete disregard for the judicial system' as condemned in GTE Automatic Electric, [47 Ohio St.2d] at page 153 [351 N.E.2d 113]." Id. However, the court in Griffey distinguished the factual situation in Colley. Griffey v. Rajan, 33 Ohio St.3d at 79, 514 N.E.2d 1122. In Griffey, the plaintiff moved for default judgment 51 days after the answer day. Id. The court again quoted Colley for the following observation: "even though a defendant has promptly notified an insurance company of the filing of the lawsuit, his neglect in failing to independently determine whether an answer has been filed on his behalf may well change from 'excusable' to 'inexcusable' upon the passage of time, without regard to the one year provision regulating the timeliness of the motion." Id. quoting Colley v. Bazell, 64 Ohio St.2d at 249, 416 N.E.2d 605. Thus, the Griffey court concluded that the

of the motion." Id. quoting Colley v. Bazell, 64 Ohio St.2d at 249, 416 N.E.2d 605. Thus, the Griffey court concluded that the 51-day delay was inexcusable neglect. Griffey v. Rajan, 33 Ohio St.3d at 80, 514 N.E.2d 1122.

In the instant case, without evidence indicating a mistake or an excusable reason for the 60-plus day delay in filing an answer, the Court finds that Civ.R. 60(B)(1) does not afford a ground for Mr. Mahmoud to challenge the judgment. Additionally, without evidence indicating "any other reason justifying relief from the judgment," the Court finds that Civ.R. 60(B)(5) offers Mr. Mahmoud no relief in this case. Accordingly, the Court finds Mr. Mahmoud's motion for relief from judgment not well-taken.

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III. SUMMARY JUDGMENT

A. STANDARD FOR SUMMARY JUDGMENT

To succeed on a Civ.R. 56(C) motion for summary judgment, the movant must demonstrate:

> "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

See, also, Zivich v. Mentor Soccer Club, Inc., 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201. "The party moving for summary judgment bears the burden of showing that there is no

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369-370, 1998-Ohio-389, 696 N.E.2d 201. "The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." Id. at 370, citing Dresher v. Burt, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. Accord Vahila v. Hall, 77 Ohio St.3d 421, 429-430, 1997-Ohio-259, 674 N.E.2d 1164; Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 114-115, 526 N.E.2d 798. In response, the nonmoving party may not rest on the allegations of her pleading, instead she must establish a genuine issue of material fact by affidavit or in some other manner provided in Civ.R. 56. State ex rel. Burnes v. Athens Cty. Clerk of Courts, 83 Ohio St.3d 523, 524, 1998-Ohio-3, 700 N.E.2d 1260.

B. DISCUSSION

In this case, Mr. Dennis argues that the plaintiffs will be unable to prove that Ms. Mahmoud's injuries were proximately caused by any breach of duty by Mr. Dennis.

To establish actionable negligence, the plaintiff must prove that the defendant owed the plaintiff a duty of care, the defendant breached that duty, and the breach proximately caused the plaintiff's injury. Mussivand v. David (1988), 45 Ohio St.3d 314, 318, 544 N.E.2d 265. At common law, a property owner owes an invitee a duty of ordinary care and has a duty to keep the premises in a reasonably safe condition. Light v. Ohio University (1986), 28 Ohio St.3d 66, 68, 502 N.E.2d 611. Pursuant to R.C. 5321.04(A), a landlord owes a general duty to maintain the premises in "a fit and habitable condition." R.C. 5321.04(A)(2). And, a landlord is

a landlord owes a general duty to maintain the premises in "a fit and habitable condition." R.C. 5321.04(A)(2). And, a landlord is liable for injuries sustained by others on the leased premises when the injuries are proximately caused by the landlord's failure to fulfill the duties imposed by the statute. Shroades v. Rental Homes, Inc. (1981), 68 Ohio St.2d 20, 25, 427 N.E.2d 774.

In this case, Ms. Mahmoud gave her deposition testimony through an interpreter because she does not speak English. (Z.Mahmoud Depo. pp.3-6.) In her opposition brief, she summarizes the events related to her fall. "It was daytime and she had her regular (flat sole) shoes on. She was going down the basement steps to retrieve something from the freezer. She got off the last

step and proceeded to step in water. This caused her to turn around. In attempting to turn around after stepping in water, she fell to the floor. She has no present memory of what happened after she fell. [Z.Mahmoud deposition, pages 12 to 19.]" Ms. Mahmoud does not "remember anything else." (Z.Mahmoud Depo. p.16.)

"Where the plaintiff, either personally or by outside witnesses, cannot identify what caused the fall, a finding of negligence on the part of the defendant is precluded." Stamper v. Middletown Hosp. Assn. (1989), 65 Ohio App.3d 65, 68, 582 N.E.2d 1040. In the Stamper case, the court concluded that testimony by the plaintiff which failed to explain the cause of her fall was insufficient to establish proximate causation. Id. The Stamper testimony is essentially identical to that of Ms. Mahmoud in this case.

testimony is essentially identical to that of Ms. Mahmoud in this case.

Thus, the Court finds that Ms. Mahmoud is unable to establish that any breach of duty on the part of Mr. Dennis proximately caused her injury. It is well-established that if the plaintiff's evidence relating to proximate cause is so meager and inconclusive as to amount to speculation and conjecture, the defendant is entitled to summary judgment as a matter of law. Schutt v. Rudolph-Libbe, Inc. (Mar. 31, 1995), 6th Dist. No. WD-94-064, 1995 WL 136777, *6, citing Renfoe v. Ashley (1958), 167 Ohio St. 472, 150 N.E.2d 50, syllabus. See, also, Williams v. Sun Co., Inc. (R & M) (1993), 63 Ohio Misc.2d 429, 433, 631 N.E.2d 195.

Accordingly, the Court will grant Mr. Dennis' motion.

JUDGMENT ENTRY

It is ORDERED that the third-party defendant's motion for relief from default judgment is denied.

It is further ORDERED that the defendant's motion for summary judgment is granted. It is further ORDERED that the plaintiffs' claims against the defendant are dismissed with prejudice.

It is further ORDERED that this case is assigned for a pre-trial conference on July 9, 2004 at 11:00 A.M. to resolve any remaining issues relating to the third-party complaint.

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any remaining issues relating to the third-party complaint.

June 9, 2004

Charles J. Doneghy, Judge

pc: Charles E. Boyk
Christopher F. Parker
Mark P. Seitzinger

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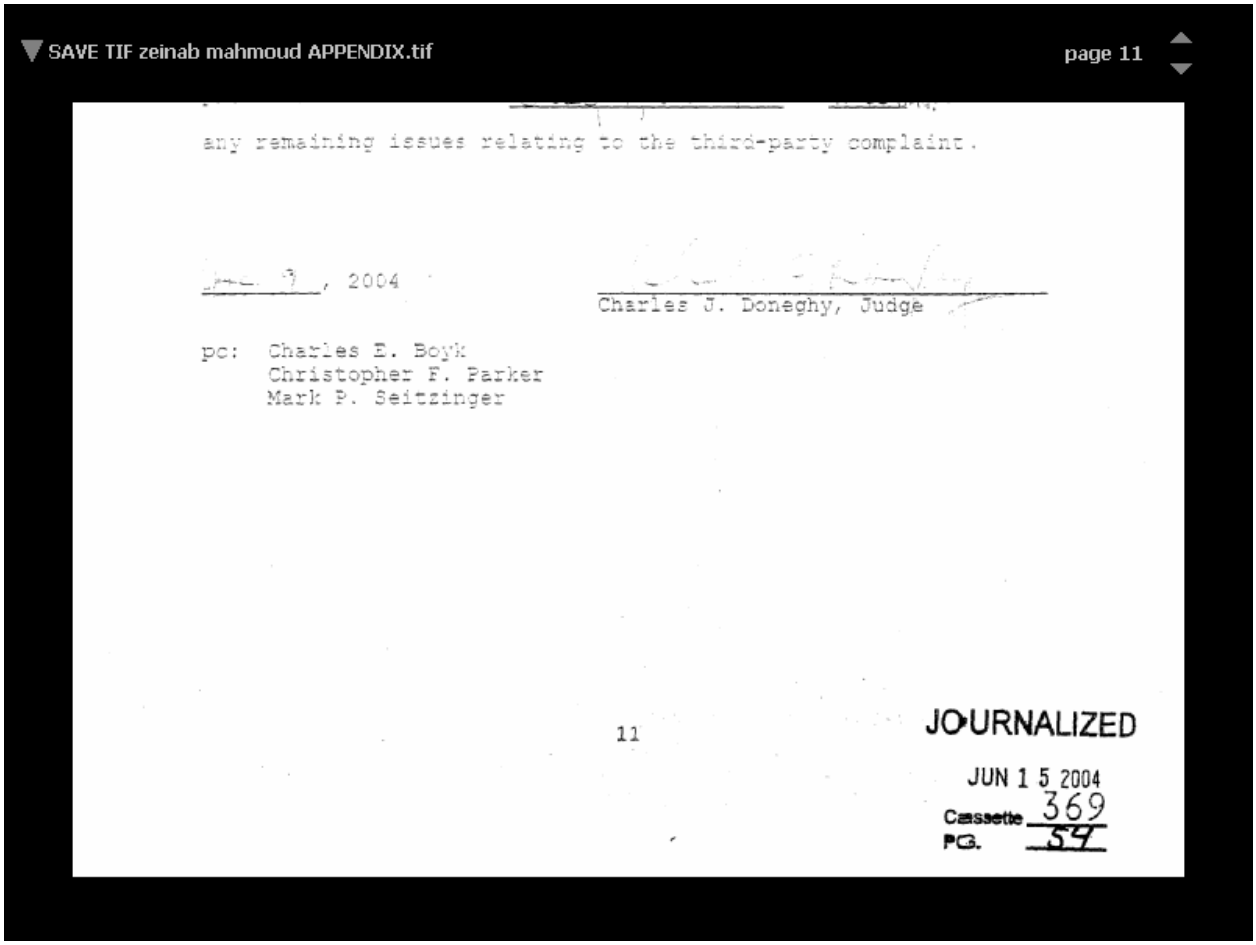
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