

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32465
Y/prt

_____AD3d_____

Argued - September 20, 2011

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
RANDALL T. ENG
SANDRA L. SGROI, JJ.

2011-02433

DECISION & ORDER

Joseph Delaney, respondent, v Town Sports
International, doing business as New York
Sports Club, et al., appellants.

(Index No. 103350/08)

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains, N.Y. (Joanna M.
Topping and Jacqueline Hattar of counsel), for appellants.

O'Leary & Spero, Staten Island, N.Y. (Maria D. Spero of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from so much of an order of the Supreme Court, Richmond County (Maltese, J.), dated January 25, 2011, as denied their motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff allegedly was injured when he fell over a moveable wooden platform which had been placed on the tile floor of a sauna located within the defendants' premises. The platform was 1½ inches off the floor with a ½ inch lip or overhang, and was located approximately 9½ inches from the sauna entrance door. The defendants moved for summary judgment contending, inter alia, that the platform did not constitute a defective condition or, alternatively, that any alleged defect was trivial in nature. The Supreme Court denied the motion. We affirm.

“Whether a dangerous or defective condition exists on the property of another so as

October 4, 2011

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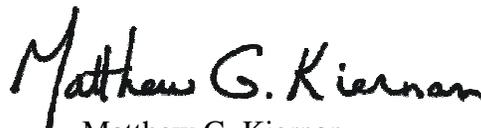
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NEW YORK SPORTS CLUB

to create liability depends on the circumstances of each case and is generally a question of fact for the jury” (*Perez v 655 Montauk, LLC*, 81 AD3d 619, 619; *see Trincere v County of Suffolk*, 90 NY2d 976, 977; *Vani v County of Nassau*, 77 AD3d 819). Although some defects are trivial and, therefore, not actionable as a matter of law (*see Trincere v County of Suffolk*, 90 NY2d at 977; *Vani v County of Nassau*, 77 AD3d at 819), “[i]n determining whether a defect is trivial as a matter of law, a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury” (*Perez v 655 Montauk, LLC*, 81 AD3d at 619-620; *see Trincere v County of Suffolk*, 90 NY2d at 977-978; *Sabino v 745 64th Realty Assoc., LLC*, 77 AD3d 722).

The defendants failed to establish their prima facie entitlement to judgment as a matter of law on the basis that the wooden platform did not constitute a defective condition (*see Mayo v Santis*, 74 AD3d 470; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165; *see also Mishaan v Tobias*, 32 AD3d 1000) or that any defect was trivial in nature (*see Trincere v County of Suffolk*, 90 NY2d 976; *DePascale v E&A Constr. Corp.*, 74 AD3d 1128, 1131; *Richardson v JAL Diversified Mgt.*, 73 AD3d 1012; *Hahn v Wilhelm*, 54 AD3d 896). Since the movants failed to establish their entitlement to judgment as a matter of law, we need not consider the sufficiency of the opposing papers (*see Kimber Mfg., Inc. v Hanzus*, 56 AD3d 615). Accordingly, the Supreme Court properly denied the defendants’ motion for summary judgment (*see Alvarez v Prospect Hosp.*, 68 NY2d 320).

MASTRO, J.P., FLORIO, ENG and SGROI, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court