Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 14
Justice

HARAN HALE JR., AN INFANT UNDER THE AGE OF 14 YEARS, BY HIS MOTHER AND NATURAL GUARDIAN, MONIQUE PAYNE AND MONIQUE PAYNE INDIVIDUALLY,	Index No. 3326/06
Plaintiffs, -against-	Motion Date February 13, 2008
	Motion Cal. No. 11
EMILIA CALDERON and IMELBA MARTINEZ,	Motion Seq. No. 1
Defendants.	

	PAPERS NUMBERED
Notice of Motion-Affid-Exhib.....	1-4
Answering Affid-Exhib.....	5-6
Reply.....	7-8

Plaintiffs commenced this action seeking to recover damages for personal injuries alleged to have been sustained by the infant plaintiff Haran Hale, Jr., (Hale) on September 9, 2005 when he stepped on a nail at the premises located at 74-12 87th Street, in the County of Queens, City and State of New York.

Defendants move for an order pursuant to CPLR 3212 granting summary judgment to defendants and dismissing the complaint as against them.

Contentions of the Parties

Defendants submit the deposition testimony of plaintiff Monique Payne (Payne), the infant plaintiff's mother. She testified that Hale was just shy of four years old at the time of the accident. As she was entering the foyer on the first floor of the premises which led to her apartment, Hale was coming out of the apartment wearing only socks and no

shoes on his feet. She heard him run to the door and when she turned around to close the vestibule door behind her, she heard him screaming. She picked him up and looked at the bottom of his right foot where she saw a nail in it. The nail was short, old and kind of rusty. She supposed that the nail came from the door which led into the foyer. She had never seen the exact type of nail on the door. She did not know how long the nail had been on the floor before Hale stepped on it.

Plaintiff Payne also testified that, on the same day, she reported the accident to the defendant Imelba Martinez (Martinez). Plaintiff Payne informed defendant Martinez that Rhea Wint, her baby sitter, had told her that defendant Martinez's brother had come to fix the door. Plaintiff Payne told defendant Martinez that she wasn't sure if the nail that Hale stepped on came from her brother's fixing the door or from some furniture or something that was moved around. She did not know exactly where the nail came from but only knew that it was in the hallway at the time of the accident. A few days before the accident, Yvette, the tenant on the second floor, had brought some of her possessions to her apartment from storage. Plaintiff Payne did not know if any of those possessions had nails in them or whether the act of moving them caused a nail to become dislodged.

Defendants also submit the deposition testimony of defendant Emilia Calderon (Calderon). She testified that she is a co-owner of the premises with her daughter defendant Martinez who has most of the responsibilities with respect thereto. There are two doors for entry, to wit, an outside door and an inner vestibule door. The vestibule door was missing a panel of glass for a long time before September 2005. She had never hired anyone to repair it before September 2005. The panels were not nailed in nor was anything else nailed to that door before the date of the accident. She was not aware of any nail sticking out of the door before the accident.

Defendant further submits the deposition testimony of defendant Martinez. Prior to the accident date, she had never received any complaints about the glass panel being missing on the vestibule door or that any nails were protruding from the door. Her brother, Angel Rivera, replaced the panel on the vestibule door after the accident. She had never noticed any nails protruding from the vestibule door or any nails on the floor of the foyer or in

the first floor foyer. Her handyman, Nelson Baez, never performed any work in the hallway or to the door that involved hammering prior to the accident.

Defendants argue that the complaint should be dismissed because defendants did not have notice of the presence of a nail on the first floor foyer. To establish a prima facie case of negligence against an owner of a premises, plaintiff must establish that the owner created the condition which caused the accident or that she had actual or constructive notice of it. Plaintiffs cannot prove that the nail was on the floor for any period of time at all since plaintiff Payne has conceded in her testimony that she did not know how long the nail was present on the floor prior to the accident. Further, plaintiffs cannot prove that the defendants created the condition because they do not know where the nail came from or how it came to be there. Defendant Payne's testimony that it came from the door is mere speculation and conjecture especially since the defendants testified that no nails were present on the door.

Plaintiffs oppose the motion and assert that defendants are merely criticizing plaintiffs' proof instead of sustaining their burden. The defendants must show that they did not create the dangerous condition or that they did not have actual or constructive knowledge of the condition. Defendants did not sustain their burden as they rely upon deposition transcripts which raise an issue of fact as to the defendants' creation of the condition at issue. Plaintiff Payne testified that she had previously complained to the landlord, defendant Martinez, concerning a loose piece of wood on the interior entrance door with nails hanging off of it. She called said defendant prior to the accident and asked for somebody to fix the door. Defendant Martinez's brother fixed the door, in response to the complaint, in the evening of September 8, 2005 or after midnight in the early morning of September 9, 2005. Plaintiff Payne was informed of such work by her babysitter who was watching her son while she worked a night shift.

Plaintiffs also argue that the deposition testimony of defendant Martinez is in direct contrast to plaintiff Payne's testimony. She denied receiving any complaints concerning nails protruding from the door or of wood being loose on the subject door. She did state that her brother made repairs to the door in the latter part of September 2005 after the accident. Such testimony raises questions of fact as to whether defendants' agent repaired the door just

hours prior to the accident. It also raises a factual issue as to whether the presence of the nail was caused and created by defendants' agents' repair work on the door. Defendants have not afforded any explanation as to how the nail appeared there. Plaintiff Payne's inability to affirmatively state exactly where the nail came from does not warrant the granting of summary judgment to defendants.

In reply, defendants assert that plaintiffs fail to raise any questions of fact which would require denial of the motion. It is clear that plaintiff cannot prove that defendants had notice of the presence of the nail in the foyer. The assertion that the "old rusty nail" came from the interior entrance door is rank speculation. It is belied by plaintiff Payne's own testimony in which she admits that she does not know where the nail came from nor how long it was on the ground prior to her son's stepping upon it. Defendant Martinez's testimony shows that the defendants had no notice concerning the presence of a nail on the floor. She testified that she never received any complaints with respect thereto. Even if the door was repaired prior to the accident, plaintiff Payne's testimony established that Yvette, another tenant, had removed some possessions from storage a few days prior to the accident. Thus, it is just as likely that the nail came from her possessions. It is not defendants' burden to explain how the nail appeared in the foyer.

Decision of the Court

The motion by defendants for summary judgment is denied.

It is well settled that: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see, Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404, NE2d 718; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649, 444 NYS2d 305; Greenberg v Manlon Realty, 43 AD2d 968, 969, 352 NYS2d 494)." (Winegrad v New York University Medical Center, 64 NY2d 851 at 853).

In the instant case, the defendants have failed to

sustain their initial burden in establishing their entitlement to judgment as a matter of law. The deposition testimony submitted by defendants in support of their motion are insufficient with respect to the issues of whether they had actual notice of the dangerous condition and whether their agent created the condition. Plaintiff Payne's testimony affirmatively shows that she lodged a complaint with defendant Martinez concerning nails hanging from the door in the foyer. Defendant Martinez specifically denies that any complaints were made to her concerning the door. She further stated that she was informed by her friend that defendant Martinez's brother was fixing the door on the evening or early morning before the accident. No testimony or affidavit from the defendant Martinez's brother is submitted to deny such allegations or to indicate what, if any, work he did on the door or in the vicinity of the door prior to the accident. Given the failure of the defendants to sustain their initial burden, the court need not consider the sufficiency of the plaintiffs' opposition papers.

Accordingly, the motion by defendants for summary judgment is denied.

Dated:April 28,2008

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HON. DAVID ELLIOT