SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

JOSEPH DELANEY,

Plaintiff,

-against-

TOWN SPORTS INTERNATIONAL d/b/a NEW YORK SPORTS CLUB and TSI STATEN ISLAND, LLC,

Defendants.

Index No: 103350/08
Calendar Nos: 3238-002
3472-003

DECISION & ORDER
HON. JOSEPH J. MALTESE

The following papers numbered 1 to 4 were marked fully submitted on the 17th day of December, 2010:

	Papers Numbered
Notice of Motion for Summary Judgment by Defendant Town Sports International d/b/a New York Sports Club And TSI Staten Island, LLC, with Supporting Papers (dated August 30, 2010)	1
Notice of Cross Motion by Plaintiff Joseph Delaney, with Supporting Papers (dated October 19, 2010)	2
Defendants' Affirmation in Opposition to Cross Motion (dated November 30, 2010)	3
Reply Affirmation (dated December 14, 2010)	4

Upon the foregoing papers, defendants' motion (No. 3238) for summary judgment dismissing the complaint is denied, as is plaintiff's cross motion (No. 3472) to amend his Supplemental Verified Bill of Particulars and Response to Combined Demands dated June 25, 2010.

In this personal injury action, plaintiff Joseph Delaney alleges that on June 27, 2006, while entering a sauna room at defendant New York Sports Club, he was caused to trip and fall when his "flip-flop" became caught on a wooden board/platform that was situated on

top of the tiled floor. According to plaintiff, his "flip flop [sic] got caught" because of the "position" of the board/platform, i.e., its location, relative to the door was approximately six to twelve inches. As stated by plaintiff at his deposition, the wooden structure "was away from the door....not right with the door, so it caused [him] to trip on [his] flip flop" (Defendants' Exhibit "G", pp 22-23).

In moving for summary judgment, defendants maintain that the complaint must be dismissed on the ground that plaintiff cannot establish that the wooden platform constituted a defect, or that any other condition in the sauna room, e.g., the lighting, was either hazardous and/or violated applicable state or local laws, codes or regulations. It is also alleged that the 1½ inch height differential between the floor and the wooden platform does not have the requisite characteristics of a trap or a snare. In the alternative, defendants maintain that the court may exercise its discretion and determine, as a matter of law, that any defects cited by plaintiff are so trivial in nature as to be non-actionable.

In support, defendants submit the affidavit of a licensed professional engineer, Jeffrey Schwalje, P.E., who conducted an inspection of the sauna room on June 18, 2010. According to this expert, the subject sauna room was in the same condition on the date of his inspection as it was in certain photographs taken on August 15, 2006 that had been authenticated and marked into evidence at plaintiff's examination before trial. On this basis, defendants' expert opines that (1) the sauna room is properly designed, constructed and maintained, and is safe for patron use, (2) the wooden platforms is structurally sound and securely positioned on the tile floor, (3) such platforms are commonly used in sauna rooms to protect the feet of patrons from contact with the tile floors, which absorb and retain heat, (4) the subject platform did not violate any codes or required standards in the State of New York, (5) the lighting provided in the sauna room was sufficient and far exceeded the New York City Building Code's requirement of "2.0 foot candles," (6) there was "good color contrast" between the tile floor and the wooden platform such that a patron could easily observe the 1 ½ inch height differential, and (7) the codes, regulations and standards referenced by plaintiff's expert and cited in the bills of particulars do not apply in this case.

In further support, defendants' rely upon plaintiff's deposition testimony to establish that insufficient lighting was not a proximate cause of the accident, and that he failed to observe the wooden platform because he was looking straight ahead as he entered the sauna room.

"Generally, the issue of whether a dangerous or defective condition exists [on premises] depends on the particular facts of each case, and is properly a question of fact for the jury. However, a property owner may not be held liable for trivial defects, not constituting a trap or a nuisance, over which a person might merely stumble, stub his or her toes, or trip. In determining whether a defect is trivial, the 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 circumstance of the injury" (Ayala v Gutin, 49 AD3d 677, 677 [internal quotation marks and citations omitted]; *see* Trincere v County of Suffolk, 90 NY2d 976, 978; Taussig v Luxury Cars of Smithtown, Inc., 31 AD3d 533).

As the proponents of a motion for summary judgment, defendants at bar have failed to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* Serano v New York City Housing Auth., 66 AD3d 867, 868; *cf.* Rodriguez v White Plains Pub. Schools, 35 AD3d 704, 705; *see also* Alvarez v Prospect Hosp., 68 NY2d 320, 324). Here, the evidentiary proof submitted by defendants in support of their motion is insufficient to eliminate all issues of fact, e.g., as to whether or not a dangerous condition arose from, *inter alia*, their placement/positioning of the raised wooden platform in relation to the entrance of the sauna room, their creation of the alleged 1½ inch height differential, and the lack of any warning signs. Furthermore, considering all these factors and taking into account the circumstances of the accident, it cannot be said, as a matter of law, that the alleged defect was so trivial in nature that it could not give rise to liability on the part of these defendants (*see* Hahn v Wilhelm, 54 AD3d 896, 898; Serano v New York City Housing Auth., 66 AD3d at 868; Fairchild v J. Crew Group, Inc., 21 AD3d 523, 524). Moreover, the fact that the alleged hazard may have been "clearly visible" would not negate defendants' duty to maintain their premises in a reasonably safe condition, but rather, creates an issue of fact as to plaintiff's comparative negligence (*id.* at 524).

In view of the foregoing, it is not necessary to consider the sufficiency of plaintiff's opposing papers (*see* Alvarez v Prospect Hosp., 68 NY2d at 324).

Turning to the cross motion, plaintiff seeks leave to amend his Supplemental Verified Bill of Particulars and Supplemental Response to Combined Demands dated June 25, 2010 to substitute the codes, regulations and standards erroneously cited therein with the following: New York City Administrative Code §§27-232, 27-530, 27-540 and 27-381(a); New York State Industrial Code §§36-2.1, 36-2.6 (12 NYCRR §§ 36-2.1, 36-2.6); the lighting standards set by the Illuminating Engineering Society as specified in the Lighting Handbook 1981 Application Volume; and the American National Standard Institutes (hereinafter, "ANSI") A1264.2-2001, §§8.1, 8.4.1, and 8.4 (*see* CPLR 3025[b], 3042).

Inasmuch as plaintiff testified that his fall was not the result of inadequate lighting in the sauna room, a factual basis is lacking for any claims under the cited provisions of the New York City Building Code (Administrative Code, tit. 27), the New York State Industrial Code (12 NYCRR, Part 23) or any other lighting requirements pertaining to places of public assembly[1] (*see* Outlaw v Citibank, N.A., 35 AD3d 564, 565). Equally without a factual basis is plaintiff's attempt to predicate a claim based on the alleged violations of the cited "standards" promulgated by ANSI. As such, "[a]lthough leave to serve an amended pleading should be liberally granted, leave should be denied, as a matter of law, where [,as here,] the proposed amended is patently lacking in merit" (Giovinco v Goldman, 276 AD2d 469, 469 [internal quotation marked omitted]; *see* Perrini v City of New York, 262 AD2d 541).

[1]A place of public assembly is defined in New York City Administrative Code §27-232 as: "an enclosed room or space in which seventy-five or more persons gather for religious, recreational, educational, political or social purposes...or for similar group activities or which is designed for use by seventy-five or more persons gathered for any of the above reasons..."

Accordingly, it is hereby:

ORDERED, that the motion and the cross motion are denied.

E N T E R,

Dated: January 25, 2011

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Joseph J. Maltese
Justice of the Supreme Court