SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MARTHA RESTIVO,

Plaintiff,

- against -

FORTY GLEN, LLC and PARAGON SALON & DAY SPA, INC.,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 17375/09
Motion Seq. Nos.: 01, 02, 03
Motion Dates: 05/02/11
05/02/11
05/02/11

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 02), Affirmation and Affidavit	2
Notice of Cross-Motion (Seq. No. 03), Affirmation and Exhibits	3
Affirmation in Partial Opposition to Motion (Seq. No. 01) and Affidavit	4
Affirmation in Opposition to Cross-Motion (Seq. No. 03) and Affidavits	5
Reply Affirmation	6
Reply Affirmation	7

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Forty Glen, LLC ("Forty Glen") moves (Seq. No. 01), pursuant to CPLR § 3212, for an order granting summary judgment in its favor and dismissing plaintiff's Verified Complaint and all cross-claims against it on the basis that plaintiff has failed to establish a *prima facie* case of negligence as and against defendant Forty Glen; or, in the alternative, moves for an order that defendant Paragon Salon & Day Spa, Inc. ("Paragon") is required to indemnify

defendant Forty Glen for any and all damages in this action. Plaintiff submits partial opposition to this motion. Plaintiff moves (improperly denominated as a cross-motion) (Seq. No. 02), pursuant to CPLR § 3212, for an order granting it summary judgment as to defendant Paragon. Defendant Paragon opposes plaintiff's motion and cross-moves (Seq. No. 03), pursuant to CPLR § 3212, for an order granting summary judgment in its favor and dismissing plaintiff's Verified Complaint and any and all cross-claims on the grounds that no material issues of fact exist regarding any liability and/or negligence on the part of defendant Paragon for the happening of the subject accident as the alleged defect was trivial and, therefore, not actionable. Plaintiff opposes defendant Paragon's cross-motion.

Defendant Paragon operates a full service hair salon at 40 Glen Cove Road in Greenvale, New York. It leased said premises from defendant Forty Glen. Following the commencement of the lease, dated April 1, 2005, defendant Paragon had installed a new ceramic floor over the existing wood floor.

Prior to her accident, plaintiff had patronized defendant Paragon between ten and twenty occasions. On the day of her fall, plaintiff had a manicure, pedicure, hair coloring and a blow-dry. Before proceeding to the front of the premises to pay for these services, she was walking to the bathroom when she tripped on a raised ceramic tile. The whole side of the tile was raised approximately one-quarter of an inch. Plaintiff testified that there used to be a wood floor before defendant Paragon installed the ceramic floor.

Francine Medici, a nail technician and waxer at defendant Paragon for approximately one year at time of plaintiff's fall, states that she saw plaintiff's foot get caught "on a raised unlevel tile." *See* Plaintiff's Medici Affidavit in Support (Motion Seq. No. 02) ¶ 3. She further avers that she saw "clients and employees trip over that tile." *Id.* According to Ms. Medici, Anthony DiMartino, the owner of defendant Paragon, would make comments such as "pick up

your feet," "watch where you are walking" and "it is those stupid flip flops." *Id.* During her year at defendant Paragon, Ms. Medici was aware of water collecting on the wood floor below the raised tile and leaking into the basement. Ms. Medici no longer works at defendant Paragon.

Anthony DiMartino, the president and principal of defendant Paragon, testified at his Examination Before Trial that, up until plaintiff's accident, he was not aware of an unlevel tile condition at defendant Paragon. He was present on the day of plaintiff's accident and she did not point out any raised tile condition as the cause for her fall. He helped her up. He did not, however, check the floor area where she fell. Mr. DiMartino testified that he had known plaintiff for forty years and had worked with her in his father's salon. Plaintiff even worked for Mr. DiMartino for one day answering the telephones and her step daughter was the receptionist at defendant Paragon on the day of plaintiff's fall. *See* Defendant Forty Glen's Affirmation in Support Exhibit J.

Summary judgment is the procedural equivalent of a trial. *See S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. *See Matter of Suffolk County Dept. of Social Servs. v. James M.*, 83 N.Y.2d 178, 608 N.Y.S.2d 940 (1994). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law. *See Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. *See id.* Summary judgment will not be defeated by surmise, conjecture or suspicion. *See Shaw v.*

Time-Life Records, 38 N.Y.2d 201, 379 N.Y.S.2d 390 (1975).

On a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *See Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 834 N.Y.S.2d 503 (2007); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004). Furthermore, the court should refrain from resolving issues of credibility. *See Forrest v. Jewish Guild for the Blind, supra* at 315; *S.J. Capelin Associates, Inc. v. Globe Mfg. Corp., supra* at 341.

Liability of the Landlord, Defendant Forty Glen

An out-of-possession landlord establishes its *prima facie* entitlement to judgment as a matter of law dismissing a claim for premises liability by establishing lack of control over the premises and no contractual obligation to maintain or repair the premises. *See Panico v. Jiffy Lube Intern., Inc.* 86 A.D.3d 553, 926 N.Y.S.2d 833 (2d Dept. 2011); *McElroy v. Bernstein*, 72 A.D.3d 757, 898 N.Y.S.2d 471 (2d Dept. 2010) *lv app. den.* 15 N.Y.3d 704, 907 N.Y.S.2d 752 (2010); *Euvino v. Loconti*, 67 A.D.3d 629, 888 N.Y.S.2d 571 (2d Dept. 2009). A landlord's reservation of the right to inspect and repair does not suffice to establish liability where the alleged defect violated no statutory obligation. *See Espada v. City of New York*, 74 A.D.3d 1276, 903 N.Y.S.2d 237 (2d Dept. 2010); *O'Connell v. L.B. Realty Co.*, 50 A.D.3d 752, 856 N.Y.S.2d 165 (2d Dept. 2008).

Here, the lease gives possession of the premises to defendant Paragon for use as a hair salon, thereby clearly establishing that defendant Forty Glen is an out-of-possession landlord. Defendant Paragon was required to make all repairs, except structural ones. *See* Defendant Forty Glen's Affirmation in Support Exhibit G ¶ 59. "Structural repairs" are defined in the lease as "repairs to foundations, load bearing walls and roofs." *Id.* at ¶ 40 (P). In addition, the "installation of flooring" is specifically included as part of the "Tenant's Work." *Id.* at ¶ 49. Consequently, defendant Forty Glen had no contractual obligation to make any repairs to the floor at the premises. While plaintiff is correct that defendant Forty Glen did retain the right to

inspect and make repairs, she has failed to raise a triable issue of fact that the alleged defect in the premises constituted a statutory violation.

Based on the foregoing, defendant Forty Glen meets the test for non-liability and its motion (Seq. No. 01) for summary judgment dismissing the Verified Complaint and defendant Paragon's cross-claim against it must be **GRANTED**.

Liability of The Tenant, Defendant Paragon

Defendant Paragon seeks summary judgment dismissing the Verified Complaint on the grounds that the raised floor tile upon which plaintiff tripped was a "trivial" defect and therefore not actionable. There is no "minimal dimension test" or *per se* rule that a defect must be of a certain minimum height or depth in order to be actionable. *See Trincere v. County of Suffolk*, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997). The Court must consider the "width, depth, elevation, irregularity and appearance of the defect, along with the time, place and circumstance of the injury." *Id.* at 977-978.

Plaintiff testified that one whole side of a large tile was raised one-quarter (1/4) inch and there is evidence that the grout was of a similar color to the tile. The Court is aware that height differentials of one-quarter (1/4) inch have been found to be trivial. *DePascale v. E&A Constr. Corp.*, 74 A.D.3d 1128, 904 N.Y.S.2d 109 (2d Dept. 2010); *Sulca v. Barry Hers Realty Inc.*, 29 A.D.3d 779, 815 N.Y.S.2d 204 (2d Dept. 2006). However, there is also case law that the presence of an edge, rather than a gradual sloping surface, plays a role in the determination of triviality. *See Argenio v. Metropolitan Transp. Auth.*, 277 A.D.2d 165, 716 N.Y.S.2d 657 (1st Dept. 2000); *Nin v. Bernard*, 257 A.D.2d 417, 683 N.Y.S.2d 237 (1st Dept. 1999). Here the photographs and the testimony presented regarding the raised tile and the circumstances of plaintiff's fall raise a triable issue of fact as to whether the height differential in this case is trivial, and, even if trivial, whether it constituted a trap or snare. *See generally Perez v. 655 Montauk, LLC*, 81 A.D.3d 619, 916 N.Y.S.2d 137 (2d Dept. 2011); *Vani v. County* of *Nassau*, 77 A.D.3d 819, 909 N.Y.S.2d 742 (2d Dept. 2010); *Portanova v. Kantlis*, 39 A.D.3d 731, 833

N.Y.S.2d 652 (2d Dept. 2007); *Herrera v. City of New York*, 262 A.D.2d 120, 691 N.Y.S.2d 504 (1st Dept. 1999).

Furthermore, a triable issue of fact is certainly presented as to whether defendant Paragon had prior notice of the defect. Accordingly, both the motion by plaintiff (Seq. No. 02) and the cross-motion by defendant Paragon for summary judgment (Seq. No. 03) must be **DENIED**.

The remaining parties shall appear for Trial in Nassau County Supreme Court, Central Jury Part, at 100 Supreme Court Drive, Mineola, New York, on September 26, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
September 9, 2011