SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

----------x

DERRICK HAYNES, NADINE HAYNES, as Guardian of DERRICK HAYNES and NADINE HAYNES individually,

DECISION AND ORDER
Index No. 150857/13

Plaintiffs,

-against-

BELLPORT PROPERTY INVESTORS I, LLC and PANCO MANAGEMENT of NEW YORK, LLC,

Defendants,

----------x

JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, defendants Bellport Property Investors I, LLC (Bellport) and Panco Management of New York, LLC (Panco) move for summary judgment. Plaintiffs Derrick Haynes (Haynes), Nadine Haynes, as Guardian of Derrick Haynes and Nadine Haynes individually oppose the motion. The motion is denied.

Background

In August 2012, the Hayneses moved into an apartment owned by Bellport and managed by Panco. On the morning of September 9, 2012, Haynes planned on shaving while in the master bathroom (Affirmation in Support [Supp], Ex E at 77-78, 81). He stepped back to get a towel from the rack behind him and his sock got caught in a vent on the floor, causing him to fall forward and hit his head (Supp, Ex E at 81-90).

Plaintiffs commenced this action to recover for injuries sustained after Haynes tripped and fell. Defendants move for summary judgment. They urge that the bathroom vent was not elevated more than half an inch and was only a *de minimus* defect that is too trivial to be actionable.

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues(*see Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden, which is "a heavy one," is on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts (*see William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the Court against summary judgment" (*id.*). If the movant, however, carries its "heavy" burden, then the burden shifts to the opponent to establish, through competent evidence, that there is a

material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

A defendant moving for judgment based on the triviality of a defect "must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact" (*Hutchinson v Sheridan Hill House, Corp.*, 26 NY3d 66, 79 [2015]).

Here, defendants rely on an affidavit from James C. Otis, Ph.D., a biomechanical engineer, who reviewed, among other things, plaintiffs' complaint, bill of particulars, photographs and deposition transcripts and who inspected the bathroom on August 20, 2014 (Otis Affidavit at ¶ 3). Dr. Otis opines that:

> "the subject vent was elevated, if at all, no more than 1/2 of an inch at the time of the alleged incident. Furthermore, there was no irregularity, and nothing on the edge, top surface, or undersurface of the vent, that presented any danger, or that would cause a sock to 'catch' on it as alleged by Plaintiffs. Lastly, the bathroom was well-lit and, according to Plaintiffs' testimony, the alleged condition was well-known by them for weeks prior to the alleged incident. As such . . . even assuming [plaintiffs'] allegations to be true, the alleged condition was *de minimus* and in no way constituted a snare or trap-like condition" (*id.* at ¶¶ 5-8).

Even assuming that defendants met their heavy burden--based on the eight-paragraph expert affidavit that makes no mention of whether the surrounding circumstances increased the risks posed by the elevated vent other than mentioning that the bathroom was well-lit and the problem well-known--plaintiffs have shown that a question of fact exists as to whether the condition was "difficult to pass over safely on foot in light of the surrounding circumstances" (*Hutchinson*, 26 NY3d at 80; *see also King v City Bay Plaza, LLC*, 118 AD3d 476 [1st Dept 2014]; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165 [1st Dept 2000]; *Nin v Bernard*, 257 AD2d 417 [1st Dept 1999]).

Plaintiffs' expert, Vincent Ettari, P.E., an engineer, opines that regardless of whether the vent was elevated no more than half an inch "the protruding floor vent cover was not physically insignificant and . . . did present a tripping hazard. . . . [The] risk that the floor vent cover presented was increased by the small size of the bathroom; the layout of the bathroom (including the location of the towel rack and window sill); and the nature of the bathroom's use, including the reasonable foreseeable uses in which people would be wearing socks, slippers, barefoot or otherwise not wearing outdoor shoes while moving about in the bathroom" (Opposition

to Motion, Ex 1 [Ettari Affidavit] at ¶¶ 13, 15). Mr. Ettari further disagreed with Dr. Otis' opinion that nothing about the vent made it likely to catch on a person's sock, explaining that the vent cover "had a sharp edge that, when protruding from the floor as it was at the time of the accident, was certainly dangerous and capable of 'catching' a sock or a foot that came into contact with it" (*id.* at ¶ 16).

Contrary to defendants' contention on reply, Mr. Ettari accounts for aggravating circumstances and awareness of the condition prior to the accident does not undermine "any argument that the alleged defect was non-trivial" (Reply at ¶ 14).

Accordingly, it is ORDERED the defendants' motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: October 14, 2016

HON. JENNIFER G. SCHECTER