NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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ADIA WALKER and JOHN WALKER,

Plaintiffs,

-against-

ESPLANADE GARDENS, INC.,

Defendants.

Index No. 151942/2014
DECISION/ORDER
Motion Seq. No. 003

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ESPLANADE GARDENS, INC.,

Third Party Plaintiff,

-against-

COINMACH CORPORATION,

Third Party Defendant.

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Recitation as required by CPLR 2219 (a) of the papers considered in reviewing defendant Esplanade Gardens, Inc.'s motion for summary judgment to dismiss plaintiffs' Adia Walker and John Walker complaint.

Papers	**NYSCEF Documents Numbered**
Defendant's Notice of Motion and Affirmation in Support	68-79
Plaintiffs' Affirmation in Opposition	83-92
Defendant's Reply Affirmation	94

Steven Wildstein, P.C., Great Neck (Michael Maiolica of counsel), for plaintiffs.
White Fleischner & Fino, LLP, New York (Joseph M. Glatstein of counsel), for defendant.

Gerald Lebovits, J.:

Defendant Esplanade Gardens, Inc. (Esplanade Gardens), moves under CPLR 3212 for summary judgment and to dismiss the complaint.

This is a trip and fall case in which plaintiff Adia Walker (Walker) and her husband John Walker are suing defendant Esplanade Gardens, the owner of the building in which they reside.

Walker alleges that, on December 7, 2013, when she was in the laundry room of her building, her big toe and/or the flip flop she was wearing got caught in an opening in a circular grate covering a drain hole, located directly in front of the washing machine Walker was

intending to use. Walker alleges that, when she was reaching for the handle of the door of the machine, her toe got caught in the grate. While trying to extricate her toe from the grate, she lost her balance, her shoulder struck the wall near the washing machine, and she landed on the floor, injuring herself.

Relying on Walker's examination before trial (EBT) testimony, defendant notes that, before her accident, Walker had seen the drain cover "a lot of times" (Glatstein affirmation in support, exhibit F [Walker tr] at 98]), was "pretty familiar" with the laundry room (*id.* at 201-202), and had never made any complaints about the drain cover. (*Id.* at 97-98.) Defendant further notes Walker's testimony that the lights in the laundry room were turned on and that she did not have trouble seeing the floor at the time of her accident. (*Id.* at 213.)

Defendant submits the affidavit of a professional engineer, David A. Guido , P.E., CSP of Affiliated Engineering Laboratories, Inc., who inspected the grate. Guido states that the grate measures 5½ inches in diameter, and that the rectangular opening in the grate is approximately 1 inch wide by 1 7/8 inches long. According to Guido, because the opening was only one inch in its least dimension, and less than 2 inches at any point, the opening did not constitute a "hole" pursuant to 29 CFR § 1910.21 or the American National Standards Institute (ANSI) standard A1264.1-1995, which require an opening to be at least two inches in its least dimension. Therefore, according to Guido, the opening in the grate cannot reasonably be considered a safety hazard.[1]

In addition, Guido states that the opening in the grate covering the drain is the same size or smaller than the openings commonly found in drainage grates in sidewalks and city streets. Finally, Guido states that

> "[t]he presence of the floor drain was visible and obvious to persons making reasonable observations along their intended path of travel. Sufficient artificial illumination was available for persons to recognize and perceive approaching walking surface conditions. The size of the rectangular grate opening was de minimus and did not violate any known applicable codes or standards." (Affirmation in support, Joseph M. Glatstein, exhibit J [Guido aff], ¶ 10.)

Quoting the decision of the Court of Appeals in *Trincere v County of Suffolk* (90 NY2d 976, 978 [1997] [internal quotation marks and citation omitted]), defendant argues that the court should consider the "time, place and circumstance" of the injury. Citing trip and fall cases that

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[1] 29 CFR § 1910.21 contains definitions promulgated pursuant to the federal Occupational Safety and Health Act (OSHA) and therefore have no relevance to this matter. Defendant does not explain the relevance to this matter, if any, of the ANSI standard A1264.1-1995 definition of a hole. (*See e.g. Jemmott v Rockwell Mfg. Co., Power Tools Div.*, 216 AD2d 444, 444-445 [2d Dept 1995] [neither OSHA regulations, nor ANSI standards applicable to strict product liability actions between employees and manufacturers].)

involved defects in sidewalks and parking lots that were similar in size to the opening in the grate, defendant argues that the opening constituted a mere trivial defect which is non-actionable. (*See Milewski v Washington Mut., Inc.*, 88 AD3d 853 [2d Dept 2011] [finding alleged defect between one to two inches long in parking lot is non-actionable trivial defect]; *accord Hawkins v Carter Community Hous. Dev. Fund Corp.*, 40 AD3d 812 [2d Dept 2007] [finding that during daylight hours, alleged defect between 1 1/4 inches deep and approximately 1 inch wide on level dry sidewalk maintained in good condition not a trap or snare and too trivial to be actionable]; *Figueroa v Haven Plaza Hous. Dev. Fund Co.*, 247 AD2d 210 [1st Dept 1998] [finding defect that is 1½ inches deep is trivial as a matter of law].)

Defendant also quotes *Nunez v Morwood Dry Cleaners* (116 AD3d 831, 831 [2d Dept 2014]), which states that "a property owner . . . may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip." Finally, defendant argues that a landowner has no duty to warn of conditions which are in plain view and are open and obvious. (*See Verdejo v New York City Hous. Auth.*, 105 AD3d 450 [1st Dept 2013]; *Schiavone v Bayside Fuel Oil Depot Corp.*, 94 AD3d 970 [2d Dept 2012].)

In response to defendant's expert, Walker submits the affidavit of Daniel S. Burdett, P.E., who has been a licensed engineer in the state of New York since June 1965.[2] Burdett states that he conducted an inspection of the accident site on May 2, 2014, that the opening in the middle of the drain cover measured approximately 1 1/8 inches wide by 1 7/8 inches long, and that the cover was easily rotated in the recess in the floor because, although there were pre-drilled screw holes in the cover, there were no screws securing the cover to the floor. Burdett describes the opening as a "cut-out in the middle of the circular drain cover consist[ing] of four linear, jagged edges ... [which] constituted a trap or a snare within which one's foot could easily become caught and trapped." (Affirmation in opposition of Michael Maiolica, exhibit 2 [Burdett aff], ¶¶ 11, 13.) Burdett further states that

"[i]t is my professional engineering opinion that the subject drain cut-out was unsafe, hazardous and deficient in that it represents a classic snaring/entrapment condition. It is also my professional engineering opinion that the subject drain cover was unsafe, hazardous and deficient because it was not safely and securely attached to the floor within the laundry room. Both of these conditions were separately and together substantial factors in causing Ms. WALKER's accident." (*Id.*, ¶¶ 23, 24.)

As plaintiffs argue, "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." (*Young v City of New York*, 250 AD2d 383, 384 (1st Dept 1998] [internal quotation marks and citations omitted]; *accord Glickman v City of New York*, 297 AD2d 220, 221 [1st Dept 2002] [internal quotation marks and citation omitted] ["even

[2] Although Burdett states that his curriculum vitae is attached to his affidavit, it appears to have been inadvertently omitted from plaintiff's submissions.

a trivial defect may constitute a snare or trap"].) Furthermore, although defendant argues that a defect on which someone can stub his or toe may still be trivial and non-actionable, here, plaintiff alleges that her toe and/or flip flop actually got caught in an opening in the grate and that she fell while trying to free her foot from the grate. (Walker tr at 42, 56.)

With respect to defendant's argument that it should be awarded summary judgment because the alleged defect was open and obvious, one of the very cases cited by defendant qualifies the proposition on which defendant relies, stating "[a] landowner . . . has no duty to protect against or warn about open and obvious conditions *that are not inherently dangerous.*" (*Schiavone*, 94 AD3d at 971 [citations omitted, emphasis supplied].) Furthermore, as plaintiff argues, proof that a condition is open and obvious may be relevant to the question of comparative negligence, but does not preclude a finding of liability against the property owner. (*Russo v Home Goods, Inc.*, 119 AD3d 924, 925 [2d Dept 2014].)

Here, we have directly conflicting opinions of two engineering experts about whether the opening in the grate was a trivial defect or a trap or snare. The court must not determine issues of credibility on a motion for summary judgment. (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974].) "The weight to be afforded conflicting testimony of experts is a matter peculiarly within the province of the jury." (*Heberer v Nassau Hosp.*, 119 AD2d 729, 730 [2d Dept 1986].) The conflicting opinions of these experts preclude a grant of summary judgment. (*Erdogan v Toothsavers Dental Servs., P.C.*, 57 AD3d 314, 315-316 [1st Dept 2008]; *accord Haas v F.F. Thompson Hosp., Inc.*, 86 AD3d 913, 914 [4th Dept 2011] [finding conflicting opinions of experts create credibility issues involved in evaluating their opinions and raise issues that cannot be decided on a motion for summary judgment]; *Abato v Millar El. Serv. Co.*, 261 AD2d 873, 874 [4th Dept 1999] ["conflicting expert opinions should not be resolved on a motion for summary judgment"]; *Gold v City of New York*, 42 Misc 3d 1209 [A], 2014 NY Slip Op 50014 [U], *5 [Sup Ct, NY County 2014] [conflicting views of experts regarding whether defect in sidewalk is trivial precludes summary judgment].)

Accordingly, it is hereby

ORDERED that defendant Esplanade Gardens, Inc.'s motion for summary judgment is denied.

Dated: January 29, 2018

J.S.C.
HON. GERALD LEBOVITS
J.S.C.