IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LISA M. YANCY and DOUGLAS YANCY	)	
Plaintiffs,	)	
	)	C.A. No: N11C-06-127 CLS
v.	)	
TRI STATE MALL LIMITED PARTNERSHIP, THE ROSEN GROUP, and TOM NGUYEN T/A KIM'S NAIL SALON II	)	
Defendants.	)	

Date Submitted: April 9, 2014
Date Decided: May 29, 2014

On Defendants Tri State Mall Limited Partnership and The Rosen Group's Motion for Summary Judgment. **DENIED.**

On Defendant Tom Nguyen T/A Kim's Nail Salon II's Renewed Motion for Summary Judgment. **DENIED.**

ORDER

Timothy A. Dillon, Esq., McCann, Schaible & Wall, LLC, 300 Delaware Avenue, Suite 805 Wilmington, Delaware 19801. Attorney for Plaintiffs.

Sandra F. Clark, Esq., Reger Rizzo & Darnall LLP, 1001 Jefferson Street, Wilmington, DE 19801. Attorney for Defendant Tom Nguyen T/A Kim's Nail Salon II.

Thomas J. Gerard, Esq., Marshall, Dennehey, Warner, Coleman & Goggin. Wilmington, DE 19899. Attorney for Defendants Tri State Mall and the Rosen Group.

Scott, J.

Introduction

Before the Court is Defendants Tri-State Mall Limited Partnership ("Tri-State Mall") and The Rosen Group, Inc.'s ("The Rosen Group") (herein, collectively, "Premises Defendants") Motion for Summary Judgment and Defendant Tom Nyugen T/A Kim's Nail Salon II (herein, the "Nail Salon") Renewed Motion for Summary Judgment. The Court has reviewed the parties' submissions and, for the following reasons, the motions are **DENIED**.

Background

On the rainy day of June 13, 2009, at about 3:30 p.m., Plaintiff Lisa M. Yancy ("Mrs. Yancy") slipped and fell while on the premises located at 333-401 Naamans Road in Claymont, Delaware. The premises, a shopping center known as the Tri-State Mall, was owned and operated by the Premises Defendants. Mrs. Yancy visited the premises, accompanied by her mother and daughter, Vanessa Yancy, in order to receive a manicure and pedicure from the Nail Salon, which was located inside the Tri-State Mall. While Mrs. Yancy never received a pedicure from this particular nail salon, she had received pedicures about six times before.[1]

[1] Premises Defs. Mot., Ex. B, Mrs. Yancy Dep. at 21:17

After her pedicure was completed, Mrs. Yancy was given an opportunity to allow her nail polish to dry before leaving the Nail Salon. She was wearing a pair of non-textured foam pedicure flip-flops which were provided to her by the Nail Salon. Mrs. Yancy continued to wear the flip-flops because she did not want to smudge her nail polish.[2] After exiting the Nail Salon, Mrs. Yancy slipped and fell on what appeared to be a "hole," "depression," or "crack" at the bottom of a blue handicap ramp in the front of the premises.[3] At the time, Mrs. Yancy was not looking down at the concrete because she was looking out toward the parking lot.[4] While Mrs. Yancy was lying on the ground and waiting for an ambulance, an employee from the Nail Salon removed her slippers.[5]

On June 13, 2011, Mrs. Yancy and her husband ("Plaintiffs") filed this action against the Premises Defendants and the Nail Salon.[6] Plaintiffs asserted that Mrs. Yancy was "required to descend a blue-painted handicap ramp which was broken, cracked and uneven and which lacked any rail, texturing or anti-slip strips."[7] Plaintiffs also asserted that the Premises Defendants were negligent in that they failed to properly and reasonably maintain the property, permitted a dangerous condition to exist, failed to

[2] Mrs. Yancy Dep. at 29:15-18.
[3] *Id*. at 36:7, 81:22, 82:3-23; Premises Defs. Mot., Ex. A, Photographs.
[4] Mrs. Yancy Dep. at 36:1-5, 109:9-14.
[5] *Id*. at 86:9-14.
[6] Mr. Yancy's claim is for loss of consortium.
[7] Compl. at ¶ 8.

exercise reasonable care, and failed to properly and reasonably inspect the premises.[8] Plaintiffs claimed that the Nail Salon negligently "suppl[ied] [Mrs. Yancy] with foam slippers which lacked any type of traction knowing that she would be going outside to her car in heavy rain."[9]

On July 7, 2012, the Nail Salon filed a motion for summary judgment, arguing that it held no duty to protect Plaintiff from the risks associated with wearing the foam flip-flops because such risks are open, apparent, and obvious.[10] The Court denied summary judgment and explained that the Nail Salon may have owed a duty to warn Mrs. Yancy of the risks of wearing the foam flip flops in the rain if a jury finds that if a reasonable person would be assumed ignorant of the risks.[11]

On November 27, 2013, the Premises Defendants filed its motion for summary judgment and, on February 27, 2014, the Nail Salon filed a renewed motion for summary judgment.

<u>Parties' Contentions</u>

The Premises Defendants move for summary judgment on the ground that Plaintiffs have not identified an expert to establish the standard of care, a violation of the standard of care, statute, or code, or the existence of a

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[8] *Id*. at ¶ 11.
[9] *Id.* at ¶ 12.
[10] Nail Salon Mot. for Summary Judgment at ¶10 (citing *Brown v. Dover Downs, Inc.*, 2011 WL 3907536 (Del. Super. Aug. 30, 2011) *aff'd,* 38 A.3d 1254 (Del. 2012)).
[11] Order dated November 13, 2012, D.I. 47697485.

dangerous condition. In addition, the Premises Defendants also argue that, even if there was a dangerous condition, the Premises Defendants owed no duty to Mrs. Yancy because it was her duty to maintain a lookout for hazards in plain view.

In response to the Premises Defendants' motion, Plaintiffs contend that they have established the existence of a dangerous condition though Mrs. Yancy's and her daughter's deposition testimony and the photographs of the ramp. Plaintiffs argue that testimony from a liability expert is unnecessary here because this is a straightforward slip-and-fall case that does not involve technical issues. Plaintiffs also argue that summary judgment should not be granted because genuine issues of fact remain which should be left for the jury.

The Nail Salon has renewed its motion for summary judgment, reasserting its position that it owed no duty to Mrs. Yancy because a patron of a nail salon should be expected to be aware of the risks of wearing non-textured pedicure flip flops. Relying on Section 392 of the Restatement (Second) of Torts, the Nail Salon points to the fact that Mrs. Yancy had prior experience wearing pedicure flip-flops for further support that it did not owe her a duty. In response, Plaintiffs argue that there is no basis to assume that the risk of wearing that type of footwear in wet weather was indeed obvious

to Mrs. Yancy and that, per this Court's prior ruling, such an issue is a question for the jury.

Standard of Review

The Court will grant a motion for summary judgment, "after adequate time for discovery,"[12] "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[13] "[G]enerally speaking, issues of negligence are not susceptible of summary adjudication. It is only when the moving party establishes the absence of a genuine issue of any material fact respecting negligence that summary judgment may be entered."[14] In rendering a decision, the Court views the facts in a light most favorable to the nonmoving party.[15]

Discussion

I. The Premises Defendants' Motion for Summary Judgment

In an action for negligence, the plaintiff must "establish that: 1) the defendant owed the plaintiff a duty of care; 2) the defendant breached that duty; 3) the plaintiff was injured; and 4) the defendant's breach was the

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[12] *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991).
[13] Del. Super. Ct. Civ. R. 56(c).
[14] *Rowan v. Toys "R' Us, Inc.*, 2004 WL 1543238, at *2 (Del. Super. June 18, 2004).
[15] *Roberts v. Delmarva Power & Light Co.,* 2 A3.d 131, 136 (Del. Super. 2009).

proximate cause of the plaintiff's injury."[16] A landowner owes a duty to a business invitee "to exercise reasonable care to protect him from foreseeable dangers that he might encounter while on the premises."[17] Delaware courts follow Section 343 of the Restatement (Second) of Torts, which states that a landowner is liable for physical harm only if he

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.[18]

Thus, if a landowner permits a dangerous condition to persist or fails to give warning, the owner may be liable. However, "a business' duty to properly maintain walking areas does not exempt customers from exercising reasonable care when walking."[19] "[I]f a danger is so apparent that the invitee can be reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning."[20]

The Court finds that an issue of fact exists as to whether a dangerous condition existed. In her deposition, Mrs. Yancy testified that a hole or

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[16] *Campbell v. DiSabatino*, 947 A.2d 1116, 1117 (Del. 2008).
[17] *DiOssi v. Maroney*, 548 A.2d 1361, 1364 (Del. 1988).
[18] Restatement (Second) of Torts § 343 (1965).
[19] *Polaski v. Dover Downs,* 2012 WL 3291783, at *1, 49 A.3d 1193 (Del. Aug. 14, 2012)(TABLE).
[20] *Niblett v. Pennsylvania R. Co.*, 158 A.2d 580, 582 (Super. Ct. 1960).

decompression caused her to trip. She also stated that her foot got "hung up" on the crack that she identified in the photographs.[21] Mrs. Yancy's daughter, Vanessa Yancy, testified that she observed a crack in the pavement which she believed caused her mother to fall.[22] Based on this testimony and the photographs, a reasonable jury could conclude that there was a crack in the ramp which constituted a dangerous condition.

According to the Premises Defendants, even if the depression or crack that Mrs. Yancy identified in photographs caused her to fall, it was in plain view and she could have avoided it. The Premises Defendants support this argument with Mrs. Yancy's deposition testimony in which she stated that she was not looking where she was walking, but if would have seen a hazard she would have avoided it.[23] Since such issues of negligence are rarely susceptible to summary judgment,[24] the Court also finds that the issue of whether the hole or decompression was so apparent that Mrs. Yancy should have noticed it and, thus, whether the condition itself constituted an adequate warning are issues that should be determined by the fact-finder in this case.

The Premises Defendants also argue that summary judgment should be granted in this case because Plaintiffs have not identified an expert to

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[21] *Id.* at 81:18-22; Premises Defs. Ex. A., Photographs.
[22] Pls. Resp. to Premises Defs. Mot, Ex. F., Vanessa Yancy Dep. at 25:17-21, 26: 3-6.
[23] Mrs. Yancy Dep. at 110:1-12.
[24] *See Ebersole v. Lowengrub*, 180 A.2d 467, 469 (1962).

testify regarding the existence of the dangerous condition or the standard of care. Although expert testimony may be required to establish the existence of a dangerous condition or the relevant standard of care, it is not required in all cases.[25] The rule in Delaware is that "[e]xpert testimony is generally required when the 'understanding and analysis of [the] issues [is] beyond the ken of the typical jury.'"[26] For example, in *Polaski v. Dover Downs*, the Supreme Court upheld this Court's finding that expert testimony was required to establish the existence of a design defect in a curb in a slip-and-fall action by a patron against a casino.[27] The Court stated that, "[a]lthough general negligence claims do not require expert testimony and can be evaluated by a lay person, design defect claims rely on facts beyond a layperson's knowledge."[28] Therefore, the patron was required to "establish, via expert testimony, what is 'custom' or 'very common practice' as an alternative means of determining negligent or defective design."[29]

In *Vandiest v. Santiago*, this Court held that expert testimony was not required to establish the local standard of care for a property manager in a

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[25] *See e.g., Simmons v. Delaware Technical & Cmty. Coll.*, 2012 WL 1980409, at *2 (Del. Super. May 17, 2012)(liability expert testimony was not required where a chain allegedly created the hazard which caused plaintiff to trip); *Vandiest v. Santiago*, 2004 WL 3030014 (Del. Super. Dec. 9, 2004).
[26] *Vandiest,* 2004 WL 3030014 at *7 (quoting *Mazda Motor Corp. v. Lindahl,* 706 A.2d 526, 533 (Del.1998)); *See* D.R.E. 702.
[27] *Polaski*, 2012 WL 3291783 at *2
[28] *Id.*
[29] *Id.*

slip-and-fall case involving a loose handrail and a faulty doorframe because property managers are not considered "professionals" who are held to an elevated standard of care.[30] In doing so, the Court distinguished those cases in which courts required plaintiffs to prove that the defendants' standard of care was higher than the standard of care required by a specific code or regulation.[31] The Court ultimately concluded that since the "negligent acts" "concern[ed] a loose handrail and a faulty doorframe", "'[s]uch issues were not beyond the understanding of the typical jury and thus do not require expert testimony.'"[32] In *Small v. SuperFresh Food Markets, Inc.,* a slip-and-fall case involving a grocery store, the Court compared a grocer to the property manager in *Vandiest* when it held that a grocer was not a "professional" and that expert testimony was not required to establish the standard of care of a reasonably prudent grocer.[33]

Expert testimony is not required to establish the existence of a dangerous condition in this case. Unlike the existence of a design defect in the curb in *Polaski*, the existence of a hole or crack in the ramp in this case does not depend on facts which are beyond the understanding of the average

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[30] *Vandiest,* 2004 WL 3030014 at *7.
[31] *Id*. (distinguishing *Miley v. Harmony Mill Limited Partnership,* D. Del., 803 F.Supp. 965, 970-971 (1992) and *Norfleet v. Mid-Atl. Realty Co., Inc.*, 2001 WL 282882 (Del. Super. Feb. 16, 2001) *opinion clarified on denial of reconsideration,* 2001 WL 695547 (Del. Super. Apr. 20, 2001)).
[32] *Id*. at *7
[33] *Small v. Super Fresh Food Markets, Inc.*, 2010 WL 530071, at *3 (Del. Super. Feb. 12, 2010).

juror. Since there is nothing in this case which distinguishes the Premises Defendants from the property manager in *Vandiest* and the grocer in *Small*, expert testimony is not required to establish a standard of care. The Premises Defendants are not professionals, the issue is not outside of the common knowledge of the jury, and Plaintiffs need not prove that the Premises Defendants breached a heightened standard of care.

The Court notes that, although not argued by Plaintiffs in opposition to the Premises Defendants' motion, in their complaint, Plaintiffs also asserted that the ramp was "uneven and [] lacked any rail, texturing or anti-slip strips."[34] Based on the rationale of the above case law, the Court finds that whether the ramp was designed in a manner that resulted in its alleged unevenness and whether it is customary for handicap ramps to be installed with railings, texturing, or anti-slip strips are issues that would require expert testimony.

II. The Nail Salon's Renewed Motion for Summary Judgment

The Nail Salon reasserts its contention that it held no duty to protect Mrs. Yancy from or to warn her of the risks inherent in wearing the foam pedicure flip-flips because such risks are obvious. In response to the original motion, Plaintiffs argued that the Nail Salon held a duty under

[34] Compl. at ¶ 8.

Section 392 of the Restatement (Second) of Torts.[35] In its decision, the Court explained the general principle that the duty to warn was owed to only "'those who could be reasonably assumed to be ignorant of the danger'"[36] and only when risks are not apparent and obvious. The Court denied summary judgment because it found that it was for the jury to decide whether the risks associated with wearing the flip-flops in the rain were open and apparent and whether a reasonable person could reasonably be assumed to be ignorant of the danger.

The Nail Salon now argues that it cannot be held liable under § 392 for failing to inform Mrs. Yancy of the dangerous character of the foam pedicure flip flops, especially in light of the fact that she had prior experience wearing pedicure flip-flops. Plaintiffs argue that there is no basis to assume that Mrs. Yancy "would be aware of the friction characteristics or

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[35] Restatement (Second) of Torts § 392 (1965) states:

> One who supplies to another, directly or through a third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should expect to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by person for whose use the chattel is supplied
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> (a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or
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> (b) if he fails to exercise reasonable care to discover its dangerous condition or character, and to inform those whom he should expect to use it.

[36] Decision dated November 13, 2012 at 6.

the lack thereof, of the specific footwear [the Nail Salon] supplied to [her]."[37]

The Court continues to find that the issues of whether Mrs. Yancey should have been aware of the risks of wearing the pedicure flip-flops and whether such risks were apparent should be determined by the jury. Mrs. Yancey testified that she never visited this particular nail salon prior to the day of the incident. Although she had worn pedicure flip-flops before, there is no indication that she had experience with the same type of pedicure flip-flops supplied by the Nail Salon on that day. Therefore, whether the risks were obvious or whether Mrs. Yancy should have been aware of them continue to be questions more properly reserved for the jury and, thus, summary judgment cannot be granted in favor of the Nail Salon.

Conclusion

As stated above, the Court finds that issues of fact remain as to whether the ramp contained a depression, hole, or crack which constituted a dangerous condition and whether the condition should have been apparent to Mrs. Yancey. In addition, Plaintiffs were not required to present expert testimony on the existence of a dangerous condition or the standard of care in this case. Therefore, the Premises Defendants' motion for summary judgment is **DENIED.**

[37] Pls. Resp. to Renewed Mot. at ¶ 6.

Whether Mrs. Yancey should have been aware of the risks associated with wearing the pedicure flip-flops and whether such risks were obvious and apparent are questions for the jury. Accordingly, the Nail Salon's Renewed Motion for Summary Judgment is **DENIED.**

IT IS SO ORDERED.

/s/Calvin L. Scott
Judge Calvin L. Scott, Jr.