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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

COLETTE MALOUF,
Plaintiff ,

-against-

EQUINOX HOLDINGS, INC.,
Defendant.

Index No. 107152/09
Seq. No. 003

EQUINOX HOLDINGS, INC.,
Third-Party Plaintiff,

-against-

Third-Party Index No. 590888/10

LIFE FITNESS, INC., REBECCA KRAUSS, and WHOLE BODY HEALTH, LLC,
Third-Party Defendants.

The following papers were read on this motion by the plaintiff to strike the answer of the defendant pursuant to CPLR 3126.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ☒ No

Motion sequences 003, 004 and 005 are hereby consolidated for disposition.

In this personal injury action, plaintiff Colette Malouf (Malouf) moves, pursuant to CPLR 3126, to partially strike the answer of defendant/third-party plaintiff Equinox Holdings, Inc. (Equinox), a company that operates a chain of health clubs (Mot. Seq. 003). Equinox moves, pursuant to CPLR 3212, for summary judgment dismissing Malouf's complaint, or, in the alternative, for partial summary judgment in its favor on the first cause of action (Mot. Seq. 004). Third-party defendant Life Fitness, a division of Brunswick Corporation, sued here as Life Fitness, Inc. (Life Fitness), moves to strike Equinox's third-party complaint as against it (Mot.

Seq. 005).

Procedural Background

Malouf is a self-employed distributor of fashion accessories. She was first allegedly injured on October 13, 2007, while attending a yoga class conducted by an Equinox employee or agent at its facility at 69 Prince Street,[1] New York County (Equinox Soho). Then, on September 17, 2008, she was allegedly injured at Equinox Soho when she fell off a treadmill. She commenced the instant action on May 20, 2009, asserting causes of action for negligence in each instance (*see* Trop Affirm., exhibit 1).

On October 15, 2010, Equinox commenced the third-party action asserting causes of action for common-law indemnification and contribution against each of the third-party defendants – Life Fitness, manufacturer of the treadmill; Rebecca Krauss (Krauss), yoga instructor employed by Whole Body Health, LLC (Whole Body); and Whole Body (*id.*, exhibit 3). Krauss never answered the complaint, and Equinox discontinued the action as against Whole Body.

Factual Background- Treadmill Incident

Malouf's motion to partially strike Equinox's answer (Mot. Seq. 003), and Life Fitness's motion to dismiss the third-party complaint as against it (Mot. Seq. 005), both pertain to the incident of September 17, 2008, when Malouf was allegedly injured when trying to use a treadmill at Equinox Soho. In her verified bill of particulars, Malouf claims that Equinox allowed the treadmill "to be so placed and in a running condition that plaintiff would not be aware of the running condition before stepping onto it" (Trop Affirm., exhibit 5, ¶ 4). When she testified at an examination before trial, on September 2, 2010, she said that "I fell on a treadmill that was running – that had been on high speed – and that wasn't recognizable that was on" (Kittredge

[1] The location is also given as 568 Broadway, an address at the corner of Prince Street.

Affirm. (Mot. Seq. 003), exhibit D at 13).

She described the site as having two rows of 20 or more treadmills in a row, "line[d] up facing people entering the gym" (*id.* at 104). The treadmills were behind other equipment, in front of a wall. She had used them often, "at least, twice a week and on a regular basis" (*id.* at 121). On the day of the incident, when she found most of the treadmills in use, she went to the back row, but found an unoccupied treadmill not working (*id.* at 110). She walked down the line and got on another available treadmill. She testified that "I hopped on it. . . . I jumped on it" (*id.* at 114). With that, she fell onto the treadmill belt which "was on and running . . . faster than a walking pace. It was a jogging pace" (*id.* at 117). In her testimony, Malouf did not recall whether any lights on the treadmill's control panel were on or whether she observed any other indication that the treadmill was on when she tried to use it (*id.* at 119-120). Specifically, she did not remember seeing the belt moving before getting on (*id.* at 123). She denied, however, that the treadmill started the moment she hopped on, stating, "It was running before. It wouldn't start up that fast. It was fast when I hopped on it" (*id.* at 127). Although she never declares it outright, she seems to intimate that locating of the treadmill in the back row was negligent, possibly because of poor lighting or shadows.

Equinox employees gave Malouf first aid for a scraped knee and an injured shoulder, and she left the premises by ambulance. She was diagnosed with a dislocated right shoulder, and had surgery three weeks later.

Lawrence Sanders (Sanders) testified for Equinox on July 28, 2011 (*see* Kittredge Affirm. (Mot. Seq. 003), exhibit G). He was assistant general manager of Equinox Soho before and its general manager after the incident, but he was assistant general manager of another Equinox site at the time of the incident. He said that treadmills were not usually checked or inspected unless a problem was reported, and if there was a problem, an in-house maintenance manager would try to fix it, calling upon an outside vendor if needed (*see* Sanders Transcript at

19, 20). According to Sanders, the maintenance manager kept a log of equipment troubles, including treadmills, on site. Routine maintenance and cleaning of treadmills was not logged (*id.* at 57). He said that there were approximately 20 treadmills at Equinox Soho in 2008 (*id.* at 20). He recalled that Life Fitness did maintenance or repairs to its treadmills, at least "[s]ometimes" (*id.* at 25). Sanders had no knowledge of the inner workings of the treadmills, and when asked about his familiarity with how they operate, he testified, "Turn it on and it operates" (*id.* at 26).

Keith McConnell (McConnell) testified on March 16, 2012 (*see* Kittredge Opp. Affirm. (Mot. Seq. 005), exhibit M). He worked as general manager of Equinox Soho from May 2008 to October 2008, when he moved first to Dallas and then Miami, while still employed by Equinox. As had Sanders, McConnell recalled that there were about 20 treadmills at Equinox Soho, from three different companies (*id.* at 50-51). McConnell said that there were two rows of treadmills, with most of them in the second (back) row (*id.* at 165). He testified that there were no written policies or procedures regarding preventative maintenance for treadmills at Equinox Soho (*id.* at 59). However, he said that the equipment was checked with some regularity, "[t]o make sure that it was functioning, that the incline was functioning, that the belt was tight, that the plugs weren't exposed that there was no debris underneath" (*id.* at 60).

McConnell himself used the treadmills at the club (*id.* at 71). He observed people at times getting off a treadmill, leave it running and walk away, and he would shut the treadmill when he saw that (*id.* at 86-88). While he had seen people fall attempting to get on a moving treadmill, he had never witnessed this at Equinox Soho (*id.* at 95). He testified that another Equinox employee was supposedly told by a club patron that he/she (McConnell knew nothing about this person) had tried to use the subject treadmill right before Malouf, but that it failed to start, only to start up on its own after this other patron left (*id.* at 100-101). He could not recall any other instance of a treadmill starting spontaneously (*id.* at 102-103, 119-120). He did not

see Malouf's accident, but he spoke to her within "a few minutes" thereafter (*id.* at 97-98).

After Malouf's mishap, an Equinox employee tested the treadmill by turning it on, and told McConnell, "yeah, it took awhile to start" (*id.* at 110-111). As a result, an out-of-order sign was put on the treadmill and a service call was probably made, according to McConnell, but not by him (*id.* at 113-114). When someone apparently came to repair the treadmill on October 3, 2008, more than two weeks after the incident, according to a service report produced at the deposition, McConnell had left Equinox Soho (*id.* at 125). Further, he "believe[d] that it was serviced prior to that time," because he did not recall seeing it with an out-of-order sign for an extended period of time (*id.* at 129-130). On the other hand, he did not remember seeing an outside vendor inspecting, servicing or repairing the treadmill before he left the site (*id.* at 133).

McConnell could not confirm that the referenced serial number for the subject treadmill was correct because he never recorded it (*id.* at 124-125). In fact, only the service call logged days later (discussed below) connects one specific treadmill to the incident. He admitted to taking no steps nor instructing any employee to identify the treadmill, such as by photographing it, or document its service and repair history (*id.* at 143-144). No treadmills were removed from Equinox Soho before he left on October 2, 2008, although a replacement plan was in place (*id.* at 144-145). When he relocated, he left no instructions, written or oral, regarding preserving the subject treadmill (*id.* at 150). As far as he knew, new treadmills were delivered to Equinox Soho in the first part of 2009 (*id.* at 145).

James Florent (Florent), an employee of TEC Industry, a subcontractor of Life Fitness, testified for Life Fitness, on September 28, 2011 (Kittredge Opp. Affirm. (Mot. Seq. 005), exhibit B). Florent, at the time of the incident, was a technician servicing exercise equipment. While he had no personal recollection of servicing a Life Fitness treadmill at Equinox Soho in October 2008, he was shown a work order, dated October 3, 2008, referencing Model 95T, serial number TCT105777 (*see* Florent Transcript at 7-8). The work order said that the problem was

that the "unit keeps saying Initializing then the belt will start suddenly" (Kittredge Opp. Affirm. (Mot. Seq. 005), exhibit H). Florent testified that this problem statement came from someone at Equinox (*see* Florent Transcript at 14-15). The work order, which Florent filled in and signed, showed that a "Motor Controller" was needed and placed on order. He testified that a defective motor controller would stop the treadmill from operating (*id.* at 19).

Florent doubted Malouf's version of the incident, because the treadmill at issue had a sensor triggered when "you're standing and it senses your body. And if you're not standing in front of it, then it automatically shuts off" (*id.* at 18-19). However, he estimated that there would be a delay, "after a minute," for the sensor to shut the treadmill (*id.* at 32). Later in his deposition, he stated that the treadmill "actually pauses and it will tell you to – if you actually want to continue the workout at that point" (*id.* at 41). Finally, in response to a question about whether the belt stops during that minute, he responds: "Yes, there's a pause" (*id.* at 46). The sensor was some type of laser, and he thought that an obstruction in its path could be mistaken for a person using the equipment (*id.* at 42-43).

Florent said that the sensor would not function, that is, allow the treadmill to continue moving, if the motor controller were not operating (*id.* at 19). He did not know if the sensor was replaced on the subject treadmill (*id.*). Florent testified that when "the sensor goes bad, usually there's a message stating that the sensor is bad" (*id.* at 20). He said that the treadmill will stop if the message appears, although it can be restarted only to stop if no repair has been made (*id.* at 21).

Florent was shown a Life Fitness invoice for a "Switch: Momentary Action," shipped to Equinox Soho on October 6, 2008, ordered on September 24, 2008 (Kittredge Opp. Affirm. (Mot. Seq. 005), exhibit H). He did not recognize the part description; it was not a motor controller (*see* Florent Transcript at 23). The invoice did not reference any particular piece of exercise equipment requiring the part.

The fate of the treadmill itself is the focus of the two motions dealing with the treadmill incident. Separately, Life Fitness, on October 18, 2011 (Korgul Affirm., exhibit E), and plaintiff, on November 17, 2011 (Kittredge Affirm. [Mot. Seq. 003], exhibit L), served Notices of Entry Upon Land For Inspection and Other Purposes on Equinox, in order to inspect treadmill Model 95T, serial number TCT105777, located at Equinox Soho. On December 12, 2011, Equinox responded to both notices, stating that "it is not in possession of the subject treadmill" (Kittredge Affirm. (Mot. Seq. 003), exhibit M).

Equinox provides an affidavit from Sanders, dated February 22, 2012, after he "conducted a search for any records or information pertaining to the whereabouts, removal or disposal of" the subject treadmill (Trop Affirm., exhibit 12., ¶ 2). This affidavit was in response to a Court order, dated February 1, 2012, regarding, among other things, production of documents about the fate of the subject treadmill (*id.*, exhibit 11). Sanders stated that the treadmill was no longer at Equinox Soho; that it "was disposed of before September 2010, which is when I commenced my tenure as General Manager of SOHO Equinox;" that "the corporate office was also not in possession of any records as to the whereabouts, removal or disposal of the treadmill;" and "that we have no record of any vendor having removed or 'buybacking' the treadmill" (*id.*, Ex. 12., ¶¶ 5-9). Equinox also submitted an affidavit from Sanders, dated January 28, 2012, reporting on his search for complaints/incident reports, maintenance and cleaning records, and inspection records regarding Life Fitness Model 95T treadmills at Equinox Soho for the period September 17, 2007 to September 17, 2008 (*see* Kittredge Affirm. (Mot. Seq. 003), exhibit Q). He stated that he found no records pertaining to that equipment for the period (*id.*, ¶¶ 3-6). He also found no service requests for any treadmills in 2008, although he said that it was "the normal practice of Equinox in 2008 to make such requests verbally" (*id.*, ¶ 7). Equinox's corporate office had none of these records as well, according to Sanders (*id.*, ¶ 8).

Discussion

Malouf, in her motion, charges that Equinox "either intentionally or negligently destroyed or otherwise lost the treadmill that caused Plaintiff's accident on September 17, 2008, thus disposing of a critical piece of evidence, prejudicing Plaintiff's case" (Trop Affirm., ¶ 3). As a result, she seeks to strike Equinox's answer due to spoliation. "If any party . . . wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make . . . an order striking out pleadings or parts thereof" (CPLR 3126[3]). "Although originally defined as the intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). "When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation, or, at the very least, preclude that party from offering evidence as to the destroyed product" (*Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept 1998] [internal citation and quotation omitted], *but see Hall v Elrac, Inc.*, 79 AD3d 427, 428 [1st Dept 2010] ["Absent proof that the destruction of the vehicle was willful, contumacious or in bad faith, the court properly declined to impose the drastic sanction of striking defendant's answer and, instead, deferred the issue of the appropriate sanction for spoliation of evidence to trial"]).

Plaintiff claims that Sanders's first affidavit, dated January 28, 2012, was the first response from Equinox to a string of demands and Court orders regarding the treadmill. With Malouf having been tended to by Equinox employees after she fell, filling out Equinox's "Accident and Injury Report Form" (*id.*, exhibit 6), and having been removed by ambulance from its premises, Equinox was on notice of the occurrence and should have exercised care in the handling of the treadmill (*see Bear, Stearns & Co., Inc. v Enviropower, LLC*, 21 AD3d 855, 855-856 [1st Dept 2005] ["Defendant's answer was properly stricken because of its negligent

spoliation of documents after it was on notice of plaintiff's claim, albeit before the action was commenced"] [citations omitted]). Instead, except for hanging an out-of-order sign on it for a few days, and having it serviced on October 3, 2008, the subject treadmill was later moved out of Equinox Soho without any attempt to preserve it, or even track its whereabouts. In the complete absence of record keeping, it is possible that the subject treadmill was still at Equinox Soho in May 2009, when the instant action commenced. While there is no evidence that it was singled out for special handling, it seems unusual that Equinox would dispose of costly capital equipment without a trace, whether singly or in a group of similar items scheduled to be replaced.

Malouf's verified bill of particulars charges that Equinox:

> "was negligent because a treadmill at the gym was allowed and permitted to become and remain in a dangerous, hazardous and unsafe condition, in that by allowing it to be so placed and in a running condition that plaintiff would not be aware of the running condition before stepping onto it " (Trop Affirm., exhibit 5, ¶ 4.)

This statement seems to implicate the physical condition of the treadmill with its location, possibly in a dark, awkward space, as the cause of Malouf's injury. If she were complaining about the location of the treadmill alone, any treadmill would suffice to demonstrate the validity of her allegations. However, from the outset, she claimed that she got onto a treadmill that was moving when she expected that it was not. Subsequently, Equinox had a particular treadmill serviced. Even if the lighting in the back row of equipment was weak, and Malouf was inattentive when she started to use the treadmill, Florent's testimony indicates that the treadmill should not ordinarily have been operating without someone standing in place. Examination of the subject treadmill would be critical in determining whether its "running condition" was at least a contributing factor to the accident. Accordingly, Equinox shall be sanctioned for losing key evidence before it could be examined by Malouf's expert. In light of this determination, that part of Equinox's motion for summary judgment to dismiss the complaint

in its entirety shall be denied.

Equinox's verified answer is quite general (*see* Trop Affirm., exhibit 2). Its eight affirmative defensives do not distinguish between the two incidents. They essentially contend that Malouf's alleged injuries and damages were the result of culpable conduct or fault of either plaintiff herself or unnamed third persons. The language is so broad that none of it can be stricken as an appropriate sanction. Rather, at trial, Equinox shall be barred from arguing that the treadmill was operating properly or was free from defects on September 17, 2008.

Life Fitness also moves to strike the third-party complaint, due to spoliation. Equinox's mishandling of the treadmill can be obviously discerned as negligent, rather than intentional, when its third-party complaint against Life Fitness is examined. Equinox charges that, to the extent that the treadmill caused Malouf's injuries, "Life Fitness did negligently design, manufacture, assemble, package, repair, service, refurbish, market, and/or sell the aforesaid treadmill" (Third-party Complaint, ¶ 10). While proving this to the satisfaction of a fact-finder might not be absolutely impossible in the absence of the treadmill, it would pose an enormous challenge to most litigators. Equinox defends its behavior by asserting that "until November 17, 2011, the date of Plaintiff's D&I for a treadmill, Equinox was fully justified in believing that the treadmill involved in Plaintiff's injury, whichever one it happened to be, was not evidence in the case" (Memorandum of Law in Opposition (Mot. Seq. 003) at 9). Yet, Equinox made the allegations of negligence against Life Fitness on or about October 15, 2010, when it commenced the third-party action, more than one year before it was asked to produce the treadmill.

Presumably, if Equinox was serious about pursuing its suit against Life Fitness, production of the treadmill would have been vital to its position. It is fruitless for Equinox to claim that the identity and condition of the treadmill only became a concern on November 17, 2011. Equinox now argues that its claims against Life Fitness "arise solely out of the operation

and functions of the treadmill, which presumably can be duplicated by relying on another unit of the same make and model (at least without expert evidence to the contrary)" (*id.* at 16). Further, Equinox claims that "there is no allegation that the relevant treadmill had a manufacturing defect or malfunctioned" (*id.*). These statements eliminate any credible assertion of negligence against Life Fitness, and the third-party complaint as against Life Fitness must be dismissed. *Kirkland, supra,* is particularly instructive here, because in that case, the New York City Housing Authority (NYCHA) negligently disposed of a kitchen stove, a critical piece of evidence, and then commenced a third-party action against the company that had installed stoves in a number of apartments in the apartment complex. While the Court found that the destruction of evidence was not intentional, it nevertheless dismissed NYCHA's third-party action. It held that, although "the employees authorizing and participating in the removal of the stove had not known about the litigation, there is no indication in the record that NYCHA, as defendant, had taken any steps to assure preservation of the evidence" (*Kirkland,* 236 AD2d at 173-174). Dismissal of Equinox's third-party action as against Life Fitness is equally warranted.

Factual Background- Yoga Incident

In its motion for summary judgment, Equinox asks, in the alternative, for judgment in its favor on the complaint's first cause of action, negligence in the incident of October 13, 2007. The complaint alleges that the instructor in an Acroyoga[2] class "forced plaintiff further into a yoga pose and injured plaintiff" (Complaint, ¶ 12). Malouf's verified bill of particulars expanded on this, declaring that the "yoga instructor negligently exceeded the customary force used to place plaintiff into a yoga pose, and in addition negligently paired her with a partner not within her weight range" (Bill of Particulars, ¶ 4). Neither document discusses or characterizes the relationship of the Acroyoga instructor, Rebecca Krauss, to Equinox, or offers any further

[2] A combination of acrobatics and yoga.

details about the incident.

In her deposition of September 2, 2010, Malouf testified that the October 13, 2007 session was "a guest class," using "guest teachers," not a part of Equinox's regular schedule (Malouf Transcript at 17-18). Malouf had practiced yoga for four to five years before the incident, but had no experience with Acroyoga (*id.* at 20). Unlike other yoga classes, she said that Acroyoga paired the students, and she was paired with a man of about the same height (*id.* at 20, 25). She thought that he was "more advanced" than she because of "his strength and flexibility" (*id.* at 34). She later acknowledged that "advanced is not the right word," but that "he was stronger and more flexible" (*id.* at 36). She had not objected to the pairing she said, because "when I knew that he was stronger or more flexible, I thought it was a good thing" (*id.* at 38). She was not certain, but she thought that other couples in the class paired men and women (*id.* at 25-26).

The class was led by a dark-haired woman, Krauss, and an unidentified blonde woman, with the former exercising more control[3] (*id.* at 26). Malouf recalled that the class lasted about one hour (*id.* at 28). The exercise during which she was allegedly injured called for her male partner to lie on his back with his legs in the air. She "was told to lean over his feet and put his feet on my pelvis and lean forward and hang limp like a rag doll balancing on his feet with his feet on my pelvic bone" (*id.* at 30). The next step "was to put our hands together and bring our hands behind our heads with our elbows up in the air" (*id.*). Then, "the dark-haired girl came and forcefully pushed my elbows behind my head and forcefully brought them together and I screamed 'Ouch'" (*id.*). Malouf had not asked for assistance (*id.* at 31). The instructor released her, and Malouf and her partner exchanged positions, with her on her back on the floor with her feet in the air (*id.* at 32-33). They continued with other poses until the class ended (*id.* at 39,

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[3] Malouf did not recall their names from the class, but she identified Krauss by looking at the Acroyoga company's web site (*id.* at 66-67).

42). She testified that a later pose, the Bridge Pose, also injured her, causing a neck sprain (*id.* at 42-43).

Malouf felt no pain at first, but "throbbing, shooting pain" in her neck set in the next day (*id.* at 68-69). She saw her general practitioner who sent her for X-rays, which showed no fractures. He recommended physical therapy for the neck pain, and she first experienced shoulder pain about one week after the incident, in addition to the neck pain, just prior to her visit to a physical therapist (*id.* at 74). She was then treated by a chiropractor, a masseuse and an acupuncturist, but her shoulder pain persisted. She testified that, only when she injured her right shoulder in the treadmill incident, almost one year later, an MRI revealed damage to her left shoulder as well, a slap lesion tear (*id.* at 89-90).

Krauss testified on July 28, 2011 (Kittredge Affirm. (Mot Seq. 004), exhibit F). She identified the session attended by Malouf as a two-hour workshop in Akra Yoga[4] (*id.* at 37). At the time, Krauss was employed by or affiliated with www.Acroyoga.com, although she stated that she later operated independently (*id.* at 58-59). Krauss said that she taught Acroyoga classes at three different Equinox sites in October 2007, before she left for India (*id.* at 34). These three engagements were arranged by Paige Elenson (Elenson), an Equinox employee, trained in Acroyoga, who was scheduled to leave the country (*id.* at 47-48). Elenson and Krauss co-taught a class on October 11, 2007, and Krauss taught a class the next day by herself, neither at Equinox Soho (*id.* at 34-35). On Saturday, October 13, 2007, she taught at Equinox Soho, the session attended by Malouf. While she had worked with Elenson before, these three classes were Krauss's first involvement with Equinox (*id.* at 48-49). Krauss said that she had only returned to New York, after extensive domestic travel, two weeks before she took on the Equinox classes (*id.* at 66). She detailed her employment as an Acroyoga

[4] Throughout Krauss's deposition, Acroyoga is rendered as Akra Yoga. On the correction sheet appended to the transcript, Krauss noted the correct name.

instructor from 2006 onwards: "I've worked in seven different countries and fifteen states, so there's a lot of studios that I've worked at. Um, in New York I have worked at Home Factory, Pure Yoga, Yoga Works, Equinox, um, Mrs. Jay's Gymnastics and Dance, um, Gold's Gym" (Krauss Transcript at 31).

Krauss testified that she continued to teach Acroyoga at Equinox Soho on and off for another year-and-a-half after the incident (*id.* at 53). She produced copies of about one dozen e-mail exchanges with several Equinox personnel, including Elenson, and others concerning class scheduling and payment for her services during the period of October 2008 through March 2009 (Kittredge Affirm. (Mot Seq. 004), exhibit H). For instance, on October 7, 2008, Elenson sent a message to Krauss and other "acroyoga sisters" requesting coverage for a class at Equinox the next day. The next day, Susan Holland (Holland), one of the "sisters," and Krauss wrote each other seemingly agreeing to accept Elenson's offer. Then, on October 30, 2008, Kevin VerEecke (VerEecke), identified as an Equinox group fitness manager, sent a message to Krauss and Holland apologizing for "a mistake in the processing of your payment." VerEecke asked them each to fill out a new form after which he "will re-submit the invoices." Later the same day, Krauss wrote to VerEecke, "looking forward to flying with you again soon!"

Discussion

Equinox moves for summary judgment in its favor dismissing the cause of action in the complaint as against it alleging negligence in regard to the October 13, 2007 yoga incident, because Malouf's alleged injury stemmed only from Krauss's conduct, not that of an employee or an agent. "The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the

burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 [1st Dept 2002]).

Equinox could be held liable to plaintiff under the doctrine of respondeat superior, if Krauss was its employee. "Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment" (*N. X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]). The doctrine does not apply to independent contractors, however. "The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts" (*Kleeman v Rheingold*, 81 NY2d 270, 273 [1993]). A determination of whether one is an independent contractor or an employee for the purposes of tort liability "typically involves a question of fact. However, where the evidence on the issue of control presents no conflict, the matter may properly be determined by the court as a matter of law" (*Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 297 [1st Dept 2000] [citations omitted]). Equinox argues that it cannot be vicariously liable for Krauss's conduct as an independent contractor, because it did not govern her conduct (*see Meyer v Kumi*, 82 AD3d 514, 514 [1st Dept 2011] ["The evidence demonstrates that defendants did not control the method and means of defendant['s] work, but exercised, at most, general supervisory powers over him, which is insufficient to subject them to tort liability for his acts"]).

Equinox argues that the doctrine of respondeat superior is inapplicable here, because it did not exercise actual or constructive control over Krauss. "Factors relevant to assessing

control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" (*Bynog v Cipriani Group,* 1 NY3d 193, 198 [2003]). By all these measures, with the exception of the first, Krauss was not an employee of Equinox. Her presence at Equinox Soho was at their mutual convenience, but not on a fixed schedule. Class times were set by Equinox, and classes were usually led by its employees. As Malouf testified about her session, Equinox "just brought it in as a guest class. They were guest teachers. It wasn't a class that was regular at Equinox" (Malouf Transcript at 17).

Krauss was a guest teacher, in Malouf's words, and paid only when she taught a class or workshop. Matthew W. Herbert (Herbert), Equinox's senior director of human resources, provides an affidavit stating that, after examining Equinox's employment records, Krauss was never an employee of Equinox (*see* Kittredge Affirm. (Mot. Seq. 004), exhibit I, ¶ 6). Herbert said that Equinox's records are less precise in tracking independent contractors (*id.*, ¶ 7). Unlike the e-mail messages produced for the period October 2008 through March 2009, there is nothing as specific that documents the relationship between Krauss and Equinox at the time of the incident. No e-mail messages have been produced to or from Krauss, Elenson or anyone else concerning the October 2007 classes at issue, nor any materials regarding payment for Krauss's work then. Krauss stated that "I didn't require an invoice at that time [October 13, 2007, because] . . . [t]hey didn't ask me for an invoice. They knew how many hours the workshop was scheduled for, and that's the check they wrote me" (Krauss Transcript at 60-61). She said that she began to submit invoices to Equinox in 2008 (*id.* at 61). She did not know or could not remember whether Equinox ever deducted payroll taxes from their payments to her (*id.* at 61-62).

"Other relevant factors [in determining employment status] include whether the individual furnishes his own tools or equipment . . ." (*Harjes v Parisio*, 1 AD3d 680, 681 [3d Dept 2003]

[internal quotation marks and citation omitted]). Krauss testified that yoga mats are the only equipment employed during an Acroyoga session when needed "as padding to make the pose more comfortable," and that "There was no [other] equipment necessary" (Krauss Transcript at 47, 63). When she taught at Equinox, she said that it provided the yoga mats (*id.*). Krauss stated that she received only general instructions from Equinox: "They told me where the room was, where to go, that if I needed any help, that they would come and help us out, um, and they just said, you know, have people clean up their mats when they're done. That was about it" (*id.* at 64). She needed Equinox's help in the opening and closing of the teaching space, for example in turning on the lights, getting the fans going, and finding the yoga mats (*id.*). She claimed that Equinox had no role in the actual teaching of her Acroyoga classes (*id.* at 64-65).

In opposition, Malouf is dismissive of the issue of Krauss's employment status at Equinox and contends that "there was never any doubt as the instructor and class were part of EQUINOX's fitness operations" (Trop Affirm., (Mot. Seq. 004) ¶ 16). She lists several "factors that militate against Krauss in fact being a true independent contractor":

- Equinox set the location of the class on its premises;
- Equinox provided the instructor;
- Equinox included the class as a part of membership;
- Equinox prepared and distributed a flyer for the class;
- Equiniox and Krauss "had no Independent Contractor Agreement";
- Equinox set the beginning time of the class;
- Equinox set the end time of the class; and
- Equinox set the date of the class.
-

While none of these factors are disputed, they simply are not critical to the analysis of a person's status as an independent contractor under New York law (*see Bynog,* 1 NY3d at 198; *Harjes,* 1 AD3d at 681). Malouf's view of the role of Equinox would be more appropriate to a contract dispute between it and a member, not a tort action founded on the alleged negligence of a yoga instructor. Plaintiff offers no factual allegations about Krauss's employment status to refute Herbert's disclaimer.

Krauss accepting random teaching assignments from Equinox, just as she did with other enterprises, did not make her Equinox's employee. Equinox did not exercise actual or constructive control over the performance and manner in which she taught the Acroyoga class on October 13, 2007. Therefore, the Court finds that Krauss was an independent contractor, and Equinox is not vicariously liable for Krauss's alleged negligence in regard to Malouf's injured neck and shoulder. Accordingly, the first cause of action in the complaint shall be dismissed.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff Colette Malouf's motion, pursuant to CPLR 3126, to partially strike the answer of defendant Equinox Holdings, Inc. (Mot. Seq. 003), is granted to the extent that defendant shall be barred at trial from arguing that the treadmill that plaintiff was using at the time of her accident was operating properly or was free from defects on September 17, 2008; and it is further;

ORDERED that the portion of defendant Equinox Holdings, Inc.'s motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint (Mot. Seq. 004) is denied in light of the granting of plaintiff's motion above; and it is further,

ORDERED that the portion of defendant Equinox Holdings, Inc.'s motion, pursuant to CPLR 3212, for summary judgment in its favor on the first cause of action (Mot. Seq. 004) is granted, and the first cause of action in the complaint asserting negligence against it in regard to the incident of October 13, 2007 is dismissed; and it is further,

ORDERED that the motion of third-party defendant Life Fitness, a division of Brunswick Corporation, sued here as Life Fitness, Inc., to strike third-party plaintiff Equinox Holdings, Inc.'s third-party complaint as against it (Mot. Seq. 005) is granted, and the third-party complaint is dismissed in its entirety as against said third-party defendant, with costs and

disbursements to said third-party defendant as taxed by the Clerk of the Court; and it is further,

ORDERED that plaintiff Colette Malouf is directed to serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 10/22/12

Enter:
PAUL WOOTEN J.S.C.

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Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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