Levy v Planet Fitness Inc.

2013 NY Slip Op 33755(U)

December 18, 2013

Sup Ct, Westchester County

Docket Number: 5250/11

Judge: Mary H. Smith

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

[* 1]

DECISION AND ORDER

FILED & ENTERED
12/18/13

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

FILED
DEC 18 2013
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

----------X

ESTELLE LEVY,

Plaintiff,

MOTION DATE: 12/13/13
INDEX NO.: 5250/11

-against-

PLANET FITNESS INC., PFIP, LLC, PF INVESTORS, LLC PFNY LLC d/b/a PLANET FITNESS and SCARSDALE FITNESS GROUP, LLC,

Defendants.

----------X

The following papers numbered 1 to 7 were read on this motion by defendants for summary judgment dismissing the complaint.

Papers Numbered

Notice of Motion - Affirmation (Migdalen) - Exhs. (A-L) 1-3
Answering Affirmation (Finger) - Affidavit (Levy) - Exhs. (1-4) 4-6
Replying Affirmation (Migdalen) 7

Upon the foregoing papers, it is Ordered and adjudged that this motion by defendants for summary judgment dismissing the complaint is disposed of as follows:

Plaintiff to seeks to recover monetary damages for personal

injuries she allegedly had sustained while exercising on a treadmill,[1] on November 28, 2010, at defendant Planet Fitness, a health club facility, located in Scarsdale. Plaintiff had been a member of this club for the previous five years, had worked out most days of the week and she had been familiar with the treadmill equipment; she never previously had any problems operating the treadmills at the club, she never had been injured while using any treadmill at the club, she never had experienced a treadmill accelerating on its own, and she never previously had used a treadmill's "kill switch."

Plaintiff maintains that, while she had been using the treadmill on the accident date, having several times pressed the manual button to increase her speed and incline, the treadmill suddenly had started increasingly accelerating and would not stop, even after she had pushed the "STOP" button and had attempted to push the "emergency kill switch."[2] Plaintiff claims that she had yelled out for help, that she had tried to keep up with the treadmill, that she had attempted to grab the handles on the sides of the treadmill but that, after a short period of time, she had

---

[1]The allegedly offending is numerically referred to by the club as "treadmill #21."

[2]According to plaintiff's deposition testimony, she had taken a silver metal piece that had been hanging from a cord and placed it onto a button, which she believed magnetically would stop the machine.

been thrown backwards off of the treadmill, whereupon she had struck an interior chain link fence. Plaintiff had testified that she herself never had made any prior complaints to club personnel regarding any of the treadmills unexpectedly accelerating, nor had she been aware of any other person making any such complaint, and she herself never previously had been injured by the chain link fence, nor did she know whether anyone else has suffered any injury as a result of the chain link fence.

In her bill of particulars, plaintiff alleges that defendants had been negligent inter alia in failing to keep the subject treadmill in good working order, in failing to properly inspect, maintain and repair the subject treadmill, in failing to remove the subject treadmill while it was in need of repair from the facility, in permitting plaintiff to use a dangerous and/or defective treadmill and in placing the treadmill and unreasonably close distance to the chain link fence.[3]

Presently, defendants are moving for summary judgment dismissing the complaint, arguing that there is no evidence that the subject treadmill had been unsafe, nor is there evidence that defendants had created or had any actual prior notice of any defective operating condition of treadmill #21, and that there is

---

[3]Plaintiff actually has asserted 25 separate claims of negligence in her bill of particulars, many of which however are simple restatements of the same claims of negligence.

no evidence establishing how long prior to plaintiff's alleged injury treadmill #21 been operating in a defective manner so as to impose constructive knowledge upon defendants. Lastly, defendants argue that there is nothing unreasonably dangerous about the chain link fencing that had been installed inside the gym, and that defendants had no prior notice of anyone prior to plaintiff's accident having injured his or herself with respect to same.

In support of their motion, defendants rely upon an affidavit from Sola Bautista, an employee manager of defendant Planet Fitness New York, who had been the manager at the Scarsdale club on the date of plaintiff's accident. According to Ms. Bautista, she had not witnessed plaintiff's accident, but had been notified thereof immediately after its occurrence by another club employee. This other employee thereupon had prepared an incident report in which she had written, "Member fell on treadmill #21. Claims treadmill wouldn't stop and speed was out of control." Ms. Bautista then removed treadmill #21 from service and had it inspected.[4]

Additionally, Ms. Bautista avers that she had examined defendant's Equipment Maintenance Log, which she states in her

---

[4]An inspection of the treadmill #21 had taken place on November 30, 2010, two days post plaintiff's accident, whereupon nothing had been found to be wrong with the treadmill: "Service Performed" "Check tred (sic) everything working as it should." According to defendants, plaintiff has not undertaken an inspection of the subject treadmill.

affidavit is kept in the regular course of defendants' business and includes entries of complaints about equipment that are received by members and any equipment problems that are discovered,[5] and that the Log does not contain any entries concerning treadmill #21; nor is Ms. Bautista aware of any maintenance or repair work done to treadmill #21. Annexed to Ms. Bautista's affidavit are three xeroxed pages from this Log, covering the time period of January 6, 2010 through February 23, 2011, which demonstrates that no complaints regarding and no inspection or work had been done on treadmill #21, except for the inspection which had occurred two days following plaintiff's accident. Ms. Bautista states that she personally never had received any complaints concerning treadmill #21 malfunctioning, nor is she aware of any prior instance in which a treadmill would not stop working when the "STOP" button was pushed or the "emergency kill switch" cord pulled.

Lastly, Ms. Bautista further avers that the black chain fencing had been installed inside the club to delineate the rows of various exercise equipment and that, prior to plaintiff's accident, no person had complained about the fencing and she had not been aware of any incident whereby someone had been injured by the fencing.

---

[5]According to Ms. Bautista, no entries are made in the Log if nothing unusual or abnormal is detected during a regular inspection of the exercise equipment.

Defendant also relies upon the examination before trial testimony of Valerie Gerace, a four year district manager for defendants, who had testified that the clubs are franchises, independently owned, and that defendant PFNY LLC owns the subject club located in Scarsdale. Defendant Scarsdale Fitness Group, LLC is owned by defendant PFNY LLC and it runs the club's day-to-day operations. Ms. Grace, who previously had worked as a manager at the subject club, had testified that she never has received any complaints about any of the treadmills at the Scarsdale club.

Plaintiff opposes the motion, arguing that defendants have failed prima facie to demonstrate their entitlement to judgment dismissing the complaint, that the evidence establishes that defendants had breached their duty as owners to maintain their property in a reasonably safe condition, and that defendants had actual and constructive knowledge of the existing dangerous condition on their property since it had been they that had installed the fencing in too close proximity to the treadmill. In any event, plaintiff contends that there exist triable issues of fact precluding summary judgment, including whether the treadmill had been working properly, whether the treadmill had been placed in a safe location, whether the fencing had been installed in safe proximity to the treadmill, whether defendants had received any complaints about the fencing, whether the manner in which the

fencing had been installed was safe and/or reasonable and whether the fence constituted an unreasonably dangerous condition. Plaintiff argues that defendants have admitted that they had installed the fencing but that they have failed to establish that, prior to the fence's installation, they had undertaken a proper inspection of the property and a safety study. According to plaintiff, during her deposition she had testified that she previously had "complained" to defendants about their installation of the fencing.

Initially, the Court grants defendants judgment dismissing plaintiff's claims asserting that defendants had been negligent in their maintenance of their property based upon the subject treadmill having been in a defective and/or dangerous condition on plaintiff's accident date, that defendants had failed to keep the treadmill in good working order and/or that defendants had failed to properly inspect and maintain the treadmill, as well as other similar but variously stated claims. The uncontroverted affidavit of Ms. Bautista, along with the Equipment Maintenance Log excerpts annexed thereto, and plaintiff's and Ms. Gerace deposition testimony, prima facie establish defendants' lack of notice of any defective or dangerous condition relating to treadmill #21, and thus defendants' entitlement to judgment dismissing all such identified claims. Plaintiff woefully has failed to raise any

triable issue of fact with respect thereto, most notably she having failed to conduct a professional inspection of the subject treadmill and submit an expert affidavit which at least raises a triable issue of fact with respect thereto, notwithstanding that the treadmill has been kept and maintained by defendants throughout this litigation. Nor has plaintiff identified any evidence in defendants' maintained Log and/or their employees' testimony which supports her claim. Necessarily then, these claims of plaintiff asserting defendants' negligence based upon the treadmill itself are all hereby dismissed.

To the extent however that defendant seeks summary judgment dismissing the remainder of plaintiff's claims, which this Court finds distills to the questions of whether defendants had been negligent with respect to the installation of the interior chain link fencing given its proximity to the treadmill, whether said location had created an unreasonably dangerous condition, and whether the location had been a proximate cause of plaintiff's injuries, the Court denies defendants' motion seeking dismissal of same, finding that defendants have failed to prima facie demonstrate entitlement to same. Although this Court necessarily finds that a chain link fence is not inherently dangerous, it also must find that defendants have not prima facie demonstrated through submission of an expert affidavit and/or applicable safety building

Code regulations, that the location of the fence to the treadmill had not created an unreasonably dangerous condition, see Trincere v. County of Suffolk, 90 N.Y.2d 976, 977 (1997); Villano v. Strathmore Terrace Homeowners Ass'n, Inc., 76 A.D3d 1061 (2nd Dept. 2010), and that the location had not been a proximate cause of plaintiff's injuries. See Gurmendi v. Perry Street Development Corp., 93 A.D.3d 635, 638 (2nd Dept. 2012).

The parties shall appear in the Settlement Conference Part, Room 1600, at 9:30 a.m., on March 3, 2014.

Dated: December 18, 2013
White Plains, New York

MARY H. SMITH
J.S.C.

Rivkin Radler LLP
Attys. For Defts.
926 RXR Plaza
Uniondale, New York 11556-0926

Finger & Finger
Attys. For Pltf.
158 Grand Street
White Plains, New York 10601

Robert Arena