| **Ficelman v Equinox Fitness Club** |
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| 2017 NY Slip Op 30976(U) |
| May 8, 2017 |
| Supreme Court, New York County |
| Docket Number: 150967/15 |
| Judge: Robert D. Kalish |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: IAS PART 21**

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JAMES FICELMAN,

Plaintiff,

- against -

EQUINOX FITNESS CLUB, EQUINOX HOLDINGS, LLC and EQUINOX-54TH STREET, INC.,

Defendants.

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Index No. 150967/15

Seq. 001

**Decision and Order**

**HON. ROBERT D. KALISH, J.:**

Motion by Plaintiff pursuant to CPLR 3212 for summary judgment is granted and cross-motion for summary judgment by Defendants is denied as follows:

## BACKGROUND

Plaintiff James Ficelman alleges that he was injured while using a "lat[eral] pull down machine" around 7:30 a.m. on January 6, 2015 at the Equinox Gym on 250 East 54th Street in Manhattan. (Sullivan Aff. ¶ 6; Ex. 1 [Ficelman EBT] at 57:24-61:04; Ex. 4 [Incident and Injury Report]; Ex. 8 [Complaint] ¶¶ 53-55; Ex. 10 [Bill of Particulars] ¶¶ 2-4.) Plaintiff, who was a member at the Equinox Gym, describes the "lat pull down machine" as having a seat with a knee pad in which he would sit and pull down an overhead bar, which was attached to a cable with weights causing upward resistance. (Ficelman EBT at 50:23-51:20.)

Plaintiff alleges that he was pulling the bar down towards his body and commencing his second set of ten to twelve repetitions on the machine, when a cable snapped causing the bar to strike his face. (*Id.* at 57:24-61:04.) Plaintiff states that he had been using the machine with 200 to 220 pounds of resistance when the cable snapped. (*Id.* at 51:21-52:12, 57:24-58:07.) Plaintiff states that he did not notice anything unusual about the machine before the accident, and that he did not perform an "inspection" of the machine prior to the accident. (*Id.* at 60:24-61:22.)[1]

Plaintiff asserts that he was using the machine properly and that his injuries were caused by the machine malfunctioning, and by no fault of his own. (Sullivan Aff. ¶ 6; Complaint ¶¶ 53-55.) Plaintiff states that, although he did not see what caused his accident, he was told by Branislav Vukojevic—who was a trainer at the gym and attended to Plaintiff's injuries—that a cable snapped. (Ficelman EBT at 57:24-60:04, 67:15-69:17.)[2]

Plaintiff now moves for summary judgment pursuant to the doctrine of res ipsa loquitur.

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[1] Plaintiff states that he currently checks by-hand to see if the bolt connecting the cable to the weight stack is properly fastened, but he did not conduct this type of manual inspection prior to his accident. (*Id.* at 61:15-22.)

[2] Plaintiff has since adopted, for the purposes of this motion, Defendants' statement in their opposition and cross-motion papers that the accident occurred as a result of a bolt (connecting the cable to the weight stack) coming loose rather than the cable snapping. (Sullivan Reply Affirm. ¶¶ 7-10.)

Defendants Equinox Fitness Club, Equinox Holdings, LLC and Equinox-54th Street, Inc. oppose Plaintiff's motion and cross-move for summary judgment, dismissing the complaint. Defendants argue that Plaintiff has failed to establish that Defendants caused or created the allegedly defective condition, or that they had actual or constructive notice of the allegedly defective condition. (Def. Mem. at 11-12.) In addition, Defendants argue that the doctrine of res ipsa loquitur does not apply to the instant case because Defendants did not have exclusive control over the subject machine. (Def. Mem. at 7-11.)

Defendants submit an affidavit from the gym's Assistant General Manager Ronald Cooper. (Cooper Aff. ¶ 2.) Mr. Cooper states that more than 6,000 individuals use the subject gym per week, and that approximately 200 individuals used the gym prior to Plaintiff's accident at 7:30 a.m. that morning. (Cooper Aff. ¶¶ 6-7, Ex. A [Weekly Facility Usage Summary].)[3] Defendants contend that these approximately 200 members all had access to the subject machine, and, as such, Defendants did not have exclusive control over the machine. (Def. Mem. at 3.)

[3] Mr. Cooper attaches a document entitled "Weekly Facility Usage Summary" as Exhibit A to his Affidavit, which purports to provide documentary evidence to support the above usage numbers. Mr. Cooper states that Equinox maintains "records of each individual who enters the club." (Cooper Aff. ¶ 6.) He further states that the attached "Weekly Facility Usage Summary" table is one such record. (*Id.*) However, there is no information regarding how the supposed underlying data was generated and/or maintained; whether it was kept in the regular course of business; how that data was retrieved and presented in the usage report; and whether this report was generated specifically for the underlying litigation.

Mr. Cooper further states that he previously was the maintenance manager at the subject location, "including in January 2015" and that his staff "conducted inspections of the exercise machines, including the lat pulldown machine involved in plaintiff's accident. These inspections occurred throughout the day, at least once an hour." (Cooper Aff. ¶¶ 4, 9-10.) Mr. Cooper states that these inspections "included checking the bolt connecting the cable to the weight stack" and that "[i]f any loose bolt is found during one of the equipment inspections, the staff would either immediately tighten the bolt or take it out of service until it could be tightened." (*Id.* ¶ 11.)[4] Mr. Cooper further states that he personally inspected the subject apparatus following Plaintiff's accident, and that "[f]rom my inspection, it appeared that while the cable itself was in one piece, the bolt connecting the cable to the weight stack had come loose, causing the cable to separate from the weight stack." (*Id.* ¶ 12.)

Defendants assert that, prior to the accident, Plaintiff inspected the machine to make sure that the adjustable weights pin was fully pushed in, that the clip

[4] The affidavit does not indicate in what manner the bolt would be tightened but implies that it cannot be done without a tool. The affidavit also does not indicate how often the bolt on the cable would come loose requiring it to be tightened or that any report or record is made as to the results of each inspection and any action taken. The affidavit also does not indicate whether the mere usage of the machine can loosen the bolt. There is also no explanation as to the cause of the bolt coming "loose"—namely, whether that means that the bolt was loose because of it being rotated or that the bolt was stripped. Neither does the affidavit suggest that Mr. Cooper discovered any evidence of vandalism.

attaching the bar to the cable was secured, and that he visually inspected the cable. (Def. Mem. at 5 [citing Ficelman EBT at 52:23-53:14, 66:11-14].)

Defendants argue that because Plaintiff cannot establish any notice to Defendants as to a defective condition, Defendants are entitled to summary judgment and that Plaintiff's motion for summary judgment should be denied.

**ANALYSIS**

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law." (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

Both Plaintiff and Defendants argue, in their respective motion papers, that there are no material issues of fact and that the Court should summarily dispose of the instant case. Upon review of the instant papers, this Court finds that Defendants have failed to make out a prima facie case for summary judgment. The Court further finds that Plaintiff has made out a prima facie case for summary judgment and that Defendants have failed to raise material questions of fact precluding an award of summary judgment to Plaintiff.

As such, this Court grants summary judgment to Plaintiff on the issue of liability.

**I. Defendants Cross-Motion for Summary Judgment Is Denied for Failure to Establish a Prima Facie Case.**

"In premises liability cases alleging an injury caused by a defective condition, the plaintiff must show that the landowner either created the defective condition, or had actual or constructive notice of the defective condition for such a period of time that, in the exercise of reasonable care, it should have corrected." (*Abrams v Powerhouse Gym Merrick, Inc.*, 284 AD2d 487, 487 [2d Dept 2001].) "A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected." (*Gairy v 3900 Harper Ave., LLC*, , 939 [2d Dept 2017].) On a motion for summary judgment, a landowner defendant is "required to offer some evidence as to when the accident site was last cleaned or inspected"

prior to the accident. (*Id.*; *see also Sabalza v Salgado*, 85 AD3d 436, 437 [1st Dept 2011].) Such evidence must come from an individual with "personal knowledge" of when the last inspection occurred. (*Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412, 412 [1st Dept 2013].)

On the instant motion and cross-motion, Defendants do not provide any evidence as to when the subject apparatus was last inspected or by whom, but rather assert (by affidavit of Mr. Cooper) that the various exercise machines are inspected "throughout the day, at least once an hour." (Cooper Aff. ¶¶ 4, 9-10.)[5] These statements regarding generalized inspection procedures are not enough to establish lack of constructive notice as a matter of law. (*See e.g. Herman v. Lifeplex, LLC*, 106 AD3d 1050, 1051 [2d Dept 2013]; *Mike v. 91 Payson Owners Corp.*, 114 AD3d 420, 420 [1st Dept 2014].) Further, there is no statement that the machine was in fact inspected on the day of the accident and what, if anything, was found. As such, Defendants' motion for summary judgment is denied.

## II. Plaintiff's Motion for Summary Judgment Is Granted, As Defendants Fail to Raise a Material Question of Fact.

The owner or possessor of property has a duty to maintain the property in a reasonably safe condition and may be held liable for injuries arising from a dangerous condition on the property if such owner or possessor either created the

[5] Mr. Cooper's affidavit also does not state what was found during the last inspection.

condition, or had actual or constructive notice of it and a reasonable time within which to remedy it. (*See Pitt v New York City Tr. Auth.*, 146 AD3d 826, 828 [2d Dept 2017].) Plaintiff argues that Defendants breached this duty as a matter of law based on a theory of res ipsa loquitur: i.e. that the manner of his injury—the bolt coming loose—could have only resulted from Defendants' failure to maintain that portion of the subject apparatus in good condition, especially in light of Defendants' acknowledgment of hourly inspections of the equipment.

Res ipsa loquitur loquitur—which literally translates to "the thing speaks for itself"—"simply recognizes what we know from our everyday experience: that some accidents by their very nature would ordinarily not happen without negligence." (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997] [internal quotation marks omitted].) Res ipsa loquitur does not create a presumption of negligence; rather, it is a rule of circumstantial evidence that allows the jury to infer negligence. (*See Morejon v Rais Const. Co.*, 7 NY3d 203, 209 [2006].) "A defendant is free to rebut the inference by presenting different facts or otherwise arguing that the jury should not apply the inference in a particular case." (*Ezzard v One E. Riv. Place Realty Co.*, 129 AD3d 159, 162 [1st Dept 2015].) Moreover, "[n]otice of a defect is inferred when the doctrine applies and the plaintiff need not offer evidence of actual or constructive notice in order to proceed." (*Id.* at 163.) As such, while there is no evidence of actual or constructive notice to Defendants

on this motion, the application of the doctrine infers that Defendants had notice. (*Id.*)

In order for the doctrine of res ipsa loquitur to apply, Plaintiff must establish that "the event (1) was of a kind that ordinarily does not occur in the absence of someone's negligence; (2) was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) was not due to any voluntary action or contribution on the part of the plaintiff." (*Singh v United Cerebral Palsy of New York City, Inc.*, 72 AD3d 272, 277 [1st Dept 2010] [internal quotation marks and emendation omitted].)

The Court of Appeals has held that res ipsa loquitur is a viable doctrine for use on a plaintiff's motion for summary judgment. However, the Court of Appeals has further indicated that "only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable." (*Morejon*, 7 NY3d at 209.) This is one such case.

To make out a prima facie case for applying the doctrine of res ipsa loquitur, a plaintiff need only show that that "it is more likely than not that defendant caused the accident. Plaintiff need not exclude every other possible cause." (*Rountree v Manhattan and Bronx Surface Tr. Operating Auth.*, 261 AD2d 324, 327 [1st Dept

1999].) However, after a plaintiff establishes a prima facie case for summary judgment based on res ipsa loquitur, summary judgment will be denied if the defendants point to a material issue of fact regarding how the accident could have occurred in the absence of their negligence. (*See Thomas v New York Univ. Med. Ctr.*, 283 AD2d 316, 317 [1st Dept 2001].) To establish a material issue of fact, a defendant may show that it is more likely than not that another actor caused the accident. A defendant making such argument must present evidence in support of that theory and cannot merely rely on its own conclusory contention that the accident could have been caused by an anonymous actor. (*See Harmon v U.S. Shoe Corp.*, 262 AD2d 1010, 1010 [4th Dept 1999].)

On the instant motion, Defendants do not contest that Plaintiff has established the first and third elements of res ipsa loquitur. Defendants only argue that Plaintiff cannot establish the second element—that the subject machine was within their exclusive control. (Def. Mem. at 5, 7-11; Oral Arg. Tr. at 11:04-13:21.) Defendants contend that because approximately 200 members "used the club" and presumably had access to the machine on the morning of Plaintiff's accident—not that they used the machine—that Defendants did not have exclusive control of the machine. Defendants argue in sum and substance that any one of the approximately 200 members (excluding Plaintiff) could have loosened the subject bolt after the gym's inspection of the machine, thereby causing the

accident. (Def. Mem. at 2-3, 7-11; Oral Arg. Tr. at 12:09-15:24.) As such, Defendants argue that the doctrine of res ipsa loquitur does not apply to the instant case. (Def. Mem. at 5, 7-11.)

Contrary to Defendants' argument on the issue of exclusive control, the appropriate line of analysis is whether the mechanism of the accident (the loose bolt) itself was generally handled by gym members, not whether gym members used the apparatus (the lateral pulldown machine) to which the loose bolt was a part. (*Pavon v Rudin*, 254 AD2d 143, 146 [1st Dept 1998].) As such, the question here is not whether Defendants had exclusive control over the entire lateral pull down machine, but rather whether Defendants had exclusive control over the subject loose bolt that Defendants concede caused the accident. Such analysis of exclusive control must take into consideration: the nature of the bolt itself; where the bolt was located on the machine; the location of the machine; the individuals who had the opportunity to loosen the bolt; and whether or not a tool was required to loosen the bolt.

The following facts are undisputed in this action: that the bolt was not an adjustable part of the machine; members were not required to adjust the bolt in their operation of the machine; and members did not have contact with the bolt in their operation of the machine. (*See* Oral Arg. Tr. at 13:22-15:24, 17:25-18:24

[Defendants' counsel stating that he had no knowledge as to whether the subject bolt nut could be manipulated by hand].)

In support of Plaintiff's motion, Plaintiff submits two photographs showing the subject machine where he was injured. (Sullivan Aff. ¶ 5; Ex. 5 [Apparatus Photos].) These photographs show that the machine's cable was attached to an adjustable weight anchor, that could be adjusted to carry as much as 260 pounds of weights. (*Id.*) The cable was fastened to the weight anchor by a bolt nut. (*Id.*) Given the amount of weight that the cable was expected to support, it is clear that one would need a wrench to loosen and/or tighten the bolt nut connecting the cable to the weight anchor. (*Id.*) It is equally clear that detaching the cable from the weight anchor would require multiple rotations of the bolt nut. (*Id.*)

In his affidavit, Mr. Cooper never stated that he discovered any evidence that would suggest that the bolt had been tampered with or vandalized; neither did he state how he believed it became detached—whether it rotated loose or was stripped. It is not reasonable to conclude that a non-employee member of the gym would happen to have the appropriate wrench, the inclination to loosen the bolt, and be able to inconspicuously do so. (*See Pavon*, 254 AD2d at 146 ["[D]efendants herein have not shown that anyone tampered with the upper pivot hinge, which was not at floor level and which would have required a conspicuous stepladder to reach. The IAS court implicitly demanded certainty instead of

relative probability, and thereby applied the exclusivity test in too strict a fashion."].) Under these circumstances, the Court finds that the subject connecting bolt was within the exclusive control of Defendants, and the Court finds that the evidence submitted by Plaintiff is so convincing as to make out a prima facie case for summary judgment.

Plaintiff having established a prima facie case for summary judgment pursuant to the doctrine of res ipsa loquitur, the burden shifts to Defendants to establish a material question of fact regarding how the accident could have occurred in the absence of their negligence. Defendants' response that some unknown, gym-member actor *could* have loosened the subject bolt—without any specific evidence suggesting that this may have actually happened or describing in some detail how it could have occurred—is insufficient and "so weak" that the inference of negligence is inescapable. (*Morejon v Rais Const. Co.*, 7 NY3d 203, 209 [2006].) The affidavit of Mr. Cooper, which states that he inspected the machine after the accident, does not indicate that the subject bolt showed signs of tampering. (*See* Cooper Aff. ¶ 12.) Mr. Cooper further stated that there had never been any similar incidents with the subject machine before. (*See* Cooper Aff. ¶ 13.) As such, this Court finds that the instant case is appropriate for summary judgment based on the doctrine of res ipsa loquitur. (*See Morejon*, 7 NY3d at 209; *Legakis v New York Westchester Sq. Med. Ctr.*, 144 AD3d 549, 550 [1st Dept 2016]; *Bonacci*

*v Brewster Serv. Sta., Inc.*, 54 Misc 3d 437, 440 [Sup Ct, Westchester County 2016] [granting plaintiff's motion for summary judgment based on doctrine of res ipsa loquitur where jeep fell onto plaintiff customer from defendant mechanic's lift]; *Rickert v Arsenault*, 54 Misc 3d 1219(A) [Sup Ct, Rensselaer County 2017] [granting plaintiff summary judgment based on doctrine of res ipsa loquitur where defendant's truck rolled back and struck plaintiff].)

Defendants cite to two Supreme Court cases that they argue stand for the position that Plaintiff's motion should denied and that they should be granted summary judgment, dismissing the action: *Harridass v. Bally Total Fitness Corp.*, 2012 WL 10057125 (Sup Ct, Queens County 2012) and *Pineda v. TSI Dobbs Ferry, LCC*, 2014 NY Slip Op 32923(U) (Sup Ct, Westchester County 2014). However, these cases are distinguishable from the instant action.

In *Harridass*, the plaintiff was using a "multi-hip machine" when she heard a "snap" and was "thrown off balance and struck in the face with the padded bar." (*Harridass*, 2012 WL 10057125, at *1.) The court there granted summary judgment to the defendant and rejected the plaintiff's assertion of res ipsa loquitur. The Court reasoned that the plaintiff had failed to establish the second and third elements of the doctrine because "plaintiff as well as other unidentified gym members had access to the particular equipment immediately preceding the

incident" and because it found that it was "equally, if not more, likely that the accident was due to the actions of the plaintiff herself." (*Id.*)

The Court's decision in *Harridass* does not indicate what the alleged malfunctioning component was on the subject machine, and neither does it state that any part of the machine in fact malfunctioned. Further, the *Harridass* court stated its belief that it seemed equally or more likely that the accident was caused by the plaintiff's actions, and there is no claim that Plaintiff contributed to the accident in the instant case. (Oral Arg. Tr. 12:08-19.) In the instant case, Defendants have specifically identified the mechanism of injury as being the bolt nut that became detached from the weights. Moreover, Defendants' argument that they need only show that the public had general access and use of the overall machine to show that they lacked exclusive control is a misstatement of the law. The Appellate Division, First Department has stated that "[t]he appropriate target of inquiry is whether the broken component itself was generally handled by the public, not whether the public used the larger object to which the defective piece was attached." (*Pavon v Rudin*, 254 AD2d 143, 146 [1st Dept 1998]; *see also Singh v United Cerebral Palsy of New York City, Inc.*, 72 AD3d 272, 277-78 [1st Dept 2010] [citing *Pavon* and finding that the defendant had exclusive control over the subject motion sensor which was located on top of the automatic doors – that

closed on the plaintiff – because there was "no real likelihood that the public could have altered it"].)

In *Pineda*, the plaintiff was allegedly injured when a foot pedal detached from a bicycle he was riding during a spin class. (*Pineda*, 2014 NY Slip Op 32923[U], at *1.) Plaintiff then got off the subject bicycle and finished the class on another bicycle. (*Id.*) Plaintiff never notified the gym about the accident and he was uncertain whether "the pedal broke off or unscrewed and detached." (*Id.*) Further, the plaintiff could not identify which bicycle caused his accident. (*Id.*) The defendant gym's manager testified that, at the time of the accident, it was his custom to inspect the bicycles once per month. (*Id.*) The court granted the defendant gym summary judgment, finding that the gym lacked notice of the defect and rejecting the plaintiff's assertion of res ipsa loquitur. (*Id.*) The court reasoned that the defendant gym lacked exclusive control of the subject bike because "the bikes were used every day by members of the gym." (*Id.* at *2.)

Similar to *Harridass*, *Pineda* is distinguisable from the instant case because it is unclear what precisely malfunctioned with the pedal—i.e. whether it broke off or unscrewed. Moreover, the pedal, by its nature, was meant to be in contact with the rider's foot, unlike the bolt in the instant case which was not a usable part. To the extent that Defendants cite *Pineda* in support of their argument that they need only show that members of the gym had general access and use of the overall

machine to establish that they lacked exclusive control, said argument would be a misstatement of the law, as explained in *Pavon* and *Singh*. In addition, to the extent that they cite *Pineda* for the proposition that they need only show a manager's general custom of inspection—rather than evidence from someone with personal knowledge as to when the last inspection occurred—that proposition is contrary to the controlling law in this department. (*Mike v. 91 Payson Owners Corp.*, 114 AD3d 420, 420 [1st Dept 2014].)

Defendants also cite to *Dermatossian v New York City Transit Authority*, 67 NY2d 219 (1986) which is likewise distinguishable from the facts of the instant case. In *Dermatossian*, the plaintiff was injured when he struck his head on a bus grab handle that the plaintiff alleged projected defectively "straight down from the ceiling of the bus instead of at the customary angle of about 45 degrees." (*Dermatossian*, 67 NY2d at 221 n 2.) The Court of Appeals rejected the plaintiff's assertion of res ipsa loquitur, reasoning that plaintiff's evidence "did not adequately exclude the chance that the handle had been damaged by one or more of defendant's passengers who were invited to use it." (*Id.* at 228.) Here, unlike the grab handle in *Dermatossian*, gym members are not invited to touch the subject bolt and/or cable; and there is no need for gym members to touch the subject bolt to operate the lateral pull down apparatus. In addition, whereas the subject grab handle in *Dermatossian* was on a public transit bus and therefore subject to

frequent use, potential abuse and vandalism, in the instant action the subject bolt was located inside of a member-exclusive "luxury fitness club" and not a component of the machine that members had contact with in their operation of the machine. (Def. Mem. at 3; *see also Torres v Cordice*, 11 Misc 3d 23, 25 [App Term, 1st Dept 2006] ["This is not a case where the public had such unfettered access to the instrumentality of the injury as to render defendant's control insufficient for a res ipsa loquitur charge to the jury."].)

This case is also distinguishable from *Barney-Yeboah v Metro-N. Commuter R.R.*, 2013 N.Y. Slip Op. 30021(U), (Sup Ct, NY County 2013), *revd* 120 A.D.3d 1023 (1st Dept 2014), *revd* 25 NY3d 945 (2015). In that case, the plaintiff was a passenger on a Metro-North train when a ceiling panel suddenly swung open and struck her in the head. (*Barney-Yeboah*, 2013 N.Y. Slip Op. 30021(U), at *1.) In the course of discovery, passenger witnesses testified that "the panel was held up by four bolts" and that the bolts or screws did not appear to be fastened securely and that one of the screws came loose causing the panel to open up and hang down hitting the plaintiff. (*Id.* at *2.)

A foreman from defendant Metro-North was also produced for deposition, who testified that the subject panel was fastened to the ceiling with "quarter turn screws, four per panel" and also had "two safety latches, and a safety chain." (*Id.* at *3 [internal quotation marks omitted].) The foreman testified that in order for the

subject panel to drop, an individual would have to "reach up on each side of the panel, depress the screws in and the panel would drop." (*Id.* [internal quotation marks and emendation omitted].) Although the panels were located in a public area of the train car, the foreman stated that he had no knowledge of anyone other than Metro-North employees accessing the ceiling panels. (*Id.*)

Similar to *Dermatossian*, the accident in *Barney-Yeboah* occurred in a mass-transit, public commuter train, where vandalism is probable and difficult to prevent. In contrast, the accident in the instant case occurred in an exclusive "luxury fitness club." (Def. Mem. at 3; *see also Torres*, 11 Misc 3d at 25.) Defendants' argument that a member both possessed the inclination and the appropriate wrench to surreptitiously sabotage the subject bolt (in full view of other members and staff) is speculative at best—and fails to create a material question of fact for trial.

The Court recognizes that the doctrine of res ipsa loquitur is only applied on summary judgment in the rarest of cases. However, given the specific, undisputed facts in the instant case, to deny Plaintiff summary judgment on the remote possibility (without any proof) that there was sabotage by an anonymous member—who managed to bring the necessary tools into the fitness club and managed to surreptitiously sabotage the machine—would effectively abrogate

application of the doctrine of res ipsa loquitur on *any* motion for summary judgment.

In addition, the Court finds that Defendants have failed to put forward a non-negligent explanation for how the accident could have occurred absent their negligence so as to raise a material issue of fact for trial. Further based upon the affidavit of Cooper that the machine was inspected every hour (although at what time prior to the Plaintiff's use is unknown) and—presumably was inspected at least one time prior to the accident and that the bolt was inspected and tightened if required—shows that if it was done at all within the hour, it was done negligently since the bolt should not have come loose.

## CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff James Ficelman's motion for summary judgment is granted with regard to liability only; and it is further

ORDERED that Defendants Equinox Fitness Club, Equinox Holdings, LLC and Equinox-54th Street, Inc.'s cross-motion for summary judgment is denied; and it is further

ORDERED that an immediate trial of the issue of damages shall be had before the court; and it is further

ORDERED that Plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial on the issue of damages only.

**Dated:** May 8, 2017
New York, New York

**ENTER:**

HON. ROBERT D. KALISH
J.S.C.