| **Colorado v YMCA of Greater N.Y.** |
| --- |
| 2017 NY Slip Op 30987(U) |
| May 10, 2017 |
| Supreme Court, New York County |
| Docket Number: 161746/2014 |
| Judge: Erika M. Edwards |
| 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. |

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

ELVIRA COLORADO,

Plaintiff,

-against-

YMCA OF GREATER NEW YORK d/b/a YMCA CHINATOWN,

Defendant.

Index No.: 161746/2014

DECISION/ORDER

Motion Seq. 002

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| Papers | Numbered |
|---|---|
| Notice of Motion and Affidavits/Affirmations Annexed | 1 |
| Answering Affidavits/Affirmations | 2 |
| Reply Affirmation | 3 |

***ERIKA M. EDWARDS, J.***:

Defendant YMCA of Greater New York d/b/a YMCA Chinatown's ("Defendant") motion for summary judgment dismissal of Plaintiff Elvira Colorado's ("Plaintiff") complaint against Defendant for injuries she sustained when falling off of a treadmill at Defendant's gym is GRANTED and Plaintiff's complaint is dismissed against Defendant.

Defendant demonstrated its entitlement to summary judgment as a matter of law under common law negligence principles as there was no evidence that Defendant caused or created a defective condition, that it had actual or constructive notice of a defective condition or that it breached a duty of care to Plaintiff. Additionally, Defendant demonstrated that Plaintiff consented to and assumed the risks inherent in use of a treadmill by voluntarily attempting to exercise on the treadmill, even though Plaintiff was a first-time user, because such risks were

apparent, obvious and reasonably foreseeable consequences of Plaintiff's actions without any negligence by Defendant.

Here, discovery is complete, including the depositions of Plaintiff, David Luis, a floor trainer and personal trainer for Defendant, and Wai Ping Kau, who works in member services and hospitality for Defendant. The evidence reveals that Plaintiff, a 74-year old woman, joined Defendant's gym a couple of days before she attempted to use the facility for the first time on October 10, 2013. She had never been a member of a gym and had never used a treadmill before. When she arrived at the facility, the employees at the front desk could not locate her registration, so she was given a pass to enter and use the facility. Plaintiff testified in substance that she was not offered an orientation class or instructions on how to operate the treadmill; she was not familiar with using it; she was unaware of the emergency safety clip; and she did not see or read any signs with warnings or instructions on how to use the treadmill either on the wall or on the treadmill's body or screen. Plaintiff testified that she stepped onto the treadmill while the screen was lit and she pressed button number 2 because it was supposed to be the slow speed. The treadmill sped up and Plaintiff was thrown off the back of the machine which caused her to suffer severe injuries to her shoulder and other areas.

Defendant disputes Plaintiff's version of the events and argues in substance that Plaintiff assumed the risks inherent in exercising on a treadmill. Additionally, Defendant argues that Plaintiff is responsible for the incident because Plaintiff willfully disregarded the warnings and instructions clearly posted on the wall near the treadmill, on the treadmill machine and on the illuminated screen; Plaintiff failed to avail herself of an orientation which was offered to all new members or first-time users and there was an orientation sign-in sheet kept at the front desk; Plaintiff failed to ask an employee or anyone for help prior to using the machine; and Plaintiff

failed to advise any employee that it was her first time using a treadmill or that she was unfamiliar with its operation.

Defendant argues in substance that Plaintiff's claims are barred by the primary assumption of the risk doctrine because Plaintiff voluntarily consented to such risks inherent in using a treadmill and Defendant is relieved of any legal duty to Plaintiff. Defendant also argues that it is not negligent based on common law negligence principles because there is no evidence that Defendant created or had constructive or actual notice of a defective condition; there is no evidence that the treadmill was defective, inherently dangerous or unsuitable for use; Plaintiff failed to provide an expert report alleging a defective condition; and there is no evidence that Defendant's actions or inaction caused Plaintiff's alleged injuries. Additionally, Defendant noted that the treadmill remained in operation without any problems subsequent to Plaintiff's accident. Finally, Defendant argues that Plaintiff's preexisting health condition of adrenal insufficiency was the proximate cause of her shoulder injuries.

Defendant relies on the deposition testimony of Plaintiff and others to allege that Plaintiff was being less than truthful during her deposition testimony when she denied pressing a second button on the treadmill, which is contradicted by Plaintiff's prior statements in her incident report and hospital record. Plaintiff's incident report revealed that Plaintiff admitted that while she was using the treadmill at speed number 2, she increased the speed by pushing button number 4, and her hospital record indicated that Plaintiff admitted that she pushed the wrong button which caused the treadmill to go faster. Additionally, Plaintiff's EMS record indicated that Plaintiff told the paramedics that the swelling in her shoulder was due to her history of adrenal insufficiency.

Plaintiff opposes Defendant's motion and argues in substance that Defendant failed to demonstrate a prima facie case of entitlement to summary judgment as a matter of law, that significant issues of fact remain to be tried, including whether Plaintiff understood the risks inherent in using a treadmill, whether her purported medical condition was the proximate cause of Plaintiff's shoulder injuries and whether Plaintiff's own negligence was the proximate cause of her injuries. Plaintiff denies making any statements about pressing an additional button on the machine or that she had adrenal insufficiency. Plaintiff further argues that, as a novice, Plaintiff cannot be deemed to have understood and fully appreciated the risks associated with using a treadmill and that Defendants were negligent for failing to instruct Plaintiff on the use of the treadmill prior to allowing her to use it.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden,

then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In an action for negligence, a plaintiff must prove that the defendant owned him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]).

An owner of an athletic facility is relieved from liability for inherent risks of engaging in a sport or recreational activity under the doctrine of primary assumption of the risk when the consenting participant is aware of the risks, has an appreciation of the nature of the risks, and voluntarily assumes the risks (*Morgan v State*, 90 NY2d 471, 484 [1997] [internal citations and quotations omitted]). A voluntary participant "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*id.* and *Brown v City of New York*, 69 AD 3d 893, 893 [2d Dept 2010]). Generally, voluntary participants in sporting or recreational activities are deemed "to have consented, by their participation, to those injury-causing events which are known, apparent, or reasonably foreseeable consequences of the participation," except for reckless or intentional acts (*Turcotte*, 68 NY2d at 439 [internal citations and quotations omitted]). Courts must consider a plaintiff's skill and experience when determining whether a plaintiff was aware of the inherent risks (*Latimer v City of New York*, 118 AD3d 420, 421 [1st Dept 2014]).

In the context of professional sporting events, when measuring a defendant's duty to a plaintiff, courts must consider the risks assumed by the plaintiff when plaintiff consented to participate in the activity and how those assumed risks qualified defendant's duty of care to plaintiff (*Turcotte v Fell*, 68 NY2d 432, 438 [1986]). A defendant's duty in such situations "is a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" by making the conditions as safe as they appear to be (*id.* at 439; *Brown*, 69 AD3d at 893-894). Therefore, primary assumption of the risk is not an absolute defense, but a measure of a defendant's duty of care to plaintiff (*Turcotte*, 68 NY2d at 439).

Many courts have granted summary judgment dismissal of plaintiff's claims based on primary assumption of the risk where plaintiffs have been injured while exercising on treadmills (*see Ingram v Life Fitness*, 140 AD3d 628 [1st Dept 2016]; *Davis v Town Sports Intl.*, 2015 NY Slip Op 51393[U] [App Term 1st Dept 2015]; *DiBenedetto v Town Sports Intl.*, LLC, 118 AD3d 663 [2d Dept 2014] and *Wallach v Am. Home Prods. Corp.*, 300 AD2d 576 [2d Dept 2002]).

In applying these legal principles to the facts in the instant matter, based on the admissible evidence submitted, the court finds that Plaintiff assumed the risk of injuring herself in the manner in which she did when she voluntarily operated the treadmill without understanding how it worked and without knowing whether she was physically capable of keeping up with the speed she selected. Here, the risks inherent in treadmills were obvious, apparent and reasonably foreseeable consequences of plaintiff's use of the equipment and there is no evidence that Defendant was negligent in causing or creating conditions which would make such activity more dangerous than usual or that Defendant concealed such danger.

Plaintiff attempts to distinguish the facts of the instant matter from the facts of many of the cases cited by Defendant in support of its arguments for dismissal, but based on the circumstances in our case, Plaintiff still fails to raise an issue of material fact which would prevent summary dismissal. For example, in many of the treadmill-related cases relied on by Defendant and the cases cited above, the plaintiffs had experience in using a treadmill and had prior experience exercising at a particular gym for a period of time. (*Ingram*, 140 AD3d 628; *Davis*, 2015 NY Slip Op 51393[U]; *DiBenedetto*, 118 AD3d 663 and *Wallach*, 300 AD2d 576). However, the analysis of whether a plaintiff appreciates a risk inherent in an activity does not end with the consideration of a plaintiff's experience, or lack thereof. As in this case, if a defendant demonstrates that such injury-causing event is obvious, apparent or a reasonably foreseeable consequence of plaintiff's participation, then plaintiff assumes the risk of injury and defendant is only liable for intentional or reckless acts, for causing or creating conditions unique and dangerous over and above the usual dangers inherent in the sport or activity, or for concealing such dangers.

In Plaintiff's opposition, she relies heavily on *Corrigan v Musclemakers*, which involved a treadmill accident when a personal trainer entered information into a treadmill without providing any instructions and left a first-time treadmill user and new gym member unattended (*Corrigan v Musclemakers*, 258 AD2d 861 [3d Dept 1999]). The plaintiff advised the personal trainer that she was "very sedentary and new to working out at a gym" and the defendant only offered a conclusory affidavit of its general manager in support of dismissal (*id.*). The court denied defendant's summary judgment motion and found that the plaintiff's use of the treadmill was not a sporting event for which the lesser standard of care should be applied and that

defendant failed to establish as a matter of law that the risks associated with the use of the treadmill were fully appreciated or perfectly obvious (*id.* at 862-863).

These facts are distinguished from the facts in the instant matter, because Plaintiff in our case failed to notify the staff that she did not know how to operate a treadmill, that she had never used one before, that she was not familiar with exercising in a gym, or that she needed help in any way. Although available to Plaintiff, Plaintiff did not request an orientation or a training session regarding use of the equipment prior to using it. Additionally, the trainer in our case, who was present in the room at the time, did not set the speed of the treadmill and simply walk away. Here, Defendant demonstrated that there were clearly marked instructions and warnings posted on the wall near the treadmill, on the machine and on the screen that Plaintiff testified was already lit when she stepped onto the machine. Plaintiff simply testified that she did not see or read any of these warnings. Therefore, there was no way for Defendant to have known that Plaintiff needed assistance or that she would simply get on a treadmill and start it without knowing anything about how to use it. Additionally, Defendants cannot be held responsible for Plaintiff's failure to read and disregard of such instructions and warnings.

Here, Defendant demonstrated that the risks inherent in Plaintiff's use of the treadmill were obvious and reasonably foreseeable consequences of Plaintiff's actions without any negligence by Defendant. Even if Plaintiff did not have any experience in using the treadmill and did not have knowledge of how to operate the equipment, adjust the speed, stop it, or the specific risks associated with its use, such risks were apparent and obvious and Plaintiff should have known by reading the warning signs and instructions. By not asking for help, not reading the instructions and warnings, not having a reasonable understanding of her fitness level and lack of experience in using a treadmill and operating the treadmill by blindly pressing one or two

buttons, Plaintiff assumed the risk of injury that was open and obvious and effectively consented to relieving Defendant of basic liability to Plaintiff, except to maintain the facility and equipment as safe as it appears to be. Therefore, the court determines that based on common law negligence principles, Defendant has demonstrated that it was not negligent for Plaintiff's injuries and Plaintiff assumed the risk inherent in using a treadmill.

Furthermore, Plaintiff's testimony during her deposition that she did not press any additional buttons directly contradicts her prior alleged statements in her incident report and hospital record and does not raise a material issue of fact to preclude dismissal. Additionally, Plaintiff failed to demonstrate that there is an issue of fact as to whether Defendant breached its duty to Plaintiff by failing to offer an orientation class. Finally, the court is not persuaded by Defendant's arguments in favor of dismissal based on Plaintiff's alleged health condition being the proximate cause of Plaintiff's shoulder injury or by Plaintiff's remaining contentions.

As such, Defendant's motion for summary judgment is granted.

Accordingly, it is hereby

**ORDERED** that Defendant YMCA of Greater New York d/b/a YMCA Chinatown's motion for summary judgment in its favor as against Plaintiff Elvira Colorado is granted, Plaintiff's complaint is dismissed against Defendant with prejudice and without costs and the Clerk is directed to enter judgment accordingly in favor of Defendant as against Plaintiff.

This constitutes the decision and order of the court.

Date: May 10, 2017

HON. ERIKA M. EDWARDS