

**Miglino v Bally Total Fitness of Greater N.Y. Inc.**

2010 NY Slip Op 33790(U)

June 9, 2010

Supreme Court, Suffolk County

Docket Number: 08-7729

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 21 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. JEFFREY ARLEN SPINNER  
Justice of the Supreme Court

MOTION DATE 7-25-08  
ADJ. DATE 4-14-10  
Mot. Seq. # 001 - MD

-----X  
GREGORY C. MIGLINO, JR., EXECUTOR OF :  
THE ESTATE OF GREGORY C. MIGLINO, SR., :  
DECEASED, :  
Plaintiff, :  
- against - :  
BALLY TOTAL FITNESS OF GREATER NEW :  
YORK INC. and BALLY TOTAL FITNESS :  
CORPORATION, :  
Defendants. :  
-----X

CHARNAS LAW FIRM, P.C.  
Attorneys for Plaintiff  
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Upon the following papers numbered 1 to 11 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 7 - 8; Replying Affidavits and supporting papers 9 - 11; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (001) by defendants Bally Total Fitness of Greater New York and Bally Total Fitness Corporation for an order pursuant to CPLR 3211(a)(7) dismissing the action is denied; and it is further

**ORDERED** that Counsel for all parties are directed to appear in Room 362A of the Courthouse located at 1 Court Street, Riverhead, New York, for a Preliminary conference on July 28<sup>th</sup>, 2010, at 10:00 AM of that day; and it is further

**ORDERED** that Counsel for the moving party is hereby directed to serve a copy of this order, with Notice of Entry, upon Counsel for all parties and upon the Calendar Clerk of this Court, within twenty (20) days of the date this order is entered by the Suffolk County Clerk.

This wrongful death action was commenced by the filing of a summons and complaint on February 26, 2008. Issue was joined on or about April 8, 2008. In the first cause of action, the complaint alleges that defendant Bally Total Fitness of Greater New York owned and operated a health club on Middle Country Road, Lake Grove, New York, and on March 26, 2006, the club had a membership of more than 500 persons. Plaintiff also alleges that the club had on its premises at least one automated external defibrillator ("AED"). However, defendant's employee negligently failed to use the AED, and/or failed to use the AED in a timely manner, when Gregory C. Miglino, Sr. ("the decedent"), a member of the club, collapsed on the

racquetball court on March 26, 2006. The complaint further alleges that as a proximate result of defendant Bally New York's negligence, the decedent died. In the second cause of action, plaintiff asserts identical allegations against defendant Bally Total Fitness Corporation.

Defendants now seek dismissal of the complaint, arguing that the complaint fails to state a cause of action. In the first cause of action, defendants contend that defendant Bally Total Fitness of Greater New York, Inc. is immune from liability pursuant to New York Public Health Law § 3000-a (also known as the Good Samaritan Statute) and 42 U.S.C.S. § 238q. In the second cause of action, defendants contend that Bally Total Fitness Corporation does not own or operate the subject health club and cannot be held vicariously liable for the acts or omissions of the health club's employees. In support, defendants submit, *inter alia*, the personal affidavits by Ronald E. Siegel and Kenneth LaGrega. Mr. Siegel avers that Bally Total Fitness Corporation does not own the subject fitness club. Mr. LaGrega avers that he was present on the date of the decedent's collapse, and was trained to operate the AED. When he was notified of the decedent's collapse, he placed the AED near the decedent. He further states he deferred to a doctor who was present in the health club who stepped forward to assist the decedent until the paramedics arrived.

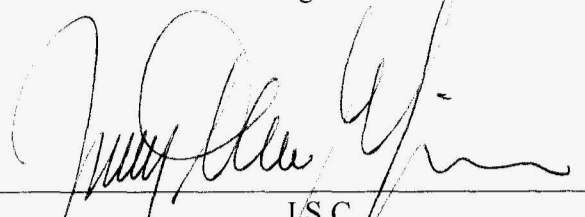
In opposition, plaintiff submits, *inter alia*, his counsel's affirmation and an affirmation by Gary Gabelman, M.D. Counsel affirms that the Good Samaritan Statute does not apply in this instance and that Bally has not demonstrated that it is a public access defibrillator provider. In addition, plaintiff claims that Bally's actions did not constitute the rendering of emergency treatment under the statute. Dr. Gabelman affirms that the immediate use of the AED would have increased the decedent's chances of survival.

Pursuant to CPLR 3211(a)(7), the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Board of Education v State Education Dep't***, 116 AD2d 939, 498 NYS2d 516 [1986]). The sole criterion is whether the pleading states a cause of action, and, if from its four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion will fail (***Guggenheimer v Ginzburg***, *supra*; *see also*, ***LoPinto v J. W. Mays, Inc.***, 170 AD2d 582, 566 NYS2d 357 [2d Dept 1991]; ***Green v Leibowitz***, 118 AD2d 756, 500 NYS2d 146 [2d Dept 1986]), regardless of whether the plaintiff will ultimately prevail on the merits (*see*, ***Sanders v Winship***, 57 NY2d 391, 394, 456 NYS2d 720 [1982]; ***Grand Realty Co. v White Plains***, 125 AD2d 639, 510 NYS2d 172 [2d Dept 1986]). "In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (***Leon v Martinez***, 84 NY2d 83, 88, 614 NYS2d 972 [1994]). "Although plaintiff may submit affidavits, he is not obliged to do so on penalty of dismissal . . . [U]nless the motion to dismiss is converted by the court to a motion for summary judgment, he will not be penalized because he has not made an evidentiary showing in support of his complaint" (***Rovello v Orofino Realty Co.***, 40 NY2d 633, 635, 389 NYS2d 314 [1976]; ***Reiver v Burkhart Wexler & Hirschberg, LLP***, \_\_ AD3d \_\_, 2010 NY App Div LEXIS 4502 [2d Dept 2010]).

Here, defendant has submitted evidentiary affidavits which make a strong, but not conclusive showing that the plaintiff does not have a cause of action. However, plaintiff is not obligated to come forth with evidence as he would on a motion for summary judgment to withstand dismissal (***Reiver v Burkhart***

*Wexler & Hirschberg, LLP, supra*). Thus, this Court, being only concerned with the sufficiency of the plaintiff's pleadings, and not evidentiary matters, determines that the pleadings herein maintain causes of action cognizable at law. Accordingly, the defendants' motion to dismiss for failing to state a cause of action is denied.

Dated: JUN 09 2010

  
\_\_\_\_\_  
J.S.C.

FINAL DISPOSITION  NON FINAL DISPOSITION

**HON. JEFFREY ARLEN SPINNER**