

Gebbia v Town Sports Intl., LLC
2017 NY Slip Op 32117(U)
October 6, 2017
Supreme Court, New York County
Docket Number: 150764/2014
Judge: Erika M. Edwards
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

JOHN GEBBIA, MELISSA GEBBIA, Husband & Wife,

Index No.: 150764/2014

Plaintiffs,

DECISION/ORDER

-against-

Motion Seq. 001 and 002

TOWN SPORTS INTERNATIONAL, LLC d/b/a NEW YORK SPORTS CLUB; PRECOR INCORPORATED, JOHN/JANE DOES 1-100 (Fictitious names for people whose names are yet known); XYZ CORPORATIONS 1-100 (Fictitious names for corporations whose identities are not yet known) and ABC ENTITIES 1-100 (Fictitious commercial entities whose identities are not yet known),

Defendants.

PRECOR INCORPORATED,

Defendant/Third-Party Plaintiff,

-against-

WATKINS FITNESS & SPORTS EQUIPMENT, INC.,

Third-Party Defendant.

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

Papers	Numbered
Notice of Motion/Cross-Motion and Affidavits/ Affirmations Annexed	1-3
Answering Affidavits/Affirmations	4-6
Reply Affirmation	7-8

ERIKA M. EDWARDS, J.:

Plaintiff John Gebbia (“Plaintiff”) brought claims against Defendants Town Sports International, LLC d/b/a New York Sports Club (“Town Sports”), Precor Incorporated (“Precor”) and fictitious individuals, corporations and commercial entities (collectively

“Defendants”) for personal injuries he sustained on July 12, 2011, while he was exercising at a gym operated by Town Sports when the cable on a seated long-pull rowing machine, which was manufactured by Precor, failed by snapping apart from its connector crimp near the handle underneath a black ball. Plaintiff’s claims against Defendants include negligence, failure to warn, breach of warranty of fitness, strict liability for design and manufacturing defects, negligence for design and manufacturing defects and *res ipsa loquitur*. Plaintiff’s wife, Melissa Gebbia, has since withdrawn her claim for loss of consortium, services and society. Recently, after the motions were filed, Precor filed a third-party action against the company that supplied the cable to Precor, Watkins Fitness & Sports Equipment, Inc.

Defendants Town Sports and Precor move for summary judgment dismissal of all claims and cross-claims against them under motion sequences 001 and 002. Plaintiff opposes both motions and cross-moves under motion sequence 001 for spoliation sanctions against Town Sports, including striking its Answer and defenses, for Town Sports’ failure to preserve the broken cable. Town Sports opposes Plaintiff’s cross-motion. These three motions are consolidated for purposes of this decision.

For the reasons set forth herein, the court grants both summary judgment motions in part and denies Plaintiff’s cross-motion to the extent set forth herein:

- 1) The court grants in part Town Sports’ motion for summary judgment dismissal of Plaintiff’s complaint as to Plaintiff’s Third, Fourth, Fifth, Seventh and Eighth Causes of Action for his claims for breach of warranty of fitness, strict liability for design defect, strict liability for manufacturing defect, negligence for design defect and negligence for manufacturing defect, respectively, and the court denies Town Sports’

- motion for summary judgment dismissal of Plaintiff's First, Second and Ninth Causes of Action for negligence, failure to warn and res ipsa loquitur;
- 2) The court denies Plaintiff's cross-motion for spoliation sanctions without prejudice to the extent that the court denies Plaintiff's request to strike Town Sports' pleadings and defenses, but determines that an adverse inference charge for Town Sports' failure to maintain the broken cable may be appropriate at the sound discretion of the trial court; and
 - 3) The court grants in part Precor's motion for summary judgment dismissal of Plaintiff's complaint as to Plaintiff's First, Third, Fourth, Fifth, Seventh, Eighth and Ninth Causes of Action for negligence, breach of warranty of fitness, strict liability for design defect, strict liability for manufacturing defect, negligence for design defect, negligence for manufacturing defect and res ipsa loquitur, respectively and the court denies Precor's motion for summary judgment dismissal of Plaintiff's Second Cause of Action for failure to warn.

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 owed 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]). A motion for summary judgment may be properly granted when a defendant demonstrates that it did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's injury (*Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014]).

To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it to correct or warn about its existence (*Lewis v Metro. Transp. Auth.*, 64 NY2d 670, 670 [1984]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

In applying these legal principles to the facts in the instant matter, based on the admissible evidence submitted, the court finds that Defendants both demonstrated their entitlement to summary judgment on Plaintiff's claims for breach of warranty of fitness, strict liability for design and manufacturing defects and negligence for design and manufacturing defects. Precor also established its entitlement to summary judgment for Plaintiff's claims for negligence and *res ipsa loquitur*. Plaintiff submitted an expert engineer's report with his opposition. Plaintiff's expert raised certain issues of material facts and opined in substance that the cable failed during its regular use, that Precor is liable for its inadequate and non-compliant warnings and Town Sports is liable for its failure to properly inspect the machine and its failure to train and instruct its employees to properly inspect the machine cables. However, Plaintiff failed to raise material issues of fact to preclude summary judgment for most of his claims. The court determines that Plaintiff successfully raised several material issues of fact in dispute to preclude dismissal of his failure to warn claim against both Defendants and his negligence and *res ipsa loquitur* claims against Town Sports. As such, only these three claims remain.

The evidence demonstrates that Plaintiff was an experienced user of the rowing machine and he routinely checked the cables prior to using the equipment. The cable failed while Plaintiff was using the equipment in a proper manner through no fault of Plaintiff. Plaintiff had never had a similar problem with the machine prior to the accident and he looked at the cable before he started exercising and did not see any fraying or problems. Additionally, there was testimony that the cable cannot be repaired and that there was no regular maintenance that could have prevented the accident. If the cable breaks, a Town Sports' employee orders a new one and replaces it within ten minutes. However, there is conflicting testimony regarding whether a proper inspection could have prevented this accident. Precor's employee testified in substance that there

was no routine inspection that a Town Sports' employee could have performed to prevent the accident. However, he also testified that the ball which covered the connection that caused Plaintiff's accident can be slid down the cable for inspection of the crimp and that their manual and warnings advised users to inspect all cables and connections, including this area. However, a Town Sports' employee admitted that he did not receive the manual or the routine inspection check list and he did not know that the ball slid down the cable for inspection of the connector underneath the cable. However, he also claimed that their employees inspected the entire cable daily, including the connection which failed in Plaintiff's accident. Clearly this could not be possible if the employees did not move the ball which covered the connection.

Precor recommends daily, weekly and annual inspections and it provides an inspection checklist and detailed manual. Town Sports did not maintain daily or regular inspection logs and they only provided six pages of maintenance records regarding this machine. However, Town Sports claims that its employees inspected the machine and cable on a daily basis. Town Sports purchases the new cables from Precor and they are sent with the connector parts intact with the ball covering the connector with no assembly required. Precor claims that the cables are supposed to last for one year based on the engineering specifications, however it disclaimed any warranties. The cable prior to the one involved in Plaintiff's accident broke approximately eight months earlier and the cable installed after Plaintiff's accident only lasted approximately six to nine months before it broke.

Plaintiff's negligence claim is dismissed against Precor because Plaintiff failed to establish that Precor had any duty to inspect, maintain or repair the equipment once it has been sold. Precor established that Town Sports purchased Precor's rowing machine years prior to

Plaintiff's accident and Precor did not have any obligation to maintain, inspect or repair it on an ongoing basis, nor to keep the gym area or equipment safe, as alleged by Plaintiff.

However, as to Town Sports' negligence, Plaintiff raised questions of fact, including, but not necessarily limited to, whether Town Sports had constructive notice of the alleged defective condition; whether Town Sports should have known to replace the cable sooner than one year, since the cable before the one involved in Plaintiff's accident broke eight months earlier and based on the machines heavy usage at its facility; whether Town Sports properly inspected and maintained the cable; whether Town Sports inspected the cable on a daily, weekly and annual basis pursuant to Precor's recommended schedule; whether it trained and instructed its employees to properly inspect the cable and connection by sliding the ball away from the connector point underneath the ball; and if Town Sports failed to properly inspect the equipment and cable or failed to maintain the equipment, then whether such failure was the proximate cause of Plaintiff's alleged injuries.

As opined by Plaintiff's expert, questions of fact remain as to whether both Defendants failed to warn Plaintiff of a dangerous condition of the gym equipment and in particular, the cable connections; whether Precor's instructions and warnings in its manual and labels were incorrect and insufficient; whether Precor attached an adequate warning label to the equipment and if it was attached, who was responsible for removing it, despite the instructions not to do so; and if Defendants failed to properly warn of the alleged dangerous condition, then whether such failure to warn was the proximate cause of Plaintiff's alleged injuries.

Plaintiff failed to demonstrate each element of its breach of a warranty of fitness claim against either Defendant and Precor expressly disclaimed any expressed or implied warranties.

Plaintiff's claims for strict liability and negligence for design and manufacturing defects only apply to Precor as the manufacturer of the equipment and parts. However, Plaintiff failed to demonstrate each element of these claims, including identifying the specific alleged defect; demonstrating that the machine, cable or its connectors were not reasonably safe for their intended use; that such cable, parts or equipment were defectively designed or manufactured and that they were in a dangerous and hazardous condition at the time they left Precor's control. Despite Plaintiff's expert's contention that there were safer designs available, such statements are insufficient to sustain this claim. Unfortunately, Town Sports did not preserve the broken cable, so no one can inspect or test it. However, such failure to do so does not relieve Plaintiff of its obligation to establish each element of this claim or to raise a material question of fact based on the evidence.

Finally, Plaintiff's claim for *res ipsa loquitur* fails against Precor because the cable and equipment were not within Precor's exclusive control. Town Sports failed to demonstrate its entitlement to summary judgment dismissal of this claim against it as the evidence taken in the light most favorable to Plaintiff indicates that the cable should not have separated from the handle during its intended use but for negligence, the cable and machine was within Town Sports' exclusive control and there is no evidence that Plaintiff used the machine improperly.

As such, the court grants dismissal of the majority of Plaintiff's claims as set forth herein and the only remaining claims are Plaintiff's failure to warn against both Defendants and its negligence and *res ipsa loquitur* claims against Town Sports. Neither Defendant discussed or demonstrated their entitlement to summary judgment dismissal of any cross-claims against them.

Additionally, the court denies Plaintiff's cross-motion to strike Town Sports' pleadings and defenses as spoliation sanctions for Town Sports' failure to preserve the broken cable. Such

sanctions are firmly within the discretion of the court and the court can consider a number of factors, including, but not necessarily limited to, the motive of the spoliator, the prejudice to the victim of the spoliation, the material nature and importance of the evidence, whether such spoliation was in violation of a court order to preserve the evidence and the circumstances surrounding the spoliation.

Here, Town Sports does not know where the cable is or what happened to it, but it appears that a former Town Sports employee installed a new cable and most likely discarded the broken cable during the normal course of its business operations. Plaintiff, who was very experienced with using the equipment and inspecting the cables, inspected the cable immediately after the accident and observed that the cable was not frayed and that it had disconnected from the connector crimp underneath the black ball. Town Sports cooperated with the other parties by permitting them to inspect the equipment, providing them with the replacement part number, making an exemplar cable available to them and providing its work ticket and maintenance logs, although such written notes are sparse at best. Additionally, there is no evidence that Town Sports willfully or maliciously destroyed the evidence and Plaintiff's written notice for Town Sports to preserve the cable was sent long after the cable was lost. Therefore, the severe remedy of striking Town Sports' pleading is not appropriate in this matter and the court denies Plaintiff's cross-motion. Although, the court determines that an adverse inference charge may be appropriate at trial, this court will leave the decision up to the sound discretion of the trial judge.

Accordingly, it is hereby

ORDERED that under motion sequence 001, Defendant Town Sports International, LLC d/b/a New York Sports Club's motion for summary judgment is granted in part and the court dismisses Plaintiff John Gebbia's Third, Fourth, Fifth, Seventh and Eighth Causes of Action for

his claims for breach of warranty of fitness, strict liability for design defect, strict liability for manufacturing defect, negligence for design defect and negligence for manufacturing defect, respectively, as against Defendant Town Sports International, LLC d/b/a New York Sports Club; and it is further

ORDERED that under motion sequence number 001, Plaintiff's cross-motion to strike Defendant Town Sports International, LLC d/b/a New York Sports Club's pleadings and defenses is denied without prejudice, however the court determines that an adverse inference charge for Town Sports' failure to maintain the broken cable may be appropriate at the sound discretion of the trial court; and it is further

ORDERED that Defendant Precor Incorporated's motion for summary judgment is granted in part and the court dismisses Plaintiff John Gebbia's First, Third, Fourth, Fifth, Seventh, Eighth and Ninth Causes of Action for negligence, breach of warranty of fitness, strict liability for design defect, strict liability for manufacturing defect, negligence for design defect, negligence for manufacturing defect and res ipsa loquitur, respectively, as to Defendant Precor Incorporated.

Date: October 6, 2017


HON. ERIKA M. EDWARDS