Warhit v North End Fitness & Training
2018 NY Slip Op 34240(U)
December 31, 2018
Supreme Court, Westchester County
Docket Number: Index No. 60637/2017
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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ILISSA WARHIT and PAUL B. WARHIT

Plaintiff,

Decision and Order
Index No. 60637/2017
Motion Sequence 1

-against-

NORTH END FITNESS & TRAINING,

Defendant.

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The following documents were received and considered in connection with the above-captioned matter:

Notice of Motion/Affirmation/Exhibits A-I	1-11
Affirmation in Opposition/Affidavit/Exhibits A-D	12-17
Reply Affirmation	18

Upon the foregoing papers, it is ordered that the motion is denied.

Factual and Procedural Background

The plaintiffs, Ilissa Warhit ("Warhit") and Paul Warhit commenced this action by filing a summons and complaint on July 19, 2017, seeking damages for injuries Warhit allegedly sustained on January 12, 2017, when she stepped on a moving treadmill at North End Fitness & Training. Paul Warhit seeks a derivative claim for deprivation of Warhit's service, society and consortium.

The defendant now files the instant motion for summary judgment, for an order dismissing all claims. The defendant argues that the plaintiff has completely failed to sustain her prima facie burden of proof as a matter of law to establish liability upon the

defendant for causing or contributing to her accident. The defendant argues that Warhit's contradictory deposition testimony about how and where the accident occurred is fatally insufficient as a matter of law. The plaintiff argues that there is no duty for a property owner to protect others from an open and obvious condition and that the doctrine of assumption of risk applies if the risk of the activity is perfectly obvious to the plaintiff and the plaintiff voluntarily engages in the activity.

In opposition, Warhit argues that the motion must be denied because there are triable issues of fact. She argues that the defendant fails to offer proof that the condition was not inherently dangerous and Warhit does not allege that the treadmill itself was in a dangerous condition, but that Joseph Englander's actions created the dangerous condition. The plaintiff contends that the defendant failed to establish its burden.

In support of the motion, the defendant relies upon, her deposition transcript, the deposition transcripts of Ilissa and Paul Wahit (the plaintiff's husband), an attorney's affirmation, and copies of the transcript.

As per Joseph Englander ("Englander"), the owner of North End Fitness & Training, he was in the process of cleaning the tread belts on four treadmills that accumulated salt and sand from the gym members' sneakers. To do this, Englander cleaned the salt and sand and then activated the treadmills to dry the tread belts. While the treadmills were activated, Warhit stepped onto one of the moving treadmills incurring injuries. Warhit's husband was using an elliptical machine next to the treadmills, noticed that all four treadmills were moving, but did not witness Warhit's accident. Englander testified that he was standing next to Paul Warhit next to the treadmills and observed Warhit step onto the moving treadmill next to the elliptical machine.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Failure of a moving party to tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact results in a failure to tender a prima facie entitlement to summary judgment and requires denial of the motion, regardless of the sufficiency of the opposing papers. (*McDonald v Mauss,* 38 AD3d 727 [2d Dept 2007]).

If a sufficient prima facie showing is made, however, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); *see also, Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept 1990]).

"An owner...of realty owes a duty to maintain the property in a reasonably safe condition" (*Fishelson v Kramer Props., LLC*, 133 AD3d 706, 707 [2d Dept 2015] *quoting Boudreau-Grillo v Ramirez*, 74 AD3d 1265, 1267 [2010]) "and must warn of any dangerous or defective condition of which it has actual or constructive notice" (*Id.*). "To be entitled to summary judgment, the defendant [is] required to show, prima facie, that it maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises" (*see Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634, 636 [2d Dept 2010]; *see also Russo v Home Goods, Inc.*, 119 AD3d 924, 925 [2d Dept 2014]).

In this case, the defendant's owner does not argue that he did not create the condition of which the plaintiff complains, but asserts that it was an open and obvious condition and that its placement was not inherently dangerous (*Id.*). However, "[p]roof that a dangerous condition is open and obvious merely negates the [defendant's] obligation to warn of the condition, but does not preclude a finding of liability against a landowner for a failure to maintain the property in a safe condition" (*Id.*) It only raises an issue of fact as to the plaintiff's comparative negligence (*see Devlin v Ikram*, 103 AD3d 682 [2d Dept 2013]). Moreover, "[a] condition that is ordinarily apparent to a person making reasonable use of his or her senses, may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted"' (*see Cassone v State*, 85 AD3d 837, 839 [2d Dept 2011]). Also, "[t]he issue of whether a dangerous condition is open and obvious is fact specific, and usually a question of fact for a jury to resolve" (*Id.*).

Here, the defendant's own contentions, regarding conflicting testimony, preclude summary judgment, since there are issues of fact as to whether Warhit actually saw that the treadmills were moving prior to stepping one of them or whether she was distracted and looking at the television. "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*see Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]). There is also an issue of fact as to whether the fact that the treadmills were activated and in motion, was open and obvious.

The defendant also argues primary assumption of risk with regard to the plaintiff's accident. "Pursuant to the doctrine of primary assumption of risk, a participant in a recreational activity 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 (*see*

Spiteri v Bisson, 134 AD3d 799, 801 [2d Dept 2015]).'For the assumption of risk doctrine to apply, it is not necessary that the injured plaintiff foresee the exact manner in which his or her injury occurred, "so long as he or she is aware of the potential for injury of the mechanism from which the injury results"' (*see Convey v City of Rye School Dist.*, 271 AD2d 154 [2d Dept 2000]). Further, the doctrine will not bar liability if the risk is unassumed, concealed, or unreasonably increased (*see Alqurashi v Party of Four, Inc.*, 89 AD3d 1047 [2d Dept 2011]). Here, Warhit did not start using the treadmill and then fell during her exercise routine. Instead she stepped on a treadmill supposedly unaware that it was on. Therefore, it cannot be said that she assumed the risk of using the treadmill.

Therefore, based on the foregoing, the Court finds that the defendant failed to establish prima facie entitlement to judgment as a matter of law and failed to eliminate all triable issues of fact.

Accordingly, based on the foregoing, it is

ORDERED that the motion for summary judgment is denied.

The parties are directed to appear before the Settlement Conference Part on February 5, 2019 in Courtroom 1600 at 9:15 a.m.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
December 31, 2018

HON. SAM D. WALKER, J.S.C.