SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** IAS MOTION 14

Justice

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INDEX NO. 157373/2018

SHANE CRANDALL,

MOTION DATE 3/29/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

EQUINOX HOLDINGS, INC. D/B/A EQUINOX FITNESS CLUB D/B/A EQUINOX, EQUINOX GREENWICH AVENUE, INC.,NICK HAMMOND, JOSE TAVERAS, MARTIN 'DOE', 'JOHN DOE'

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion to dismiss the complaint pursuant to CPLR 3211[a][7] is determined as follows:

This action arises out of a purported incident of sexual assault and harassment Plaintiff claims occurred at a fitness club operated by Defendant Equinox Holdings, Inc. d/b/a Equinox Fitness Club D/B/A Equinox and Equinox Greenwich Avenue ("Equinox"). Equinox operates a chain of high-end fitness clubs throughout the United States, including multiple locations in New York City. In his verified complaint, Plaintiff claims on August 9, 2017 he was a member of Equinox's heath club and he was in a steam room at Equinox's location at 97 Greenwich Avenue, New York, New York. On that date, Plaintiff alleges an unnamed "member of Equinox" "began masturbating to and in close proximity of the plaintiff". When he attempted to exit the steam room, Plaintiff alleges the unnamed "member of Equinox" "grabbed" and "held the plaintiff down and sexually assaulted the plaintiff."

In paragraphs 25 and 30 of his complaint, Plaintiff alleges "EQUINOX had prior knowledge that its members were engaging in orgies, indecent exposure, masturbation, sexual assault, sexual harassment and lewd behavior in the men's steam rooms." Moreover, Plaintiff asserts in his pleading that despite such knowledge Equinox "intentionally looked the other way regarding the reprehensible conduct occurring in their steam rooms." In paragraphs 91 and 92 of the complaint, Plaintiff avers the "activity by the [unnamed "member of Equinox"] was reasonably predictable and foreseeable based on prior occurrences and knowledge" for "more than a decade . . . of same or similar incidents involving inappropriate, lewd, sexual acts, indecent exposure, masturbation, and sexual solicitation, assault and sexual harassment taking place in the same steal [sic] room at the same fitness club." Plaintiff further claims Equinox has "marketed their health clubs as a place for sex", that "sexual predators appear to be welcomed" and that it "encouraged and allowed to flourish sexual deviant behavior in their steam rooms."

Plaintiff alleges that Equinox management not only had prior knowledge of "sexual assault" in their steam rooms, but that they "admitted they were aware of no less that twenty (20) previously reported incidents of sexual assault and indecent sexual acts which have occurred in the men's steam room". As to facts in support of these allegations, Plaintiff pleads, *inter alia*, the existence of three prior lawsuits filed in New York State against Equinox, including one concerning the location at issue here, in which claims of inappropriate sexual behavior, sexually deviant acts and sexual assaults were made. Plaintiff also notes that information regarding "lewd and disgusting sexual behavior that regularly occurred at EQUINOX's steam rooms" were published, prior to the alleged incident, in traditional and social media. Plaintiff pleaded that Equinox employees were aware of and regularly sought out this information. Further, Plaintiff alleged that in a 2005 New York Times article, "Steven Rosen, then chief operating officer of Equinox, admitted . . . that unlawful and illicit sexual activity occurs in their steam rooms."

Based upon these allegations, Plaintiff pled six causes of action against Equinox, to wit: [1] negligent hiring, training and supervision, [2] negligent security, [3] negligence, [4] breach of contract, [5] breach of implied warranty of good faith and fair dealing, and [6] civil conspiracy.

Now, Equinox moves to dismiss the complaint as against Equinox Holdings, Inc. D/B/A Equinox Fitness Club D/B/A Equinox, Equinox Greenwich Avenue, Inc., Nick Hammond, and Jose Taveras for failure to state a claim pursuant to CPLR 3211[a][7].

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *Palazzolo v Herrick, Feinstein, LLP*, 298 AD2d 372 [2d Dept 2002]; *Schulman v Chase Manhattan Bank*, 268 AD2d 174 [2d Dept 2000]). In determining such a motion, "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" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In evaluating a pleading in this procedural context, not only must the facts and allegations contained therein presumed to be true (*see 219 Broadway Corp. v. Alexander's, Inc.*, 46 NY2d 506 [1979]; *Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]), but "whatever may be implied from its statements by reasonable intention" is required to be accepted (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127 [1st Dept 2017]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

While permitted to submit affidavits and evidence in support of its motion (*see* CPLR 3211[c]["either party may submit any evidence that could properly be considered on a motion for summary judgment"]; *see also also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]), movant eschewed this option and only attacked the pleading as insufficient on its face.

With respect to the negligence claims pled in causes of action two and three, Defendants argue the complaint does not contain sufficient facts to support a premises liability cause of action grounded in a claim of deficient security at Equinox's premises (*see generally* PJI 2:90). Such a cause of action lies when one in possession or control of property neglects to act reasonably by failing to control the foreseeable conduct of third-parties on the premises when able and aware of the need for such action (*see D'Amico v Christie*, 71 NY2d 76, 85 [1987]; *Arreaga v 112 Dyckman Rest. Inc.*, 143 AD3d 646 [1st Dept 2016]; *see also Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1987]).

Contrary to Defendants' arguments, Plaintiff's complaint is replete with facts and allegations which support the above requisites for pleading purposes. Plaintiff alleges in the complaint that sexual assaults and illicit sexual activity regularly occurred in Equinox's steam rooms prior to his assault, that Equinox was aware of and admitted knowledge of same and that Equinox negligently and/or intentionally took no action despite this knowledge. That the allegations contained in the complaint may lack particularity or "material facts" in support is of no moment (*see Melito v Interboro-Mutual Indem. Ins. Co.*, 73 AD2d 819, 820 [4th Dept 1979]). Particularity is not required in this type of negligence claim (CPLR 3016) and pleaded facts which simply give "notice" of the claims asserted are sufficient (CPLR 3013; *Foley*, supra at 63). Indeed, all manner of ostensibly unsupported allegations have been assumed to be true when the Court of Appeals has evaluated challenged pleadings (*see Howard v Lecher*, 42 NY2d 109 [1977][Court assumed as true "doctor was negligent in failing to take the proper measures to determine whether the fetus suffered from Tay-Sachs and that as a result of that negligence the parents permitted the pregnancy to run its course and the child to be born instead of seeking an abortion"]; *Becker v Schwartz*, 46 NY2d 401 [1978][Accepted as true were allegations regarding defendants failure to inform plaintiffs of risks of a procedure and available tests as well as plaintiff's claim procedure would not have been underwent had they been informed]; *see also Howard Stores Corp. v Pope*, 1 NY2d 110 [1956][Assumed as true were allegations regarding the events precipitating a fire and as to negligence and causation]).

The case authority relied upon by Defendants in support of this argument is entirely distinguishable both procedurally and substantively. Of the some 20 cases cited for authority on the issue of the sufficiency of the negligence claims, all but three were decided in a summary judgment or post-trial procedural context where evidence was measured. "Since [the] determination [here will be] made on pleadings alone, whether or not plaintiff will be able to establish his allegations by competent evidence is not a pertinent consideration" (*Cohn v Lionel Corp.*, 21 NY2d 559 [1968]).

The three procedurally comparable precedents (*see Morris v Chase Bank*, 125 AD3d 731 [2d Dept 2015]; *Mills v Gardner*, 106 AD3d 885 [2d Dept 2013]; *Sugarman v Equinox Holding, Inc.*, 73 AD3d 654 [1st Dept 2010]), are substantively dissimilar since in each case the pleadings therein were *entirely* devoid of *any* facts or allegations to support the causes of action (*see Morris*, supra at 732 ["The complaint failed to allege that the attack upon the plaintiff by a third-party assailant was foreseeable"]; *Mills* supra at 886 ["the complaint simply alleged that Tompkins was negligent in allowing the attack to occur, *without alleging any facts* indicating that Tompkins had the authority, ability, and opportunity to control Gardner's actions necessary to give rise to a duty to prevent the attack"][emphasis added]; *Sugarman*, supra at 655 ["Plaintiff

failed to allege any facts that put defendant Equinox on notice that any criminal activity had occurred on the premises or that it would occur"][emphasis added][1]).

Defendants' assertion that the facts in the complaint establish as a matter of law they discharged their duties to provide reasonable security measures is misplaced. To the extent the facts and allegations, taken in isolation, could be read to imply what Defendants' assert, the court must, in this procedural context, find all implications and inferences favor Plaintiff and view the complaint's as a whole (*see eg Howard Stores Corp. v. Pope,* 1 NY2d 110 [1956]; *Hense v Baxter,* 79 AD3d 814 [2d Dept 2010]; *Stoianoff v Gahona,* 248 AD2d 525 [2d Dept 1998]). As such, when viewed in its entirety, the complaint clearly does not demonstrate or admit Defendants fully discharged their duties to Plaintiff. It alleges precisely the opposite.

Accordingly, the branch of the motion to dismiss Plaintiff's second and third causes of action is denied.

Defendants' argument to dismiss the cause of action for negligent hiring, training and supervision is premised exclusively on the theory that these claims fail if the negligence cause of action is dismissed. Since the branch of the motion to dismiss Plaintiff's negligence claims has been denied, this branch of the motion necessarily fails.

As to Plaintiff's fourth cause of action for breach of contract, specifically the membership agreement between Plaintiff and Equinox, it is entirely duplicative of his negligence causes of action, does not seek distinct damages and, therefore, must be dismissed (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker,* 56 AD3d 1, 8-9 [1st Dept 2008]; *Murray Hill Invs. v Parker Chapin Flattau & Klimpl,* 305 AD2d 228, 229 [1st Dept 2003]; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.,* 70 NY2d 382, 389 [1987]). Moreover, this cause of action is deficient since it does not identify the provision of the contract allegedly breached (*see eg New York City Educ. Constr. Fund v Verizon N.Y. Inc.,* 114 AD3d 529 [1st Dep 2014]).

Plaintiff's fifth cause of action for breach of the covenant of good faith and fair dealing similarly fails. Such a cause of action is nothing more than a breach of contract claim based upon terms not expressly contained in the contract (*see Fasolino Foods Co., Inc. v Banca Nazionale del Lavoro*, 961 F.2d 1052 [2d Cir 1992]; *see also Fishoff v Coty Inc.,* 634 F3d 647 [2d Cir 2011]). The terms that Plaintiff seeks implied in the contract are identical to those terms pled in the breach of contract claim, specifically that Equinox would have "proper security", "sufficient and competent staff", "properly trained . . . staffing", "make the fitness club a safe and secure environment" and prevent sexual assaults. As such, this claim is barred as duplicative of both the negligence and breach of contract claims[2].

Plaintiff's sixth cause of action for civil conspiracy also fails. While allegations of conspiratorial conduct are acceptable "to connect the actions of separate defendants with an

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[1] A review of the complaint contained in the court records revealed a "bare bones" twelve paragraph cause of action asserted against Equinox which was not simply absent supporting facts, it lacked even a naked allegation of prior notice of similar activity.

[2] A cause of action may be dismissed as duplicative of a previously dismissed cause of action (*see An-Jung v Rower LLC,* ____ AD3d ____, 2019 NY Slip Op 04652 [1st Dept 2019]).

otherwise actionable tort" (*Alexander & Alexander v Fritzen*, 68 NY2d 968, 969 [1986]), an independent claim therefor is not recognized in New York State (*see eg Brackett v Griswold*, 112 NY 454 [1889]["a mere conspiracy to commit a fraud is never of itself a cause of action"]; *American Baptist Churches v Galloway*, 271 AD2d 92 [1st Dept 2000]).

Accordingly, based on the foregoing, Defendants' motion is granted only to the extent that Plaintiff's fourth, fifth and sixth causes of action are dismissed. Defendant's motion is denied in all other respects.

7/2/2019
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE