[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 103866/2008

H. JESSICA

VS

EQUINOX HOLDINGS

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE 10/16/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The instant motion (sequence 002) is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that defendants Equinox Holdings, Inc., Equinox Fitness Club, and the Equinox Group, Inc.'s motion for summary judgment dismissing the claims as against them is granted and the complaint is dismissed as against said defendants, and the Clerk is directed to enter judgment in favor of said defendants with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for Equinox shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: 01/04/2010

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION ✓NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

JESSICA H.,

Plaintiff,

Index No.: 103866/08

-against-

DECISION

EQUINOX HOLDINGS, INC.,
EQUINOX FITNESS CLUB,
THE EQUINOX GROUP, INC., and
SHAIMAINE LOCAINO,

Defendants.

----------x

CAROL ROBINSON EDMEAD, J.:

BACKGROUND

Defendants Equinox Holdings, Inc., Equinox Fitness Club, and The Equinox Group, Inc. (collectively, Equinox) move, pursuant to CPLR 3212, for summary judgment dismissing each cause of action asserted as against them. Plaintiff is a 28-year old female who is prosecuting this action anonymously, pursuant to New York Civil Rights Law § 50-b, and other related laws, as an alleged victim of sexual assault. Individual defendant Shaimaine Locaino (Locaino), also referred to as Shaimaine Loaicono, has not appeared in this action to date.

The allegations of the complaint concern multiple sexual assaults perpetrated on plaintiff by Locaino, an employee of Equinox, at a premises operated by Equinox. The amended complaint asserts three causes of action as against Equinox: the fourth cause of action, asserting vicarious liability based on

the doctrine of respondeat superior; the fifth cause of action, asserting negligent supervision; and the sixth cause of action, asserting negligent hiring and retention.

Plaintiff is employed in the financial services industry in New York City, and has been a member of Equinox since 2003. Plaintiff continues to train at Equinox to this day.

According to plaintiff's examination before trial (EBT), plaintiff met Locaino in the summer of 2004 at Equinox' East 85th Street facility, when he approached her to see if she would be interested in training with him. EBT, at 77. Locaino was a personal trainer working for Equinox at that time. At first, plaintiff did not agree to train with Locaino, because of the fee charged by Equinox for personal training sessions. However, plaintiff did agree to have an Equifit[1] with Locaino, plus one free training session. After the free training session, Locaino suggested an arrangement whereby plaintiff would pay Locaino $40 in cash for each personal training session, about one-half of what Equinox charged, and they would circumvent Equinox's personal training contract. Plaintiff agreed. *Id.* at 125-126.

Plaintiff states that she felt that Locaino looked at her inappropriately, but admits that she never reported that feeling to anyone at Equinox. Plaintiff also says that Locaino did not engage in any other conduct that made her feel uncomfortable for

---

[1]An Equifit is a fitness evaluation test developed by Equinox.

the first year that she trained with him. *Id.* at 122.

During the first year of training with Locaino, plaintiff trained with him once a week, and, after the first year, began to train with him twice each week, until the fall of 2006, when she started to train with him three to four times per week. *Id.* at 114, 123-125, 133-135. Plaintiff would train with Locaino privately on Monday and Wednesday mornings at 6:30 A.M., and she would also participate in group training sessions with Locaino with other club members several times each month. *Id.* at 128-131, 133-135. One of the other people participating in the group training sessions was Nina Lico (Lico), another trainer employed by Equinox, who was also being trained by Locaino. *Id.* at 134. Around October of 2006, plaintiff began to exercise at the club two times each day, in the morning and again after work, allegedly based on recommendations made to her by Locaino. *Id.* at 129-131.

According to plaintiff, the first sexual assault took place in mid-December, 2006, on one of the mornings that she had a personal training session with Locaino, either a Monday or a Wednesday. *Id.* at 183-184. Plaintiff indicated, throughout her EBT, that all of the first 12 sexual assaults occurred under almost identical circumstances: with 15 to 20 minutes left in the training session, Locaino would suggest that they go to a spa room on a different floor, where he had previously increased the

room temperature, to do abdominal exercises and stretches in heat, so as to increase plaintiff's caloric burn; with plaintiff on her stomach, Locaino would pull down her tights and exercise shorts, and sexually assault her;[2] after each incident, plaintiff would pay Locaino, shower and dress, go to work, and return to the club in the evening for her second workout, never telling anyone what had transpired. At the 13th and last occurrence, taking place on March 21, 2007, Locaino allegedly raped plaintiff.

Plaintiff testified that on each occasion that she accompanied Locaino to the spa room she passed two or three maintenance employees of Equinox who would be eating and/or doing each other's nails. *Id.* at 206-210. Although plaintiff stated that she never called out to these maintenance workers during the assaults, she maintains that she orally objected to Locaino about his actions. *Id.* at 220-221, 231-232.

Plaintiff states that she never reported Locaino's actions to Equinox personnel because she felt ashamed about what had happened and also understood that she was paying Locaino "under the table" and was afraid of having her membership revoked, a fear on which, allegedly, Locaino played. *Id.* at 224. Plaintiff continued to train with Locaino after the alleged rape, and did

---

[2]Plaintiff stated that at the first occurrence, she had told Locaino that she was suffering with a digestive problem, which, allegedly, Locaino said he could relieve, resulting in the assault.

not inform any Equinox employee of what had happened until after Locaino had been terminated by Equinox. *Id.* at 336-337, 388-390, 395-401.

After Locaino was fired, and subsequent to the alleged rape, Locaino contacted plaintiff and told her that he was no longer associated with Equinox, but that he was still willing to train her. Plaintiff then met with Locaino in Carl Shurz Park for a training session, where Locaino told plaintiff that he had voluntarily left Equinox. *Id.* at 443-444. It was only later that plaintiff discovered that Locaino had been fired by Equinox.

The first Equinox employee to whom plaintiff reported Locaino's actions, after Locaino was no longer with Equinox, was Lico, who told plaintiff that Locaino had been fired for a very serious cause. Lico insisted that plaintiff report what had happened to Equinox' training manager. *Id.* at 396-398. Lico accompanied plaintiff to the manager's office, where the manager and Lico insisted that plaintiff report the occurrences to the police, which she later did. *Id.* at 398-401.

Plaintiff also asserts that in 2006, more than two years after she began training with Locaino, Locaino commented on her weight, and suggested that she wear tights under her workout clothes to produce more sweat and that she eliminate certain foods, keeping a journal of what she ingested and her daily exercise routine, which Locaino would review on a weekly basis.

Id. at 457-459. Plaintiff never spoke to anyone at Equinox about the propriety of the nutritional advice that Locaino was providing her. *Id.* at 459-460. Plaintiff stated that, other than monitoring her journal and providing her feedback on her diet, Locaino did not offer any other type of nutritional counseling. *Id.* at 461.

According to the affidavit of Matthew Herbert (Herbert), the Director of Human Resources at Equinox, Locaino was hired on June 6, 2003, as a personal trainer at the East 85th Street Equinox health club, after a personal interview and review of Locaino's resume. No criminal investigation was performed, according to Herbert, because there was nothing in Locaino's application that indicated that further investigation was necessary. In connection with the present lawsuit, Equinox did conduct a criminal investigation of Locaino, attached as an exhibit to the motion papers, which indicates that Locaino's only criminal history was a misdemeanor conviction in 1994 of attempting to obtain liquor with false identification when Locaino was underage, resulting in a $25 fine.

Herbert further states that on January 9, 2006, Locaino became the Personal Training Manager at the Equinox fitness club located on 50th Street in New York City, but was returned to the East 85th Street location as a personal trainer because of complaints asserted against him by his subordinate trainers

regarding Locaino's management style and personality. According to Herbert, there were no allegations that Locaino had committed any sexual offenses against any club members or employees. Locaino was terminated by Equinox in April of 2007, after a member lodged a complaint against him for dishonesty. Herbert avers that, prior to the instant matter, Equinox had never received any notification from anyone that Locaino had engaged in any unwarranted sexual behavior with any female member or employee.

In opposition to the instant motion, plaintiff has provided an affidavit from Lico, in which Lico asserts that Locaino "openly engaged inappropriate behavior with women on the gym floor, as well as behind closed doors." Lico Aff, ¶ 5. Lico also affirms that Locaino openly trained members off the books, and that plaintiff lost a dramatic amount of weight while she was training with Locaino. However, Lico does not indicate why she never reported any of this alleged conduct to an Equinox supervisor. In her affidavit, Lico states that, as a personal trainer, she believes that it was inappropriate for Locaino to give plaintiff nutritional advice, but she does not indicate that the advice Locaino provided to plaintiff was inaccurate. Lico also says that she voluntarily left Equinox in August of 2008.

Plaintiff has also submitted the affidavit of Ross Franklin, (Franklin), a former general manager at Equinox' East 85th Street

location from 2006 to 2007. Franklin states that he conducted an investigation of Locaino as a result of a complaint by a member, not plaintiff, of Locaino's inappropriate sexual conduct, which resulted only in Franklin discovering that Locaino had lied about where he had been at the time of the alleged occurrence. Franklin Aff, ¶ 8. Franklin goes on to state that plaintiff eventually told him what had happened to her, after Locaino had been fired, which he then reported to the manager. *Id.*, ¶¶ 11-12.

In reply to this affidavit, Equinox asserts that Franklin and Equinox are currently in litigation over alleged misappropriation of Equinox trade secrets after Franklin resigned from Equinox.

Plaintiff also includes in her opposition the affidavit of Charles Murkofsky, M.D. (Murkofsky), a board certified psychiatrist, who first saw plaintiff six months after the alleged sexual assault. Murkofsky states that, in his medical opinion, plaintiff's current psychological and physical state are a direct result of Locaino's sexual assault on plaintiff and his dietary and exercise advice to her.

Lastly, plaintiff provides Locaino's employment records, supplied by Equinox during discovery, which includes the complaints made against Locaino by his former subordinate trainers when he was engaged as a manager. These reports

indicate that Locaino was intimidating to his subordinates, that he ordered them to perform lengthy push-ups as alleged punishment, and that one male trainer said that he felt nervous when Locaino put his arms around the trainer to complain about the trainer failing to meet a monthly quota, because the trainer felt that he could not move. Opp Exhibits 9-15.

The court notes that the only complaint regarding inappropriate sexual conduct appearing in Locaino's personnel file is plaintiff's complaint, discussed above, made to management on Lico's insistence after Locaino had been terminated by Equinox.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d

223, 231 (1978).

Equinox' motion for summary judgment with respect to the fourth cause of action as against it based on a theory of vicarious liability for the actions of its employee is granted.

> "The doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment. Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment. If, however, an employee 'for purposes of his own departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable.' Assuming plaintiff's allegations of sexual abuse are true, it is clear that the employee here departed from his duties for solely personal motives unrelated to the furtherance of [Equinox]'s business [internal citations omitted]."

Judith M. v Sisters of Charity Hospital, 93 NY2d 932, 933 (1999).

Sexual assaults committed by an employee are not in furtherance of an employer's business, and the employer will not thereby be held vicariously liable for the employee's actions. *RJC Realty Holding Corp. v Republic Franklin Insurance Company,* 2 NY3d 158 (2004); *N.X. v Cabrini Medical Center,* 97 NY2d 247 (2002). Furthermore, as will be discussed below, there was no credible showing that Equinox was aware of any prior conduct on the part of Locaino that would put it on notice of the foreseeability of such incidents as are alleged here. *Bowman v State of New York,* 10 AD3d 315 (1st Dept 2004).

Equinox' motion for summary judgment with respect to the

fifth and sixth causes of action as against it, alleging negligent supervision, hiring and retention, is granted.

> "In those instances where an employer cannot be held vicariously liable for torts committed by its employee, the employer can still be held liable under theories of negligent hiring and negligent retention. The negligence of the employer in such a case is direct, not vicarious, and arises from its having placed the employee in a position to cause foreseeable harm from which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee.
> An essential element of a cause of action for negligent hiring and retention is that the employer knew, or should have known, or the employee's propensity for the sort of conduct which caused the injury [internal citations omitted]."

Sheila C. v Povich, 11 AD3d 120, 129-130 (1st Dept 2004); *Sandra M. v St. Luke's Roosevelt Hospital Center,* 33 AD3d 875 (2d Dept 2006).

There is no common-law duty to institute specific procedures for hiring employees, unless the employer knows of facts that would lend a reasonably prudent person to investigate the employee. *Doe v Whitney,* 8 AD3d 610 (2d Dept 2004). Moreover, a negligent retention theory is not viable in a sexual abuse case, unless the employer had notice of prior allegations of an employee's improper conduct and failed to investigate the allegations. *Colon v Jarvis,* 292 AD2d 559 (2d Dept 2002).

There is no evidence in the papers presented to raise an issue of fact regarding the adequacy of Equinox' hiring and screening process. Furthermore, considering the criminal record

report ordered by Equinox for the purpose of this lawsuit, even had Equinox performed such an investigation as part of its hiring procedures, nothing in Locaino's background would have put Equinox on notice of Locaino's alleged perverted sexual proclivities. *Ceneus v Beechmont Bus Service,* 272 AD2d 499 (2d Dept 2000). "The record is bereft of even a scintilla of evidence that [Locaino]'s background ... suggested, much less presented, a history of a propensity for violence or sexual misconduct." *Rodriguez v United Transportation Co.,* 246 AD2d 178, 180-181 (1st Dept 1998).

With respect to Equinox' retention of Locaino after he was hired, in order for Equinox to be found liable, it must be demonstrated that it had notice of Locaino's alleged inappropriate sexual behavior. Plaintiff attempts to assert that the complaints filed against Locaino by the trainers whom he supervised should have put Equinox on notice of Locaino's behavior. However, in order to prevail on such a theory, plaintiff must evidence that Equinox was on notice of Locaino's propensities for the type of behavior that caused plaintiff's harm. *Zanghi v Laborers' International Union of North America, AFL-CIO,* 8 AD3d 1033 (4th Dept 2004).

In the instant matter, none of the trainers complained about Locaino demonstrating inappropriate sexual behavior, and all of the complainants were from co-workers, not members. Even the

trainer who expressed consternation at being held by Locaino did not suggest that such action was sexually motivated. Furthermore, as evidenced by Locaino's personnel file, as soon as Equinox became aware of the complaints, Locaino was demoted back to being a trainer, not a manager, and was moved to a different location. There is nothing to indicate that such remedial action on the part of Equinox was not appropriate or expeditious.

Plaintiff also tries to impute notice to Equinox based on the affidavit submitted by Lico, another Equinox employee. However, it is noted that although Lico makes assertions about Locaino engaging in vague and undescribed inappropriate sexual behavior, she failed to report such conduct to a supervisor or manager, and she continued to train with Locaino herself. In her EBT, plaintiff states that as soon as she informed Lico of what had happened to her, Lico immediately insisted that plaintiff notify a manager. This testimony by plaintiff negates Lico's affidavit, prepared in opposition to the instant motion and made a year after Lico left Equinox' employ. In addition, plaintiff has provided no judicial support for her assertion that the unreported observations by a staff-level co-worker rises to the level of constructive knowledge on the part of an employer.

Franklin's affidavit also fails to substantiate plaintiff's claims that Equinox knew or should have known about Locaino's behavior. In Franklin's affidavit, he only states that his

investigation found that Locaino allegedly lied about where he was when an alleged sexual assault of another member occurred; it did not uncover any evidence that Locaino committed such assault. Further, shortly thereafter, Locaino was fired based on a complaint that was actually reported to Equinox management.

Plaintiff's allegations that Equinox failed to supervise the spa area in which the sexual assaults took place also fails on the issue of notice.

To recover damages from an owner of real property for injuries caused by the acts of persons on the owner's premises, a plaintiff must produce evidence indicating that the owner knew or should have known of the probability of such conduct where the conduct occurred (see *Francis v Ocean Village Apartments*, 222 AD2d 551 [2d Dept 1995]), and that such conduct was foreseeable.

"[T]o establish foreseeability, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location." *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 153 (2d Dept 1999). Plaintiff has presented no evidence that the spa area had been the scene of similar occurrences in the past. Therefore, her claim of negligent supervision of the spa area must fail.

Similarly, plaintiff's assertion that Equinox was negligent in supervising Locaino by tacitly permitting him to proffer

nutritional advice to her, as well as excessive exercise training, is without merit.

Lico states in her affidavit that, in her opinion as a certified personal trainer, Locaino was "out of bounds" in monitoring plaintiff's diet, since personal trainers are not trained to give dietary or nutritional advice. However, Lico never states that Locaino's nutritonal advice was incorrect. Moreover, there is no evidence that Equinox knew of, approved or condoned such conduct, especially since plaintiff did not hire Locaino through Equinox, but was attempting to circumvent Equinox' supervision by engaging Locaino off the books. As admitted by plaintiff herself, hiring a trainer off-the-books is against Equinox policy, and so it is hard to fathom how Equinox could be held liable for injuries that occurred beyond the scope of Locaino's employment duties. *Detone v Bullit Courier Service, Inc.*, 140 AD2d 278 (1st Dept 1988).

Plaintiff's other affidavit submitted in support of the negligent supervision claim, that of Murkofsky, discusses plaintiff's condition when Murkofsky first met with her, six months after the alleged abuse. The psychiatrist states that plaintiff's psychological state is directly caused by Locaino's sexual assaults and his excessive focus on plaintiff's diet and over-exercising. However, Murkofsky fails to demonstrate any personal knowledge of diet or exercise, which is outside his

specialty, so as to raise a factual issue as to the appropriateness of Locaino's nutritional advice. *See Kaplan v Karpfen*, 57 AD3d 409 (1st Dept 2008).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendants Equinox Holdings, Inc., Equinox Fitness Club, and the Equinox Group, Inc.'s motion for summary judgment dismissing the claims as against them is granted and the complaint is dismissed as against said defendants, and the Clerk is directed to enter judgment in favor of said defendants with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for Equinox shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: January 4, 2010

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD