

Jessica H. v Equinox Holdings, Inc.

2010 NY Slip Op 30970(U)

April 19, 2010

Supreme Court, New York County

Docket Number: 103866/08

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. CAROL EDMEAD

PART 30

Index Number : 103866/2008

H. JESSICA

VS.

EQUINOX HOLDINGS

SEQUENCE NUMBER : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his 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

FILED

APR 21 2010

NEW YORK COUNTY CLERK'S OFFICE

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff to reargue this Court's decision, dated January 4, 2010, which granted summary judgment in favor of defendants Equinox Holdings, Inc., Equinox Fitness Club, and The Equinox Group, Inc. (collectively, "Equinox" or "defendants") and dismissed plaintiff's amended complaint, is granted; and it is further

ORDERED that upon reargument, the Court adheres to its earlier determination to grant summary judgment in favor of Equinox, and dismiss plaintiff's amended complaint; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: 4/19/10 This constitutes the decision and order of the Court. [Signature] J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X

JESSICA H.,

Plaintiff,

Index No.: 103866/08

-against-

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

Defendants.

HON. CAROL ROBINSON EDMEAD

FILED
APR 21 2010
NEW YORK COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this action arising from an alleged sexual assault, plaintiff Jessica H. ("plaintiff") moves to reargue this Court's decision, dated January 4, 2010, which granted summary judgment in favor of defendants Equinox Holdings, Inc., Equinox Fitness Club, and The Equinox Group, Inc. (collectively, "Equinox" or "defendants") and dismissed plaintiff's amended complaint.

Plaintiff alleges multiple sexual assaults perpetrated on her by a then employee of Equinox Shaimaine Locaino ("Locaino"), at a health club operated by Equinox. The amended complaint asserts three causes of action as against Equinox: vicarious liability based on the doctrine of *respondeat superior* (fourth); negligent supervision (fifth); and negligent hiring and retention (sixth).

In support of reargument, plaintiff contends that the Court's dismissal of the amended complaint was premature because plaintiff had not received all of the documents she had requested and she was prevented from conducting any party or non-party depositions on the issue of notice, while the Equinox defendants were afforded that opportunity. Plaintiff claims that the

self-serving affidavits of select managerial personnel that they had no prior notice of a sexual assault, does not entitle defendants to summary judgment. Where (i) information necessary to oppose the summary judgment motion is within the exclusive knowledge of the movant and (ii) the movant had not yet been deposed, a summary judgment motion should be denied as premature. Equinox was given the benefit of the doubt on issues which plaintiff has every right to address during pre-trial discovery. When an employee commits an intentional tort, his intentional conduct may be said to have been within his scope of employment when his employee could have reasonably anticipated the conduct. If further discovery does not reveal any additional information on the issue of notice, then Equinox can move for summary judgment.

Even without having the benefit of deposing Equinox, material factual issues exist to preclude summary judgment on all of the causes of action against Equinox, such as (1) whether Equinox sufficiently supervised the spa area when it was not in use for spa services by allowing unfettered access to trainers for ostensible training purposes; (2) whether the unwanted physical contact that took place while Locaino trained female clients at the health club, as well as his other inappropriate behavior, which at least one Equinox employee witnessed, gave Equinox actual and/or constructive notice that Locaino had a propensity to engage in conduct that could foreseeably lead to sexual assault; (3) whether Equinox was negligent in hiring and retaining Locaino to work at the health club, where Locaino trained many young women, after Locaino was demoted from a managerial position and transferred out of the health club because of his abusive and offensive behavior primarily toward women; (4) whether Equinox was negligent in rehiring Locaino to work at the health club after he was deemed ineligible for re-hire at a different location in 2000; (5) whether Equinox looked the other way and failed to supervise

Locaino even though it was obvious to all that he routinely trained young, female clients in violation of Equinox policy; (6) whether Equinox's investigations, including the written report Equinox refuses to furnish, of the sexual assaults by Locaino revealed: (i) prior notice of other abusive, inappropriate behavior, including but not limited to assaults; and/or (ii) a propensity by Locaino to engage in inappropriate behavior of a sexual nature; or (iii) deficiencies in Equinox' policies or procedures.

In opposition, Equinox argues that plaintiff simply rehashes the same arguments regarding her purported need for depositions and document discovery, and also impermissibly attempts to add new legal arguments and purported "facts" to support her position, and thus, failed to demonstrate her entitlement to reargument. There is no allegation that this Court overlooked or misapprehended the procedural status of this action or any of the law cited in the underlying papers on this issue, as this issue was clearly addressed by the parties in their underlying summary judgment motion papers.

Further, plaintiff's speculative allegations that some issue of fact may arise from further depositions or purported document discovery utterly fail to meet the legal standard required to defeat a motion for summary judgment based on the need for further discovery, and are belied by this Court's decision, the law, and the ample and extensive record that was presented to this Court.

In plaintiff's opposition brief, plaintiff merely devoted one sentence of legal authority regarding opposing a motion for summary judgment on the grounds that further discovery is needed. In her motion to reargue, however, plaintiff devotes nearly two pages and numerous new cites to case law in support of a newly advanced legal argument that the discovery that she needs

"is within the exclusive knowledge of [Equinox]." Putting aside the fact that this argument is completely meritless, plaintiff was required to advance and develop this legal argument in her opposition papers to the summary judgment motion, which she failed to do. It is wholly inappropriate for her to obtain a second chance to oppose Equinox's motion by attempting to amend her underlying opposition papers under the guise of a motion to reargue. Similarly, plaintiff now for the first time alleges that Equinox "deliberately" failed to produce an unidentified purported "written report pertaining to the [plaintiff's] incident which may shed light on what Equinox knew or did not know." There is absolutely no mention of this purported "report" in plaintiff's underlying opposition papers. Equinox fully responded to all discovery requests and orders in this action prior to making its motion for summary judgment by producing nearly 750 pages of documents. To the extent that plaintiff mistakenly believed that Equinox was "deliberately" withholding any purported "report" or other documents, she had ample opportunity, including discovery conferences before this Court, to raise this issue, which she failed to do. Plaintiff did not even cross-move to compel discovery in opposition to Equinox's summary judgment motion. The attempt by plaintiff's counsel to raise these new purported "facts" is completely impermissible on a motion to reargue.

Plaintiff's submission of affidavits in opposition to summary judgment from Nina Lico ("Lico"), a fellow Personal Trainer of Loacono who was friends with plaintiff and trained with plaintiff, and Ross Franklin ("Franklin"), the General Manager of the health club where Loacono worked, among other facts, completely belie plaintiff's argument and illustrate its disingenuous nature. Franklin, who as the General Manager of the health club was in the best position to know about what previously occurred at the club, and failed to substantiate plaintiff's claims that

Equinox knew or should have known about Loacono's behavior. In fact, Franklin made absolutely no mention that he was aware of any prior inappropriate conduct on the part of Loacono at all, much less that there was any inappropriate conduct on the part of Loacono indicating that he had a propensity for rape. There is no mention of any purported "report" in Franklin's affidavit; nor does he mention any purported written "policies or procedures" that Equinox allegedly "failed" to produce. With respect to Lico, this Court also correctly found that her allegations of "vague and undescribed inappropriate sexual behavior" on the part of Loacono were never reported by her "to a supervisor or manager, and she continued to train with Loacono herself." As this Court further found, plaintiff's testimony "that as soon as she informed Lico of what happened to her, Lico immediately insisted that plaintiff notify a manager... negate[d] Lico's affidavit, prepared in opposition . . . and made a year after Lico left Equinox's employ." Notably, Lico did not even mention in her affidavit that she believed Loacono had a propensity for rape. By plaintiff's own admission, up until the morning of the first alleged sexual assault, she had no indication that Loacono had any propensity to commit sexual crimes against her. This is despite the fact that she personally trained with Loacono one or more times per week for several years prior to that date. In fact, she specifically testified that Loacono "had been normal" and "professional" during this time period, and that she "trusted him." More importantly, plaintiff admits that she never informed Equinox, the police or anyone about any of the alleged crimes until nearly a month after the final alleged incident occurred, by which time Loacono had already been terminated from his employment at Equinox. She also admitted that she voluntarily met with Loacono in the Spa Room without objection on the dates of each incident; she continued to extensively train with him as the assaults continued; and she even trained with him

in a New York City park after his employment with Equinox had been terminated. Regardless, Equinox fully complied with its discovery obligations prior to making its summary judgment motion.

In any event, plaintiff failed to demonstrate a likelihood that discovery will lead to evidence that Equinox was on notice of Loacono's alleged propensity to commit sexual crimes against health club members. Plaintiff simply asserts that it "may shed light on what Equinox knew or did not know." The extensive record submitted by the parties on the underlying summary judgment motion demonstrates that there is no likelihood of discovery of any evidence to overturn this Court's decision. Equinox demonstrated through moving affidavits, including an affidavit from Loacono's direct supervisor and two affidavits from its Director of Human Resources, which demonstrated that Equinox had no knowledge that Loacono "had engaged in any unwarranted sexual behavior with any female member or employee." Plaintiff's conclusory allegation that Equinox's supporting affidavits were "self-serving" is not a legal argument. Plaintiff does not allege that this Court overlooked or misapprehended the law in finding these affidavits sufficient to demonstrate a lack of notice, and fails to provide even a shred of viable case law for any such position. Thus, her allegation that depositions of these parties or other Equinox employees may somehow lead to evidence that may raise an issue of fact not only fails to meet the legal standard, but also fails to even identify what type of "fact" would constitute notice. Furthermore, plaintiff's allegation that there may be some undefined evidence of notice in the "exclusive possession" of Equinox is bogus. In light of the foregoing, there is absolutely nothing in the record of the underlying summary judgment motion to support a finding of a likelihood that discovery will lead to evidence of any notice on the part of Equinox.

Plaintiff has failed to demonstrate that she is entitled to reargument or reversal of summary judgment on the issue of vicarious liability. By simply rehashing her exact same arguments, she has failed to meet the standard for reargument, and her motion should be denied outright. Regardless, as this Court correctly held 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.

In reply, plaintiff argues that Equinox relies upon the incorrect standard of review by asserting that plaintiff needs to present evidence to support "a likelihood" that further depositions or discovery will lead to evidence on the "notice" issue. Rather, the proper standard is not whether it is "likely," but, rather, whether, in light of the allegations in the complaint, plaintiff has the right to depose Equinox to determine whether issues of material fact exist regarding what Equinox knew about Loacono prior to plaintiff's sexual assault. The Court erred by considering Equinox' motion for summary judgment as though it had been filed after both parties had been given the opportunity to engage in meaningful pre-trial discovery. Plaintiff never had the opportunity to cross-examine any of the Equinox affiants whom the Court credited. Further, plaintiff contends that Equinox acted negligently by (i) permitting Loacono exclusive access, *via* his own key, to the premises at 5 a.m. before any managers started work (see Ross Franklin's affidavit dated August 13, 2009) and (ii) despite determining he was "ineligible to re-hire" in 2006, by nonetheless re-hiring him, and by (iii) sanctioning his practice of seeing club members unsupervised and alone in a private room. It is also legally significant that Equinox inexcusably failed to produce all of the material and relevant documentation plaintiff demanded. For example, in his August 13, 2009 affidavit, Ross Franklin stated that investigations of

Loaicono-prior to his termination-were "fully documented in writing." The documentation could contain evidence of what Equinox knew-and did not know-about Loaicono prior to April 2007. Plaintiff also requested, but never received, the "employee handbook" which Equinox concedes Mr. Loaicono received. It may be that Mr. Loaicono's unsupervised sessions violated Equinox own written policies, thereby giving rise to liability for what occurred. The Equinox depositions may reveal the identity of a trainer (currently unknown to plaintiff and not yet identified by Equinox) who knew about Mr. Loaicono's behavior and practices and reported it to someone in management prior to the time plaintiff was sexually assaulted, placing the case in an entirely different light.

Discussion

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]).

Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588)" (*William P. Pahl Equipment Corp. v Kassis, supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]). Given that plaintiff argues that the Court overlooked her argument concerning

the need for further discovery on the issue of notice, and that material issues of fact exist, reargument is granted. However, upon reargument, the Court adheres to its earlier determination.

It is well settled that an argument opposing summary judgment on the grounds of insufficient discovery “is unavailing where the nonmoving party has failed to ‘produce some evidence indicating that further discovery will yield material and relevant evidence’” (*Heritage Hills Soc., Ltd. v Heritage Development Group, Inc.*, 56 AD3d 426, 427 [2d Dept 2008], quoting *Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203, 1205 [3d Dept 2008]); *Hayden v City of New York*, 809 NYS2d 75, 76 [1st Dept 2006] [“plaintiff failed to show that the representatives already deposed had insufficient knowledge or were otherwise inadequate, or that further discovery was warranted by reason of a substantial likelihood that additional persons sought for deposition possessed information material and necessary to oppose the motion”]; *Prestige Decorating and Wallcovering, Inc. v U.S. Fire Ins. Co.*, 49 AD3d 406, 407 [1st Dept 2008] [“Based on the record, the discovery that has already taken place, and the lack of a showing of what further evidence might be unearthed, the asserted need for further discovery reduces itself to a ‘mere hope,’ which is insufficient to defeat summary judgment”]; *Steinberg v Abdul*, 230 AD2d 633, 633 [1st Dept 1996] [“We add that the mere hope, expressed by plaintiffs, that evidence sufficient to establish defendants’ assumption of a duty to plaintiffs’ decedent may be obtained during discovery does not fulfill their obligation to demonstrate the likelihood of such disclosure (CPLR 3212[f]) and, thus, is insufficient to defeat defendants’ motions for summary judgment”]; *Frierson v Concourse Plaza Associates*, 189 AD2d 609, 610 [1st Dept 1993] [“Neither can [defendants] avoid summary judgment by claiming a need for discovery. The ‘mere hope’ of defendants that evidence sufficient to defeat such a motion may be uncovered during the

discovery process is not enough Defendants were bound to show there was a likelihood of discovery leading to such evidence, *i.e.*, that facts “may” exist but cannot be stated at that time (CPLR 3212[f]). This they failed to do”]).

The complete record before the Court, including plaintiff’s own testimony belie, any claim that outstanding discovery, either documentary or by way of deposition testimony, will indicate that Equinox had notice of Loacono’s propensity to commit sexual misconduct against health club members. Plaintiff never informed Equinox, the police or anyone about any of the alleged crimes until almost a month after the final alleged incident occurred, by which time Loacono had already been terminated from his employment at Equinox. Plaintiff testified that she passed two or three maintenance employees of Equinox while she and Loacono were on their way to the spa room, but never called out to these maintenance workers during the alleged assaults. Although Lico, Loacono’s coworker, attested that Loacono “openly engaged in inappropriate behavior” with women on the gym floor as well as behind closed doors, and believed that it was inappropriate for Loacono to give nutritional advice to plaintiff, Lico does not describe any of this “inappropriate behavior” as sexual in any way and herself never reported any of this alleged conduct to an Equinox supervisor. The only reference in Lico’s affidavit to Loacono’s inappropriate sexual misconduct toward health club members is Lico’s statement that she “heard,” in April 2007, (after the last alleged incident of sexual misconduct toward plaintiff occurred) that Loacono was fired after another woman made a complaint about him. Such vague reference to another incident involving Loacono without any personal knowledge or other factual detail, is insufficient to warrant further discovery. Further, Franklin’s affidavit, coupled with Loacono’s employment records, failed to demonstrate that Equinox had any prior notice, in

the form of any complaints or reports, of Loacono's inappropriate sexual conduct prior to plaintiff's alleged incidents of sexual misconduct. Equinox was advised in early 2007 about an incident in which Loacono allegedly performed a rectal exam of a member in the health club. However, no mention is made of any "sexual" misconduct by Loacono. The record indicates that by the time Equinox first learned of Loacono's "sexual" misconduct toward health club members, which was through the complaint of plaintiff, Loacono had already been terminated for dishonesty.

Plaintiff provided no evidence indicating that further discovery will yield material and relevant evidence. Therefore, plaintiff's request that Equinox's motion be denied lacks merit.

Furthermore, reasons as to why Equinox deemed Loacono ineligible for re-hire in 2000, and whether Loacono's unsupervised sessions violated Equinox alleged policy in the employee handbook are immaterial, in light of the fact that Loacono's personnel records contain no complaints of sexual misconduct prior to the one report lodged against him by plaintiff in 2007. Likewise, whether Equinox allegedly allowed unfettered access to trainers for ostensible training purposes, whether physical contact that took place while Locaino trained female clients gave Equinox actual and/or constructive notice that Locaino had a propensity to engage in conduct that could foreseeably lead to sexual assault, Locarno's alleged abusive and offensive behavior toward women, and whether further depositions may reveal the identity of a trainer who knew about Loacono's behavior and practices and reported it to someone in management prior to the time plaintiff was sexually assaulted, are all speculative theories constituting a fishing expedition, especially in light of the existing discovery indicating that Equinox never received any prior complaints or reports of sexual misconduct of Locaino. That any alleged incidents of sexual

misconduct may have occurred in the presence of other trainers, if at all, does not rise to the level of liability, in the absence of prior notice to Equinox supervisors of same. Equinox's motion was not solely based on the affidavits of its representatives, but also, supported by documentary evidence, such as Locarno's personnel records. Such evidence, indicating that Equinox did not receive any prior complaints or reports of any sexual misconduct by Loacono is sufficient to support summary judgment.

Therefore, upon reargument, the Court adheres to its earlier determination to grant summary judgment in favor of Equinox, and dismiss plaintiff's amended complaint.

Conclusion

Based on the foregoing, it is hereby

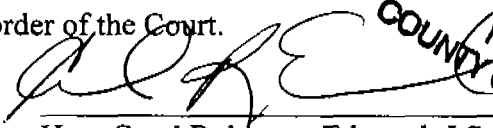
ORDERED that the motion by plaintiff to reargue this Court's decision, dated January 4, 2010, which granted summary judgment in favor of defendants Equinox Holdings, Inc., Equinox Fitness Club, and The Equinox Group, Inc. (collectively, "Equinox" or "defendants") and dismissed plaintiff's amended complaint, is granted; and it is further

ORDERED that upon reargument, the Court adheres to its earlier determination to grant summary judgment in favor of Equinox, and dismiss plaintiff's amended complaint; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 19, 2010


Hon. Carol Robinson Edmead, J.S.C.
HON. CAROL EDMEAD

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