

**Tipman v Reebok Sports Club/NY**

2010 NY Slip Op 32659(U)

September 23, 2010

Supreme Court, New York County

Docket Number: 108524/07

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla  
Justice

PART 19

Index Number : 108524/2007  
TIPPMAN, PAMELA  
vs.  
REEBOCK SPORTS CLUB/NY  
SEQUENCE NUMBER : 006  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n 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 is determined

in accordance with the  
accompanying decision/order.

**FILED**  
SEP 27 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/23/10

Saliann Scarpulla  
SALIANN SCARPULLA <sup>J.S.C.</sup>

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X

PAMELA TIPPMAN,

Plaintiff,

-against-

Index No.:108524/07

Submission Date: 7/21/2010

REEBOCK SPORTS CLUB/NY, MILLENNIUM  
DEVELOPMENT PARTNERS VIII, LLC AND  
JASON KRIEGER,

**DECISION AND ORDER**

Defendants.

-----X

For Plaintiff:  
Burns & Harris, Esqs.  
233 Broadway, Suite 900  
New York, NY 10007

For Defendants:  
Callan, Koster, Brady & Brennan, LLP  
One Whitehall Street  
New York, NY 10004

**FILED**  
SEP 27 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Papers considered in review of this motion for summary judgment:

- Notice of Motion . . . . . 1
- Aff in Opp . . . . . 2
- Reply . . . . . 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Reebok Sports Club/NY, MILLENNIUM Development Partners VIII, LLC and Jason Krieger (“Reebok Defendants”) move for summary judgment dismissing the complaint.<sup>1</sup>

Plaintiff Pamela Tippman (“Tippman”) commenced this action in or about June 2007 seeking to recover damages for the injuries she sustained to her back at the Reebok Defendants’ sports club located at 160 Columbus Avenue. According to the allegations

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<sup>1</sup> At oral argument on July 21, 2010, the Court dismissed all claims asserted against Jason Krieger individually and any claims against the Reebok Defendants regarding the adequacy or efficacy of the equipment.

of the complaint, on May 25, 2006 and June 1, 2006 during her participation in complimentary training sessions administered by defendant personal trainer Jason Krieger (“Krieger”), she was caused to re-rupture a lumbar herniated disc as a result of the negligent performance and/or administration of services by the Reebok Defendants and Krieger’s insufficient qualifications and skill to be her personal trainer.

Specifically, Tippman alleged that at the May 25, 2006 session, Krieger negligently caused and instructed Tippman to perform seated leg presses with 100 lbs. weight knowing that she had previously undergone back surgery, and at the June 1, 2006 session, Krieger negligently caused and instructed Tippman to perform seated leg presses with 80 lbs. weights knowing that she had previously undergone back surgery and was unusually sore after the May 25, 2006 session. After the June 1, 2006 workout, Tippman woke up in the middle of the night with pain in her back and legs. She sought medical attention and underwent back surgery soon thereafter.

Tippman testified at an examination before trial. She explained that when she began exercising at Reebok Sports Club/NY (“Reebok”), she asked for a personal trainer with experience in dealing with people with disabilities and was assigned to train with Krieger. She signed a membership agreement with Reebok acknowledging that the Reebok Defendants were not qualified to diagnose, examine or treat any medical condition or make any such evaluation or recommendation. She had exercised at gyms before and received instructions from physical therapists and doctors on the proper use of

gym equipment prior to the subject workouts. She had also lifted weights and done exercises on her own. She had been using a lying leg press machine in the months prior to the subject training sessions. She had never used a seated leg press machine. Prior to the sessions, Tippman submitted a medical clearance form from her physician dated May 9, 2006 to Reebok, indicating that she had no restrictions or limitations on exercising.

The Reebok Defendants now move for summary judgment dismissing the complaint. The Reebok Defendants first argue that Krieger was sufficiently qualified, trained, skilled and competent to properly train Tippman. In support thereof, they submit Krieger's examination before trial testimony. Krieger testified that he began working as a personal trainer in 1999 and as a personal trainer at Reebok in 2002. He is certified by the American Council on Exercise ("ACE") as a personal trainer and also belongs to The National Strength and Conditioning Association and The National Academy of Sports Medicine. He testified about various other certifications that he received. He also underwent Reebok's in-house certification process, and received a certificate from Reebok. He was evaluated by Reebok managers. He also took an integrated flexibility course at Reebok, in which he learned about dealing with clients who had some degree of physical limitations or injuries. The training included instruction on limitations of stretching exercises to perform with a person who had prior injuries. He knew that there were certain types of equipment that people with certain injuries should not use.

The Reebok Defendants also submit the affidavit of personal training expert Vincent Metz (‘‘Metz’’), who opined that Krieger met the standard of care in the personal training industry in all aspects. He was qualified as a personal trainer for Tippman and had all the required certifications, education, experience and training to be such a personal trainer. Krieger properly gave Tippman simple and beginner workouts with no controversial exercises. Metz explained that it was not the duty of personal trainers to determine movement restrictions.

The Reebok Defendants next argue that they were not negligent in their performance and/or administration of its personal training services for Tippman. They also maintain that Tippman assumed the risk of engaging in the personal training sessions in that she was not a person wholly without knowledge seeking assurances from one with exclusive knowledge, and, by her voluntary participation in the training, consented to the activity allegedly resulting in her injury.

In support of this argument, the Reebok Defendants refer to Krieger and Tippman’s examination before trial testimony. Krieger and Tippman both testified that when they first met, Krieger took a history of Tippman’s health and Tippman informed him of her prior surgeries and restrictions. She told him that she underwent back surgery 11 months prior, had two knee surgeries and suffered from fibromyalgia. She felt that he was thorough in his evaluation of her prior history and explained each exercise before they did them. Tippman did not complain to Krieger of pain during the 15-20 minute

May 25 training session and did not feel any extraordinary pain during that session. He supervised her during that session and made sure she was feeling good and comfortable. According to Krieger, Tippman was in the proper position during those exercises. After that session, Tippman started feeling pain in her back and legs and had trouble walking on the stairs. She had never felt pain like that after any workout previously. However, the pain subsided. If it had not subsided, she would not have gone to the next session.

She did not feel any residual soreness during the June 1 workout and did not express feeling any pain to Krieger at that time. Tippman told Krieger that her soreness had totally dissipated. They took it a little lighter though so she would not be as sore afterwards. They reviewed all of the proper techniques and he did not increase the weight on the leg press. At no time did she inquire of Krieger if performing the activities would re-injure her back.

Finally, the Reebok Defendants argue that the alleged negligence in the performance and/or administration of personal training services was not a proximate cause of Tippman's injuries. They maintain that Tippman failed to introduce any evidence detailing the cause of her injury. She merely speculates that the use of a seated leg press and the 100 pound weights is what began the problem. They submit the affidavit of orthopedic surgeon Edward S. Crane ("Crane") who reviewed the bills of particulars, Tippman's examination before trial testimony and medical records. He also examined her on September 3, 2009. He averred that had Tippman injured her back

during the May 25 and June 1 workouts, the pain would have started at the time of those workouts and there is no causal relationship between those workouts and the recurrent disc herniation sustained by Tippman.

In opposition, Tippman first argues that the Reebok Defendants failed to meet their burden of proving that Krieger was sufficiently qualified, trained, skilled and competent to properly train Tippman. She maintains that the certificates submitted do not establish that Krieger was sufficiently proficient in training individuals with prior back injuries. Further, the Reebok Defendants did not submit Krieger's evaluation or any affidavits from Reebok's fitness manager, assistant fitness manager or master trainer regarding their evaluation as to his proficiency as a trainer. In addition, Krieger testified that he did not recall whether any of the continuing education classes he took concerned training people who had previous surgery.

She also argues that an issue of fact exists as to whether the Reebok Defendants were negligent in the performance and/or administration of personal training services. Krieger testified that he had knowledge that certain pieces of equipment were not appropriate for certain medical injuries or history and that certain equipment would not be appropriate for people with prior back injuries. He acknowledged that there were risks associated with using the leg press machine, including possible lower back injury, if the client was not seated on it in the proper position. Krieger was aware that Tippman was sore after her first workout, but did not believe that there was a possibility that she was

not qualified as a personal trainer for her due to her previous surgeries and fibromyalgia diagnosis and his lack of specialized training in those areas.

Tippman next argues that the Reebok Defendants failed to meet their burden of establishing the applicability of the doctrine of primary assumption of risk. Even though Tippman had exercised at gyms prior to the subject incident and used leg press machines, she had never used a sitting leg press machine, had not done squat exercises and had not used a rowing machine, all exercises which Krieger performed with her at the subject sessions. Tippman maintains that the utilization of the seated leg press machine under the circumstances in this case raises issues of fact as to whether the Reebok Defendants elevated the risk of danger.

Finally, Tippman argues that the Reebok Defendants failed to meet their burden of proving that the two sessions were not the proximate cause of Tippman's injury. First, Crane had not examined Tippman until over three years after her injury. Second, Tippman clearly testified that her pain did begin during the course of her workouts, testifying "working out is painful" and the day after the first session, she was unusually sore.

### **Discussion**

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853

*Aversa v. Taubes*, 194 A.D.2d 580 (2<sup>nd</sup> Dept. 1993); *Strachman v Palestinian Authority*, 2008 NY Slip Op 31346U (Sup. Ct. N.Y. Co., May 13, 2008).

In accordance with the foregoing, it is hereby

ORDERED that defendant Reebok Sports Club/NY, MILLENNIUM Development Partners VIII, LLC and Jason Krieger's motion for summary judgment dismissing the complaint is granted only to the extent that the claims asserted against defendant Jason Krieger individually are dismissed and any claims asserted against the defendants relating to the adequacy or efficacy of the equipment are dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

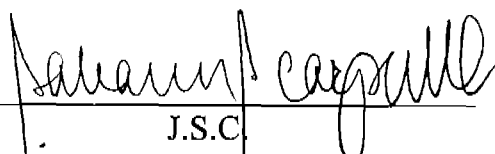
ORDERED that the remaining claims asserted against the remaining defendants Reebok Sports Club/NY and MILLENNIUM Development Partners VIII, LLC are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York  
September 23, 2010

ENTER:

**FILED**  
SEP 27 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
J.S.C.  
**SALIANN SCARPULLA**