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SCANNED ON 12/23/2010

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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 114879/2008

ROER, JASON

vs

150 WEST END AVENUE OWNERS

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

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 ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 23 2010

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

DEC 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/20/10

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

JASON ROER,

Plaintiff,

Index No.
112198/06

- against -

DECISION and ORDER

150 WEST END AVENUE OWNERS CORP., ACP 150 WEST END AVENUE ASSOCIATES, L.P., COOPER SQUARE REALTY, INC. and CAROL SARNOFF,

Mot. Seq.
003 & 004

Defendants.

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HON. EILEEN A. RAKOWER

Jason Roer ("Plaintiff") brings this action seeking damages for personal injuries sustained on June 15, 2008 in the basement gym of the apartment building where he and his wife reside, located at 150 West End Avenue in New York County. Plaintiff states in his Complaint that, while exercising on a treadmill in the gym, he was caused to fall and injure himself due to a loose exercise ball. Plaintiff alleges that his injuries were caused by the negligence of defendants 150 West End Avenue Owners Corp. ("150 West End"), owner of the premises; Cooper Square Realty, Inc. ("Cooper"), managing agent of the premises; and Carol Sarnoff ("Sarnoff"), a building resident. Specifically, Plaintiff alleges that 150 West End and Cooper (collectively the "Co-op") failed to take reasonable measures to ensure that the subject exercise ball would be secured when not in use; and that Sarnoff was negligent in her placement of the exercise ball in proximity to the treadmill that Plaintiff was exercising on.

Presently before the Court are motions for summary judgment by the Co-op and Sarnoff. The Co-op argues that Plaintiff's Complaint must be dismissed as against it for four reasons: First, it claims that Plaintiff's claim is overly speculative because even if a rack or other storage existed for the ball, the ball may not necessarily have

been secured by the last person to use it. Second, the Co-op argues that the mere presence of the ball on the floor was not the proximate cause of Plaintiff's accident; rather, it was the movement of the ball towards the treadmill, which the Co-op was not responsible for. Third, the Co-op claims that it cannot be held liable for Plaintiff's accident due to a written waiver signed by Plaintiff. Lastly, the Co-op argues that the manner of the accident was entirely unforeseeable.

Sarnoff argues in her motion that she is entitled to summary judgment because there no evidence to support a finding that she was negligent in any way by merely moving an exercise ball out of her own way. She asserts that the accident, as it occurred, was entirely unforeseeable.

Plaintiff submits an affirmation in opposition to the Co-op's motion, but does not oppose Sarnoff's motion. However, the Co-op opposes Sarnoff's motion for summary judgment, and Sarnoff opposes the Co-op's motion.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

The record contains video of surveillance camera footage depicting the gym at the time of the subject accident. The video shows Plaintiff jogging on a treadmill. An exercise ball, described by Sarnoff as "knee height," is in a stationary position immediately to the right of Plaintiff and his treadmill. The ball remains in this position for several minutes. Eventually, Sarnoff, who is also in the gym, walks up to Plaintiff and briefly greets him. As she passes Plaintiff she gently rolls the ball out of her way and towards a weight machine several feet behind the treadmill, adjacent to another exercise ball, which is behind the treadmill to the immediate left of Plaintiff's treadmill. After Sarnoff rolls the ball to this position, the ball slowly

rebounds back towards Plaintiff's treadmill, to the point it is immediately behind the treadmill and physically touching the belt of Plaintiff's treadmill. Slightly less than one minute later, the exercise ball gets sucked under the belt of the treadmill, and the rear of the treadmill is lifted a couple of inches, propelling the machine forward several feet where it hits the wall and causes Plaintiff to fall.

In order to recover in a claim for negligence, a plaintiff must show that there existed a duty on the part of the defendant owed to the plaintiff, that the defendant breached this duty, that the plaintiff was injured, and that the defendant's breach was the proximate cause of the plaintiff's injuries (*Rodriguez v. Budget Rent-A-Car Sys., Inc.*, 2007 NY Slip Op 6502 [1st Dept. 2007]). As the Court of Appeals observed in *Di Ponzio v. Riordan*,

> Foreseeability of risk is an essential element of a fault-based negligence cause of action because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated. Further, although virtually every untoward consequence can theoretically be foreseen with the wisdom born of the event, the law draws a line between remote possibilities and those that are reasonably foreseeable because no person can be expected to guard against harm from events which are. . . so unlikely to occur that the risk. . . would commonly be disregarded.

(89 N.Y.2d 578, 583 [1997]) (citations and internal quotes omitted). In other words, "[a]lthough the precise manner in which the harm occurred need not be foreseeable, liability does not attach unless the harm is within the class of reasonably foreseeable hazards that the duty exists to prevent" (*Sanchez v. State*, 99 N.Y.2d 247, 252 [2002] (*citing Di Ponzio* at 584). The issue of foreseeability may only be resolved as a matter of law when "there is only a single inference that can be drawn from the undisputed facts" (*Chen v. Everprime 84 Corp.*, 2006 NY Slip Op 8336, *1 [1st Dept. 2006]).

Here, the Court finds that the issue of whether the occurrence which caused Plaintiff's injuries was "naturally associated with" the defendants' breach of their alleged duty (*i.e.*, to secure the exercise ball in order to prevent it from moving freely about the gym and becoming a hazard) presents an issue of fact and thus cannot be

resolved by the Court on a motion for summary judgment. A rational factfinder could determine that it was foreseeable that placing an exercise ball in proximity to a moving treadmill, where it could come into contact with the belt and disturb the treadmill's functionality, posed a danger to the person using it. Similarly, a factfinder could rationally conclude that the Co-op's failure to provide storage racks or other means to prevent the free movement of the balls throughout the gym was a proximate cause of Plaintiff's injuries. As stated by the Court of Appeals in *Derdiarian v. Felix Contracting Corp.*,

> Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus. Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve.

(51 N.Y.2d 308, 315 [1980]) (citations omitted).

Lastly, the Court rejects the Co-op's argument that the gym membership contract signed by Plaintiff relieves the Co-op of any liability. The contract provides as follows:

> The undersigned hereby waives to the fullest extent permitted by law any and all claims which I/we may have against the Corporation, its directors, officers, agents and employees of any associated party, arising out of our use of the facilities, and injuries sustained in, or near the Exercise Room premises.

However, it is well settled that, in order for an exculpatory clause to be deemed as insulating a party from liability for its own negligence, such provision must contain plain and unmistakable language to that effect (*see Gross v. Sweet*, 49 N.Y.2d 102, 107 [1979]). Moreover, even if the waiver could be read to provide that the Co-op is not liable for any claims resulting from its own negligence, such a waiver would be unenforceable under General Obligations Law ("GOL") §5-326. That statute provides that any contractual provision which exempts, *inter alia*, the owner or operator of a gymnasium from liability for damages caused by its own negligence is "void as against public policy and wholly unenforceable."

Wherefore it is hereby

ORDERED that defendants' motions for summary judgment are denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 20, 2010

EILEEN A. RAKOWER, J.S.C.