Van't Hof v Equinox Holdings, LLC
2017 NY Slip Op 32639(U)
December 19, 2017
Supreme Court, New York County
Docket Number: 150247/2011
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 57

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MATTHEW KAES VAN'T HOF,

Plaintiff,

Index No. 150247/2011

- against -

Mot. Seq. No. 001

EQUINOX HOLDINGS, LLC, and EQUINOX HOLDINGS, INC.

Defendants.

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EQUINOX HOLDINGS, INC.,

Third-Party Plaintiff,

- against -

ICON HEALTH & FITNESS, INC.,

Third-Party Defendant.

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HON. JENNIFER G. SCHECTER:

Third-party defendant Icon Health & Fitness, Inc. (Icon) moves for summary judgment dismissing the third-party complaint asserted against it by Equinox Holdings, Inc.--the defendant and third-party plaintiff. Icon's motion is denied.

Background

This action arises out of an accident that took place in November 2010 at an Equinox Health Club operated and maintained by defendants Equinox Holdings, LLC and Equinox Holdings, Inc. (together, Equinox) (Amended Complaint, ¶¶ 4, 15; Turkel affirmation, ¶ 3).

Plaintiff Matthew Kaes Van't Hof alleges that he sustained serious and permanent injuries while using an exercise machine called a "Light Commercial Free Motion EXT Dual Cable Cross" (the Machine) as a result of Equinox's negligence and recklessness, including its failure to maintain, inspect, test and give warnings related to the Machine (Amended Complaint, ¶ 19).

Equinox commenced a third-party action against Icon, the Machine's manufacturer, "because its manual and warnings did not provide adequate guidance to Equinox as to what maintenance is required or the potential risks of a lapse in maintenance" (Third Party Complaint, Turkel affirmation, exhibit D, ¶ 9). The third-party complaint asserts two causes of action for common-law indemnification and contribution (*id.*, ¶¶ 10-15). Icon moves for summary judgment urging that it cannot be liable for indemnification or contribution because it was not negligent for any failure to warn and there is no claim for which Equinox would be responsible but not be "actively negligent."

The Machine

Equinox purchased the Machine in January of 2007 (Turkel affirmation, exhibit M). The Machine has a center column with weight stacks, a left and a right arm, and a base structure (Kittredge affirmation, exhibit B). The weight stacks are in ten pound increments and a pin is used to select the weight that is to be used for a particular workout. The Machine came with an owner's manual (the Manual) (*id.*). The Manual contained several warning labels or "decals," which were also located on the Machine (*id.* at 4; *id.*, exhibit F, L. Jensen

EBT at 79-80). Among the warnings is an instruction to "inspect the machine before use," a caution that the "weight selector pin must be fully inserted into the weight plate," and a warning to "inspect all cables, straps, moving parts, and fasteners weekly" (Kittredge affirmation, exhibit B at 4, decals 2, 6, and 7). Another warning, with an accompanying illustration, advises to "make sure selector pin is fully engaged before use. Red collar on pin should not be visible" (*id.*; Turkel affirmation, exhibit R). The Manual includes a number of "important precautions" and four pages of maintenance instructions, but nothing in either section expressly mentions the "bushings" or "bearings" that Icon contends Equinox failed to maintain.

The Accident

Van't Hof was allegedly injured while using the Machine when its arm suddenly collapsed, striking him on the head and causing a laceration to his scalp. Van't Hof testified that, on the day of the accident, he arrived at Equinox at approximately 7 A.M. and worked out for about 35 minutes (Turkle affirmation, exhibit H at 54, 62, 66). Van't Hof testified that he had used the Machine "at least ten times" before his accident, all without incident (*id.* at 115). On the morning in question, Van't Hof did not notice any "visual issues" with the Machine (*id.* at 69). He both "heard the pin click in" and "visually saw the pin click in" before beginning his exercises (*id.* at 72). According to his testimony, he specifically checked to make sure there was no red "collar" visible on the pin as it clicked in (*id.* at 117). He completed two sets of ten on the Machine without incident then the Machine "broke" on

the fourth or fifth repetition of his third set (*id.* at 76-77). At that point, Van't Hof heard a "very loud sound" and felt a "corresponding hit to the head" as "the metal edge of the pulley ... hit [his] head" (*id.* at 80). When a manager, Justin Folley, appeared following this accident, Van't Hof claims Foley told him, "[w]e had a problem with that machine last week" (*id.* at 88).

Following the accident, paramedics took Van't Hof to Beth Israel Hospital, where he received treatment, including twelve staples, for his laceration (*id.* at 91-92).

The Inspection

Laurel Jensen, Icon's director of product safety, testified on behalf of Icon (Kittredge affirmation, exhibit F). Jensen visited the Equinox where Van't Hof was injured following the accident in 2010 and inspected the Machine (*id.* at 46). He inspected the Machine again in 2012 (*id.* at 56, 121). Jensen explained that "when the pin is not correctly positioned in [the machine], there's a red portion of the pin that can be seen" whereas "[w]hen it is in position, you can't see that red portion" (*id.* at 91). He also explained that, "[i]f you have wear [in the bushings] on the machine ... you could have the pin only partially inserted into the hole" (*id.* at 96). According to Jensen, the selector pin for the vertical adjustment of the arms was "working, but you could see that it was impaired in its function" (*id.* at 111). When asked if he concluded that the Machine posed a "safety hazzard" following his inspection in 2010, Jensen testified that, "the potential for improper use is certainly increased with the wear and the condition of the machine" (*id.* at 124).

Expert Affidavit

In opposition to Icon's summary judgment motion, Equinox submitted an expert affidavit of Clyde V. Richard, Ph.D., P.E., a professional engineer (Richard aff., ¶ 1).[1] Richard's affidavit is based on, among other things, his review of "the owner's manual, the photographs contained in the deposition exhibits, and the videos of the product inspection held on August 2, 2012" (*id.*, ¶ 9). Richard also reviewed Van't Hof's description of the accident (*id.*). According to Richard, "the only reasonable explanation for the plaintiff's accident as described by plaintiff would be a design and/or manufacturing defect in the [machine], such as a failure in the spring mechanism that inserts and holds the pin of the adjustable arm mechanism in place" (*id.*). In his opinion, the "'minimal wear' that Icon's engineer, Laurel Jensen, allegedly found during his inspection [in 2010] was not a causative factor in plaintiff's injury. Nor was the allegedly loose/missing bolts that Icon's engineer [Jensen] observed during his inspection" (*id.*, ¶ 10).

Richard further attested that if the accident "was the result of some inadequate maintenance on the part of Equinox ... it is [his] opinion that Icon's owner's manual did not sufficiently warn Equinox of the need to perform specific periodic maintenance procedures on the FreeMotion Dual Cable Cross exercise machine in order to prevent the risk of physical

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[1] Icon's argument that Equinox's expert affidavit cannot be considered is rejected. CPLR 3212(b) specifically provides that where "an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101(d)(1)(i)] was not furnished prior to the submission of the affidavit."

injury to users of the machine" (*id.*, ¶ 13). Specifically, Richard claims that, "the owner's manual as well as the warnings and instructions on the machine fail to adequately alert the machine's owner of" the machine's ability to malfunction as a result of worn bushings, bearings, or adjustment bracket, and nothing in either the manual or on the warnings, alerts "the machine owner of the possibility that failure to conduct routine maintenance ... might result in the arm becoming disengaged and causing injury [to] a user of the machine" (*id.*, ¶¶ 13-14).

Discussion

Summary Judgment

To succeed on a motion for summary judgment, the movant must establish its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014] [citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant "fails to meet this initial burden, summary judgment must be denied 'regardless of the sufficiency of the opposing papers'" (*id.*, citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Only if the movant satisfies this initial burden does the burden shift to the non-moving party to demonstrate the existence of a triable issue of fact. "In other words, the burden does not shift to the nonmoving party to persuade the court against summary judgment" (*id.*). It is the movant's burden in the first instance to establish its entitlement to judgment as a matter of law.

Failure to Warn

A product manufacturer may be liable for ensuing injuries which may result from, among other things, inadequate warnings for the use of that product (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998] [citations omitted]). A failure to warn claim often involves a factual inquiry, which renders it a jury question (*id.* at 242). Generally, "[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (*id.* at 237; *Stewart v Honeywell Intl. Inc.*, 65 AD3d 864, 864 [1st Dept 2009]). The duty to warn may be obviated, however, "where the injured party was fully aware of the hazard through general knowledge, observation or common sense, or where the hazard is open and obvious" (*id.* at 865 [internal quotation marks and citation omitted]).

Here, the 15-page manual included a number of "important precautions," warnings, and four pages of maintenance instructions, but nothing that expressly addressed the "bushings" or "bearings" that Icon now contends were improperly maintained, causing Van't Hof's accident to occur (Kittredge affirmation, exhibit B). For example, the section entitled "Important Precautions" instructed to "[c]heck all cables, cable connections, and pulleys before each use" and to "replace any worn parts immediately" (*id.* at 3, ¶ 12). Likewise, this section instructed the owner to "[r]eplace all cables at least every two years" (*id.*, ¶ 13). Multiple decals in the manual and on the machine also warned of various hazards such as the

importance of "keeping hands free of moving parts," and the need to "be certain that weight pin is completely inserted" (*id.* at 4, decals 1, 2, 5, 6 and 7).

In the "Maintenance" section, however, nothing addresses the maintenance or inspection of bushings and bearings. Likewise, there is no instruction to replace the bushings and bearings or to check these specific items for wear. Instead, the maintenance sections provide a number of daily, weekly, and "monthly or as required" instructions and warnings, all of which are silent as to bushings and bearings. Icon's own representative, Jensen, acknowledged that the manual did not specifically address the maintenance of bushings and bearings (Turkel affirmation, exhibit F at 139, 88).

A triable issue of fact exists as to whether the alleged lack of adequate warnings regarding the machine's maintenance may have contributed to Van't Hof's accident (*see Young v Daglian*, 63 AD3d 1050, 1052 [2d Dept 2009]). Icon's only argument on reply--that "[t]he manual does not say specifically to check the bushing[] because there are so many wear parts that should be checked"--does not warrant issuance of summary judgment in its favor (Turkel reply affirmation, ¶ 35). This is particularly so in light of Richard's affidavit that more specific warnings should have been given. Contrary to Icon's argument, Richard's affidavit, at least with respect to the warnings contained in the manual, is based on evidence contained in the record--the Manual itself (*id.*, ¶ 36; Kittredge affidavit, exhibit B). In any event, whether a general instruction to check for wear in the manual was adequate to warn

of the need to check and maintain the bushings and bearings is a question for the jury to determine.

To the extent that Icon maintains that, "it is immaterial how prominent or conspicuous any warning in the owner's manual might have been because it is undisputed that plaintiff did not read the manual," the maintenance of the machine would be the responsibility of Equinox and not its gym customers (Icon Mem. in Supp. at 21). Likewise, Icon's contention that, "it has not been established that anyone at Equinox read the manual" is insufficient to meet Icon's affirmative burden on summary judgment as Icon cannot obtain summary judgment dismissing the complaint against it by merely pointing to gaps in Equinox's proof or by highlighting weaknesses in the theory of the case against it. Rather, it must establish, through admissible evidence, the merits of its position. On the papers here, Icon has failed to do so.

Indemnification and Contribution

In contribution, joint tort-feasors responsible for a plaintiff's loss or injury may share liability for such loss or injury (*Mas v Two Bridges Assoc.*, 75 NY2d 680, 689 [1990]). "Since they are *in pari delicto*, their common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss" (*id.* at 689-90). In contrast, in indemnity, "which arises commonly in cases involving vicarious liability[,] a party held legally liable to plaintiff shifts the entire loss to another" (*id.* at 690 [citations omitted]). Where the right to

indemnification is implied, and not based upon contract, it is generally permitted because a failure to do so "would result in the unjust enrichment of one party at the expense of another," and generally, "it is available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer" (*id.* [citations omitted]).

Icon's motion for summary judgment on the common-law contribution claim against it must be denied because factual issues exist as to whether Equinox is liable for Van't Hof's injuries and, if so, whether some portion of that liability may lie with Icon. Its motion for judgment on the indemnification claim, however, is granted as liability "for indemnification may only be imposed against those parties (*i.e.*, indemnitors) who exercise actual supervision" (*McCarthy v Turner Const., Inc.* 17 NY3d 369, 378 [2008], citing *Felker v Corning Inc.*, 90 NY2d 219, 226 [1997]; *87 Chambers, LLC v 77 Reade* , LLC, 122 AD3d 540, 542 [1st Dept 2014] citing *McCarthy*, *supra*). There is no question that Icon did not exercise any "actual supervision" for the maintenance or care of the Machine nor would Equinox's liability in this case, if any is found, be solely vicarious.

Accordingly, it is

ORDERED that Icon's motion for summary judgment is granted with respect to the indemnification claim asserted against it and the motion is otherwise denied. This is the decision and order of the court.

Dated: December 19, 2017

ENTER:

Jennifer Schecter, JSC