

Pecora v Fitness Intl., LLC

2019 NY Slip Op 32259(U)

June 19, 2019

Supreme Court, Richmond County

Docket Number: 150176/2017

Judge: Judith N. McMahon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

IAS PART 6

_____ x
MICHAEL PECORA,

ORDER

Plaintiffs,
- against -

Index Number: 150176/2017

FITNESS INTERNATIONAL, LLC, FITNESS & SPORTS
CLUBS, LLC, L.A. FITNESS, et al.,

Hon. Justice
Judith N. McMahon

Defendants.
_____ x

Defendants' motion (sequence 001) for summary judgment is granted and Defendants' motion (sequence 002) to amend the Answer is moot, as detailed herein.

Plaintiff alleges that he sustained personal injuries when he allegedly contracted a bacterial infection known as MRSA at the sauna of Defendants' health club.

Plaintiff testified that he joined Defendants' health club on or about July 18, 2014. On July 24, 2014, Plaintiff was admitted to Richmond University Medical Center's ER because of a boil on his stomach. His diagnosis was cellulitis, he was treated with an antibiotic regiment and discharged after five days. Plaintiff testified that at the time he had no knowledge of the cause of his infection.

Plaintiff used the health club and the sauna on or about, October 31, 2014. The next day he was experiencing pain in his buttocks, so he went to his doctor. On November 9, 2014, Plaintiff was diagnosed with MRSA.

Plaintiff's Complaint, served on or about January 20, 2017, alleged injury related only to the October 2014 infection. At Plaintiff's February 21, 2018 EBT, Plaintiff indicated an intent to

amend the Bill of Particulars to include the July 2014 infection, which Plaintiff did by way of a Supplemental Bill of Particulars served that same day.

Defendants are now moving for summary judgment to dismiss the case. Defendants have also moved to amend their Answer to include the affirmative defense that Plaintiff's claims related to the July 2014 infection are barred by the three-year statute of limitations of CPLR 214.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

In support of their motion for summary judgment, Defendants argue that Plaintiff has failed to provide any evidence that, even if any such MRSA bacteria existed at Defendants' health club, Defendants had the required notice, either actual or constructive, prior to the occurrence of Plaintiff's alleged July 2014 infection. Defendants state that there is no record of any complaints to Defendants prior to the alleged date of Plaintiff's accident. Defendants argue that regular cleaning was performed, and Plaintiff has provided no evidence to support the claim that the bacteria existed at the health club or the sauna prior to Plaintiff's infection.

Defendants submitted an Affidavit from Dr. Dennis Miller, a physician with a subspecialty of infectious disease. Dr. Miller states that, "[i]t is well recognized in the field of infectious diseases that MRSA can be transmitted in a variety of common everyday interactions." Dr. Miller further explains that, "MRSA can also be transmitted from one person to another by merely being in close proximity to a person who is colonized by MRSA who is coughing or sneezing. It is common for individuals who are 'colonized', to be unaware of that fact, making it

virtually impossible to trace whether physical contact or other methods of transferring MRSA.”
Finally, Dr. Miller states that, “there is no evidentiary foundation or scientific methodology, which is generally accepted in the infectious disease medical community to attribute the cause of the [P]laintiff’s MRSA infection to his use of the sauna in question.”

“In reviewing a summary judgment motion, the court must consider the facts in a light most favorable to the nonmoving party, and examine whether the proponent has made 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. Once the moving party has done so, the nonmoving party must show facts sufficient to require a trial on any issue of fact. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.”
Lau v. Margaret E. Pescatore Parking, Inc., 30 N.Y.3d 1025, 90 N.E.3d 1276 (2017).

In opposition to Defendants’ summary judgment motion, Plaintiff argues that Defendants failed to meet their initial burden of proof of a lack of constructive notice. This Court does not agree. Defendants have established that there is no basis to conclude that Defendants had constructive notice. Plaintiff has put forth no facts to support the argument that Defendants knew or should have known about MRSA bacteria being present in Defendants’ health club.

Plaintiff next argues that there is a question of fact as to whether Plaintiff contracted MRSA from the subject sauna. However, there is no factual basis to conclude that MRSA was present in Defendants’ health club. Plaintiff offers only speculation related to health code violations related to record keeping at Defendants’ health club.

“In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive

notice of its existence. Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury. However, summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous. A defendant can also make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her [accident] without engaging in speculation.” *Touloupis v. Sears*, 155 A.D.3d 807, 63 N.Y.S.3d 518 (N.Y.A.D. 2nd Dept. 2017).

“A plaintiff’s inability to identify the cause of his or her [accident] is fatal to a cause of action to recover damages for personal injuries because a finding that the defendant’s negligence, if any, proximately caused the plaintiff’s injuries would be based on speculation. Proximate cause may be established without direct evidence of causation by inference from the circumstances of the accident. However, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action.” *Vojvodic v. City of New York*, 148 A.D.3d 1086, 51 N.Y.S.3d 534 (N.Y.A.D. 2nd Dept. 2017).

Plaintiff’s complaint is founded on speculation that Plaintiff contracted MRSA at Defendants’ health club. Even viewing facts in a light most favorable to Plaintiff, Plaintiff has not put forth any facts to establish an issue of fact as to whether Plaintiff contracted MRSA at Defendants’ health club.

ORDERED Defendants’ motion for summary judgment (sequence 001) is granted; and it is further

ORDERED that the case is dismissed; and it is further

ORDERED Defendants' motion to amend the Answer (sequence 002) is moot; and it is further

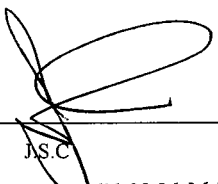
ORDERED that the Clerk of the Court shall enter judgment dismissing the action.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: 6/19/19

So Ordered.

ENTER: _____


J.S.C.
Hon. Judith N. McMahon
J.S.C.