Alexander v Blink Fitness
2019 NY Slip Op 32554(U)
August 19, 2019
Supreme Court, Kings County
Docket Number: 512420-17
Judge: Peter P. Sweeney
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512420-17

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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IRMA ALEXANDER and ROY ALEXANDER,

Plaintiffs,

-against-

BLINK FITNESS AND BLINK FITNESS HOLDINGS, INC.,

Defendants.

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Index No.:
Motion Date: 5-20-19
Mot. Cal. Nos.: 1-2

DECISION/ORDER

The following papers numbered 1 to 5were read on these motions:

Papers:	**Numbered:**
Notices of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/.....	1-2
Answering Affirmations/Affidavits/Exhibits.....	
Reply Affirmations/Affidavits/Exhibits.....	3
Memorandums of Law.....	4-5

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the defendant, BLINK FITNESS HOLDINGS, INC. d/b/a BLINK FITNESS, moves for an order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint. By Notice of Cross-Motion, plaintiffs, IRMA ALEXANDER and ROY ALEXANDER, move for an order pursuant to CPLR § 3126 striking defendant's answer, or in the alternative, imposing an appropriate sanction due to defendant's alleged spoliation of evidence. Both motions are consolidated for disposition.

MS # 01 & 02

The Accident:

The plaintiff, IRMA ALEXANDER, commenced his action claiming that she was injured on the morning of December 9, 2016, while performing an exercise known as a face pull. At the time of injury, she was using a "dual crossover pulley machine" at defendant's fitness club. At her deposition, which defendant submitted in support of the motion, plaintiff testified that a face pull required her to stand on the floor, grab onto a rope attachment connected to the machine which was situated above her head and pull the rope toward her chest. The rope attachment, which is connected to the machine by a harness clip, was already connected to the machine when she began using it that morning. She did not look at the harness clip prior to the accident to determined whether the rope attachment was properly connected.

The accident occurred after plaintiff grabbed onto the rope attachment and began pulling it downward toward her chest. She claims that lost her balance and fell to the floor injuring her elbow when the rope attachment suddenly detached from the machine as she was pulling it down. Plaintiff had never used the machine before the accident and first joined defendant's fitness club that morning.

At his deposition, Mr. Guy, the manager of the club, testified that while he was working at the fitness club that morning, he heard "a slight sound of pain." He turned around and saw that the plaintiff was laying on the floor in the vicinity of the dual crossover pulley machine. When he went over to assist her, she informed him that when she was pulling down the rope attachment, it broke away from the machine and caused her to fall to the ground.

According to Mr. Guy, the rope attachment consisted of a heavy duty black rope with a metal fixture in the middle. The rope attachment connects to the cables of the machine by a "spring loaded" harness clip. The rope attachment was on the floor when he arrived at the scene of the accident and he noticed that it was not attached to the harness clip, which was still connected to the cables of the machine.

Shortly after the accident, Mr. Guy reattached the rope attachment to the machine, inspected the rope, the metal fixture on the rope where the harness clip attached, the harness clip and the cables on the machine. He did a few reps using the rope attachment and determined that everything was in good operating order. Neither machine or the rope attachment were taken out of service

Mr. Guy filled out an accident report stating that "[t]he member failed to correctly attach the rope and fell back to the floor when attempting to complete the first rep." He maintained that he obtained the information from the plaintiff.

Mr. Guy was unaware of any problems with the dual cross-over machine or the rope attachment prior to the accident and testified that he would do a detailed inspection of each machine at the club once a month and a less detailed inspection of each machine throughout every working day.

The Spoliation Issue:

Plaintiff retained counsel shortly after the accident. By letter dated January 10, 2017 to the defendant, plaintiff's counsel advised that her office would be representing the plaintiff in connection with the accident. By letter dated August 7, 2017 to plaintiff's counsel, defense counsel suggested they conduct an inspection of the machine within 30

days. Plaintiff's attorneys responded to this letter on August 24, 2017 by writing to defense counsel inquiring whether the defendant still had the machine and the component parts and requested that defendant preserve all the equipment involved in the accident pending an inspection. Plaintiff did not, however, specifically allege ask the defendant to preserve the harness clip. It was not until plaintiff's bill of particulars was served around December 7, 2017 that the harness clip was mentioned as a possible cause of the accident.

On January 17, 2018, plaintiff's counsel sent another letter to defendant's counsel inquiring whether defendant retained the equipment and specifically mentioned the harness clip. Defendant's counsel responded to his letter by writing to plaintiff's counsel on January 25, 2018, stating the defendant was still in possession of the machine but not the harness clip. Defendant's counsel stated in the letter that harness clips are replaced in the regular course of business every two months.

Plaintiff's Motion:

In a premises liability case, a defendant demonstrates its prima facie entitlement to judgment as a matter of law by submitting admissible proof that it did not create the alleged dangerous condition that plaintiff claims caused his or her injuries or that it did not have actual or constructive notice of the condition (*see Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774; *McMahon v. Gold,* 78 A.D.3d 908, 909, 910 N.Y.S.2d 561; *Applegate v. Long Is. Power Auth.,* 53 A.D.3d 515, 516, 862 N.Y.S.2d 86; *Powell v. Pasqualino,* 40 A.D.3d 725, 836 N.Y.S.2d 218). To provide constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the defendant] to discover and

remedy it" (*Gordon v. American Museum of Natural History,* 67 N.Y.2d at 837, 501 N.Y.S.2d 646, 492 N.E.2d 774). "[C]onstructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection" (*Curiale v. Sharrotts Woods, Inc.,* 9 A.D.3d 473, 475, 781 N.Y.S.2d 47; *see Lal v. Ching Po Ng,* 33 A.D.3d 668, 823 N.Y.S.2d 429; *Lee v. Bethel First Pentecostal Church of Am., Inc.,* 304 A.D.2d 798, 800, 762 N.Y.S.2d 80).

Here, Mr. Guy's testimony established, *prima facie*, that defendant did not create or have actual or constructive notice of any defective condition that may have caused plaintiff's injuries (*see Applegate v. Long Is. Power Auth.,* 53 A.D.3d at 516, 862 N.Y.S.2d 86; *Scoppettone v. ADJ Holding Corp.,* 41 A.D.3d 693, 694–695, 839 N.Y.S.2d 116; *Monroe v. City of New York,* 67 A.D.2d 89, 96–97, 414 N.Y.S.2d 718). According to Mr. Guy, the dual pulley cross-over machine, the rope attachment and the harness clip where in good operating condition before and after plaintiff's accident.

In opposition, the plaintiff failed to raise a triable issue of fact (*see Payen v. Western Beef Supermarket,* 106 A.D.3d 710, 964 N.Y.S.2d 583; *Alami v. 215 E. 68th St., L.P.,* 88 A.D.3d 924, 925, 931 N.Y.S.2d 647; *Walker v. City of New York,* 82 A.D.3d 966, 967, 918 N.Y.S.2d 775; *Slintak v. Price Chopper Supermarkets,* 81 A.D.3d 808, 916 N.Y.S.2d 528). It appears as though plaintiff has no idea what caused the rope attachment to disconnect from the dual cross-over machine.

The Cross-Motion:

Plaintiff contends that this Court should issue an order pursuant to CPLR §3126 striking defendant's answer, or affording another appropriate sanction, on the ground of

spoliation of evidence. Plaintiff claims that since the defendant discarded the harness clip knowing of the likelihood of litigation, she has been prevented from conducting a meaningful inspection to assist her in establishing a *prima facie* case.

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (*Holland v. W.M. Realty Mgt., Inc.*, 64 A.D.3d 627, 629, 883 N.Y.S.2d 555). "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547, 26 N.Y.S.3d 218, 46 N.E.3d 601 [internal quotation marks omitted]; *see Aponte v. Clove Lakes Health Care & Rehabilitation Ctr., Inc.*, 153 A.D.3d 593, 59 N.Y.S.3d 750).

Here, the record raises triable issue of fact as to whether the defendant intentionally or negligently failed to preserve the harness clip after being placed on notice that litigation was likely, and if so, whether the plaintiff is entitled to a sanction pursuant to CPLR 3126 for spoliation of evidence (*see, Aponte v. Clove Lakes Health Care & Rehabilitation Ctr., Inc.*, 153 A.D.3d at 594, 59 N.Y.S.3d 750; *Golan v. North Shore–Long Is. Jewish Health Sys., Inc.*, 147 A.D.3d 1031, 1033–1034, 48 N.Y.S.3d 216; *Bach v. City of New York,* 33 A.D.3d 544, 545, 827 N.Y.S.2d 2; *cf. Rokach v. Taback*, 148 A.D.3d 1195, 1196, 50 N.Y.S.3d 499; *Biniachvili v Yeshivat Shaare Torah, Inc.*, 120 A.D.3d 605, 606–607, 990

N.Y.S.2d 891; *Strong v. City of New York*, 112 A.D.3d 15, 18, 22, 973 N.Y.S.2d 152). These issues can only be decided after an evidentiary hearing has been conducted.

Accordingly, it is hereby

ORDERED that the parties are directed to appear for an evidentiary hearing on the issue of whether the defendant intentionally or negligently failed to preserve the harness clip after being placed on notice that litigation was likely, and if so, whether the issuance of an order striking defendant's answer or the granting of some other remedy would be an appropriate sanction, it is further

ORDERED that the parties are directed to appear before the undersigned on October 7, 2019, for the purposes of scheduling the evidentiary hearing, and it is

4 at 2:30 pm

ORDERED that pending the evidentiary hearing, defendant's motion shall be held in abeyance.

This constitutes the decision and order of the Court.

2019 AUG 27 AM 9:04
KINGS COUNTY CLERK
FILED

Dated: August 19, 2019

PETER P. SWEENEY, J.S.C.

HON. PETER P. SWEENEY, J.S.C.