

**Hammond v Equinox Holdings LLC**

2020 NY Slip Op 31065(U)

April 24, 2020

Supreme Court, New York County

Docket Number: 155061/2019

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

STEVEN HAMMOND,
Plaintiff,
- v -
EQUINOX HOLDINGS LLC D/B/A EQUINOX FITNESS CLUB D/B/A EQUINOX, EQUINOX WALL STREET INC., AND MICHAEL ALEXANDER,
Defendants.

INDEX NO. 155061/2019
MOTION DATE
MOTION SEQ. NO. 002, 003
DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 66, 67, 80, 81

were read on this motion to/for DISMISS

Plaintiff Steven Hammond commenced this action after his fitness club membership was terminated in May 2018, when defendant Michael Alexander reported that plaintiff had allegedly engaged in lewd behavior in the gym's steam room. In his complaint, plaintiff asserts causes of action for defamation, negligence, breach of contract, negligent hiring and supervision, and negligent infliction of emotional distress. Defendants Equinox Holdings LLC d/b/a Equinox Fitness Club d/b/a Equinox, and Equinox Wall Street Inc. (together "Equinox Defendants") now move pursuant to CPLR 3211(a)(7) to dismiss the complaint. Plaintiff also moves pursuant to CPLR 3215 for a default judgment against defendant Alexander and defendant Alexander cross-moves to dismiss the complaint based on plaintiff's failure to effectuate service of process.

With respect to the motion to dismiss by the Equinox Defendants, this motion must be granted. First, regarding to the breach of contract claim, this claim fails as a matter, as plaintiff has failed to identify any provision of his membership agreement that was breached by the Equinox Defendants' termination of his gym membership without conducting an investigation of

defendant Alexander's accusations. *EBC I, Inc. V. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 33 (2005) (affirming dismissal of contract claim where plaintiff failed to allege that defendants breached any particular provision of the agreement). Likewise, there is no basis for plaintiff's duplicative good faith and fair dealing claim. *See Empire State Bldg. Assocs. v. Trump*, 247 A.D.2d 214 (1<sup>st</sup> Dep't 1998). Finally, even if plaintiff could identify a provision of his membership agreement that was allegedly breached, he has not alleged any legally cognizable damages since the reputational and emotional damages he seeks are not recoverable in a breach of contract claim. *Rather v. CBS Corp.*, 68 A.D.3d 49 (1<sup>st</sup> Dep't 2009).

Plaintiff's negligence claim against the Equinox Defendants must also be dismissed as it is duplicative of his breach of contract claim. Plaintiff's negligence claim is based on the allegation that the Equinox Defendants breached their duty of care to plaintiff by failing to investigate co-defendant Alexander's accusations prior to terminating plaintiff's gym membership. These are the same allegations that form the basis of his breach of contract claim and thus this claim must be dismissed as duplicative. *Ulysses I & Co. V. First American Title Ins.*, 309 A.D.2d 643 (1<sup>st</sup> Dep't 2003).

Plaintiff's defamation claim against the Equinox Defendants must also be dismissed. It is well-settled that an employer cannot be held vicariously liable for the allegedly tortious conduct of an employee unless the alleged act was committed while the employee was acting within the scope of his employment. *Rausman v. Baugh*, 248 A.D.2d 8 (2d Dep't 1998). In order to be considered acting within the scope of his employment, the employee must be performing regular duties that he owes to his employer, acting under the direction and control of the employer, and acting in furtherance of the employer's business. *Id.* at 10-11.

As discussed at length in the decision and order issued in a related matter captioned *Alexander v. Equinox Holdings LLC*, Index No. 160323/2018 (Sup. Ct. N.Y. County June 24, 2019), defendant Alexander was not acting within the scope of his employment when he made the accusation against plaintiff. Indeed, as plaintiff admits in his complaint, defendant Alexander was off-duty and was not working at the time of the incident. Complaint, para. 27. Further, defendant Alexander's duties as a front-desk associate was to check members into the club and he was not required to monitor and inspect the steam room, where the alleged conduct occurred. Thus it cannot be said that Alexander was acting within the scope of his employment at the time of the incident, but was rather acting as a club member. Accordingly, defendant Alexander's allegedly defamatory statements cannot be imputed to the Equinox Defendants. *See Rausman v. Baugh*, 248 A.D.2d at 12-13.

To the extent that plaintiff's defamation claim is based on the internal reporting of Alexander's accusation between Equinox employees, the claim must also be dismissed. As an initial matter, plaintiff fails to identify any of these other alleged defamatory statements in his complaint, and thus the claim fails as a pleading matter under CPLR 3016. Further, even if these allegations were properly plead, the statements between Equinox employees are protected by the common interest privilege. *See Panghat v. New York Downtown Hosp.*, 85 A.D.3d 473, 474 (1<sup>st</sup> Dep't 2011). Accordingly, plaintiff's defamation claim against the Equinox Defendants must be dismissed.

Plaintiff's negligent hiring and supervision claim also fails. To state a claim for negligent hiring and supervision, plaintiff must allege facts sufficient to show that defendant "knew or should have known of a propensity on the part of their employee to commit the alleged wrongful acts." *Shu Yuang Huang v. St. John's Evangelical Lutheran Church*, 129 A.D.3d 1053, 1054 (2d

Dep't 2015). Here, plaintiff's claim fails because there is no allegation that the Equinox Defendants knew or should have known that defendant Alexander had a propensity to make false accusations. *Milosovic v. O'Donnell*, 89 A.D.3d 628, 629 (1<sup>st</sup> Dep't 2011). Finally, plaintiff's negligent infliction of emotional distress claim must also be dismissed as plaintiff fails to allege that the Equinox Defendants breached a duty to him that either unreasonably endangered his physical safety or caused him to fear for his physical safety. *Ferreyr v. Soros*, 116 A.D.3d 407 (1<sup>st</sup> Dep't 2014). Accordingly, the motion to dismiss must be granted and the complaint dismissed with respect to the Equinox Defendants.

Turning to defendant Alexander, plaintiff moves for a default judgment against defendant Alexander and defendant Alexander cross-moves to dismiss the complaint based on plaintiff's failure to timely serve him with the complaint. Plaintiff is not entitled to a default judgment against defendant Alexander as he has failed to submit an affidavit of service for this defendant, as required under CPLR 3215. Plaintiff fails to cite any support for his argument that the appearance of defendant Alexander's counsel in this action should be deemed proper service. However, plaintiff is correct that defendant Alexander has waived any objections to service by appearing in this action and filing a motion to consolidate. *Deutsch Bank Nat'l Trust v. Vu*, 167 A.D.3d 844 (2d Dep't 2018). Accordingly, it is

ORDERED that the Equinox Defendants' motion to dismiss the complaint is granted and the complaint is dismissed as against these defendants, and the Clerk shall enter judgment accordingly, with costs and disbursements awarded to the Equinox Defendants; and it is further

ORDERED that plaintiff's claims against defendant Alexander are severed and continued; and it is further

ORDERED that the caption in this case shall be amended to reflect the dismissal of the Equinox Defendants, and all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that counsel for the Equinox Defendants shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office who are directed to mark the court's records to reflect the change in caption; and it is further

ORDERED that plaintiff's motion for a default judgment against defendant Alexander and defendant Alexander's cross-motion to dismiss are denied.

4/24/20

DATE

*Paul A. Goetz*  
PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: