Henig v Barry & Florence Friedberg Jewish Community Ctr.
2020 NY Slip Op 35167(U)
April 22, 2020
Supreme Court, Nassau County
Docket Number: Index No. 610027/17
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

TRIAL/IAS, PART 18
NASSAU COUNTY

MORRIS HENIG and EILEEN HENIG,

Plaintiff(s),

Index No.: 610027/17

-against-

BARRY and FLORENCE FRIEDBERG JEWISH COMMUNITY CENTER, MEDIFIT COMMUNITY SERVICES LLC, EXOS, EXOS FOR HUMAN PERFORMANCE, ADAM BECKER and "JOHN DOE", Said name being fictitious and intended to represent the employee/trainee referred to herein,

Defendant(s).

Motion Seq. No.: 003, 004, 005 & 006
Motions 003, 004 & 005 Submitted: 2/19/2020
Motion 006 Not fully Submitted.
XXX

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XXXX
Affirmations in Opposition/Supporting Exhibits.....XXXXX
Reply Affirmations.....XXX

Defendants, Adam Becker (Becker) and Exos Community Services LLC f/k/a Medifit Community Services, LLC d/b/a Exos for Human Performance and d/b/a Exos (collectively "the Exos Defendants") moves this court for an order, pursuant to CPLR sec. 3212, granting them summary judgment (Motion Seq. 003) and dismissing the

complaint and all cross claims against them. Defendant, Barry and Florence Friedberg Jewish Community Center (BFFJCC), moves this court for summary judgment (Motion Seq. 004) dismissing the complaint and all cross claims against them. Plaintiff, Morris Henig (Henig)1, opposes both motions. Henig moves for summary judgment and n adverse interest at trial (Motion Seq. 005). Defendants oppose the motion. Henig separately moves for a trial preference (Motions Seq. 006). While Motion Seq. 006 has not yet been fully submitted, the decisions on Motion Seqs. 003 and 004 render 006 moot.

Henig commenced this action by complaint, then by amended complaint dated August 24, 2018. Issue was joined by service of an answer with cross claims, to the amended complaint, dated October 24, 2018. Becker and the Exos Defendants interposed an answer to the amended complaint dated December 12, 2018. The case certified ready for trial on June 24, 2019 and a note of issue was filed on September 26, 2019

On October 9, 2015, Henig was at the BFFJCC's gym using a treadmill. He had used treadmills at the facility numerous times before. The Exos Defendants were hired by BFFJCC to operate, maintain and control the gym. While on the treadmill, Becker, an employee of the Exos Defendants, walked up to Henig's treadmill, placed his left foot on the side of Henig's treadmill, and his right foot on the side of another treadmill, and

1 Former Plaintiff Eileen Henig discontinued her action against all Defendants.

tapped Henig on the shoulder. Becker's intent was to enforce the gym's rule that a member may only use a treadmill for 30 minutes at a time. Though the parties differ on how many times Becker tapped Henig's shoulder, with Becker saying it was once and Henig alleging it was many times, Henig alleges that the tapping was "unexpected" and he turned briefly to look at Becker. According to Henig, the act of turning caused his left foot to possibly turn, resulting in an injury to his foot. He initially thought something fell on his foot. He stopped the treadmill soon thereafter and noticed something wrong with his foot. It was "flopping" while he walked. He tried using another treadmill after that but was unable to because of his foot. All Defendants now move for summary judgment, largely making the same arguments. They claim that Henig's causes of action are actually for an intentional tort, therefore the statute of limitations has run. Further, they argue that Becker's action of tapping Henig on the shoulder was not the proximate cause of the injury. BFFJCC further argues that, based upon its contract with the Exos Defendants, BFFJCC cannot be liable.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (see Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]; Friends of Animals, Inc. v. Associates Fur Mfrs., 46 NY2d 1065 [1979]; Zuckerman v. City of New York, 49 NY2d 5557 [1980]; Alvarez V. Prospect Hospital, 68

NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegard v. New York University Medical Center, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see Zuckerman v. City of New York, 49 NY2d 5557 [1980], supra).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (see Anderson v. Bee Line, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, Garcia v. J.C. Duggan, Inc., 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (see also Andre v. Pomeroy, 35 NY2d 361 [1974]).

"A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk" (Giulini v. Union free School Dist. # 1, 70 AD3d 632 [2d Dept. 2010]; Basso v Miller, 40 NY2d 233, 241 [1976]). "To impose liability upon a defendant

landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (Morrison v. Apolistic Faith Mission of Portland, 111 AD3d 684 [2d Dept 2013]; see Winder v. Executive Cleaning Servs., LLC, 91 AD3d 865 [2d Dept 2012]; Gonzalez v. Natick N.Y. Freeport Realty Corp., 91 AD3d 597 [2d Dept 2012]).

The amended complaint herein contains 10 causes of action, though the 10th Cause of Action was Eileen Henig's derivative claim that has since been discontinued. The First Cause of Action alleges negligence against BFFJCC. The Second Cause of Action alleges negligence against Becker and BFFJCC. The Third Cause of Action alleges negligence against Medifit Community Services. The Fourth Cause of Action alleges negligence against Medifit and Becker. The Fifth Cause of Action alleges negligence against Exos. The Sixth Cause of Action alleges negligence against Exos and Becker. The Seventh Cause of Actin alleges negligence against Exos Human Performance. The Eight Cause of Action alleges negligence against Exos Human Performance and Becker. The Ninth Cause of Action is for negligence against Becker.

BECKER AND THE EXOS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 003)

In support of their motion, the Exos Defendants submit, inter alia, the pleadings,

the deposition transcripts of Henig, Becker and Benjamin Curran, a representative of Exos Community Services, and the expert affirmation of Dr. Christopher Hubbard, a physician.

Becker and the Exos Defendants' first argument is that the complaint, while couched in the terms of negligence, actually alleges intentional tort. A cause of action in negligence must allege that the defendant owed a duty to the plaintiff, that the defendant breached that duty and that the plaintiff was injured as a result. (Pasternack v. Laboratory Corp. of Am. Holdings, 27 NY3d 817 [2016]). As for intentional torts, only battery, if anything, would fit the allegations of the complaint. The intentional tort of battery requires a showing of an unjustified touching of another person, without the person's consent, with the intent to cause bodily contact that a reasonable person would find offensive. (Rivera v. State, 34 NY3d 383 [2019]). While Henig's opposition accuses Becker and the Exos Defendants (and BFFJCC) of cherry picking allegations from the complaint, the majority of the causes of action clearly contain allegations that Becker touched Henig without Henig's permission. The touching is described as "unsafe, dangerous and hazardous", and as "interfering with plaintiff's legal activities". Further, the touching was done "without regard for plaintiff's safety and well-being". It is clear that these allegations fit the elements of battery. Henig states in his deposition the touching was unjustified because his time to use the treadmill was not over. He testified he had only been on the treadmill for 25 minutes, and was entitled to 30 minutes. Further, the allegation that Becker was interfering with Henig's legal activities also

implies the touching was unjustified. Also during his deposition, Henig makes it clear he never gave Becker or any of the defendants permission to touch him:

> Q. Did you hear anybody ask you to tap you on the shoulder that day before they tapped you on the shoulder?
> A. No, it was all very sudden.
> Q. Had you ever given permission for anyone at the JCC to make contact with you at any time prior to October 9, 2015?
> A. Contact with me while I was on the treadmill?
> Q. Correct.
> A. No.
> Q. Just so I'm clear, so no, you had never given them permission to touch you?
> A. No.

Finally, by referring to the touching as "unsafe, dangerous and hazardous" and "without regard for plaintiff's safety and well-being", it is clear Henig believed a reasonable person would find the touching offensive. "…[I]f, based on a reading of the factual allegations, the essence of the cause of action is, as here, [an intentional tort], the plaintiffs cannot exalt form over substance by labeling the action as one to recover damages for negligence…". (Schetzen v Roberts, 273 AD2d 220, 221 [2d Dept 2000])(cites omitted). Once intentional action occurs, there can be no cause of action for negligence. (Oteri v. Village of Pelham, 100 AD3d 725 [2d Dept 2012]). As a result, the court finds the complaint alleges nine causes of action of intentional tort, all of which are time barred by the one year statute of limitations. Becker and the Exos Defendants have therefore established entitlement to summary judgment as a matter of

law. The burden shifts to Henig to raise a material issue of fact that requires a trial of the action.

However, even if the court accepted the complaint as one sounding in negligence, the court would still find that the complaint should be dismissed. Becker and the Exos Defendants have established both that they did not breach a duty to Henig, nor was any alleged breach the proximate cause of Henig's injuries. Further, Henig himself is unclear as to what caused his injury, first believing something fell on his foot, then equivocating as to whether his foot turned after Becker tapped him.

Henig was a regular patron of the gym and a regular user of the treadmills. On the date of his injury, he was on the treadmill, walking at a rate 4.2 miles per hour, which he called a "fast walk". The treadmill was also in an incline posture. He was wearing headphones and watching TV while he walked. When Becker tapped his shoulder, it was Henig's decision to turn. He acknowledges he did not slow down or turn off the treadmill, or take off the headphones. He simply turned, at which point he claims an injury occurred. While he states the tapping was "unexpected", he did to say it startled him or caused him to jump reflexively. To be clear, the tapping of the shoulder itself, whether it happened once or multiple times, did not cause the injury. It was Henig choosing to turn after his shoulder was tapped that caused the injury. Based upon those facts, the court would find that Becker and the Exos Defendants did not breach a duty to Henig, nor was the tapping the proximate cause of his injury

In opposition, Henig first raises the argument that the treadmills were too close

together in violation of ASTM International Standard F2115-05. It appears this is the first time Henig has raised this argument in this matter, but even assuming it can be raised now and is true, it has no relevance to these proceedings. The notion that, had the treadmills been placed farther apart, Becker would have attempted to get Henig's attention in another way, is pure speculation and does not raise an issue of fact. There is no proof that Becker would not have tapped Henig on the shoulder to get his attention if the treadmills were spaced differently. Further, Becker testified he first tried going in front of Henig to get his attention by waving at him, but Henig was either too engrossed in watching the TV or simply ignored him. Then Becker tried to make "an announcement" from behind Henig that his time was almost up, but there was no indication Henig heard him. As a result the placement of the treadmills is irrelevant.

Henig next argues that his allegations do not equate to an intentional tort because Becker did not intend to hurt Henig's shoulder, did not intend to physically harm Henig and did not intend an offensive contact. As for the intent to cause harm, that is not an element of battery. However, Henig claiming that the tapping on the shoulder was not an intentional offensive touching contradicts the wording of the complaint. As discussed, supra, Henig repeatedly describes the touching as "unsafe, dangerous and hazardous" and "without regard for plaintiff's safety and well-being". It is a contradiction in terms to call a touching that was dangerous and hazardous to not also be a touching that someone would find offensive.

Henig next argues the negligent conduct was in interrupting him and distracting

him. Again, the complaint is worded differently, and Henig's deposition testimony does not support these assertions. He described the tapping as "unexpected", but did not say he was surprised or startled, or that the tapping made him jump or act reflexively. Instead, he testified that he turned to see who was tapping him, which was a voluntary action on his part, as did so without slowing down or turning off the treadmill first.

Next, Henig argues that Becker's actions were the proximate cause of the injury. The court agrees with Henig that Dr. Hubbard's opinion that Henig's injury was caused more due to Henig's medical condition than anything Becker did is speculative and conclusory. However, Henig does not raise an issue of fact regarding whether a duty was breached, or how Henig voluntarily turning while on the treadmill without slowing it down or turning it off caused the injury.

Finally, Henig argues that Becker and the Exos Defendants should be sanctioned for spoliation of evidence. There is no need to address it as the complaint will be dismissed against these Defendants.

BFFJCC'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 004)

As discussed, supra, the BFFJCC makes the same argument as Becker and the Exos Defendants that the complaint sounds in the intentional tort of battery and not negligence. Henig raises the same objections to those argument. Therefore, based upon the court's analysis, supra, BFFJCC's motion will be granted as the action is time barred.

Further, as with Becker and the Exos Defendants, the court finds there is no breach of duty nor is there proximate cause. Because Henig raises the same arguments in opposition as to Becker and the Exos Defendants, the court finds the complaint against BFFJCC would have to be dismissed even if the complaint properly alleged negligence. As a result the court need not reach the issue of whether the contract between BFFJCC and the Exos Defendants would have shielded BFFJCC from liability.

HENIG'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY AND FOR AN ADVERSE INFERENCE (MOTION SEQ. 005) AND FOR A TRIAL PREFERENCE (MOTION SEQ. 006)

As the court finds that this action is time barred and that none of the Defendants are liable or were negligent, these motions will be denied as moot.

Accordingly, it is hereby

ORDERED, that Becker and the Exos Defendants' motion for summary judgment (Motion Seq. 003) is GRANTED; and it is further

ORDERED, that BFFJCC's motion for summary judgment (Motion Seq. 004) is GRANTED; and it is further

ORDERED, that Henig's motion for summary judgment and an adverse inference (Motion Seq. 006) is DENIED as moot; and it is further

ORDERED, that Henig's motion for a trial preference is DENIED as moot.

The complaint is dismissed.

The court has considered the other arguments raised by the parties and finds them

to be without merit or rendered moot.

The foregoing constitutes the Decision and Order of the Court.

Dated: April 22, 2020
Mineola, N.Y.

/S/
Hon. James P. McCormack, J. S. C.