Stroud v Bling Holdings, Inc.

2020 NY Slip Op 35402(U)

December 10, 2020

Supreme Court, Kings County

Docket Number: Index No. 519397/2017

Judge: Reginald A. Boddie

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At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 10th day of December 2020.

PRESENT:
Honorable Reginald A. Boddie, JSC

DIANE F. STROUD,

Plaintiff,

-against-

BLINK HOLDINGS, INC., BLINK FITNESS, BLINK HOLDING, INC., d/b/a BLINK FITNESS and AMANDA SNYDER,

Defendants.

Index No. 519397/2017
Cal. No. 33 MS 2

DECISION AND ORDER

Papers	Numbered
MS 2	Docs. # 25-49

Upon the foregoing cited papers, the decision and order on defendants' motion for summary judgment, pursuant to CPLR 3212, is as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained at defendant Blink Holdings, Inc.'s fitness club (Blink) at 1413 Fulton Street, Brooklyn, New York, on May 30, 2017. On the date of the accident, plaintiff, a new member, was participating in a free 30-minute introductory personal training session with defendant Amanda Snyder (Snyder), a personal trainer employed by Blink.

Plaintiff fell while performing plyometric exercises, a challenging exercise in which a person jumps from a static standing position on the ground onto a plyo box, which is a cube made

of sturdy gym mats. Snyder testified she was aware that plaintiff was a certified personal trainer and averred plaintiff sought a personal trainer to push her and bring her fitness to the next level. Snyder testified she used this exercise with plaintiff because plyo boxes are challenging, plaintiff appeared to be physically fit and asked to be challenged.

Snyder averred she demonstrated the jump before plaintiff made her attempts. Defendants averred plaintiff made an initial attempt to jump onto a 24-inch cube, which was the highest cube. Snyder testified that she observed plaintiff completed the initial jump, but described plaintiff as looking uncomfortable, nervous and lacking confidence. She therefore instructed plaintiff to switch to the 18-inch cube, and plaintiff agreed. Plaintiff averred that Snyder instructed her to jump on a 30- or 36-inch cube five times. The parties agree that on plaintiff's second jump, she lost her balance, fell backwards, and broke her wrist. Snyder testified that she was standing about an arms length to the side of plaintiff, watched her perform the jump and tried to catch her when she fell, but did not recall whether she ever made contact with plaintiff.

Defendants sought summary judgment on the grounds that plaintiff assumed the risk when she engaged in exercise activity. Defendant further argued that plaintiff had been an athlete all her life, was a fitness devotee and certified personal trainer. They argued plaintiff was aware that there are risks associated with participation in exercise activities. Plaintiff opposed the motion on the grounds that Snyder failed to complete an intake questionnaire or assess her abilities prior to instructing her to perform the jump, and Blink failed to ensure such. Plaintiff also averred that her fall could have been prevented if Snyder had properly spotted her.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter

of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*, 49 NY2d at 562).

The doctrine of primary assumption of risk, under which defendants seek summary judgment, provides that a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation (*DiBenedetto v Town Sports Intl., LLC*, 118 AD3d 663, 663 [2d Dept 2014], citing *see Morgan v State of New York*, 90 NY2d 471, 484 [1997]). The doctrine includes risks associated with the activity engaged in and has been applied in cases involving injuries sustained in gyms and fitness centers (*DiBenedetto*, 118 AD3d at 663, citing *see Perez v New York City Dept. of Educ.*, 115 AD3d 921 [2d Dept 2014]; *see Marcano v City of New York*, 99 NY2d 548 [2002]; *Ramirez v Lucille Roberts Health Clubs, Inc.*, 110 AD3d 975 [2d Dept 2013]; *Baccari v KCOR, Inc.*, 109 AD3d 856 [2d Dept 2013]). The doctrine, however, does not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased (*DiBenedetto*, 118 AD3d at 664 [citations omitted]). Awareness of the risk of engaging in a particular activity is " 'to be assessed against the background of the skill and experience of the particular plaintiff' " (*DiBenedetto*, 118 AD3d at 663-664, quoting *Maddox v City of New York*, 66 NY2d 270, 278 [1985]).

Here, defendants established their prima facie entitlement to summary judgment on the grounds that plaintiff, a certified personal trainer and experienced fitness participant, assumed the risks of engaging in the plyometric exercises at Blink on May 30, 2017. Thus, the burden shifted

to plaintiff to raise a triable issue of fact (*Winegrad*, 64 NY2d at 853; *Zuckerman*, 49 NY2d at 562).

In opposition, plaintiff averred Blink failed to provide its trainers with a required training manual, intake questionnaire or health information sheet. Plaintiff further averred that Snyder was an inexperienced personal trainer and failed to conduct an assessment of her ability prior to instructing her to jump onto the plyo box. Plaintiff denied that Snyder told her to perform to her abilities, averred the cube she was given was 30- to 36-inches high, and testified that she had not previously performed plyo exercises. Plaintiff testified that she joined Blink in order to reorient herself to the world of fitness and fitness training and get herself in shape since she had been out for the preceding two years focusing on nutrition and education. Plaintiff testified she told Snyder that she had done fitness training before, had not done it in a number of years, and wanted to get back in shape.

Plaintiff proffered the affidavit of David Bluman (Bluman). He stated, based upon the testimony of the parties and his inspection of the scene, the plyo boxes at Blink Fitness came in 3 different heights: 12 inches, 18, inches and 24 inches. He opined that Snyder violated the standards of practice of personal trainers in failing to complete an assessment form, obtain plaintiff's health history, assess plaintiff's abilities prior to instructing her to perform the plyo exercise, or advise her of the risks of the objectives, benefits and possible complications of the exercises. Bluman argued, even assuming plaintiff informed Snyder that she was a personal trainer and wanted to be challenged, that does not obviate the need to fully assess her physical abilities prior to starting an exercise plan since plaintiff was 60 years old and stated that it had been a while since she belonged to a gym and wanted to get back into shape.

Plaintiff relied on *Mathis v New York Health Club*, 261 AD2d 345, 346 (1st Dept 1999) arguing Snyder unreasonably increased the risk of harm to plaintiff by instructing her to perform such an advanced exercise. In *Mathis*, the Court held plaintiff, who was not a novice to weight training, assumed the risks ordinarily entailed by properly supervised weight training, but not

> risks in excess of those usually encountered, particularly unreasonably increased risks attributable to lapses in judgment by trainer whose qualifications were not as represented by health club at time plaintiff purchased club's specialized training package; trainer increased weight on machine to 270 pounds and, despite plaintiff's doubts as to whether he could handle weight, urged plaintiff to continue with his repetitions; issues are raised as to whether plaintiff's injury was not consequence of risks which, although inherent in weight training, were unreasonably augmented by culpable misjudgment as to plaintiff's capacity to bear so much weight (261 AD2d at 345).

In *Levy v Town Sports Intl., Inc.*, plaintiff was injured when, while engaged in fitness training at defendant gym, she fell after being directed by her personal trainer (defendant's employee) to perform jump repetitions on an exercise ball (*Levy*, 101 AD3d 519 [1st Dept 2012]). The Appellate Division held there were triable issues of fact including

> whether the trainer, knowing that plaintiff had osteoporosis and had recently had surgery, unreasonably increased the risk of harm to plaintiff by recommending that she perform an advanced exercise with multiple repetitions (*see Mathis*, 261 AD2d 345; *see also Corrigan v Musclemakers, Inc.*, 258 AD2d 861, 863 [3d Dept 1999]); whether the trainer was in a proper position to help guard against plaintiff falling during the exercise; and whether plaintiff voluntarily assumed the risks or was following the trainer's expert advice and encouragement while attempting to complete the exercise (*see Mathis* at 346).
> Here, there are questions of fact as to what Snyder knew about plaintiff's abilities and fitness and whether she unreasonably increased the risk of harm to plaintiff when she instructed plaintiff to perform the plyo exercises (*see Mathis*, 261 AD2d at 345; *see also Levy*, 101 AD3d 519). As "[t]he function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist"

(*114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 759 [2d Dept 2019] [citations omitted]), defendants' motion is denied.

ENTER:

HON. REGINALD A. BODDIE

Honorable Reginald A. Boddie
Justice, Supreme Court

KINGS COUNTY CLERK
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