SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** IAS MOTION 18EFM

Justice

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FRANCES LEAVITT,

Plaintiff,

- v -

BLINK HOLDINGS, INC D/B/A BLINK FITNESS,

Defendant.

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INDEX NO. 156083/2017

MOTION DATE 08/19/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendant Blink Holdings, Inc. (Blink) moves for summary judgment pursuant to CPLR 3212, on the grounds that it did not have actual or constructive notice of the allegedly dangerous or defective condition and that plaintiff's negligence claim is barred under the doctrine of assumption of risk.

Plaintiff commenced this action on July 6, 2017 seeking damages associated with injuries sustained when Leavitt was caused to fall on an allegedly defective treadmill at the Blink Fitness Club located at 121 Broadhollow Rd, Melville, NY 11747 on September 10, 2016. Leavitt, a gym patron of Blink with 30 years of experience on treadmills, was operating treadmill #35 (treadmill) at speed setting 4.2 for an hour without the treadmill safety clip affixed to her persons. After the first hour of operation, Leavitt reprogramed the treadmill to work out for an additional amount of time without the safety apparatus tethered to Leavitt's persons. Leavitt alleges the treadmill malfunctioned when she reprogramed it to do a second workout, causing it

to rapidly accelerate beyond the imputed speed setting of 4.2 and eventually causing her to lose her balance and fall.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008] [internal quotation marks and citation omitted]). "[A] motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

In support of its motion, defendant proffers Leavitt's deposition transcript; Blink's Club Manager Caitlin Martin's (Martin) deposition transcript; an affidavit of Blink's Facility Manager Phillip Eddy (Eddy); a compliance conference order dated May 9, 2018; and an attorney affirmation from Sherry S. Hamilton (Hamilton). In the Hamilton affirmation, defendant affirms multiple attempts at scheduling plaintiff to inspect the treadmill followed by a May 9, 2018 compliance conference order stating "Π Shall inspect subject treadmill [on or before] 6/28/18" [sic] (NYSCEF Doc. No. 26).

Defendant contends it did not have actual or constructive notice that the treadmill was dangerous or defective. Moreover, there is no evidence that the treadmill was defective at the time of the injury; and that Blink caused or created any purported defect. Both Eddy and Martin confirm there were no prior service reports or issues; therefore, no actual notice exists. As for constructive notice, defendant submits evidence that the treadmill was routinely inspected prior

to the incident and also inspected after the incident, and found to be in good working order. Defendant argues any alleged defect was not noticeable or apparent for a sufficient length of time to impute constructive notice.

Blink also maintains that plaintiff is barred under the doctrine of assumption of risk because Leavitt had 30 years of experience operating treadmills. Specifically, for four years prior to the accident, Leavitt would operate the same treadmill daily for an hour, and Leavitt voluntarily chose not to use the safety features associated with the machine at the time of the accident – even though the dangers associated with the operation of the treadmill were obvious and apparent to Leavitt at the time of the accident. Therefore, she consented to the risk and defendant has satisfied their duty of care owed to plaintiff.

In opposition, plaintiff contends that Blink failed to establish that it did not create a dangerous or defective condition of allowing a malfunctioning treadmill to be operated by gym patrons. Moreover, Blink failed to show an absence of actual or constructive notice of the dangerous or defective condition, insofar as Blink did not proffer any evidence as to the last time the treadmill was inspected prior to the accident. In addition, plaintiff contends defendant failed to establish that the subject treadmill did not malfunction at the time of the accident. Furthermore, plaintiff avers there is still a question of fact as to whether the inspections conducted on a monthly or semimonthly basis were reasonable.

Plaintiff maintains Blink failed to establish that Leavitt comprehended the increased and/or unreasonable risk of a malfunctioning treadmill which accelerated faster than she anticipated; therefore, there are issues of fact regarding whether Leavitt assumed the risk of falling from a malfunctioning treadmill. Finally, plaintiff avers the application of the doctrine of assumption of risk is generally a question for the Jury.

In reply and in connection with the Hamilton Affirmation, defendant states plaintiff cannot establish negligence due to plaintiff's failure to procure an expert to inspect the treadmill.

Defendant has met its initial burden for summary judgment with regard to not possessing actual notice. Eddy, the Director of Facilities for Blink, in his affidavit and Martin, Blink's Club Manager, in her deposition testified that Blink was never notified prior to or after the accident that there was an issue with the treadmill (*see Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010] ["absence of actual notice is also established by" testimony that defendant "had never received any complaints" prior to the accident]; NYSCEF Doc. No. 28, p. 20:2-18; NYSCEF Doc. No. 35).

> "A defendant property owner who moves for summary judgment in a personal injury action arising from an alleged hazardous or defective condition on his or her property has the burden of establishing that he or she did not create the hazardous or defective condition or have [...] constructive notice of its existence"

(*Schnell v Fitzgerald*, 95 AD3d 1295 [2d Dept 2012], citing *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). "To constitute 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 defendant's employees to discover and remedy it" (*Gordon* at 837). When defendants establish prima facie that they lacked constructive notice, they must include evidence indicating the last time the area in question was to be inspected or maintained (*Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323 [1st Dept 2008] [staircase slip and fall case]).

In *Sanchez v New Scandic Wall L.P.*, (145 AD3d 643 [1st Dept 2016]), summary judgment was granted when defendants presented evidence that their elevators were regularly inspected, and the elevator doors were operating properly before and after plaintiff had an accident. The court found that plaintiff failed to offer an "expert affidavit or other evidence of

any malfunction" (*Sanchez,* 145 AD3d 643).[1] Moreover, the *Sanchez* court held that "even if a defect existed, [defendant] demonstrated that they did not create or have actual or constructive notice of it" (*Sanchez,* 145 AD3d 643).

Here, Blink has met their initial prima facie burden of not having constructive notice. There is no evidence Blink created the allegedly defective condition. Martin testified that she would regularly inspect the treadmill "[a]pproximately one to two times a month" and immediately after the accident she conducted an inspection of the machine with no issues (NYSCEF Doc. No. 29, pp. 15-19, 31-34; *see e.g. Sanchez,* 145 AD3d 643; *see e.g. Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]). Furthermore, Eddy in his affidavit stated there has been no issue with the treadmill prior to the accident or any post-accident issue (*see* NYSCEF Doc. No. 35).

In opposition, plaintiff failed to point to any evidence demonstrating an issue of fact as to the existence of a defect or defendant's notice of the same. Even with the reasonable inspection of the treadmill, the alleged defect was not visible or apparent, it did not exist for a sufficient length of time prior to the accident, and it has not been discovered (*see Gordon* at 837; *see also Garcia v Delgado Travel Agency Inc.*, 4 AD3d 204 [1st Dept 2004] ["there is no evidence that defendants either created the [dangerous] condition [...] or had notice of a hazard that could have been prevented by the exercise of reasonable care"]).

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[1] *see e.g. Haberman v Icon Health & Fitness, Inc.*, 14-CV-8314 (CM), 2018 WL 1413263, at *4 [SDNY Mar. 6, 2018], appeal withdrawn, 18-957, 2018 WL 3325910 [2d Cir May 22, 2018] [internal citation omitted] ["Whether a products liability claim [specifically one founded on a defective treadmill] "is pleaded in strict products liability, breach of warranty or negligence, it is a consumer's burden to show that a defect in the product was a substantial factor in causing the injury. Typically, this proof requires an expert."]).

Accordingly, it is hereby ORDERED that defendant's motion is granted and the complaint is dismissed. This constitutes the decision and order of the Court.

1/5/2021
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE