SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No.: 507818/2019
Motion Date: 10-31-22
Mot. Seq. No.: 3

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ALLA PERTSOVA,

Plaintiff,

-against-

DECISION/ORDER

KINGSWAY REALTY, LLC, PLANET FITNESS, INC., PLANET FITNESS FRANCHISING LLC, PLANET FITNESS EQUIPMENT, LLC, "XYZ FRANCHISEE COMPANY" THE NAME OF THE FRANCHISEE COMPANY BEING UNKNOWN, "JOHN DOE" and 1601 KINGS HIGHWAY FITNESS GROUP, LLC,

Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 73-96, the motion is decided as follows:

In this action seeking damages for personal injuries allegedly sustained as a result of a slip and fall on December 26, 2018, at Planet Fitness located at 1601 Kings Highway, Brooklyn, New York, defendants PLANET FITNESS, INC., PLANET FITNESS FRANCHISING LLC, PLANET FITNESS EQUIPMENT LLC (hereinafter the "Franchisor Entities") together with 1601 KINGS HIGHWAY FITNESS GROUP, LLC and KINGSWAY REALTY, LLC move for an order granting summary judgment pursuant to CPLR 3212 dismissing plaintiff's Amended Verified Complaint in its entirety, with prejudice, and granting all such other relief as the Court deems just and proper. Plaintiff ALLA PERTSOVA opposes the motion.

Background:

Plaintiff commenced this action claiming that on the morning of December 26, 2018, she suffered bodily injuries when she slipped and fell on an accumulation of water after stepping out of a shower stall in the shower area of the women's locker room at the Kings Highway Planet Fitness located at 1601 Kings Highway, Brooklyn, New York. When she entered the shower stall shortly before the accident to take a shower, she noticed that there was a 3" to 5" gap between the bottom of the shower curtain and the floor. After taking a shower, she exited the shower stall

by stepping over the separation between the shower stall and the outside floor and slipped and fell on the accumulation of water on the floor. She maintains that the water on the floor emanated from the shower and flowed onto the floor because there was a 3" to 5" gap between the bottom of the shower curtain and the floor. Plaintiff testified that there was no water on the floor prior to her shower.

Ahmari Joseph, who was employed at the Planet Fitness facility as a member service representative testified at a deposition that she would normally clean the locker room every ten to fifteen minutes and if she saw water on the floor, she would push it towards the drain outside the shower.

In an affidavit, Alison Johnson, Esq., an Associate General Counsel for Pla-Fit Franchise, LLC, a subsidiary of defendant Planet Fitness, Inc., stated that Planet Fitness, Inc., through its wholly owned subsidiary, defendant Planet Fitness Franchising LLC, grants franchises and licenses to third parties to independently own and operate fitness clubs using the Planet Fitness name and the Planet Fitness trademarks. She further stated that as of August 2018, in connection with a corporate restructuring, Planet Fitness Franchising LLC became the Planet Fitness "franchisor" via a transfer of said interests to it from Pla-Fit Franchise, LLC and that Planet Fitness, Inc. also owns and operates a subsidiary company by the name of Planet Fitness Equipment LLC, which sold fitness equipment to franchisees for use in their franchised fitness clubs prior to August 2018. She maintained that neither Planet Fitness, Inc., Planet Fitness Franchising LLC, Planet Fitness Equipment LLC nor Pla-Fit Franchise, LLC, ever owned, operated, maintained, repaired, managed, or supervised the Planet Fitness club located at 1601 Kings Highway in Brooklyn, New York, and that these entities never employed, managed, or supervised any of the individuals working at the Kings Highway Planet Fitness facility. She maintained that the Kings Highway Planet Fitness is independently owned and operated by defendant 1601 Kings Highway Fitness Group, LLC.

Discussion:

It is well established that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez Prospect Hosp.*, 68 N.Y.2d

320 [1987]). Once the movant has made such a showing, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*see Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Center*, 64 6N.Y.2d 851, 853 [1985]).

It is well settled that "[l]iability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property (*see Mitchell v. Icolari*, 108 A.D.3d 600, 601–602; *Nappi v. Incorporated Vil. of Lynbrook*, 19 A.D.3d 565, 566). Here, the Franchisor Entities established their prima facie entitlement to summary judgment dismissing the action insofar as asserted against them by submitting admissible proof that they neither owned, occupied, controlled of made special use of the property. The plaintiff failed to raise a triable issue of fact.

The Franchisor Entities also demonstrated as a matter of law that they cannot be found liable based upon its status as franchisors. In determining whether a franchisor may be held vicariously liable for the acts of its franchisee, the most significant factor is the degree of control that the franchisor maintains over the daily operations of the franchisee or, more specifically, the manner of performing the very work in the course of which the accident occurred (*see Repeti v. McDonald's Corp.*, 49 A.D.3d 1089, 1090, 855 N.Y.S.2d 281; *Hart v. Marriott Intl.*, 304 A.D.2d 1057, 1058, 758 N.Y.S.2d 435; *Andreula v. Steinway Baraqafood Corp.*, 243 A.D.2d 596, 668 N.Y.S.2d 891). Here, the Franchisor Entities tendered sufficient evidence in support of their motion to establish, prima facie, that they lacked the requisite control over the alleged causes of the plaintiff's injuries. The plaintiff failed to raise a triable issue of fact in opposition. For the above reasons, the Franchisor Entities are entitled to summary judgment dismissing the complaint insofar as asserted against them.

That branch of the motion in which defendant 1601 Kings Highway Fitness Group, LLC seeks summary judgment is DENIED. To be entitled to summary judgment in his case, 1601 Kings Highway Fitness Group, LLC had the burden of demonstrating by admissible that it maintained the premises in a reasonably safe manner and that it did not create a dangerous

condition that posed a foreseeable risk of injury to individuals expected to be present on the property premises (*see Cassone v. State of New York,* 85 A.D.3d 837, 838, 925 N.Y.S.2d 197; *Luksch v. Blum–Rohl Fishing Corp.,* 3 A.D.3d 475, 476, 771 N.Y.S.2d 136; *Etminan v. Esposito*, 126 A.D.3d 854, 855, 6 N.Y.S.3d 103, 104). 1601 Kings Highway Fitness Group, LLC failed to meet failed to meet this burden.

In the Court's view, a jury could infer that the premises were not reasonably safe because the shower curtain that was being used in the shower stall where plaintiff had taken a shower was inadequate to prevent water from flowing out from inside the shower stall to the floor outside through the gap between that bottom of the shower curtain and the floor and that the inadequate shower curtain posed a foreseeable risk of injury to individuals expected to be present on the property premises. Further, defendant 1601 Kings Highway Fitness Group, LLC failed to demonstrate, as a matter of law, that it did not create this condition or that it was unaware of the condition.

In *Matos v. Azure Holdings II, L.P.*, 181 A.D.3d 406, 406, 121 N.Y.S.3d 51, 52, a somewhat similar case, the plaintiff alleged that he slipped and fell while stepping out of a combined bathtub/shower in his apartment after taking a shower. He claims that the wet and slippery condition of the floor was the result of the failure of defendants, his landlord and the landlord's property manager, to repair the brackets that held the shower curtain rod. While the defendants were granted summary judgment by the motion Court, the Appellate Division held that "summary judgment should have been denied because issues of fact exist as to whether plaintiff's fall was caused by the condition of water accumulation and, if so, whether it was a hazardous condition attributable to the absence of a shower curtain that was the result of defendants' negligence in failing to timely repair the brackets" (*Matos,* 181 A.D.3d at 407, 121 N.Y.S.3d at 53).

Here, as in *Matos*, issues of fact exist as to whether plaintiff's fall was caused by the condition of water accumulation. Issues of fact also exist in this case as to whether this condition was attributable to an inadequate shower curtain (as opposed to the absence of a shower curtain as in *Matos*) that was the result of defendant 1601 Kings Highway Fitness Group, LLC's negligence in using a shower curtain it knew or had reason to know was inadequate.

Finally, the movants did not establish as basis for granting summary judgment to defendant KINGSWAY REALTY, LLC.

For the above reasons, it hereby

ORDERED that the motion is GRANTED, solely to the extent that the Franchise Entities, i.e., - defendants PLANET FITNESS, INC., PLANET FITNESS FRANCHISING LLC, PLANET FITNESS EQUIPMENT LLC, are awarded summary judgment dismissing the complaint insofar as asserted against them. The motion is otherwise **DENIED.**

This constitutes the decision and order of the Court.

Dated: December 13, 2022

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020