

113 A.D.3d 422
Supreme Court, Appellate Division,
First Department, New York.

Colette MALOUF, Plaintiff–Respondent,

v.

EQUINOX HOLDINGS,
INC., Defendant–Appellant.
Equinox Holdings, Inc., Third–
Party Plaintiff–Appellant,

v.

Life Fitness, Inc., Third–
Party Defendant–Respondent,
Rebecca Krauss, et al., Third–Party Defendants.

Jan. 9, 2014.

Synopsis

Background: Plaintiff brought personal injury action against health club operator, alleging she was injured on treadmill in health club. The Supreme Court, New York County, [Paul Wooten, J., 969 N.Y.S.2d 804, 2012 WL 7154115, 38 Misc.3d 1223\(A\)](#), granted plaintiff's motion for spoliation sanctions to the extent of precluding health club operator from arguing at trial that the treadmill plaintiff was using at the time of her accident was operating properly or was free from defects, and granted the motion of third-party defendant to strike the third-party complaint against it, and health club operator appealed.

Holding: The Supreme Court, Appellate Division, held that motion court did not abuse its discretion in remedying health club operator's spoliation of evidence.

Affirmed.

West Headnotes (1)

[1] **Pretrial Procedure**

Failure to Comply;Sanctions

In personal injury action against health club operator, alleging plaintiff was injured

on health club treadmill, motion court did not abuse its discretion in remedying health club operator's spoliation of evidence by precluding operator from arguing at trial that treadmill plaintiff used was operating properly or was free from defects, and by striking operator's third-party complaint against treadmill manufacturer seeking contribution and indemnification based on design, manufacture, and servicing of treadmill; health club operator was unable to provide treadmill for inspection or to provide any information as to how or when it was removed, other than affidavit from manager who believed treadmill was replaced as part of equipment upgrade, and all paperwork concerning treadmill was also missing.

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

****161** Larocca Hornik Rosen Greenberg & Blaha LLP, New York ([David N. Kittredge](#) of counsel), for appellant.

Law Office of Robert Evan Trop, PLLC, Garden City ([Robert E. Trop](#) of counsel), for Colette Malouf, respondent.

K & L Gates LLP, New York ([David Short](#) of the bar of the State of Illinois, admitted pro hac vice, of counsel), for Life Fitness, Inc., respondent.

[GONZALEZ, P.J., TOM, RENWICK, MANZANET–DANIELS, FEINMAN, JJ.](#)

Opinion

***422** Order, Supreme Court, New York County (Paul Wooten, J.), entered October 26, 2012, which, insofar as appealed from, granted plaintiff's motion for spoliation sanctions to the extent of precluding defendant from arguing at trial that the treadmill plaintiff was using at the time of her accident was operating properly or was free from defects, and granted the motion of third-party defendant Life Fitness, Inc., to strike the third-party complaint against it, unanimously affirmed, without costs.

In this action for personal injuries allegedly sustained by plaintiff on September 17, 2008, when she fell off a treadmill at defendant's Soho location, defendant was unable to provide the treadmill for inspection or to provide any information as to how or when the treadmill was removed, other than an affidavit from a manager at the Soho location who believed that it was replaced as part of an equipment upgrade that would have occurred some time prior to September 2010. All paperwork concerning the treadmill was also missing. Plaintiff and third-party defendant established that defendant's failure to take affirmative steps to preserve the treadmill constituted spoliation of evidence by demonstrating that defendant was on notice that the treadmill might be needed for future litigation (see *Strong v. City of New York*, 112 A.D.3d 15, 973 N.Y.S.2d 152 [1st Dept. 2013]). Although the instant action was not commenced until May 20, 2009, the evidence shows that plaintiff immediately reported the accident and a claims defense form was prepared by defendant's employee and forwarded to its legal department (see *id.*; see also ****162** *Kirkland v. New York*

City Hous. Auth., 236 A.D.2d 170, 173–175, 666 N.Y.S.2d 609 [1st Dept. 1997]). Accordingly, the motion court did not abuse its broad discretion in remedying defendant's discovery failures by barring it from arguing at trial that the subject treadmill was operating properly or was free from defects.

***423** The motion court's invocation of the harsh penalty of striking defendant's third-party complaint seeking contribution and indemnification based on the design, manufacture, sale, maintenance, and servicing of the treadmill was warranted since the treadmill was a key piece of evidence that is not available for inspection (see *Kirkland*, 236 A.D.2d at 176, 666 N.Y.S.2d 609; *Standard Fire Ins. Co. v. Fed. Pac. Elec. Co.*, 14 A.D.3d 213, 219, 786 N.Y.S.2d 41 [1st Dept. 2004]).

All Citations

113 A.D.3d 422, 978 N.Y.S.2d 160, 2014 N.Y. Slip Op. 00165