Telano v Daume
2018 NY Slip Op 31768(U)
July 16, 2018
Supreme Court, Suffolk County
Docket Number: 15-1360
Judge: Sanford N. Berland
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SHORT FORM ORDER **INDEX NO.: 15-1360**

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

KIANA TELANO, a minor under the age of eighteen years, by her parents and natural guardians, STEVEN G. TELANO and LISA TELANO, and STEVEN G. TELANO and LISA TELANO, individually,

Plaintiff(s),

-against-

MARIA DAUME, a minor under the age of eighteen years by her mother and natural guardian, MAUREEN DAUME, LONG ISLAND SOCCER LEAGUE, INC., LONG ISLAND SOCCER REFEREES ASSOCIATION, and LAKE GROVE-NEWFIELD SOCCER CLUB, INC.,

Defendant(s).

ORIG. RETURN DATE: July 25, 2016
FINAL RETURN DATE: February 13, 2018
MOT. SEQ. #: 004 **MD**

ORIG. RETURN DATE: September 13, 2016
FINAL RETURN DATE: February 13, 2018
MOT. SEQ. #: 005 **MD**

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendant Maria Daume, dated June 8, 2016, and supporting papers; (2) Notice of Motion by defendants Long Island Junior Soccer League, Inc. and Lake Grove-Newfield Soccer Club, Inc., dated July 14, 2016, and supporting papers; (3) Affirmation in Opposition made by plaintiffs, dated October 09, 2016, and supporting papers; (4) Reply Affirmation made by defendants Long Island Junior Soccer League, Inc. and Lake Grove-Newfield Soccer Club, Inc, dated November 16, 2016; it is

ORDERED that these motions (#004 and #005) are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion #004 made pursuant to CPLR 3212 by defendant Maria Daume is denied, and it is further

ORDERED that the motion #005 made pursuant to CPLR 3212 by defendants Long Island Junior Soccer League, Inc. and Lake Grove Newfield Soccer Club, Inc. is denied.

This is an action seeking money damages for injuries that the infant plaintiff, Kiana Telano, sustained during a soccer match between her team, the North Bellport Blue Thunder, and the Lake Grove-Newfield Soccer Club, Inc. ("LGNSC") on September 22, 2013. Plaintiffs claim that Kiana's injuries were the result of violent, intentional, reckless and otherwise tortious off-the-play conduct by one of the LGNSC players, Maria Daume. Among other things, plaintiffs allege that Maria had a history of violent and injurious conduct against opposing players during soccer matches and that her soccer club, the Long Island Soccer League, Inc. and the Soccer Referees Association, all of whom, along with Maria and her mother, have been named as defendants in this action, should have prevented her from playing against Kiana's team on September 22, 2013, or in any event should have earlier removed Maria from the game, and, by having failed to do so, are jointly and severally liable for the injuries sustained by Kiana. The complaint seeks recovery against the club, league and referee's association[1] based upon negligence and against Maria for assault and battery and for recklessly causing injury to Kiana. In addition, Kiana's parents seek to recover for medical and other expenses they incurred on account of their daughter's injuries. In stark contrast to plaintiffs' contention - that Kiana, after scoring a goal, was running 5 to 10 feet behind the play of the soccer ball when Maria came from behind her, turned and ran her raised knee into Kiana's knee and used her hands to push Kiana to the ground - Maria avers that both girls were playing the ball, that she did not use her knee to strike Kiana and that any contact was accidental and unintentional. Maria also denies the allegation that earlier in the same game, she elbowed another North Bellport player in the face, also off-the-play, causing that player's dental brace's to become embedded in her lip and requiring surgical removal.

Defendants now move - LIJSC and LGNSC jointly, defendant MD separately - for summary judgment dismissing the action pursuant to CPLR 3212. LIJSC and LGNSC ground their motion in their contention that the Kiana, by voluntarily participating in competitive soccer play, assumed the risk that the physical contact associated with such play could result in personal injury and that they owed no duty to protect her from such injury. They also argue that there is no factual support for plaintiffs' contention that Maria's contact with Kiana was anything other than incidental to the athletic competition in which the two players were then participating, and they tender the affidavit of another player on Maria's team to support their contention.

In opposition, plaintiffs argue that the motions for summary judgment are premature as no depositions have been taken, that participants in sports do not assume the risk of reckless or

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[1] The complaint against defendant Long Island Soccer Referees Association, Inc. was previously dismissed by an order of Judge Asher, J.S.C. (ret.) dated May 9, 2017.

intentional conduct and that athletic organizations have a duty to protect players from conduct that falls outside of the risks assumed by participants. They argue that Maria Daume had a recent history of similar conduct, for which she had been "red-carded" and suspended from play for two games - the game against Kiana's team was, in fact, Maria's first game following that suspension - as well as the elbowing of Kiana's teammate earlier in the same game in which Kiana was injured, so both LIJSC and LGNSC were aware of her proclivities. They also tender the affidavit of one of kiana's teammates, averring, inter alia, that after Kiana had scored a goal against Maria Daume's team, Maria turned away from chasing the soccer ball downfield and blindsided Kiana, striking Kiana's knee forcefully with her own raised knee, and pushed Kiana to the ground.

Summary Judgment

On a motion for summary judgment, the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

In cases where a plaintiff alleges that a fellow player in a sporting event committed battery and/or assault against him or her and alleges that the host of the sporting event negligently supervised the game, mere assertions that the defendant intentionally or recklessly caused harm are inadequate to create triable issues of fact (***Morabito v. Macarthur***, 2008 WL 2401235 [Sup Ct 2008], *affd* ***Morabito v MacArthur***, 70 AD3d 792, 793 [2d Dept 2010]). Indeed, "before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff" (***Pulka v Edelman***, 40 NY2d 781, 782 [1976]). "[W]hile the determination of the existence of a duty and the concomitant scope of that duty involve a consideration not only of the wrongfulness of the defendant's action or inaction, they also necessitate an examination of plaintiff's reasonable expectations of the care owed [her] by others (***Turcotte v Fell***, 68 NY2d 432, 437 [1986]), which necessarily "must be evaluated by considering the risks plaintiff assumed when [s]he elected to participate in the event and how those assumed risks qualified defendants' duty to [her] (***Turcotte v Fell***, 68 NY2d 432, 438 [1986]).

The doctrine of primary assumption of the risk has survived as an exception to CPLR 1411, which otherwise eliminated assumption of risk as a bar to recovery (Hon. John C. Cherundolo (J.), ***Tort Law***, 63 Syracuse L Rev 923, 926 [2013]), and made it, instead, a factor to

be considered in assessing the comparative fault of the injured party and the alleged tortfeasors - i.e., "the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages" (CPLR 411; *see* ***Turcotte v Fell***, *supra*, 68 NY2d at 439 ["assumption of risk is not an absolute defense but a measure of the defendant's duty of care and thus survives the enactment of the comparative fault statute"]). Thus, "[p]rimary assumption of the risk applies generally when a participant in a qualified sporting event or activity is aware of the risks generally involved in that activity and voluntarily assumes the risks. It is only when the risks that cause injury result from reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced beyond those generally accepted in participation of the sport" (Hon. John C. Cherundolo (J.), ***Tort Law***, *surpa* at 926 [footnotes omitted]) that the doctrine will be deemed inapplicable. Thus, as the Court of appeals has written:

> [P]rimary assumption of the risk applies when a consenting participant in a qualified activity "is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks" (***Bukowski v. Clarkson Univ.***, 19 N.Y.3d 353, 356, 948 N.Y.S.2d 568, 971 N.E.2d 849 [2012] [internal quotation marks and citation omitted]). A person who chooses to engage in such an 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" (***Morgan***, 90 N.Y.2d at 484, 662 N.Y.S.2d 421, 685 N.E.2d 202). As a result, participants may be held to have consented to those injury-prone risks that are "known, apparent or reasonably foreseeable" (***Benitez v. New York City Bd. of Educ.***, 73 N.Y.2d 650, 657, 543 N.Y.S.2d 29, 541 N.E.2d 29 [1989] [internal quotation marks and citation omitted]). The duty owed in these situations is "a duty to exercise care to make the conditions as safe as they appear to be" (***Turcotte***, 68 N.Y.2d at 439, 510 N.Y.S.2d 49, 502 N.E.2d 964). On the other hand, participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced (*see* ***Morgan***, 90 N.Y.2d at 485, 662 N.Y.S.2d 421, 685 N.E.2d 202).

(***Custodi v. Town of Amherst,*** 20 N.Y.3d 83, 88, 980 N.E.2d 933, 935 [2012]; *see* ***Manoly v. City of New York***, 29 A.D.3d 649, 816 N.Y.S.2d 499 [2d Dept 2006]).

Here, plaintiff's injury occurred while she was voluntarily participating in a formally conducted and league-overseen soccer match. There is no dispute that soccer is a competitive sport that includes the inherent and obvious risk of coming into physical contact with opponents and the concomitant potential for physical injury. The broad issue posed by the current motions and the plaintiffs' opposition is whether the injury sustained by plaintiff Kiana Telano was the result of "'those commonly appreciated risks which are inherent in and arise out of the nature of

the sport generally and flow from such participation'" and to which participants are deemed to have consented (***Custodi v. Town of Amherst,*** *supra,* 20 N.Y.3d at 88, *quoting* ***Bukowski v. Clarkson Univ.,*** *supra*, 19 N.Y.3d at 356), or resulted "from the reckless or intentional conduct of others" (*id., citing* ***Morgan v State of New York,*** 90 N.Y.2d 471, 485 [1997]), and whether the team and league defendants fulfilled their "duty to exercise care to make the conditions as safe as they appear to be" (*id., quoting* ***Turcotte,*** *supra*, 68 N.Y.2d at 439). As the Court of Appeals has explained, the rationale for preserving the "concept of assumption of the risk" for "particular athletic and recreative activities" has been

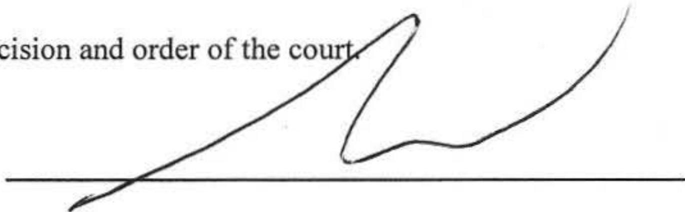
> in recognition that such pursuits have "enormous social value" even while they may "involve significantly heightened risks" (***Trupia***, 14 NY3d at 395). Hence, the continued application of the doctrine "facilitate[s] free and vigorous participation in athletic activities" (***Benitez***, 73 NY2d at 657), and fosters these socially beneficial activities by shielding coparticipants, activity sponsors or venue owners from "potentially crushing liability" (***Bukowski***, 19 NY3d at 358).

(***Custodi v. Town of Amherst,*** *supra*, 20 N.Y.3d at 88.) Accordingly, courts have generally been cautious in their handling of challenges to the application of the primary assumption of the risk doctrine to organized athletic activities in particular (*see generally* ***Morgan v State of New York,*** 90 N.Y.2d 471, *passim*).

Here, plaintiffs allege that Kiana Telano was injured when Maria Daume deliberately charged at her off the play, kneed her and pushed her to the ground in retaliation for Kiana having just having scored a goal against Maria's team. For her part, Maria avers that she and Kiana "were both going for the ball" when the incident occurred and that she "saw her with one foot on the ball and the next thing I saw she was falling to the ground and crying out." Although Maria further avers that she is "not aware of making any physical contact with" Kiana - which is inconsistent with both the fellow teammate's statement she has tendered in support of her motion, which recites that Maria and Kiana "collided," and the Referee Report for the game, which states that there was "normal contact" - she does allow that "if there was any contact, the contact and fall were completely accidental" and that she "never intended to strike Kiana or in any way cause her to fall and sustain an injury." And although Maria and her coach deny that Maria intentionally struck another North Bellport player earlier in the same game, there appears to be no dispute that Maria had just completed a two-game suspension. Given the diametrically opposed accounts of how Kiana's injury occurred - with plaintiffs attributing it to an unprovoked battery unrelated to athletic competition, while the defendants assert that it resulted from something more in the nature of the "luckless accident arising from . . . vigorous voluntary participation in competitive . . . athletics" that the Court of Appeals described in ***Benitez,*** *supra*,

73 NY2d at 659, the undeveloped factual state of the record at this time dictates that summary judgment be denied, without prejudice to renewal after discovery has been completed.

The foregoing constitutes the decision and order of the court.



Dated: 7/16/2018

Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

_____ **FINAL DISPOSITION** __XX__ **NON-FINAL DISPOSITION**