

Greiber v National Coll. Athletic Assn.

2021 NY Slip Op 33311(U)

November 29, 2021

Supreme Court, Nassau County

Docket Number: Index No. 600400/17

Judge: Robert A. McDonald

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. ROBERT A. MCDONALD**
JUSTICE

TRIAL/IAS, PART 15
NASSAU COUNTY

-----x
SAMANTHA GREIBER,

Plaintiff,

Index No. 600400/17
Motion Seq. Nos. 021 & 022
Submission Date: 8/5/21

- against -

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION, HOFSTRA UNIVERSITY and
SHANNON SMITH, Individually and in her
official capacity as Head Coach of Hofstra
University Women's Lacrosse,

Defendants.

-----x

HOFSTRA UNIVERSITY and
SHANNON SMITH, Individually, and in her
official capacity as Head Coach of Hofstra
University Women's Lacrosse,

Third-Party Plaintiffs,

- against -

PROHEALTH CARE ASSOCIATES, LLP
and PHYSICIANS 1-X,

Third-Party Defendants.

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The following papers read on this motion:

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Relief Requested

Motion by the defendants, Hofstra University (hereinafter “Hofstra”) and Shannon Smith, for an order pursuant to CPLR 3211 and 3212, dismissing the plaintiff’s complaint against them (Seq. No. 21). Motion by the defendant, National Collegiate Athletic Association (hereinafter “NCAA”), for an order pursuant to CPLR 3212 granting summary judgment in its favor. The plaintiff submits opposition to each of the motions. The movants submit reply.

Background

The plaintiff initiated the instant action to recover for personal injuries from multiple concussions sustained while participating in women’s lacrosse practice drills as a member of Hofstra’s collegiate team. The plaintiff’s first concussion occurred during a shooting drill on March 18, 2013, when a ball which was shot by another player and had missed the goal ricocheted off of nearby bleachers, striking the plaintiff in the back of the head. The plaintiff was removed from play, examined by Athletic Trainer Robert DiMonda, and referred to team physicians. The plaintiff was ultimately cleared to return to play after approximately two months, in May of 2013. The plaintiff’s second concussion occurred during a “mimic drill” on January 21, 2014, when she slipped and collided heads with another player. The plaintiff was again removed from practice, examined by Mr. DiMonda, and referred to team physicians. The plaintiff was not cleared to return to team activity following her second concussion.

The plaintiff alleges, *inter alia*, that Hofstra and Head Coach Shannon Smith (hereinafter “Coach Smith”) failed to adequately supervise, regulate and minimize the risk of injury to the plaintiff. The plaintiff claims that the defendants failed to warn her of the risk of head injuries that could result from concussions and takes issue with Coach Smith’s experience, the safety of the drills

which resulted in her injuries, and the adequacy of the concussion protocols.

With regard to the NCAA, the plaintiff claims that it breached a duty of care by failing to provide proper information and by prohibiting protective headgear that allegedly would have prevented the plaintiff's injuries.

Applicable Law

It is well established that the proponent of a motion for summary judgment must demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*See, Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *see also, Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *see also, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). The evidence will be construed in a light most favorable to the one moved against (*See, Weiss v. Garfield*, 21 AD2d 156 [3d Dept 1964]). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*See, Zuckerman, supra*).

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v. Goodson*, 200 NYS2d 627 [1960]). The role of the court is to determine if bonafide issues of fact exist, and not to resolve issues of credibility (*Gaither v. Saga Corp.*, 203 AD2d 239 [2d Dept 1994]; *Black v. Chittenden*, 69 NY2d 665 [1986]). Evidence must be viewed in the light most favorable to the nonmoving party (*Gonzalez v. Metropolitan Life Insurance Company*, 269 AD2d 495 [2d Dept 2000]). The nonmoving party's evidence must be accepted as true and the nonmoving party is entitled to every favorable inference which can reasonably be drawn from the evidence (*Wong v. Tang*, 2 AD3d 840 [2d Dept 2003]; *Farrukh v. Board of Education of the City of New York*, 227 AD2d 440 [2d Dept 1996]).

"Under the doctrine of primary assumption of risk, '[i]f the risks are known by or perfectly obvious to [a voluntary participant], he or she has consented to them and the [defendant] has discharged its duty of care by making the conditions as safe as they appear to be'" (*Calderone v Molloy College*, 177 AD3d 692 [2d Dept 2019], *quoting Brown v. City of New York*, 69 AD3d 893 [2d Dept 2010]). "This principle extends to those risks associated with the construction of the playing field and any open and obvious condition thereon" (*Brown, supra, citing Ziegelmeyer v. United States Olympic Comm.*, 7 NY3d 893 [2006]). However, participants are not deemed to have assumed risks that are concealed or unreasonably increased over and above the usual dangers that are inherent in the sport (*Cruz v. City of New York*, 2021 NY Slip Op 04658 [2d Dept. 2021]; *see also, Benitez v. New York City Bd. of Educ.*, 73 NY2d 650 [1989]).

Discussion

In support of their motion, Hofstra and Coach Smith submit, *inter alia*, the pleadings, the parties' deposition transcripts, a certified weather report for January 21, 2014, and the affidavits of Dr. Shawn Arent, Andrew Smith, and Jennifer Kent. Hofstra and Coach Smith contend the statute of limitations bars any claims stemming from the plaintiff's first concussion, which occurred more than three years prior to the instant action being commenced. These defendants add that the plaintiff voluntarily assumed the risk of injury that comes with playing women's lacrosse, was repeatedly provided with educational materials and admits to executing multiple informed consent forms throughout her years participating with the team. Team meetings were held in which concussion risks were discussed and a concussion fact sheet was posted in the team locker room. In any event, the defendants argue that they provided safe playing conditions for all players and exercised reasonable care with regard to concussion protocols.

Dr. Arent is a Professor and Chair of the Department of Exercise Science at the Arnold School of Public Health at the University of South Carolina. Dr. Arent describes his extensive experience in concussion research and familiarity with the resulting protocols and rehabilitation of NCAA student-athletes, as well as his review of the documents related to this action and the plaintiff's injuries.

Dr. Arent opines that Hofstra and its staff, including Coach Smith, were properly trained and experienced in preventing concussions and had adequate protocols and policies in place that put player safety first. Dr. Arent further opines that Hofstra properly relied upon contracted team physicians to ascertain injuries to their players. Dr. Arent opines that Coach Smith and Hofstra's athletic trainers were appropriately experienced and trained with respect to concussions and provided players with adequate equipment considering the information available and the fact that NCAA did not allow headgear at the time. Dr. Arent adds that Coach Smith and Hofstra personnel acted appropriately given their respective roles, properly supervising team activities in light of the players' advanced experience and properly deferring to and relying on medical experts with regard to the plaintiff's injuries. Dr. Arent further opines that the drills performed which resulted in the plaintiff's injuries were common in the sport and safe to perform in rainy conditions as they are meant to prepare players for game situations.

Specifically, Dr. Arent opines that following both of the plaintiff's injuries, Athletic Trainer Robert DiMonda acted properly by immediately removing the plaintiff from participation, examining her for symptoms, and contacting the team physician for further evaluation. Dr. Arent opines that Hofstra and its contracted physicians properly implemented a medically sound concussion protocol in accordance with established guidelines, taking a conservative approach in managing the plaintiff's injuries. Dr. Arent notes that the plaintiff was not cleared to return to play until she passed medical exams and reported herself to be symptom free. Dr. Arent additionally notes that the plaintiff did not actually participate for Hofstra's team again until several additional months later in the fall of 2013, yet chose to participate with another team independently of Hofstra during the summer of 2013.

Mr. Smith is Director of Sports Medicine at Canisius College. Mr. Smith supervises, hires, schedules, mentors, and evaluates athletic trainers and team physicians and he serves as a liaison for medical needs and follow-up in the medical community. Mr. Smith describes his experience and familiarity with athletic training and NCAA concussion protocols, as well as documents related the instant action and the plaintiff's injuries. Upon his review, Mr. Smith opines that Hofstra and its personnel properly implemented a thorough concussion management plan by following Prohealth Care Associates, LLP's concussion protocol which placed player safety first. Mr. Smith further opines that Hofstra and its staff responded promptly and properly implemented this protocol. Mr. Smith agrees with Dr. Arent that Hofstra's contracted team physicians took a conservative approach in holding the plaintiff out of participation for approximately two months. Mr. Smith additionally opines that the plaintiff was provided safe and adequate equipment and that the plaintiff was made aware of the risks as demonstrated by the fact that she executed informed consent forms.

Coach Kent is the Assistant Coach for the Boston College Women's Lacrosse Team. Coach Kent played women's lacrosse for ten years and coached for over thirty years. Coach Kent opines that the shooting drills in which plaintiff sustained her concussions were basic and common drills used with women's lacrosse players at varying levels. Coach Kent adds that it is common for missed shots to go wide of the net or ricochet off the goal post or other objects in the area, and that players assume risks such as being struck by a ball or slipping and colliding with another player. Coach Kent concludes that Hofstra and Coach Smith acted in a reasonable and safe manner with regard to how practice drills were conducted and provided adequate supervision and warnings to players including the plaintiff.

In support of its motion, NCAA submits, *inter alia*, the affidavit of John Parsons, various communications and scientific studies which were relied upon in assessing concussions and whether helmets should be required for student athletes participating in women's lacrosse. NCAA argues that it did not owe any duty to warn individual players of the risks of concussions, but even if it did, such duty was satisfied by providing member institutions including Hofstra with the most current information about the risks of concussions. NCAA further argues that student athletes such as the plaintiff are provided detailed information and warnings, and as such, assume the risks when participating. NCAA notes that there was no certified standard for women's lacrosse headgear at the time of the plaintiff's injuries, and in fact no manufacturer made headgear for use by women's lacrosse players while the plaintiff was playing. NCAA points to the litany of studies it provided in averring that the rule prohibiting helmets was based on careful analysis, wherein the ultimate consensus was that helmets could increase rather than decrease risk to women's lacrosse players.

Mr. Parsons is the managing director of the NCAA Sports Science Institute, which is a resource for health and safety. In his affidavit, Mr. Parsons avers that the NCAA provides a sports medicine handbook as well as support and educational resources to each member institution including Hofstra. Mr. Parsons adds that only NCAA member institutions may propose and approve rule changes through the playing rules committee, and as such, NCAA is unable to create or change playing rules on its own.

In opposition to the two motions, the plaintiff provides, *inter alia*, medical records of the plaintiff, studies regarding head injuries in collegiate athletics, and the reports of Dr. Robert C. Cantu, a neurologist, and R. Dawn Comstock, Ph.D., a professor and epidemiologist. The plaintiff contends that the defendants breached a multitude of duties, including failing to use reasonable care in instituting safe practices and implementing adequate concussion protocols, failing to supervise the plaintiff, and prohibiting the use of helmets. The plaintiff contends that these failures impacted her recovery and caused her to suffer permanent post-concussion issues.

In support of her position, Dr. Cantu opines that the plaintiff's injuries are permanent and would have been prevented if the plaintiff were allowed to wear a helmet. Dr. Cantu adds that the plaintiff's concussion related symptoms caused a decline in her test scores which prevented her from being accepted into graduate school. Dr. Cantu concludes that the NCAA rendered the plaintiff vulnerable to concussions by failing to require the use of helmets.

Dr. Comstock opines that women's lacrosse players have high concussion rates compared to other sports. Dr. Comstock notes that concussion rates have increased over time in women's lacrosse and opines that concussions would have been prevented if players were allowed to wear helmets as was allowed with men's teams.

With their submissions, Hofstra and Coach Smith have demonstrated *prima facie* entitlement to judgment as a matter of law. Specifically, Hofstra and Coach Smith met their burden by providing expert opinions establishing that (1) Hofstra adequately informed the plaintiff of the risks associated with concussions, (2) plaintiff was injured while performing common practice drills in conditions typical to women's lacrosse players under adequate supervision, (3) Hofstra properly implemented an adequate concussion protocol to manage the plaintiff's injuries, (4) Hofstra personnel, including Athletic Trainor DiMonda and contracted team physicians, acted properly at all times in caring for the plaintiff following her accidents, and (5) that the plaintiff assumed the risk of injury by voluntarily participating on the women's lacrosse team despite her knowledge that doing so could result in being struck by an errant ball or colliding with another player (*See, Brown, supra; see also, Alvarez, supra*).

In her opposition papers, the plaintiff reiterates various allegations regarding duties that allegedly have been breached by defendants Hofstra and Coach Smith, but fails to adequately address the conclusions of said defendants' experts that the parties' actions were not negligent. Here, the experts for the plaintiff offer no opinion regarding Hofstra and Coach Smith to rebut the defendants' experts' findings with regard to the safety of the practice drills, the adequacy of concussion protocols in place, the supervision of the plaintiff, the information provided to educate and warn the plaintiff regarding concussions, or the actions of Coach Smith and others involved in managing the plaintiff's injuries. As such, the plaintiff failed to raise an issue of fact as to Hofstra and Coach Smith (*See, Zuckerman, supra*).

Rather, the Court finds that the only questions of fact that exist regarding the negligence of any party herein pertains to the rule prohibiting women's lacrosse players from wearing helmets,

which was under the purview of the NCAA rather than Hofstra or Coach Smith. As stated within the prior order herein of Justice Jeffrey S. Brown dated September 5, 2017, the NCAA exercised significant control over the rules of play and equipment for women's lacrosse, and imposed conditions of membership on its member institutions which included requirements regarding head injury protocols. As such, the NCAA was charged with carrying out these functions with reasonable care (*See, Serrell v. Connetquot Cent. High School Dist. of Islip*, 280 AD2d 663 [2d Dept 2001]). The studies submitted by the plaintiff, in conjunction with Dr. Cantu's opinion that the plaintiff would not have suffered concussions had the NCAA allowed women's lacrosse players to wear helmets, are sufficient to create issues of fact as to whether the NCAA adequately discharged its duty to avoid exposing the plaintiff to risks that were "unreasonably increased" (*See, Benitez, supra; see also, Zuckerman, supra*).

In light of the foregoing, it is hereby

ORDERED that defendant Hofstra University's and Shannon Smith's motion for summary judgment (Seq. No. 21) is granted and all claims against said defendants are hereby dismissed; and, it is further

ORDERED that defendant National Collegiate Athletic Association's motion for summary judgment (Seq. No. 22) is denied in its entirety.

This shall constitute the decision and order of the Court.

Dated: Mineola, New York
November 29, 2021

ENTER:


Robert A. McDonald, J.S.C.

ENTERED

Dec 03 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE