SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Sherry Klein Heitler Justice PART 30

0109179/2004

SCOTTLAND, DENISE
VS
DUVA BOXING, LLC

SEQ 2

DISMISS

INDEX NO. 105175/04

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

Motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits

Replying Affidavits

FILED
OCT 31 2005
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated Oct 11, 2005

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: Oct 11, 2005

SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

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DENISE SCOTTLAND, individually and as Administratrix of the Estate of BEETHAVEAN SCOTTLAND, Deceased,

Plaintiff,

-against-

DUVA BOXING, LLC, LOU DUVA, ARTHUR MERCANTE, JR., RUFUS SADLER, GERARD VARLOTTA and BARRY JORDAN,

Defendants.

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Index No. 109179/04

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

Motion sequence numbers 002 and 003 are consolidated herein for disposition.

On June 26, 2001, a light-heavyweight boxing match between Beethavean Scottland ("Scottland") and George Khalid Jones ("Jones") was held aboard the U.S.S. Intrepid in New York City. Jones knocked Scottland out in the tenth and final round of the right, and Scottland fell into a coma from which he never recovered. He died six days later at Bellevue Hospital. Plaintiff Denise Scottland, both individually and as Administratrix of Scottland's estate, commenced this action on June 21, 2004, by filing a Summons and Complaint with the New York County Clerk.

In motion sequence 002, defendant Gerard Varlotta ("Varlotta"), a physician, moves, pursuant to C.P.L.R. §3211(a)(5), to dismiss plaintiff's complaint as against him on the ground that the allegations sound in medical malpractice, a claim for which the Statute of Limitations had already expired by the time plaintiff commenced this law suit. In motion sequence 003, defendant Rufus Sadler ("Sadler"), also a doctor, moves to dismiss plaintiff's complaint as

against him, on the same ground and for the same reason as Varlotta.

At issue in both of these motions is whether the allegations against defendants Sadler and Varlotta contained in the complaint necessarily sound in medical malpractice. If they do, plaintiff concedes, then these claims are time-barred because plaintiff did not file this complaint within two-and-a-half years of the date the claims accrued. See C.P.L.R. § 214-a. Both Varlotta and Sadler[1] are New York State licensed physicians. Both contend that they were present at the Scottland - Jones fight in their medical capacity and, therefore, plaintiff's allegations against them constitute medical malpractice claims.

Plaintiff argues that defendants were present at the fight not in their capacity as doctors, but as ring-side observers who, like the referee, shared a common law duty to Scottland to exercise reasonable care in determining whether to stop the fight at some point prior to the knockout. Additionally, plaintiff contends that there was no physician-patient relationship between Scottland and defendants and, therefore, a medical malpractice claim against these defendants would not lie. If, as plaintiff asserts, these allegations may properly be regarded as sounding in common law negligence and not medical malpractice, then plaintiff has not violated the accompanying three-year Statute of Limitations and the claims may survive these motions. See C.P.L.R. § 214(6).

The sport of boxing is closely regulated in New York. The New York State Legislature "has specifically stated that because of the hazards inherent in the sports of boxing and wrestling, 'it is in the public interest to extend the jurisdiction of the state' into the regulation of those

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[1] Plaintiff has voluntarily withdrawn, with prejudice, her claim against Dr. Barry Jordan, by so-ordered stipulation dated June 2, 2005.

activities (see L. 1988, ch 426, § 1, reprinted following McKinney's Uncons. Laws of N.Y. § 8901)." American Boxing & Athletic Assn. v. Chemung County YMCA, 13 A.D.3d 842, 844 (3rd Dept. 2004). Due to the "risk to public health and safety" posed by unsupervised or insufficiently supervised boxing matches, all boxing matches in New York, with very few exceptions[2], are subject to the supervision of the New York State Athletic Commission ("the Commission"). Id. at 843. See also 19 N.Y.C.R.R. § 206.2; Quartey v. AB Stars Productions, 260 A.D.2d 39, 43 (1st Dept. 1999).

In keeping with the Legislature's safety concerns, N.Y. Unconsol. Ch. 7, § 26(1) requires "every person or corporation licensed to conduct a boxing or sparring match or exhibition, to have in attendance . . . at least one physician designated by the commission as the rules provide." Additionally, there must be "two physicians in attendance at ringside, unless otherwise directed or authorized by the commission." 19 N.Y.C.R.R. § 211.3. The duties of a ringside physician are delineated as follows:

> The ringside physician may terminate any contest or exhibition at any time if in the opinion of such physician the health or well-being of any participant would be significantly jeopardized by continuation of the context or exhibition. In the event of any serious physical injury, such physician shall immediately render any emergency treatment necessary, recommend further treatment or hospitalization if required, and fully report the entire matter to the commission within 24 hours, and thereafter, as required by the commission. Such physician may also require that the injured participant and his or her manager remain in the ring or on the premises or report to a hospital after the contest for such period of time as such physician deems advisable.

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[2] The exceptions are boxing contests in which contestants are active militia in the New York State national guard or naval militia, or "amateurs, sponsored by or under the supervision of any university, college, school or other institution of learning, recognized by the regents of the state of New York", or "amateurs sponsored by or under the supervision of the U.S. Amateur Boxing Federation or its local affiliates or the American Olympic Association." N.Y. Uncons. Ch. 7 §31.

19 N.Y.C.R.R. §213.6. See also N.Y. Unconsol. Ch.7 §26(2). In order to facilitate the ringside physician's performance of these duties, the physician is permitted to enter the ring at any time in order to examine the contestants. N.Y. Unconsol. Ch.7 §26(3); 19 N.Y.C.R.R. §213.7.

Although both the referee and the ringside physician are independently empowered to terminate a boxing match, see supra, 19 N.Y.C.R.R. § 213.6 (Duties of ringside physician) and §211.6 (Referee's powers and duties), the referee is directed to seek the "advice of the attending physician" if a contestant has been injured. See 19 N.Y.C.R.R. § 211.6. The physician, however, is not directed to seek the advice of the referee or other personnel when deciding whether to terminate a match.

Similarly, both the referee and the ringside physician are required to "attend such neurological training seminars as specified and approved by the commission after consultation with the medical advisory board," 19 N.Y.C.R.R. § 213.13, and the medical advisory board provides training to all commission personnel to assist in their recognition of "adverse medical indications in a participant prior to or during the course of a match"; however, the physician alone will be tested as to his "comprehension of the medical literature on boxing," N.Y. Unconsol. Ch. 7 § 4.

In sum, the court's review of the applicable regulations leads it to conclude that the Legislature's primary purpose in requiring the presence of ringside physicians, in addition to the referee and other personnel, is to ensure the safety of the match participants. In this regard, this case falls outside the rubric of those cited by plaintiff for the proposition that no physician-patient relationship existed between Scottland and defendants.

For example, in Lee v. City of New York, 162 A.D.2d 34 (2nd Dept. 1990), the Appellate

Division held that a physician who was hired by a fire department to certify the fitness of its firefighters for duty could not be held liable for failure to diagnose the decedent firefighter's heart condition:

> [A] claim for medical malpractice must be founded upon the existence of a physician-patient relationship. Where, as here, the physician is employed or retained by a third party to conduct an examination for the benefit of the third party, **there must be something more than a mere examination in order to find a physician-patient relationship**. . . . There must be some showing that the physician affirmatively treated the patient or affirmatively advised the plaintiff as to a course of treatment.

Id. at 37 (emphasis supplied). In so holding, the court in Lee was careful to distinguish its fact pattern from that in Bradley v. St. Charles Hospital, 140 A.D.2d 403 (2nd Dept. 1988):

> The physician-patient relationship does not exist if the physician is retained solely to examine an employee on behalf of an employer (see, Murphy v Blum, 160 AD2d 914). An exception applies, however, when the physician affirmatively treats or affirmatively advises the employee as to treatment and the treatment actually causes further injury. Thus, a cause of action for malpractice may result even where the physician-patient relationship rests upon an "implied" contract (see, Hickey v Travelers Ins. Co., 158 AD2d 112).
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> * * *
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> Under the particular set of circumstances found in Bradley, this court held that dismissal of the action was not warranted on the basis that there was no physician-patient relationship. The record in Bradley indicates that the deceased had been an employee of the defendant St. Charles Hospital. The hospital annually evaluated the health of its employees and over the years the plaintiff had been given chest X rays as part of the examination. The chest X rays had apparently been added to the deceased's physical examination after a tine test for tuberculosis had come back positive. After several years, she died of cancer and her estate sued the hospital on its failure to properly interpret the X rays. The failure of the hospital to establish the nonexistence of a physician-patient relationship upon these facts led to this court's affirmance of the denial of the hospital's motion for summary judgment.
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> The facts in Bradley (supra) clearly established that an ongoing relationship existed between the deceased and the hospital and that she could have

> reasonably relied upon the results of her annual examination. The chest X rays were added to the deceased's annual examination to meet her specific medical situation, i.e., they were included in the annual examination only after the deceased had tested positive on her tuberculin skin test. **The deceased had every reason to believe that the hospital was monitoring her condition, and that she could rely upon it for a proper diagnosis of her condition.**

Lee, supra, 162 A.D.2d at 36-38 (emphasis supplied).

The instant case is more analogous to Bradley than to Lee, or Murphy v. Blum, 160 A.D.2d 914 (2nd Dept. 1990), upon which plaintiff also relies. While boxing regulations require a physical examination for certification of fitness to obtain a license to box, see 19 N.Y.C.R.R. § 213.2(b), the regulations go further to impose a duty upon the ringside physician to moniter the boxing participants' physical condition throughout the match, to terminate the match if a participants' health is endangered and to render emergency medical treatment if necessary. As in Bradley, the fact that ringside physicians also give standard examinations for fitness does not preclude the existence of a doctor-patient relationship – and, hence, a malpractice claim – where the physicians are alleged to have "failed to properly diagnose the . . . condition of the plaintiff's decedent and to act thereon, thereby . . . eventually caus[ing] the decedent's death." Bradley, supra, 140 A.D.2d at 404.

Where, as here, New York State's boxing regulations require the presence of ringside physicians for the explicit purpose of monitoring the physical conditions of the boxing participants and exercising their independent medical judgment to terminate a match and/or treat the participants, it seems clear that "[a] physician's duty in that situation is the same as it is in any other situation – to practice in accordance with good and accepted standards of *medical* care." Classen v. Izquierdo, 137 Misc.2d 489, 493 (S.Ct. N.Y. Cty. 1987) (emphasis supplied)

(denying summary judgment to defendant ringside physicians on medical malpractice claim alleging negligent failure to stop boxing match). To reason otherwise

> calls for a doctor, who at the time is the sole master of the patient's fate, to discard his own medical knowledge and experience, to push aside his own observations and to submerge his own conscience, to defer to the judgment of someone else. This type of reasoning opens the door to such tragic and foreseeable consequences that we hold it to be negligence.

Rosensweig v. State of New York, 208 Misc. 1065, 1073 (N.Y.Ct. Claims 1955), rev'd on other grounds, 5 A.D.2d 293 (3rd Dept. 1958).

The court finds, therefore, that under the facts of this case, the physician defendants were retained as ringside physicians in their capacity as physicians, and they were charged with the duty to exercise reasonable medical care to provide an ongoing medical diagnosis of the boxing participants' physical condition throughout the match. This holding is consistent with the boxer's reasonable expectation that a ringside physician will call the match if necessary to protect his or her well-being, as well as attend to any injuries the boxer sustains during the match.

Consequently, a physician-patient relationship was created, such that Scottland had a right to rely upon the physicians' proper diagnosis of his condition. See Lee, supra, 162 A.D.2d at 38. In essence, then, plaintiff's claims against defendants Varlotta and Sadler sound in medical malpractice and have expired under the applicable Statute of Limitations. See C.P.L.R. § 214-a. Accordingly, it is hereby

ORDERED that defendant Gerard Varlotta's motion to dismiss plaintiff's complaint in its entirety as against Varlotta (motion sequence number 002) is granted; and it is further

ORDERED that defendant Rufus Sadler's motion to dismiss plaintiff's complaint in its

entirety as against Sadler (motion sequence number 003) is granted; and it is further

ORDERED that this action, as against defendants Varlotta and Sadler, is discontinued and the action, as severed, shall proceed accordingly; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for the remaining parties shall appear for a conference on November 9, 2005, at Room 438, 60 Centre Street, New York, New York 10007.

This shall constitute the decision and order of the court.

DATED: October 11, 2005

SHERRY KLEIN HEITLER
J.S.C.