

Bukowski v Clarkson Univ.

2009 NY Slip Op 32622(U)

October 10, 2009

Supreme Court, Albany County

Docket Number: 1148-08

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

SHAWN BUKOWSKI,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 1148-08
RJI NO. 01-08-93865

CLARKSON UNIVERSITY and JAMES KANE,

Defendants.

Supreme Court Albany County All Purpose Term, October 21, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Shawn Bukowski (hereinafter "Plaintiff"), a freshman pitcher for Clarkson University's baseball team (hereinafter "Clarkson"), was practicing with his team on March 2, 2006. Practice that day was indoors. Plaintiff was pitching "live practice", wherein he pitched full speed to a live batter, inside a nylon batting cage. While he had been playing baseball for many years, it was his first time pitching "live practice" indoors as a pitcher with Clarkson. Although available, no protective screening separated the batter from Plaintiff. After approximately eight to ten

uneventful pitches, the batter hit a line drive directly back at Plaintiff striking his right cheek and causing him substantial personal injuries.

Plaintiff commenced this action seeking damages due to the injuries he sustained. Issue was joined by Defendants and discovery is complete. Defendants now move for summary judgement, claiming that Plaintiff's complaint must be dismissed by operation of the doctrine of "primary assumption of the risk." Plaintiff opposes the motion. Because Plaintiff demonstrated the existence of issues of fact, Defendants' motion is denied.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). All evidence must be viewed in the light most favorable to the opponent of the motion (Haider v. Zadrozny, 61 AD3d 1077 [3d Dept. 2009]); and, the doctrine of primary assumption of the risk "is generally considered a question of fact for the jury." (Pantalone v. Talcott, 52 AD3d 1148, 1149 [3d Dept 2008]).

It is well established that "the proponent of a summary judgment motion 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." (Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; CPLR §3212). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]; Manculich v. Dependable Auto Sales and Service, Inc., 39 AD3d 1070 [3d Dept. 2007]).

"The doctrine of primary assumption of risk provides that participants in sporting or

recreational activities may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation.” (Martin v. State, 64 AD3d 62, 63-64 [3d Dept. 2009] quoting Turcotte v. Fell, 68 NY2d 432 [1986][internal quotations omitted]).

Here, Defendants demonstrated their prima facie entitlement to judgment as a matter of law. They submit the deposition testimony of Plaintiff, who stated that he had been pitching competitively for approximately eight years prior to March 2, 2006. He acknowledged the likelihood of a ball being hit back to him, by the batter, in the course of pitching. It is undisputed on this record, that a batted ball potentially travels at a high velocity with the ability to cause harm to the pitcher if not fielded correctly. With such experience and acknowledgment of the risk, Defendants made a prima facie showing that Plaintiff assumed the risk of being hit by a batted ball while pitching for Defendants.

In opposition, however, Plaintiff demonstrated the existence of issues of fact due to the unique circumstances surrounding this particular pitching session. “Assumption of risk in competitive athletics is not an absolute defense but a measure of the defendant's duty of care” (Benitez v. New York City Bd. Of Educ., 73 NY2d 650, 657 [1989]), and players are not deemed to have consented to “unreasonably increased risks”. (Parisi v. Harpursville Cent. School Dist., 160 AD2d 1079 [3d Dept. 1990]; Meyers v. Friend so Shenendehowa Crew, Inc., 31 AD3d 853 [3d Dept. 2006]; Zmitrowitz v. Roman Catholic Diocese of Syracuse, 274 AD2d 613 [3d Dept. 2000]; Ross v. New York Quarterly Meeting of Religious Soc. of Friends, 32 AD3d 251 [1st Dept. 2006]; Benitez, supra). Plaintiff demonstrated that he was unfamiliar with this particular pitching scenario because a protective screen had always been placed between himself and the

batter whenever he had pitched indoor “live practice” prior to March 2, 2006. While it does appear that screening was available for Plaintiff’s use, an issue of fact exists as to whether Defendants failure to require the screening for indoor “live practice” unreasonably increased the risks to Plaintiff. Plaintiff demonstrated that the indoor conditions made it more difficult for him to see, and therefore react to, the batted ball. The lighting indoors did not illuminate the ball as well as the natural outdoor light. Moreover, the color of the interior walls and the baseball were similarly light in color, unlike a dark backdrop as used outdoors. Because the interior walls did not contrast with the ball as well as a dark backdrop, again Plaintiff’s ability to see and react to a batted ball was diminished. Additionally, Plaintiff’s expert affidavit¹ alleges that the failure of Defendants to provide Plaintiff with a screen “was a deviation from sound coaching practices” and unreasonably heightened the danger associated with pitching.

Accordingly, Defendants’ motion for summary judgment is denied.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 10, 2009
Albany, New York



JOSEPH C. TERESI, J.S.C.

¹Even if, as Defendants allege, this expert was not disclosed pursuant to CPLR §3101, Defendants made no showing that his affidavit could not be considered on this motion. (Hernandez-Vega v. Zwanger-Pesiri Radiology Group, 39 AD3d 710 [2d Dept. 2007]).

PAPERS CONSIDERED:

1. Notice of Motion, dated September 16, 2009, Affirmation of Louis Annunziata, dated September 16, 2009, with attached Exhibits A-I.
2. Affidavit of Shawn Bukowski, dated October 12, 2009, Affidavit of Michael Serbalik, dated October 8, 2009, Affidavit of Tina Chericoni Versaci, dated October 13, 2009, with attached Exhibits A-I.
3. Reply Affirmation of Laurie Ogden, dated October 21, 2009.