

Thomas v Farrago

2016 NY Slip Op 30732(U)

April 13, 2016

Supreme Court, Kings County

Docket Number: 505880/14

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of April, 2016.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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CHARLES J. THOMAS, as guardian of the property of MAGOMED ABDUSALAMOV, an incapacitated person, BAKANAY ABDUSALAMOV, individually, PATIMAT ABDUSALAMOV, SHAKRIZAT ABDUSALAMOV and SAYGIBAT ABDUSALAMOV as infants, by their mother and natural guardian BAKANAY ABDUSALAMOV,

Plaintiffs,

- against -

MATTHEW D. FARRAGO, ANTHONY G. CERRERI, M.D., OSRIC S. KING, M.D., AVERY F. BROWNE, D.O., GERARD P. VARLOTTA, D.O., BARRY D. JORDAN, M.D., BENJAMIN ESTEVES, JR., and K2 BOXING PROMOTIONS, LLC,

Defendants.

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MATTHEW D. FARRAGO and BARRY D. JORDAN, M.D.,

Third-Party Plaintiffs,

-against-

JOHN DAVID JACKSON, BORIS GRINBERG, SR., BORIS GRINBERG, JR., SAMPSON LEWKOWICZ and NATHAN LEWKOWICZ,

Third-Party Defendants.

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Decision / Order

Index No. 505880/14

Mot. Seq. # 20 & 25

The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-3 6-7

Opposing Affidavits (Affirmations) _____

4-5 8

Upon the foregoing papers in this personal injury action, third-party defendants, Nathan Lewkowicz and Sampson Lewkowicz, separately move (in Motion Seq. Nos. 20 and 25) for orders, pursuant to CPLR 3211 (a) (7), dismissing the third-party complaint filed by third-party plaintiffs, Matthew D. Farrago (Farrago) and Barry D. Jordan, M.D. (Dr. Jordan).

Background

The Boxing Match

As described in greater detail in the April 28, 2015 decision and order, this personal injury action arises out of a professional heavyweight boxing match between Magomed Abdusalamov (Abduslamov) and Ismaikel Perez, which took place on November 2, 2013 at the Theatre at Madison Square Garden (MSG), during which Abdusalamov suffered serious personal injuries (Boxing Match).

The Boxing Match was regulated by the New York State Athletic Commission (the Commission).¹ Dr. Jordan, one of the defendants and the Commission's Chief Medical Officer, was allegedly "chosen, appointed, hired and or contracted to observe, monitor, render medical services, care and treatment and determine if and when medical services, care

¹ New York State's Boxing Laws are in Chapter 1, Title 25 of the Unconsolidated Laws governing the Commission for Boxing and Wrestling (Boxing Laws) and Chapter VII of Title 19 N.Y.C.R.R., Parts 205-219, which include the Commission's Boxing Rules and Regulations (Boxing Rules and Regulations).

and/or treatment [was] required” and allegedly “supervised, instructed, directed, controlled, advised, and trained certain ringside physicians, ringside observers, fight inspectors and referees” at the Boxing Match (complaint at ¶¶ 13-14). Farrago, a fight inspector employed by the Commission, was allegedly “chosen, appointed, hired and or contracted to observe and monitor” the Boxing Match (*id.* at ¶ 28).

The Personal Injury Action

On June 26, 2014, Abdusalamov’s guardian and his family commenced this personal injury action, asserting seven causes of action against the Boxing Match venue, the ringside physicians and others involved with the Boxing Match, including Farrago and Dr. Jordan. Essentially, plaintiffs allege that Abdusalamov’s severe physical injuries were caused by defendants’ negligence.

The Third-Party Complaint

Farrago and Dr. Jordan, on or about June 23, 2015, filed a third-party complaint, verified by their counsel, against John David Jackson, Boris Grinberg, Sr., Boris Grinberg, Jr., Sampson Lewkowicz and Nathan Lewkowicz, asserting claims for indemnification and/or contribution (third-party complaint at ¶ 26).

Regarding Sampson and Nathan Lewkowicz, the third-party complaint alleges “[u]pon information and belief” that: (1) Sampson Lewkowicz was Abdusalamov’s “promoter;” (2) Nathan Lewkowicz was Abdusalamov’s “co-promoter;” (3) they were both “present” at the Boxing Match; (4) they “knew or should have known that an ambulance was present” at MSG; (5) they “had both the duty and ability to request” that Abdusalamov be taken by

ambulance to a hospital, if, as plaintiffs allege in the complaint, Abdusalamov was suffering from, or appeared to be suffering from, severe physical injury during or after the Boxing Match; and (6) they “did not make that request” (*id.* at ¶¶ 22 and 23).

Nathan Lewkowicz’s Dismissal Motion

Nathan Lewkowicz moves for an order, pursuant to CPLR 3211 (a) (7), dismissing the third-party complaint with prejudice based, in part, on his August 20, 2015 affidavit (Lewkowicz Affidavit) in which he attests that:

- “I had nothing to do with any of the actions or inactions complained of in said Third-Party Complaint” (Lewkowicz Affidavit at ¶ 2);
- “[a]ll of the allegations against me appear in ¶ 23 of the Third-Party Complaint and are inaccurate, except for the allegation that I was present (as a spectator) at the November 2, 2013 boxing match . . .” (*id.* at ¶ 3);
- “I was not and have never been the promoter or co-promoter of Magomed Abdusalamov” (*id.* at ¶ 4);
- “I am not a licensed promoter nor have I ever been a boxing promoter” (*id.* at ¶ 5);
- “[t]he promoter of Magomed Abdusalamov is Sampson Boxing, LLC . . .” and “I am not a member or director of Sampson Boxing, LLC, and I have no interest in said company whatsoever” (*id.* at ¶¶ 6 and 7);
- “[m]y father, Sampson Lewkowicz, is the managing member of Sampson Boxing, LLC, and the reason I attended the November 2, 2013 boxing match as a spectator” (*id.* at ¶ 8);
- “my father invited myself and several of my friends to the Abdusalamov bout, and after the bout I left with my friends who I attended with. I did not go back to Abdusalamov’s locker room, or even know at that time that he had suffered any injuries” (*id.* at ¶ 9);

- “I had no knowledge of the existence or non-existence of an ambulance at the event, nor the extent of Magomed Abdusalamov’s physical injuries sustained during the boxing match” (*id.* at ¶ 10).

In his memorandum of law, Nathan Lewkowicz argues that regardless of whether or not he attended the Boxing Match as Abdusalamov’s “co-promoter” he, nonetheless, had no duty upon which he could be held liable to the plaintiffs:

“As required by state law, the match was sanctioned and overseen by the [Commission which] possesses exclusive jurisdiction to: (a) license and test ringside doctors, inspectors, judges, and referees; (b) appoint and choose which doctors, officials, and referees will be present at each bout; and (c) implement the standards by which the doctors, officials, and referees apply during each fight. *The promoter of the event and attending spectators, such as Third-Party Defendant Nathan Lewkowicz . . . had no say in any of these matters, and are in fact forbidden by law from intervening in the selection of doctors, referees, and officials, and are further prevented from rendering medical services to the boxers themselves. As set forth below, Nathan Lewkowicz was present at this match purely as a spectator, but nonetheless, even if he was the co-promoter of Abdusalamov as alleged in the Third-Party Complaint, for which he denies, he would still have no duty and therefore no liability to Plaintiff*” (Nathan Lewkowicz Memorandum at page 1 [emphasis added]).

Thus, Nathan Lewkowicz argues that even if the factual allegations in the third-party complaint regarding his role as “co-promoter” at the Boxing Match are presumed to be true, the “threshold matter” of whether he owed a legal duty “to request that Magomed Abdusalamov be taken by . . . ambulance to a hospital” is a question of law (*id.* at pages 5-6).

Nathan Lewkowicz argues that he could not be liable for “negligence”:

“Third-Party Plaintiffs have asserted a cause of action for *negligence* against [him], which is based on a perceived duty owed to Third-Party Plaintiffs. Specifically, Third-Party Plaintiffs assert that Lewkowicz owed Abdusalamov a duty with respect to his medical care on November 2, 2013, and further, that Lewkowicz *negligently* discharged those duties” (*id.* at page 7).

In response to the allegation in paragraph 23 of the third-party complaint, he argues that “the Commission – not the promoter – possesses the ‘power’ and ‘duty’ to set the ‘regulations and standards for the physical examinations of professional boxers including, without limitation, pre-fight and/or postfight’” examinations, citing to Boxing Law § 8904 (2).²

Nathan Lewkowicz argues that “[a]s a matter of law, promoters are not responsible and cannot be held vicariously liable for breaches of duties allegedly committed by representatives of the [Commission] because [the Commission] regulations vest exclusive jurisdiction with the [Commission] and forbid the sports venues from intervening in the discharge of the [Commission’s] duties” (*id.* at page 9). Nathan Lewkowicz cites two cases which, he contends, compel dismissal here. Lewkowicz relies upon *Classen v Izquierdo*, (137 Misc 2d 489 [Sup. Ct. New York County 1987]), in which the trial court held that MSG, the venue and promoter of a boxing match, was not vicariously negligent for the acts of the physicians who “were chosen to attend and officiate at the subject fight by” the Commission because MSG “neither participated in the selection of the co-defendants nor provided them with training, instruction or supervision” (*id.* at 493). Lewkowicz also relies on the holding

² Boxing Law § 8904 (2) specifically provides: “The advisory board shall have power and *it shall be the duty* of the board to prepare and submit to the commission for approval regulations and standards for the physical examination of professional boxers including, without limitation, pre-fight and/or *post fight examinations* and periodic comprehensive examinations. The board shall continue to serve in an advisory capacity to the commission and from time to time prepare and submit to the commission for approval, such additional regulations and standards of examination as in their judgment will safeguard the physical welfare of professional boxers licensed by the commission. The advisory board shall recommend to the commission from time to time such qualified physicians, for the purpose of conducting physical examinations of professional boxers and other services as the rules of the commission shall provide; and shall recommend to the commission a schedule of fees to be paid to physicians for such examinations and other services as required by this act” (emphasis added).

in *Collins v Resto*, (746 F Supp. 360 [SDNY 1990] [based on the “regulatory structure” regarding the Commission’s rules governing the conduct of boxing matches, the court held that the promoter bore no duties beyond those contained in its contract], *aff’d* 224 AD2d 273 [1996]).

***Third-Party Plaintiffs’ Opposition To
Nathan Lewkowicz’s Dismissal Motion***

Third-Party plaintiffs submit Dr. Jordan’s October 13, 2015 affidavit in opposition to Nathan Lewkowicz’s dismissal motion (Jordan Opposition Affidavit) wherein he attests that:

“Although Mr. Lewkowicz alleges that he was not a promoter . . . *I am aware that in newspaper interviews* concerning the November 2, 2013 bout and its aftermath, *and in other communications*, Nathan Lewkowicz has identified himself as a promoter of Magomed Abdusalamov and/or the Executive Vice President of Sampson Boxing, LLC, which acted as Mr. Abduslamov’s promoter for the November 2, 2013 boxing match” (Jordan Opposition Affidavit at ¶ 5 [emphasis added]).

Dr. Jordan also contends that Nathan Lewkowicz’s affidavit testimony that he lacked knowledge regarding the availability of an ambulance at MSG during and after the Boxing Match “is not credible” because “it is common knowledge among boxing professionals that the State of New York requires the presence of an ambulance at all professional boxing matches” and Boxing Rule and Regulation § 209.37 requires promoters to have an ambulance available (*id.* at ¶ 6).³

³ Boxing Rule and Regulation § 209.37 provides that “[a]ll boxing promoters shall provide medical information, facilities and equipment, including but not limited to a stretcher and emergency oxygen, adequate for emergency occasions, and all such medical facilities and equipment shall be approved in advance by the commission. Specifications of the commission for the medical information and equipment, and for the platform, padding and the covering may be prescribed by the commission from time to time by bulletin and forwarded by the commission to each promoter. *The promoters at all boxing contests or exhibitions shall have an ambulance*

According to Ross N. Herman, Esq., counsel for the third-party plaintiffs,⁴ “the Third-Party Complaint’s allegations regarding Nathan Lewkowicz’s status as a Co-promoter, must be accepted as true and the Court may not make credibility determinations, and when a defendant submits an affidavit denying some or all of the plaintiff’s allegations, that submission raises credibility determinations that are not properly before the Court on a CPLR Section 3211 motion to dismiss.”

Attorney Herman affirms that “Nathan Lewkowicz has repeatedly and publically represented himself to be the promoter of Magomed Abduslamov and/or the Vice President of Sampson Boxing, LLC” (Herman Opposition Affirmation at ¶ 10) and submits arguably hearsay documents that post-date the November 2, 2013 Boxing Match, including: (1) a redacted copy of a November 6, 2013 email from Nathan Lewkowicz (*id.* at Exhibit 1); (2) “a page the undersigned printed from the website of Sampson Boxing . . .” on August 20, 2015 (*id.* at Exhibit 2); (3) a November 3, 2013 Newsday article identifying Nathan Lewkowicz as “vice president of Sampson Boxing . . .” (*id.* at Exhibit 3); (4) a November 3, 2013 New York Post article referring to “Nathan Lewkowicz of Sampson Boxing, Abdusalamov’s promoter . . .” (*id.* at Exhibit 4); (5) a November 8, 2013 Wall Street Journal article identifying Nathan Lewkowicz as “Abdusalamov’s crestfallen promoter . . .” (*id.* at Exhibit 5); (6) a November 4, 2013 internet article from USA Today stating that “[f]ight promoter

with medical attendants available at the site of the event, unless otherwise directed or authorized by the commission” (emphasis added).

⁴ See ¶ 9 of the October 15, 2015 affirmation of Ross N. Herman, Esq., in opposition to Nathan Lewkowicz’s dismissal motion (Herman Opposition Affirmation).

Nathan Lewkowicz confirmed the fighter's condition . . ." (*id.* at Exhibit 6); (7) a November 4, 2013 internet article from ESPN identifying Nathan Lewkowicz as "vice president of his father Sampson Lewkowicz's promotional company, Sampson Boxing, which promotes Abduslamov" (*id.* at Exhibit 7); (8) a November 5, 2013 sports blog identifying Nathan Lewkowicz as "vice president of Sampson Boxing . . ." (*id.* at Exhibit 8); (9) a November 13, 2013 Daily News article in which Nathan Lewkowicz is referred to as Abdusalamov's "promoter" (*id.* at Exhibit 9); (10) a November 14, 2013 internet article from RingTV.com identifying Nathan Lewkowicz as Abdusalamov's "promoter" (*id.* at Exhibit 10); (11) a November 15, 2013 New York Post article identifying Nathan Lewkowicz as Abdusalamov's "promoter" (*id.* at Exhibit 11); (12) a November 22, 2013 Daily News article referencing a text message from Nathan Lewkowicz regarding Abdusalamov's medical condition (*id.* at Exhibit 12); (13) a November 22, 2013 Wall Street Journal article reporting Abdusalamov's medical condition "according to Nathan Lewkowicz of Sampson Boxing, Abdusalamov's promoter" (*id.* at Exhibit 13); (14) a December 11, 2013 ESPN article referring to "[p]romoter Nathan Lewkowicz . . ." (*id.* at Exhibit 14); and (15) a December 25, 2013 ESPN article also referring to "promoter Nathan Lewkowicz . . ." (*id.* at Exhibit 15).

Essentially, Attorney Herman contends that "[h]aving repeatedly held himself out as Magomed Abdusalamov's promoter, and as the Vice President of Sampson Boxing, LLC, Nathan Lewkowicz should be estopped from claiming on this motion to dismiss that he was neither . . ." (*id.* at ¶ 15).

Attorney Herman also submits “a screen shot” allegedly taken from an HBO broadcast of the Boxing Match and contends, “[u]pon information and belief,” that “the figure [in the ring] on the far left in the dark sport jacket, staring in the direction of the camera, is Nathan Lewkowicz” (*id.* at ¶ 14 and Exhibit 16). Attorney Herman theorizes that a mere spectator would not enter the boxing ring and join the winning fighter at the conclusion of the Boxing Match.

Attorney Herman contends that Nathan Lewkowicz’s counsel “misconstrues the duty at issue” in the third-party complaint and clarifies that “the third-party plaintiffs are not seeking to hold Nathan Lewkowicz liable for any alleged breaches committed by [Commission] personnel. Rather, the third-party plaintiffs seek to hold Lewkowicz liable for his own direct failure to fulfill his duty as a promoter to protect the health and welfare of his fighter” (*id.* at ¶¶ 25 and 26 [underline in original]). According to Dr. Jordan, Nathan Lewkowicz, as Abdusalamov’s promoter, *had a duty to request that Abdusalamov be taken by ambulance to the hospital* after the Boxing Match,” pursuant to the Commission’s Boxing Rule and Regulation § 207.34⁵ (Jordan Opposition Affirmation at ¶¶ 7-8 [*emphasis added*]).

Sampson Lewkowicz’s Dismissal Motion

Sampson Lewkowicz, on or about November 4, 2015, also moved for an order, pursuant to CPLR 3211 (a) (7), similarly dismissing the third-party complaint on the ground

⁵ Boxing Rule and Regulation § 207.34, entitled “Reporting obligations of licensees” provides that “[a]ll licensees *shall promptly furnish the commission with all information concerning illness of a boxer or wrestler and of any reason why any licensee has failed to fulfill any contract. No licensee shall be relieved from performing his or her contractual obligations unless otherwise directed or authorized by the commission*” (*emphasis added*).

that he “did not have any duty to request that Abdusalamov be transported” to the hospital.⁶ His attorney argues that even if the allegations against Sampson Lewkowicz are proven they “created no duty or liability on the part of Sampson, the promotional representative of Sampson Boxing, LLC, the promoter of Abdusalamov [which] was not named as a Defendant or Third-Party Defendant in this matter” (Sampson Lewkowicz Memorandum at page 5).

Sampson Lewkowicz responds to the allegation in paragraph 22 of the third-party complaint by arguing, like Nathan Lewkowicz, that “the Commission – not the promoter – possesses the ‘power’ and ‘duty’ to set the ‘regulations and standards for the physical examinations of professional boxers including, without limitation, pre-fight and/or postfight’”, citing to Boxing Law § 8904 (2) (*id.* at 9). Sampson Lewkowicz similarly relies upon the holdings in the *Classen* and *Collins* cases.

***Third-Party Plaintiffs’ Opposition To
Sampson Lewkowicz’s Dismissal Motion***

The third-party plaintiffs, in opposition, only submit the affirmation of their counsel, Ross N. Herman, Esq., who notes that “Sampson Lewkowicz’s sole basis for seeking dismissal of the Third-Party Complaint as against him is his contention that he had no legal duty to protect the health and welfare of the boxer he was promoting.”⁷ Attorney Herman contends that a promoter has an independent duty to request an ambulance under Boxing

⁶ See ¶ 9 of the November 4, 2015 affirmation of Robert J. Hantman, Esq. in support of Sampson Lewkowicz’s dismissal motion.

⁷ See ¶ 4 of the January 7, 2016 affirmation of Ross N. Herman, Esq. in opposition to Sampson Lewkowicz’s dismissal motion (Herman Opposition Affirmation).

Rule and Regulation § 207.34 (Herman Opposition Affirmation at ¶ 8). Attorney Herman further argues that “custom and practice in the boxing industry” also imposed a duty upon Sampson Lewkowicz (*id.* at ¶ 9).

Attorney Herman contends that “[a] statement made by Sampson Lewkowicz subsequent to the boxing match at issue appears to confirm his recognition that he had a duty to request an ambulance if he believed that Magomed Abdusalamov was seriously injured” and annexes an August 26, 2014 “Case Activity Report” from the Office of the State Inspector General, which reflects that it was sent to Attorney Herman pursuant to a Freedom of Information Law request (*id.* at ¶ 11 and Exhibit 4). The Case Activity Report seemingly documents a “Telephone follow-up with Farrago” by “Investigator Ken Michaels” and states:

“Today at approximately 12:25 p.m., I spoke by telephone . . . with Matt Farrago. I sought to clarify an issue that was presented in a telephone interview of promoter Sampson Lewkowicz on November 22, 2013. In that interview, Lewkowicz had asserted that, at the end of the boxing match between Abdusalamov and Perez, but before the winner was announced, he had entered the ring and *told the inspector that ‘we should take him [Abdusalamov] to the hospital right away.’*”

“When asked, *Farrago denied that anyone had made such a statement to him.* Farrago noted that no one, at that point, made any mention of going to a hospital. At that point, he noted, Abdusalamov was walking on his own and talking on his own. . . .” (*id.* at Exhibit 4 [emphasis added]).

Tellingly, third-party plaintiff Farrago declined to submit a fact affidavit in opposition to Nathan or Sampson Lewkowicz’s dismissal motions regarding the Boxing Match, his communications with Sampson Lewkowicz at the Boxing Match and/or the truth of the statements in the Case Activity Report.

Discussion

(1)

“On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible [favorable] inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2008], *lv dismissed* 12 NY3d 878 [2009]; *see also EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). A court considering a dismissal motion on the basis of failing to state a claim generally must accept the facts alleged in the complaint as true and make any possible favorable inferences for the plaintiff (*Sokol v Leder*, 74 AD3d 1180, 1181 [2010]), even when such allegations are “upon information and belief” (*see Roldan v Allstate Ins. Co.*, 149 AD2d 20, 40 [1989]).

““In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*Ruffino v New York City Tr. Auth.*, 55 AD3d 817, 818 [2008], quoting *Morris v Morris*, 306 AD2d 449, 451 [2003]). However, “bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference” (*id.*). Dismissal of the complaint pursuant to CPLR 3211 (a) (7) “will be warranted . . . in those situations in which it is conclusively

established that there is no cause of action” (*Town of N. Hempstead v Sea Crest Constr. Corp.*, 119 AD2d 744, 746 [1986]).

(2)

Dr. Jordan and Inspector Farrago, the Commission’s Chief Medical Officer and fight inspector, respectively, seek to hold Nathan and Sampson Lewkowicz liable for contribution and/or indemnification as Abdusalamov’s “co-promoter” and “promoter” for allegedly breaching their duties to protect Abduslamov’s health and welfare by failing to request that he be taken by ambulance to the hospital (third-party complaint at ¶¶ 22-23).

As a preliminary matter, Nathan Lewkowicz contends that he only attended the Boxing Match in his capacity as a “spectator,” rather than as a “co-promoter,” and his father, Sampson Lewkowicz, contends that he attended the Boxing Match in his capacity as “the promotional representative of Sampson Boxing, LLC, the promoter of Abdusalamov . . .” (Nathan Lewkowicz Affidavit at ¶ 6; Sampson Lewkowicz Memorandum at page 3).

For purposes of third-party defendants’ dismissal motions, the third-party plaintiffs’ allegations regarding Nathan and Sampson Lewkowicz’s “co-promoter” and “promoter” status made “[u]pon information and belief” in the third-party complaint must be accepted as true. Thus, the only issue presented here is whether or not a boxing promoter and/or its promotional representatives have a duty, independent of the promotion contract, to protect its boxer’s health and welfare during a boxing match, as a matter of law.

“[T]he Commission is vested with the sole direction, management, control and jurisdiction over all boxing matches or exhibitions conducted within the State of New York”

(*Am. Boxing & Athletic Ass'n. v Chemung Cty. YMCA*, 13 AD3d 842, 843 [2004]; see Boxing Law § 8906).

Importantly, the Commission regulates the conduct and safety of boxing matches, pursuant to Boxing Law § 8923 (2), which provides:

“2. The *commission may by rule, regulation or order*, require the presence of any medical equipment and personnel at each boxing or sparring match or exhibition as is necessary or beneficial for the safety and protection of the contestants; *and may also require the presence of an ambulance* or other apparatus at the site of any such match or exhibition or the promulgation of an emergency medical plan in lieu thereof” (emphasis added).

In accordance with its authority under Boxing Law § 8923 (2), the Commission issued Boxing Rule and Regulation § 209.37, entitled “Emergency medical facilities and equipment,” which requires that boxing promoters “shall have an ambulance with medical attendants available at the site of the event . . .”:

“All boxing promoters shall provide medical information, facilities and equipment, including but not limited to a stretcher and emergency oxygen, adequate for emergency occasions, and all such medical facilities and equipment shall be approved in advance by the commission. Specifications of the commission for the medical information and equipment, and for the platform, padding and the covering may be prescribed by the commission from time to time by bulletin and forwarded by the commission to each promoter. The promoters at all boxing contests or exhibitions shall have an ambulance with medical attendants available at the site of the event, unless otherwise directed or authorized by the commission” (emphasis added).

As part of its regulatory function, the Commission also maintains copies of all boxing contracts between promoters and boxers, pursuant to Boxing Law §§ 8934 (3) and (7), which require all boxing promotion contracts to be filed with the Commission:

“3. No professional boxing match may occur in this state unless the promoter, organizer, producer or another that participates in the proposition, selection,

or arrangement of one or more boxers for a contest files with the commission a copy of any agreement in writing to which the promoter is a party with any boxer participating in the match.

. . . .

“7. Any contract between a boxer and the promoter or manager shall be in writing and filed with the commission at the time any agreement is made for a match to take place in the state. . . .” (emphasis added).

Section 208.16 of the Commission’s Rules and Regulations similarly provides that “[n]o bout shall be held in the State of New York unless . . . each promoter of the bout shall file with the commission a true and accurate copy of every contract currently in effect between the promoter and a participant.”

Here, the Commission’s employees seek to hold Nathan and Sampson Lewkowicz liable for indemnification and/or contribution in the event that they are held liable for negligence because they contend that, as Abduslamov’s promoters, they breached their duties *owed to Abduslamov* to request that he be taken by ambulance to the hospital after the Boxing Match, pursuant to Boxing Rule and Regulation § 207.34.

Contrary to third-party plaintiffs’ contentions, Boxing Rule and Regulation § 207.34 specifically requires licensees to “furnish *the commission* with all information concerning illness of a boxer . . . and of any reason why any licensee has failed to fulfill any contract.” According to the plain and unambiguous language of Boxing Rule and Regulation § 207.34, the Commission did not impose a statutory duty running from the promoter to the boxer. However, the Commission’s Boxing Laws and Boxing Rules and Regulations recognize and, indeed, require that the promoter/boxer relationship be evidenced and defined by contract, and therefore, the parties’ duties are exclusively set forth therein.

Notably missing from the record is a copy of the contract between Sampson Boxing, LLC, as promoter, and Abdusalamov as boxer, reflecting the duties that Sampson Boxing, LLC, owed to Abdusalamov regarding the Boxing Match. Presumably, the third-party plaintiffs had access to the Sampson Boxing, LLC, promotion contract, since it had to be filed with the Commission prior to the Boxing Match, pursuant to Boxing Law §§ 8934 (3) and (7).

Finally, the Case Activity Report [Exhibit 4] submitted by Farrago's counsel (which is double hearsay) does not "confirm" Sampson Lewkowicz's acknowledgment that he had a duty to send Abdusalamov to the hospital at the Boxing Match as Mr. Herman avers. Even if the Inspector General's Investigator's Case Activity Report was in admissible form, it wouldn't resolve anything, because it states that Farrago denied that Sampson Lewkowicz entered the boxing ring and told him that "we should take [Abdusalamov] to the hospital right away," while Samson Lewkowitz told the investigator that he had done so. To be clear, whether Samson Lewkowitz said anything to Farrago or not does not establish that he had a duty to the Boxer either at common law or in the Promotion Agreement which neither side has submitted.

For the foregoing reasons, dismissal of the third-party complaint asserting claims against Abdusalamov's alleged promoters for contribution and/or indemnification is warranted. Accordingly, it is

ORDERED that Nathan Lewkowicz's motion (in Motion Seq. 20) for an order, pursuant to CPLR 3211 (a) (7), dismissing the third-party complaint as against him is granted; and it is further

ORDERED that Sampson Lewkowicz's motion (in Motion Seq. 25) for an order, pursuant to CPLR 3211 (a) (7), dismissing the third-party complaint as against him is granted.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**

FILED
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2016 APR 13 AM 7:41