

Greiber v National Coll. Athletic Assn.
2017 NY Slip Op 32762(U)
September 5, 2017
Supreme Court, Nassau County
Docket Number: 600400/17
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 13**
SAMANTHA GREIBER,

Plaintiff,

-against-

INDEX # 600400/17

Mot. Seq. 1

Mot. Date 4.6.17

Submit Date 7.7.17

**NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
HOFSTRA UNIVERSITY, SHANNON SMITH, Individually,
and in her official capacity as Head Coach of Hofstra
University Women's Lacrosse, ROBERT DiMONDA,
Individually, and in his official capacity as Assistant Athletic
Trainer at Hofstra University for Women's Lacrosse,
DEENA CASIERO, M.D., Individually, and in her official
capacity as Team Physician at Hofstra University for Women's
Lacrosse, PROHEALTH CARE ASSOCIATES, LLP, GLENN
WALDMAN, M.D., Individually, and in his official capacity as
Physician at ProHEALTH Care Associates, LLP, FIELDTURF
USA, INC. and FIELDTURF TARKETT, INC.,**

Defendants.

-----X

The following papers were read on this motion:

E File Docs Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 17-20, 66, 69,70

Answering Affidavit 58-64

Reply Affidavit..... 68

Motion by defendant National Collegiate Athletic Association (NCAA), pursuant to CPLR § 3211(a)(7), for an order dismissing the complaint.

Plaintiff Samantha Greiber commenced this action against the defendants alleging, among other things, common law negligence. By her complaint, plaintiff alleges that she suffered two separate concussions while playing women's collegiate lacrosse for Hofstra University and continues to suffer the lasting effects of those injuries.

The first injury occurred on March 18, 2013. On that occasion, another lacrosse player threw a ball at the goal but missed, hitting the bleachers. The ball then ricocheted off the bleacher and struck plaintiff in the back of the head. Following this injury, an athletic trainer for the team performed a Sports Concussion Assessment Tool 2 (SCAT) test on plaintiff. The trainer found that plaintiff ranked low in balance, concentration and delayed recall, and instructed her to rest. Plaintiff later took it upon herself to visit Winthrop University Hospital for a full evaluation and CT scan, where she was diagnosed with a scalp contusion and head injury. Plaintiff also saw the team physician who diagnosed her with a concussion and ordered her to avoid mental and physical activity.

The second concussion allegedly occurred nearly a year later on January 21, 2014. Plaintiff and another lacrosse player both slipped on soaking wet turf during a mandatory practice drill and collided with each other head-to-head. Plaintiff alleges that she vomited in the locker room immediately following the collision but was forced to remain and observe the practice by the team athletic trainer.

The athletic trainer performed daily SCAT exams on plaintiff between January 21, 2014 and January 24, 2014, but never advised her to go to the hospital. The team physician diagnosed plaintiff with a concussion on January 24, 2014. However, the physician did not order plaintiff to undergo an MRI until nine days after the second injury took place.

The first count of the complaint is the only cause of action asserted against the movant NCAA. Count I states that “[d]efendant NCAA owed a duty to plaintiff to supervise, regulate, monitor and provide reasonable and appropriate rules to minimize the risk of injury to the student-athletes” and that “[t]he NCAA acted carelessly and negligently in its position as the regulatory body for college teams and [their] student-athletes, including Plaintiff. The NCAA knew or should have known that its actions or its inaction in light of the rate and extent of concussions reported and made known to the NCAA would cause harm to players in both the short- and long-term.” In addition, the complaint alleges that the NCAA breached the duty of care that it owed to the plaintiff in the following particular ways:

- Failure to implement system-wide guidelines for the screening and detection of head injuries;
- Failure to implement legislation addressing the treatment and eligibility of student-athletes who have sustained multiple concussions in the course of play;

- Failure to implement system-wide “return to play” guidelines for student-athletes who have sustained concussions;
- Failure to warn of the risk of unreasonable harm resulting from repeated concussions;
- Failure to disclose the special risks of long-term complications from repeated concussions and return to play;
- Failure to disclose the role of repeated concussions in causing chronic life-long cognitive decline;
- Failure to promulgate rules and regulations to adequately address the dangers of repeated concussions and return-to-play policy to minimize long-term cognitive problems; and
- Failure to adopt and reasonably enforce rules to minimize the risk of players suffering debilitating concussions.

In addition, in opposition to the instant motion, plaintiff provides an affidavit to amplify the allegations of the complaint. (*Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). By her affidavit, Ms. Greiber states:

Because I played an NCAA-sanctioned sport at an NCAA school, I followed all NCAA rules and regulations governing my conduct on and off of the field. I relied on the NCAA’s extensive experience and expertise in the area of player safety and health because the NCAA governed player conduct and safety in all major college athletics, including women’s lacrosse. Consequently, I knew that the NCAA had the responsibility to implement rules and guidelines regarding lacrosse games and practice to protect my health and safety, particularly concerning the potential for serious head injury. The NCAA represented to me that those safety rules and the required equipment would be continually reviewed and updated to keep pace with the experimental, scientific and medical research available to the NCAA. I also relied on my coaches, trainers, University medical personnel to protect my safety in games and practice. The NCAA, however, as the exclusive governing and rule-making authority for collegiate athletics, was responsible for requiring safe conditions, protocols, rules, safe facilities, protective equipment, and appropriate medical care for my health and welfare. Further, I relied on the NCAA to monitor Hofstra, its coaches and trainers, to assure that they had adequate training and

experience to protect my safety. Moreover, I relied upon the NCAA's unique experience and knowledge of the risks of concussions in women's lacrosse and their long-term health effects. Finally, I relied on the NCAA to disclose relevant risk information to me, my family, Hofstra, its coaches, and medical personnel in order to protect my health and safety and to require, for example, that helmets be worn by female players to prevent head injury.

The NCAA did not effectively research, monitor, assess or review the available data, nor did it implement or enforce any rules, guidelines, protocols, or requirement that would have prevented by severe concussive injuries. The NCAA did not properly monitor Hofstra, its coaches and trainers, to assure that they had adequate training and experience to protect my safety. The NCAA failed to disclose relevant information to me, my family, Hofstra, its coaches, and medical personnel regarding the risks of concussions and their long-term health effects in order to protect my health and safety and failed to require that helmets be work by female players to prevent head injury.

....

The NCAA treated me differently because of my gender. Although the NCAA knew from the available medical research that females were more likely to suffer concussions than male players, the NCAA required helmets for men while making them illegal for women, thereby intentionally putting players like me at high risk for the disabling injury I sustained. If the rules allowed, I would have worn a helmet for my safety. As a result of the NCAA's failure to protect my health and safety, I have sustained significant injuries that continue to leave me with severe medical problems.

Additionally, counsel for Ms. Greiber provides a wealth of health studies and information regarding athletics-related head injuries available to the NCAA over the course of Ms. Greiber's college career. In particular, counsel attaches the NCAA Sports Medicine Handbook (Handbook), which seeks to "formulate guidelines for sports medicine care and protection of student-athlete's health and safety" and "to assist member schools in developing a safe intercollegiate athletics program." When appropriate, "the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports makes recommendations to modify safety guidelines, equipment standards or a sport's rule of play." The Handbook further states that "student-athletes rightfully assume that those who sponsor intercollegiate athletics have taken reasonable

precautions to minimize the risks of injury from athletics participation.” Significantly, the guidelines provide that they are “not intended to supersede the exercise of medical judgment in specific situations by a member institution’s sports medicine staff. In all instances, determination of the appropriate care and treatment of student-athletes must be based on the clinical judgment of the institution’s team physician or athletic health care team that is consistent with sound principles of sports medicine care.” Furthermore, the recommendations contained in the Handbook “provide guidance for an institution’s athletics administrators and sports medicine staff in protecting student-athletes’ health and safety, but do not establish any rigid requirement that must be followed in all cases.”

Counsel also attaches the NCAA Constitution, which includes among its purposes: “To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association” and to “formulate, copyright and publish rules of play governing intercollegiate athletics.” Although the Constitution also makes clear that “[i]t is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes,” it contemplates that the NCAA will enforce compliance with its rules and regulations, to wit: “It shall be the mission of the NCAA enforcement program to eliminate violations of NCAA rules and impose appropriate penalties should violations occur,” “The Association shall assist the institution in its efforts to achieve full compliance with all rules and regulations and shall afford the institution, its staff and student-athletes fair procedures in the consideration of an identified or alleged failure in compliance,” and “The membership of any active member failing to maintain the academic or athletics standards required for such membership or failing to meet the conditions and obligations of membership may be suspended, terminated or otherwise disciplined. . . .”

As part of Article 3 pertaining to “NCAA Membership,” in a section entitled “Conditions and Obligations of Membership,” member institutions are required to “have a concussion management plan for its student-athletes,” which “shall include” measures to (1) ensure that the members educate their student-athletes every year about the “signs and symptoms of concussions; (2) require the removal of student-athletes from athletic activities and evaluation by a member of the institution’s medical staff when the student-athlete exhibits signs, symptoms or behaviors consistent with a concussion; (3) preclude a student-athlete diagnosed by the institution’s personnel with a concussion from returning to athletic activity for at least the remainder of the day and (4) require medical clearance by an institution’s physician for a student-athlete diagnosed with a concussion to return to athletic activity. Institutions were further required to submit their Concussion Safety Protocol to a Concussion Safety Protocol Committee each year.

Finally, counsel attaches the equipment and uniform rules that require certain protective equipment such as mouth guards and goggles but prohibit women’s lacrosse players from wearing hard helmets, as opposed to soft foam helmets. Such hard headgear is made illegal on the women’s lacrosse field. By contrast, the equipment rules for men’s lacrosse players require the use of a “protective helmet.”

In sum, according to plaintiff, the NCAA failed to implement adequate regulations in order to address the detection, treatment, and prevention of head injuries. Ms. Greiber alleges that the NCAA should have known that its action or inaction would lead to harm. Further, plaintiff asserts that the NCAA failed to warn athletes of the risks of unreasonable harm and long-term complications associated with repeated head injuries. Finally, plaintiff alleges that the NCAA, through its rules, actually exacerbated her risk of sustaining head injuries.

As a proximate, direct, and foreseeable result of the NCAA's negligence, plaintiff alleges that she has suffered past medical costs and will suffer future medical costs. Plaintiff also alleges that as a proximate result of the NCAA's negligence she continues to suffer from numerous permanent injuries, including traumatic brain injury, concussion, headaches and depression.

On this motion, defendant contends that it did not have or breach any legal duty to protect student athletes from head injuries. The NCAA states that it is a voluntary, unincorporated association composed of 1,100 autonomous member institutions with programs in 24 sports. Further, the NCAA contends it does not have a special relationship with plaintiff or any of the other 460,000 student athletes enrolled in these athletic programs. Moreover, the NCAA contends that no duty attached to its activities because the plaintiff assumed the risks inherent in participating in contact sports.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the court must determine whether, from the four corners of the pleading "factual allegations are discerned, which taken together, manifest any cause of action cognizable at law." (*Salvatore v. Kumar*, 45 AD3d 560 [2nd Dept. 2007], lv to app den. 10 NY3d 703 [2008], quoting *Morad v. Morad*, 27 AD3d 626, 627 [2006]). Further, the pleading is to be afforded a liberal construction, the fact alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference. (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). However, "[w]hile the allegations in the complaint are to be accepted as true when considering a motion to dismiss . . . , 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration'" (*Garber v. Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2d Dept. 2007], quoting *Maas v. Cornell Univ.*, 94 NY2d 87, 91 [1999]).

As a starting point, negligence is "a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances." (NY PJI3d 2:10 at 231 [2017]). "Negligence arises from a breach of a legal duty, . . . and is not actionable unless it results in damage to a person to whom the legal duty is owed." (NY PJI3d 2:10 at 232 [2017]).

Courts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation

of new channels of liability. Thus, in determining whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree (*Hamilton v. Beretta U.S.A. Corp.*, 96 NY2d 222,232-233 [2001] [quotations and citations omitted] [The “judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another.”]).

A duty can arise “where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant’s actual control of the third person’s actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others.” (*Id.* at 233). Key to the existence of such a duty is that the “defendants’ relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm” and that the “specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship.” (*Id.*; see also *Matter of New York City Asbestos Litig.*, 5 NY 3d 486, 493-494 [2005]). “Foreseeability, alone, does not define duty— it merely determined the scope of the duty once it is determined to exist.” (*Hamilton*, 95 NY2d at 232 [citations omitted]).

Based upon the foregoing precepts, New York courts have found that a duty of care may arise where an event sponsor “exercises a sufficient degree of control” over the event. (*Katz v. United Synagogue of Conservative Judaism*, 135 AD3d 458 [1st Dept 2016] [operator of study-abroad program in Israel owed 19-year old plaintiff with limited knowledge of Hebrew a duty to provide her with necessary medical care]; see also *Derezeas v. Robert H. Glover & Assoc., Inc.*, 121 AD3d 523 [1 st Dept 2014] [defendant association owed injured pedestrian a duty of care where it supervised a group run, selected the route on an enclosed promenade, and provided coaches to ensure runners stayed to the left and warned of pedestrians and other hazards]; *Hores v. Sargent*, 230 AD2d 712 [2d Dept 1996] [community college owed duty to student cyclists participating in bicycle trip that was organized, planned, and supervised the trip]).

On the present record, the court finds that the defendant NCAA owed a duty of reasonable care to the plaintiff. NCAA acknowledges that “[w]hether an association, be it a not-for-profit, professional organization, or union, is responsible for injuries to third parties depends on whether the members have assigned to the association, and the association has accepted, responsibility for the activity which gave rise to the injury.” The NCAA exercised significant control over the rules of play and equipment, and imposed conditions of membership on its member institutions, which included requirements regarding head-injury protocols. Upon undertaking to exercise such control over its member institutions, it was charged with carrying out these functions with reasonable care. (*Cf. Serrell v. Connetquot Cent. High School Dist. of Islip*, 280 AD2d 663 [2d Dept 2001] [finding no breach of duty to make rules concerning head injuries and return to play where movant was an administrative body in charge of scheduling

events and officials and was without resources, expertise, or a mandate to promulgate such rules]). Whether it did so is ultimately a question for the finder of fact.

Defendant’s argument that it cannot be liable because the plaintiff assumed the risks inherent in the sport of lacrosse is unavailing. Through its control over the rules of play and equipment, NCAA effectively prohibited the plaintiff from utilizing protective headgear. As the party with authority to make rules concerning the safety equipment utilized by athletes on the field of play, and who undertook to exercise that authority, NCAA had a duty to avoid exposing the plaintiff to risks that were “unreasonably increased.” (*Benitez v. New York City Bd. Of Ed.*, 73 NY2d 650 [1989] [“We hold that a board of education, its employees, agents and organized athletic councils must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks.”]). Moreover, plaintiff contends that the NCAA failed to provide or require adequate warnings of the risk of unreasonable harm resulting from repeated concussions although it was in the best position to do so.

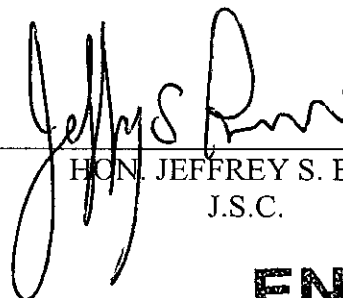
In this case, the plaintiff has alleged facts sufficient to demonstrate that she has a cause of action against the NCAA. Accordingly, the motion to dismiss is **denied**.

ORDERED, that all parties shall appear at a **preliminary conference** at the supreme courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on **September 27, 2017**, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or order of this court. All parties are forewarned that failure to attend the conference may result in judgment by default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 5, 2017

ENTER :



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