Fevola v Kings Park High Sch.
2019 NY Slip Op 33961(U)
January 10, 2019
Supreme Court, Suffolk County
Docket Number: 17-609068
Judge: Sanford Neil Berland

SHORT FORM ORDER **INDEX NO.: 17-609068**

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

CHRISTOPHER FEVOLA and DOLLY FEVOLA,

Plaintiff(s),

-against-

KINGS PARK HIGH SCHOOL, KINGS PARK SCHOOL DISTRICT, MARY T. KENAVAN, as parent and natural guardian of CHRIS KENAVAN and CHRIS KENAVAN,

Defendant(s).

ORIG. RETURN DATE: February 22, 2018
FINAL RETURN DATE: June 19, 2018
MOT. SEQ. #: 003 **MG**

ORIG. RETURN DATE: February 22, 2018
FINAL RETURN DATE: June 19, 2018
MOT. SEQ. #: 004 **MD**

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion, made by the Kenavan Defendants, filed January 23, 2018, and supporting papers; (2) Notice of Cross Motion, made by the Kings Park Defendants, filed February 7, 2018, and supporting papers; (3) Affirmation in Opposition, made by the Plaintiffs, filed May 2, 2018, and supporting papers,; (4) Affirmation in Reply, made by the Kenavan defendants, filed May 17, 2018; (5) Affirmation in Reply, made by the Kings Park defendants, filed June 12, 2018; it is

ORDERED that Mot. Seq. # 003, made by the Kenavan defendants, for an order pursuant to CPLR 3212 dismissing the complaint and cross-claims as asserted against them is granted; and it is further

ORDERED that Mot. Seq. # 004, made by the Kings Park defendants, for an order pursuant to CPLR 3212 dismissing the complaint and cross-claims as asserted against them is denied; and it is further

ORDERED that the Kenavan defendants' cross-claims asserted against the Kings Park defendants are dismissed as moot; and it is further

ORDERED that the remaining parties to this action are reminded of a previously scheduled certification conference on April 2, 2019 at 9:30am at Part 6 of the Supreme Court

located at 1 Court Street, Riverhead, New York.

The Plaintiffs commenced this action seeking damages for personal injuries allegedly sustained by the plaintiff, Christopher Fevola ("Fevola"), on February 13, 2016, in a gymnasium at the Kings Park High School (hereinafter the "high school"). Specifically, the plaintiffs allege that Fevola was injured when he was struck by a bat swung by co-defendant Chris Kenavan ("Kenavan") during an indoor varsity baseball practice drill.

Plaintiffs aver that the defendants Kings Park High School and Kings Park School District ("Kings Park defendants") were negligent in that they, *inter alia*, failed to properly supervise, control, and/or direct the students during practice, and created an unreasonable risk of harm by virtue of the coach's design and layout of the practice drill stations. Plaintiff alleges that the Kings Park defendants placed participants at various drill stations too close together, which was a proximate cause of the plaintiff Christopher Fevola's injury. Plaintiff also avers that defendant Chris Kenavan was negligent in that he, as a left-handed batter, positioned himself too closely to Fevola and failed to check his proximity to other players prior to swinging his bat.

The Kenavans now move, and Kings Park defendants now cross-move, for summary judgment dismissing the complaint and the defendants' respective cross claims on the grounds that: (i) Fevola was aware of and assumed the inherent risk of the injuries he allegedly sustained by voluntarily participating in an extra-curricular athletic event, and (ii) the drill set-up area where the incident occurred was open and obvious and did not create or conceal a dangerous condition or unreasonably increase the risk of injury over and above the usual dangers that are inherent in the sport.

The Fevolas oppose the instant motions contending, in pertinent part, that Kings Park designed the layout of the drill area without taking into account the left-handedness of Kenavan, which resulted in Kenavan batting with his back to Fevola, as opposed to facing Fevola, as would a right-handed batter, thereby creating a dangerous condition and increasing the risk of injury, which in fact resulted when Kenavan struck the left side of Fevola's face with his bat.

The parties' submissions[1] paint a picture wherein Fevola and Kenavan were positioned at two drill stations proximate to each other at the corner of the gymnasium. Fevola's station ("soft toss station") faced one corner wall and Kenavan's station ("tee station") faced the adjacent corner wall. Fevola was retrieving rag balls at the soft toss station each time the batter hit the ball against the wall, causing it to bounce off of the wall toward Fevola, who stood a few feet behind the batter. Kenavan, for his part, was hitting rag balls off the tee at the tee station toward his corner wall and, as a result of his left-handed batting stance, had his back to Fevola's back.

[1] It should be noted that the parties' submissions are exceptionally drafted and that their respective positions are well briefed.

Summary judgment must be granted if the proponent makes "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," and the opponent fails to rebut that showing (*see* ***Alvarez v. Prospect Hosp.***, 68 NY2d 320 [1986]).

Pursuant to the primary assumption of risk doctrine, it is well settled that a participant in an athletic activity is deemed to have assumed "those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (***Morgan v. State of New York***, 90 NY2d. 471 [1997]; *see also* ***Barretto v. City of New York***, 229 AD2d 214 [1st Dept 1997]). The awareness of a risk ascribed to a particular individual "is not to be determined in a vacuum" but rather is "to be assessed against the background of the skill and experience of the particular plaintiff" (***Maddox v. City of New York***, 66 NY2d 270, 278 [1985]). "[I]t is not necessary to the application of the doctrine that the injured plaintiff may have foreseen the exact manner in which the injury occurred so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (***Kaminer v Jericho Union Free School Dist.***, 139 AD3d 1013, 1014 [2d Dept 2016] *quoting* ***Joseph v New York Racing Ass'n, Inc.***, 28 AD3d 105, 108 [2d Dept 2006]). An individual who participates in a sporting or recreational activity is deemed "to have consented to those injury causing events which are known, apparent, or reasonably foreseeable consequences of participation" (***Castello v. County of Nassau***, 223 AD2d 571 [2d Dept. 1996]; ***Convey v. City of Rye School District***, 271 AD2d 154 [2d Dept 2000]; ***Turcotte v. Fell***, 68 NY2d 432 [1986]).

"[A] plaintiff also assumes risks attributable 'to any open and obvious condition of the place where [the sporting activity] is carried on'" (***Roberts v. Boys and Girls Republic, Inc.***, 51 AD3d 246, 247-248 [1st Dept 2008] *citing* ***Maddox v. City of New York***, 66 NY2d 270, 277 [1985]). "A defendant's duty, then, is limited under the doctrine to 'exercising care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant has performed its duty'" (***Roberts v. Boys and Girls Republic, Inc.***, 51 AD3d 246 [1st Dept 2008] *citing* ***Turcotte v. Fell***, 68 NY2d 432 [1986]).

At the same time, "[a]n educational institution organizing a team sporting activity must exercise ordinary reasonable care to protect student athletes voluntarily participating in organized athletics from unassumed, concealed, or enhanced risks" (***Kaminer v Jericho Union Free School Dist.***, 139 AD3d 1013, 1014 [2d Dept 2016] *quoting* ***Bukowski v Clarkson Univ.***, 19 NY3d 353, 356 [2012]).

A review of the caselaw applying the foregoing legal principals provides helpful, albeit somewhat divergent and highly fact specific, guidance. For example, in *Kamimer, supra*, the court granted summary judgment to the defendant school district and held that a high school baseball coach did not unreasonably enhance the risk of plaintiff being struck by a baseball by throwing the ball while wearing a fleece glove, as the plaintiff was "aware of, and appreciated the risks inherent in the sport of baseball, including the risk of being struck by an errant baseball,

and that [plaintiff] voluntarily assumed that risk" (139 AD3d 1013 at 1014). Similarly, in *Napoli v. Mount Alvernia, Inc.*, 239 AD2d 325 [2d Dept 1997], the court granted summary judgment to the defendants, finding that the danger associated with players swinging bats on the sidelines while warming up for a baseball game is inherent in the sport. Thereafter, in *Roberts v. Boys and Girls Republic, Inc.*, 51 AD3d 246 [1st Dept 2008], the court granted summary judgment to the defendants where plaintiff, a bystander with limited knowledge of the sport, was struck with a baseball bat when she voluntarily approached an off-field, on-deck area that was adjacent to where the baseball game was being played. Expanding on the principle set forth in *Napoli*, the Appellate Division, First Department, articulated that "appreciation of the risk posed by a swung bat does not require thorough knowledge of the sport; the risk of injury from such a mechanism was 'perfectly obvious' and thus assumed by plaintiff", despite the claimed lacunae in her knowledge and experience of the game" (*Id.* at 248 [internal citations omitted]).

On the other hand, in *Braile v Patchogue Medford School Dist. of Town of Brookhaven*, 123 AD3d 960, 963 [2d Dept 2014], the court reiterated the principle that school districts "must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks" (*Id.*) and denied defendant's motion for summary judgment, holding that the district failed to establish that the coach of a middle school girls' soccer team did not unreasonably increase the inherent risks of a running injury by having the students race each other in the hallways, causing one student to run into a wall, particularly where the team had never held practice in the hallway before. Similarly, in *Sheehan v Hicksville Union Free School Dist.*, 229 AD2d 1026, 1026 [2nd Dept 1996], the court denied summary judgment to the school district, holding that there was a question of fact as to whether the plaintiff's coach failed to provide proper supervision of the cheerleading squad, thereby increasing the risk of a cheerleading-related injury. Further, in *Balone v New York State Amateur Softball Ass'n, Inc.*, 71 AD3d 710 [2d Dept 2010], the court denied summary judgment to a softball association, holding that the plaintiffs raised triable issues of fact with respect to whether the association unreasonably increased the risk of injury by hosting two simultaneous softball clinics beside each other and failing to implement safety plans and physical barriers to separate them.

With the foregoing legal principles in mind, this court finds that the defendants established their *prima facie* entitlement to judgment as a matter of law by demonstrating that the injured plaintiff was aware of and assumed the risk of being struck by a bat while at baseball practice by reason of his years of experience playing baseball, his awareness of the risks of injury associated with playing baseball, and the open and obvious proximity of his fellow participants. The burden then shifted to the plaintiff to raise triable issues of fact.

The plaintiffs failed to raise triable issues of fact as to whether Kenavan individually unreasonably increased the risk of injury to Fevola. The plaintiffs, however, raised triable issues of fact with respect to whether Kings Park unreasonably increased the risk of injury during baseball practice by failing to implement safety plans or erect space barriers between the drill stations (*see* ***Balone***, *supra*). Accordingly, Mot. Seq. # 003, made by the Kenavan defendants,

for an order pursuant to CPLR 3212 dismissing the complaint and cross-claims as asserted against them is granted and Mot. Seq. # 004, made by the Kings Park defendants, for an order pursuant to CPLR 3212 dismissing the complaint and cross-claims as asserted against them is denied.[2]

The parties are advised to make all reasonable efforts to settle this matter without further court intervention.

The foregoing constitutes the decision and order of the court.

Dated: 1/10/2019

Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

[2] The court is cognizant that the policy underlying the doctrine of assumption of risk is "intended to facilitate free and vigorous participation in athletic activities" (***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 657 [1989]). However, "[w]hile athletics and recreation are socially valuable endeavors, society also has an interest in the safety of participants of those activities" (***Philius v City of New York***, 161 AD3d 787, 797 [2d Dept 2018]). Here, the plaintiff offers, among other things, State Education Department *Guidelines for Concussion Management in the School Setting*, recommending, for example, that "districts evaluate the physical design of their facilities and . . . include plans that emphasize safety practices" and that "district should ensure that . . . education, proper equipment, and supervision to minimize the risk [of concussion] is provided" to students when they are participating in interscholastic athletic activities for the notion that countervailing public policy considerations necessitate that the assumption of risk doctrine not apply in this instance. In light if its decision, the court need not reach that question.