SCAN

SHORT FORM ORDER *mg*

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

GREG LOTYSZ and HEATHER LOTYSZ,

Plaintiff(s),

-against-

MOTION DATE: 5/13/03
INDEX No.:3167/03
MOTION SEQUENCE NO:1
X X X

THE NEW YORK JETS LLC, DAVID PRICE and JOHN MELODY,

Defendant(s).

The following papers read on this motion to dismiss the complaint:

Notice of Motion/ Order to Show Cause.....	1-5
Answering Affidavits.....	6,7
Replying Affidavits.....	8,9
Briefs:	10,10a

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3211 dismissing the complaint is granted.

Plaintiff Greg Lotysz, a former New York Jet, sustained an injury during pre-season practice in July, 2000. He sustained a tear of the anterior cruciate ligament of his left knee while blocking another player. Pursuant to his NFL Player contract and his Collective Bargaining Agreement, he received care from the Jets' Medical Department. He underwent pre-surgery rehabilitation, surgery, and post-surgery rehabilitation under the care of the Jets' Medical Department until September, 2000, at which time he sought medical care elsewhere.

Lotysz brought an action sounding in medical malpractice

against two of the Jets' doctors who were primarily responsible for his care and treatment: Dr. Elliot Hershman, the team orthopedist, and Dr. Kenneth Montgomery, the associate team orthopedist. By order and decision dated December 19, 2002, the Supreme Court, New York County [Sklar, J.], dismissed that action as barred by the Workers' Compensation Law (*Lotysz v Montgomery*, NYLJ, December 31, 2002, p. 18, col. 5). The court found that the defendant doctors were employees of the Jets, that their medical services were made available to plaintiff as a consequence of his employment and that their services were not available to members of the general public. Thus, the alleged medical malpractice occurred during the course of plaintiff's employment as a New York Jet.

This action to recover of the Jets' and the Jets' Head Trainer, defendant David Price, and the Jets' Assistant Athletic Trainer, defendant John Melody, for the same injuries was commenced on February 27, 2003. Defendants seek dismissal of this action as barred by the Workers' Compensation Law as well.

The plaintiffs do not oppose the motion filed by the individual defendants. The complaint against David Price and John Melody is accordingly dismissed.

Insofar as defendant New York Jets is concerned, collateral estoppel bars plaintiffs' claims. The doctrine applies when an identical issue has been necessarily decided in a prior action and is decisive of the present action. The party to be precluded from relitigating the issue must have had a full and fair opportunity to litigage the prior determination (*See, Kaufman v Lilly and Co.*, 65 NY2d 449, 455; *see also, Giordano v Patel*, 177 AD2d 408, 469). "Preclusion applies to 'issues that were actually litigated, squarely addressed and specifically decided'" (*Liddle, Robinson & Shoemaker v Shoemaker*, __AD2d __, 2003 WL 1908181, quoting *Ross v Medical Liability Mut. Ins.*, 75 NY2d 825, 826).

It has already been adjudicated that the very claims advanced by plaintiffs here are barred as against his co-employees by the the Workers' Compensation Law. While the defendant here is not an actual co-employee, but rather the employer, i.e., the New York Jets, plaintiffs have failed to establish any basis for differentiation and this court's extensive research has discerned

none. Plaintiffs' claims are barred by the doctrine of collateral estoppel *(See, Anunziato v Kar Grabber Mfg. Co., Inc.*, 298 AD2d 476).

In any event, even if collateral estoppel did not apply here, the action must be dismissed.

Lotysz's contract with the Jets provided:

> Unless this contract specifically provides otherwise, if Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and will continue to receive his yearly salary for so long, during the season of injury only and for no subsequent period covered by this contract, as Player is physically unable to perform the services required of him by this contract because of such injury.

NFL Clubs are, in fact, required by their collective bargaining agreement with the players to have a board-certified orthopedic surgeon as a team physician and to assume the costs of medical care rendered by club's doctors. Similarly, head and assistant trainers are required to be certified by the National Athletic Trainers Association.

At all relevant times, the defendant trainers sued herein were members of the Jets' in-house Medical Department. They were supervised by Dr. Elliot Pellman, the chairman of that department, as were the two staff doctors, Drs. Hershman and Montgomery. Both defendants Price and Melody were certified by the National Athletic Trainers Association. They were full-time salaried employees of the Jets. As such, they are covered by the Jets' benefit plans and have taxes and other expenses withheld from their pay checks. Their services are rendered to the team players at the Jets' Hempstead training facility or at stadiums, as need be. And, their work as athletic trainers is performed exclusively for the Jets: They do not serve other professional athletes or the general public. The trainers are bound by the Jets and NFL's rules and regulations, including contractual and collective bargaining

agreement provisions. For instance, they may not disclose any information about a Jets' player to anyone other than specific Jets staff members, without express permission. The Jets players are not charged for their services. As part of their duties, the defendant trainers are responsible for recognizing, treating and rehabilitating the Jets' players' sports-related injuries suffered by them in the course of their employment. They consult with Jets' staff concerning the team's players' medical status. They develop programs and routines aimed at preventing injuries and also implement rehabilitative programs for injured players which are prescribed by the team's doctors.

Workers' Compensation Law §29[6] provides that: "[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee...when such employee is injured or killed by the negligence or wrong of another in the same employ." Whether this statutory bar applies in a given situation must "focus on three key factors: 'the doctor's professional services were offered and paid for by the employer; the services were not available to the general public; and plaintiff obtained the services not as a member of the public but only as a consequence of his employment'" *(Feliciano Delgado v New York Hotel Trades Council and Hotel Ass'n of New York City Health Center, Inc.,* 281 AD2d 312, *citing Marange v Slivinski,* 257 AD2d 427; *see also, Garcia v Iserson,* 33 NY2d 421, 423; *Woods v Dador,* 187 AD2d 648, 649).

Not only was it a work-related injury that originally gave rise to plaintiff's need for the club's trainers' services, the trainers' services were provided and paid for by the Jets; they were not available to the general public; and, plaintiff's status as a New York Jet was a necessary link - - and was the only link - - to his treatment and care by the defendant trainers.

Plaintiff's attempt to avoid the bar imposed by Workers' Compensation Law §29 on the grounds that the defendant trainers exacerbated his injury via their negligent treatment fails. In fact, "[t]he 'work related' element is satisfied by the 'nexus' between the plaintiff's employment and the employer's provision of medical services not available to the public *(see, Firestein v Kingsbrook Jewish Medical Center, 137 AD2d 34, 39*). There is no requirement that the medical condition upon which a negligent

treatment claim is based must be an 'injury,' or that it must be a direct consequence of plaintiff's employment duties (citations omitted)" (*Feliciano Delgado v New York Hotels Trades Council and Hotel A'ssn of New York City Health Center, Inc., supra*, at p. 321).

This action is accordingly barred by the Workers' Compensation Law (*See: Garcia v Iserson, supra; Golin v Nachtigall*, 38 NY2d 745; *Carman v Abter*, 300 AD2d 160; *Faele v New York City Health and Hospitals Corp.*, 283 AD2d 547; *Feliciano-Delgado v New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc., supra; Marange v Slinnski, supra; Cronin v Perry*, 244 AD2d 448; *Irizarry v Minnesota Min. and Mfg. Corp .*, 91 AD2d 558; *compare, Litwak v Our Lady of Victory Hospital of Lackawanna*, 238 AD2d 879; *Girit v Dogan*, 224 AD2d 660; *Ruiz v Chase Manhattan Bank*, 211 AD2d 539).

The motion is granted and the case is dismissed.

Dated: JUN 19 2003

J.S.C.

ENTERED

JUN 19 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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