SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

SHAUN MCMAHON,

Plaintiff,

-against-

MOUNT SAINT MARY COLLEGE,

Defendant.

Index No.
607477/18

Motion Seq:
002 MG
Decision/Order

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	20-27
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Defendant's/Respondent's.....	

Defendant Mount Saint Mary College (MSMC) moves this Court for an Order granting summary judgment dismissal of the complaint. Plaintiff opposes the requested relief.

The plaintiff sues MSMC on a breach of contract theory alleging that the college failed to carry a health insurance policy for student athletes during the 2015-2016 academic year. Plaintiff apparently became injured on February 6, 2014, while playing lacrosse as a student athlete for MSMC. The plaintiff does not assert any claim against MSMC for physical injury based upon negligence, nor could he at this juncture since this action was filed more than four years after the date of the incident (***CPLR § 214[5]***).

Plaintiff became injured at a lacrosse practice, and plaintiff alleges that he sought medical treatment for his injuries sustained at the practice. Apparently, there are outstanding medical expenses for which the plaintiff seeks to recover from MSMC.

MSMC maintains that it is entitled to summary judgment dismissal of the complaint because the plaintiff has not produced any contract between the parties, nor has he pointed to any particular contract,

and in any event, MSMC maintained insurance coverage for students although any such coverage was excess to plaintiff's own health insurance. Finally, MSMC maintains that the insurance carriers are proper defendants, not MSMC.

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[l974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id.***) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

In support of its motion, MSMC submits, *inter alia*, the pleadings, and the parties' responses to discovery demands. Plaintiff's response to combined demands states that he is not in possession of any contract with MSMC. Inasmuch as the elements of a breach of contract action require that there be proof specifying the terms of the agreement, the consideration, the performance by plaintiff and the basis of the alleged breach of the agreement by the defendant (***Furia v. Furia***, 116 A.D.2d 694, 695 [2d Dept 1986]), the fact that the defendant has established that the plaintiff has no contract upon which to rely serves to establish MSMC's *prima facie* entitlement to summary judgment on this basis alone.

Moreover, and although MSMC does not concede that there was a contract between the parties, MSMC has produced in its discovery responses to plaintiff documentation from the sports accident insurance carriers (Niagara and QBE) that provided excess coverage to plaintiff at the time of the incident and during the time period of treatment thereafter. Accordingly, it is established by the defendant that it did not breach any agreement, to the extent that one even existed, to procure insurance for the plaintiff, who was a student athlete.

Whether or not the plaintiff's own medical insurance carrier(s), and/or MSMC's insurance carriers denied coverage either in full or in part for plaintiff's treatment does not give rise to an action against MSMC since the college is not an insurer, but an institution of higher learning.

Based upon the foregoing, MSMC has established its *prima facie* entitlement to summary judgment dismissal of the complaint as a matter of law.

In opposition, plaintiff submits his own affidavit, the affirmation of counsel, a copy of the National Collegiate Athletic Association (NCAA) Division I Manual effective August 1, 2021, and a letter from Commercial Travelers Mutual Insurance Company dated September 20, 2016.

Plaintiff's affidavit establishes that he had primary medical insurance, but that there were unreimbursed expenses not covered by that primary medical insurance. The plaintiff is silent as to any efforts he may have taken to seek coverage from his primary insurance carrier for the denied claims, but none of those carriers are named herein.

The Court also notes that the plaintiff does not identify the NCAA manual submitted as his Exhibit A as the contract upon which he relies, nor does he refer to any provision therein. In any event, the submitted manual applies to Division I schools; however, MSMC is a Division III school, and the submitted manual does not cover the date of the incident giving rise to this action or the 2015-2016 school year; therefore, plaintiff's claim that he is a third-party beneficiary of those inapplicable NCAA rules fails.

Plaintiff does not deny that the school provided the excess coverage provided by Niagara and QBE, and he acknowledges that Commercial Travelers paid him $250.00 under a particular accident policy, after waiving the untimely filing denial. The letter dated September 20, 2016 also advised plaintiff that Commercial Travelers was not the insurance carrier for the 2015-2016 school year, thereby alerting plaintiff approximately eighteen (18) months before he commenced this action that he should be submitting his claims to a different insurance company. Instead, plaintiff claims that he "took all steps that the defendant required of me including submitting various claim applications. All claims were denied as not covered. Defendant's employees and agents did not seem to know the claim process and I was often told conflicting information by Defendant's employees and agents." This vague and self-serving statement fails to raise a triable issue of fact as to the breach of contract claim asserted in the complaint. It is unknown what claims were denied, and contrary to his contentions, plaintiff submits proof of a claim that was paid.

Counsel's claim that, "at the very least Defendant was negligent in informing Plaintiff where to submit the policy [claim]," is inapposite. Not only does plaintiff's complaint specifically and solely allege breach of contract claims, but negligence claims are subject to a three-year statute of limitations (*see* ***CPLR §§ 214***); thus any such claims sounding in negligence are time-barred.

For all the reasons stated herein, MSMC's summary judgment motion is granted, and the complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: December 8, 2021
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [X] NON-FINAL DISPOSITION [ ]