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Decision of Interest --

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**Gamache v. State of New York, 106968**

**Decided: November 26, 2008**

Judge Melvin L. Schweitzer

COURT OF CLAIMS

Attorney Appearances:

**For Claimant:**

**Keith Sullivan, Esq.**

**Sullivan & Galleshaw, LLP**

For Defendants: By: Ross N. Herman, Esq.

Assistant Attorney General

Andrew M. Cuomo, Attorney General

**Judge Schweitzer**

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### **DECISION AND ORDER**

Defendant State of New York moves for summary judgment asserting it is not liable as a matter of law on this claim which alleges that the State Athletic Commission ("Athletic Commission") improperly conducted the weigh-in for a professional boxing match and then allowed the match to occur, resulting in permanent injury to claimant, Joey Gamache, one of the fighters.<sup>1</sup>

Joey Gamache, a professional boxer, and his wife Sissy Gamache (together, "claimants"), allege that the weigh-in took place on February 25, 2000, the day before Mr. Gamache was scheduled to fight Arturo Gatti in an agreed-upon modified junior welterweight bout.

Both sides previously had agreed the maximum weight would be 141 lbs.<sup>2</sup> The claim alleges that at the weigh-in of the boxers conducted at Madison Square Garden by the Athletic Commission, Mr. Gamache was accurately weighed in at 140<sup>1</sup>/<sub>4</sub> lbs., but Mr. Gatti was inaccurately recorded as weighing 141 lbs., when, in fact, he weighed much more than that as evidenced by the fact that the next day, right before the fight, the sponsor, Home Box Office ("HBO"), recorded Mr. Gatti as weighing 160 lbs. Claimants allege the official weigh-in was conducted improperly by Anthony Russo, the Executive Director of the Athletic Commission ("Russo"), under the Athletic Commission's Rules and Regulations Regulating Boxing<sup>3</sup> and that the Athletic Commission then allowed the fight to proceed the following day when the boxers had a weight differential of almost 20 lbs. Mr. Gamache was knocked out in the second round and allegedly suffered permanent and career-ending injuries. Claimants further allege that because Mr. Gatti's weight was falsely recorded at the weigh-in, he was allowed to fight with 8 oz. gloves instead of the 10 oz. gloves all fighters who exceed 154 lbs. are required to wear, also allegedly resulting in such injuries. The claim alleges all this "was the result of carelessness, negligence, fraud, and breach of contract" on the part of the State and the Athletic Commission. (See Claim attached as Ex. A to Moving Affirmation of Ross N. Herman in Support of Summary Judgment ("Herman Affirmation"); and Claimants' Verified Bill of Particulars at ¶10 attached as Ex. C to the Herman Affirmation).

At the conclusion of discovery, defendant moved for summary judgment asserting that the record shows Mr. Gamache and his agents were aware at the time of the weigh-in and "before and during" the boxing match the following day of the weight differential between Mr. Gatti and Mr. Gamache, and that Mr. Gamache nevertheless proceeded with the fight. With regard to the claim of fraud, defendant contends claimants thus cannot demonstrate justifiable reliance, one of the necessary elements of the cause of action. Herman Affirmation at ¶5. As to the negligence claim, defendant argues this, too, should be dismissed because even if the Athletic Commission conducted the weigh-in negligently this was a discretionary act rather than a ministerial one for which no liability may attach absent a "special relationship" or "special duty" owed by defendant which cannot be established here; and also because "[o]ne of the necessary elements of the 'special relationship test' is justifiable reliance" which likewise is not present here. With regard to the claim for breach of contract, defendant argues there was no contract between it and Mr. Gamache; and, "even if there was [a contract], by going forward with the fight with knowledge of [Mr. Gatti's] allegedly excessive weight, [Mr.]

Gamache intentionally waived any contract conditions governing the weight of the fighters." *Id.* at ¶6-7. In its reply, defendant adds an additional ground for summary judgment: claimants cannot prove the essential element that Mr. Gatti actually was overweight at the weigh-in because claimants admit in their opposition there is "no proof as to Gatti's weight at the time of the weigh-in" and the fact he clearly was heavier the next day is not a basis to assume Mr. Gatti was overweight at the weigh-in because "[Mr. Gatti] could simply have rehydrated after making the weight." Reply Affirmation of Ross N. Herman ("Reply Affirmation") at ¶5.

Depositions of Mr. Gamache, Melville Southard ("Southard"), who at the time of the weigh-in was Chairman of the Athletic Commission, and Mr. Russo were taken and the transcripts of those depositions are attached to the Herman Affirmation as Exhibits F, G and H, respectively. In opposition, claimants submit three video DVDs showing: the weigh-in of Messrs. Gatti and Gamache on February 25, 2000; the weigh-in for the featured Coley-De La Hoya bout, conducted earlier that day; and the Gamache-Gatti fight itself on February 26, 2000, followed by an interview of Mr. Gatti in April 2000 (Ex. A to the Affirmation in Opposition of Keith M. Sullivan, dated January 30, 2008 (the "Sullivan Affirmation")); and affidavits from Mr. Gamache, Robert Duffy ("Duffy") (an expert and witness to the weigh-in), Johnny Bos ("Bos") (Mr. Gamache's agent and a witness to the weigh-in), Jimmy Glenn ("Glenn") (Mr. Gamache's trainer and a witness to the weigh-in), and Peter Pharoah (another witness to the weigh-in) (Exs. B through F, respectively, to the Sullivan Affirmation).

At the time of the Gamache-Gatti boxing match, it was the customary practice to hold weigh-ins on the day before the fight. This was because fighters tend to dramatically diet and/or dehydrate in order to make the prescribed weight for the fight. Holding weigh-ins the night before the fight enabled the boxers to rehydrate themselves in order to regain their strength and stamina in time for the bout.<sup>4</sup> Ex. F to Herman Affirmation at pp 68-70; Ex. G to Herman Affirmation at pp 18-20. During the weigh-in, Messrs. Bos and Glenn allegedly protested that Mr. Gatti had not made weight, and that the scale never settled at 141 lbs. before Mr. Gatti got off and Mr. Russo called Mr. Gatti's weight to be 141 lbs. Mr. Bos states in an affidavit that he protested Mr. Gatti's weight and asked the Athletic Commission to re-weigh Mr. Gatti, but Mr. Russo told him to "stop starting," "shut up," and "get out of here." Ex. D to Sullivan Affirmation at ¶5. Mr. Glenn says he also protested and was told the same thing. Ex. E to Sullivan Affirmation at ¶5. Their alleged protest and Mr. Russo's alleged refusal to act in the

face of it ostensibly is shown on the DVD video. Ex. A to the Sullivan Affirmation. At his deposition, Mr. Gamache testified he believed Messrs. Bos and Glenn were correct. Ex. F to Herman Affirmation at pp 96-100.

On the fight night itself, as Messrs. Gamache and Bos walked down the aisle of Madison Square Garden to enter the boxing ring for the bout, someone told Mr. Bos that Mr. Gatti had weighed 161 lbs. at the HBO weigh-in.<sup>5</sup> Ex. D to Sullivan Affirmation at ¶6; Ex. F to Herman Affirmation at p 114. When Mr. Gamache entered the ring and saw Mr. Gatti with his shirt off, Mr. Gamache said Mr. Gatti appeared to be "huge." Ex. F to Herman Affirmation at pp 114 and 115. The DVD video of the fight shows that Mr. Gatti is bigger than Mr. Gamache, and the announcer on the video (Ex. A to Sullivan Affirmation) commented on several occasions prior to, during, and after the fight on the disparity in weight between Mr. Gamache's weight on the day of the fight of 146 lbs. and Mr. Gatti's of 160 lbs., as reported at the HBO weigh-in prior to the fight.

Mr. Gamache proceeded with the fight even though he believed Mr. Gatti was significantly over the contract weight of 141 lbs. He testified:

Somebody told my manager as we were walking down the aisle . . . that [Gatti] weighed 161 I believe on the scale . . . When I get into the ring okay take my robe off loosen it off and Arturo Gotti [sic] comes into the ring he takes his robe off. I mean I can't believe that what I'm looking at. I'm looking at a guy that's I mean just a machine. Like I mean it was like to define it I don't know how to define it. I just, oh, my God he's huge and we're fighters. I mean, we're in the trenches. We're in fights like with Julio Cesar Chavez you discover who you really are there. So me I never quit a fight. I've never backed down from a fight or been intimidated whatever may be the case. We're fighters all right. We're cut that way. We're born that way and that's what I am. And when I see Arturo Gotti [sic] take off his robe I look at him and said oh, my God I says ho.

Ex. F to Herman Affirmation at pp 114 and 115. Mr. Gamache also testified he was aware that in a fight involving contestants over 154 lbs., the fighters are supposed to wear 10 oz. gloves rather than 8 oz. ones. 10 oz. gloves provide additional padding. Even though Mr. Gatti had not made weight and was in excess of 154 lbs, Mr. Gamache proceeded with the fight knowing that both he and Mr. Gatti were wearing 8 oz. gloves. Ex. F to Herman Affirmation at pp 120-121.

Mr. Gamache was knocked down twice during the first round of the fight. Following the second knock down, as the bell was ending the first round, the referee asked him if he knew where he was and whom he was fighting. He responded that he was at Madison Square Garden and was fighting Mr. Gatti, and the bout was allowed to continue. Although Mr. Gamache answered the bell for the second round, he was quickly knocked out by Mr. Gatti with three rapid punches to the head. Ex. F to Herman Affirmation at pp 119-120; and video of fight (Ex. A to the Sullivan Affirmation).

In addition to the claim before this court, Mr. Gamache also brought an action in the U.S. District Court for the Southern District of New York against Mr. Gatti and others, including Messrs. Russo and Southard. Subsequently, that action was voluntarily dismissed. A copy of the complaint in the federal action is annexed as Ex. I to the Herman Affirmation. In the federal complaint, Mr. Gamache alleged that "some boxers have historically attempted to gain a superior physical advantage over a smaller opponent by dramatically reducing his [sic] weight just in time for the weigh-in when, in fact, their normal weight may [be] one or several divisions above that of the opponent he is about to face." Ex. I to Herman Affirmation at ¶18. The federal complaint further alleged that Mr. Gamache was aware, prior to entering into a contract with Mr. Gatti for the fight and before the weigh-in was conducted, that Mr. Gatti had a reputation in the boxing industry "for having difficulty making weight and for gaining disconcertingly huge amounts of weight between his pre-fight weigh-ins and his actual bouts." Id. at ¶24. The federal complaint also alleged it "was obvious to all in attendance, that Russo, with Southard standing only feet away, declared Gatti to have made the 141 weight over the strenuous objections of Gamache's trainer, Jimmy Glenn and Gamache's adviser, Johnny Bos." Id. at ¶43.

In the affidavit from Mr. Duffy submitted by claimants, Mr. Duffy (presently a promoter in the boxing industry but at the time of the weigh-in, a deputy commissioner with the Athletic Commission who was present at the weigh-in) opined that "the commission negligently conducted the weigh-in of Gatti because he did not remain on the scale for the appropriate length of time required to fairly conduct a weigh-in and therefore, the scale failed to balance . . . Mr. Tony Russo and Mr. Melville Southard did not follow the generally accepted practices of conducting weigh-ins." Ex. C to Sullivan Affirmation at ¶¶4 and 5. Mr. Duffy also said "Mr. Southard observed a dispute between Mr. Bos and Mr. Russo over the accuracy of Gatti's weight but he never interjected in his official capacity. Instead, he said to Mr.

Russo 'let's get out of here.'" Id. at ¶9 (quoting Mr. Southard's deposition at p 52). Further, Mr. Duffy said that if a boxer appeared not to make weight, the protocol at the time was to allow the boxer not making weight two hours to make weight, and the "protocol was not followed in response to the protest by the Gamache camp." Id. at ¶8. In reply, defendant submits an affidavit from Mr. Southard who states that no one from the Gamache camp used the word "protest," and if they really had intended to formally protest the weigh-in, they would have refused to allow Mr. Gamache to be weighed following the weigh-in of Mr. Gatti. Ex. 1 to Reply Affirmation at ¶6. Mr. Southard thus suggests that the court should "discount" the Duffy affidavit "on grounds of lack of credibility," stating if "Mr. Duffy truly believed at the time that the Gatti weigh-in had not been conducted properly, and/or the Gamache camp had, in fact, made a formal protest that had not been properly responded to, it would have been his responsibility to take immediate action, such as approaching other members of the Athletic Commission." Id. at ¶10.

Defendant further contends that if Mr. Gamache could have demonstrated that Mr. Gatti was not in compliance with the required contract weight, remedies were available to him which he did not pursue (see discussion of negligence claim, *infra*). "[R]ather than pursuing any of these remedies, Gamache, of his own free choice proceeded with the fight, and continued the fight even after twice being knocked down in the first round." Herman Affirmation at ¶22.

On a summary judgment motion, movant must make a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact ([Alvarez v. Prospect Hosp.](#), 68 NY2d 320 [1986]; [Friends of Animals, Inc. v. Associated Fur Mfrs. Inc.](#), 46 NY2d 1065 [1979]). When the movant has made out a prima facie case, the burden of going forward shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact ([Zuckerman v. City of New York](#), 49 NY2d 557 [1980]). Summary judgment should be denied if there is a doubt as to whether a material issue of fact exists. ([Phillips v. Kantor & Co.](#), 31 NY2d 307, 311 [1972]; [Glick & Dolleck, Inc. v. Tri-Pac Export Corp.](#), 22 NY2d 439, 441 [1968]). Summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference and issues of credibility may not be determined on the motion but must await the trial ([Westhill Exports, Ltd. v. Pope](#), 12 NY2d 491 [1963]). The papers submitted on a summary judgment application are always scrutinized in a light most

favorable to the party opposing the motion ([Robinson v. Strong Mem. Hosp.](#), 98 AD2d 976 [1983]).

Defendant contends with regard to the fraud claim that as a matter of law claimants cannot prove fraud because the record shows Mr. Gamache did not rely on an alleged false representation by defendant. To establish a claim for fraud, claimants must prove by clear and convincing evidence that (1) defendant made a representation, (2) as to a material fact, (3) which was false, (4) and known to be false by defendant, (5) the representation was made for the purpose of inducing the other party to rely upon it, (6) the other party rightfully did so rely, (7) in ignorance of its falsity, and (8) to his injury ([Otto Roth & Company v. Gourmet Pasta, Inc.](#), 277 AD2d 293, 294-95 [2d Dept 2000]; [Brown v. Lockwood](#), 76 AD2d 721 [2d Dept 1980] [citing 24 NY Jur, Fraud and Deceit, Â§14; 37 CJS, Fraud, Â§3]). Defendant asserts claimants cannot prove the sixth and seventh elements. Because the record shows Mr. Gamache and his agents believed the Gatti weigh-in was inaccurate and that Mr. Gatti was overweight, defendant argues there was no reliance on claimant's part. In response, claimants argue that reliance is a question to be determined by the finder of fact at trial. (See e.g. [Talansky v. Schulman](#), 2 AD3d 355, 361 [1st Dept 2003] ["Resolution of a reasonable reliance claim is generally left to the finder of fact."].)

Claimants' argument is that Mr. Gamache was justified in relying on the results of the weigh-in because although "there was concern as to whether Gatti made the weight, there was no conclusive proof as to his actual weight at the weigh-in." Sullivan Affirmation at p 42. Defendant counters in its reply that claimants' argument itself admits of there being no proof Mr. Gatti actually was overweight at the time of the weigh-in, and the fact Mr. Gatti clearly was heavier the next day proves nothing about the weigh-in because "[Gatti] could simply have rehydrated after making the weight." Reply Affirmation at Â¶5. Contrary to the argument of claimants' counsel, however (his affirmation is not evidence in any event) there does appear to be evidence that Mr. Gatti was overweight at the time of the weigh-in, even if, as claimants contend, the beam of the scale never settled to record his real weight. The protests from Messrs. Bos and Glenn at the weigh-in, and the extraordinary difference the next day between the "called" weight of 141 lbs. and the 160 lbs. weight reported by HBO, suggest Mr. Gatti, in fact, may have been well over 141 lbs. at the time of the weigh-in. A reasonable inference may be drawn at this stage, absent persuasive expert testimony to the contrary, that it is highly unlikely Mr. Gatti could have gained as much as 19 lbs. in just

one day, especially since the video of his weigh-in and of the fight itself does not appear to show an appreciable difference in his appearance between the two days. On both occasions, Mr. Gatti appears to be lean, but significantly heavier than Mr. Gamache. The court concludes there is sufficient evidence to raise a fact issue whether Mr. Gatti was significantly over 141 lbs. at the official weigh-in which cannot be resolved by summary judgment.

With regard to claimants' fraud claim, however, even if claimants are able to prove Mr. Gatti exceeded the catch weight of 141 lbs. at the weigh-in, they cannot prove reliance by clear and convincing evidence. The record shows the Gamache camp had reason to believe Mr. Gatti was overweight at the weigh-in. Mr. Gamache himself testified as follows:

Q- \*\*\*Following the weigh-in let me ask you this: Following the weigh-in, were you in your own mind convinced that Gatti [sic] was overweight?

A- Was I convinced that Gatti [sic] was overweight absolutely, absolutely because my trainer Jimmy Glenn is a guy that I have never seen get upset and when I seen that I knew right then and there, and, you know, Johnny Bos is another guy we had been together since my third pro fight. This has never happened through all of my whole career so. And the big thing - was I convinced Gatti [sic] was overweight that's the question?

Q- Yes?

A- When he - when I just stood up here and gave you an example of once he got off the scale with the controversy that he starts drinking that told me right there that he was overweight.

Ex. F to the Herman Affirmation at pp 108 and 109. In addition, as noted, claimants alleged in their federal complaint that:

Although Gatti attempted to influence the beam, it never balanced as required and Gatti did not make the required 141 pound weight.

Despite what was obvious to all in attendance, Russo, with Southard standing only feet away declared Gatti to have made weight over the strenuous objections of Gamache's trainer Jimmy Glenn and Gamache's advisor Johnny Bos.

Ex. I to the Herman Affirmation at ¶¶42 and 43. Because Mr. Gamache believed Mr. Gatti was over 141 lbs. at the weigh-in, he cannot rely on the call of the weigh-in to sustain a claim that he was defrauded. (See [Gouldsbury v. Dan's Supreme Supermarket, Inc.](#), 154 AD2d 509 [2d Dept 1989], lv denied, 75 NY2d 701 [1989] [employee's claim alleging employer concealed the identity of a contractor who installed a ramp was dismissed where he testified he knew the identity of the contractor]; [Matter of Garvin](#), 210 AD2d 332 [2d Dept 1994] ["At an examination before trial, the petitioner testified that when she signed the agreements she believed that the respondents were committing a fraud. Therefore, the petitioner cannot prove that she justifiably relied on the respondents' representations."]). Even if Mr. Gamache can demonstrate somehow he was not aware at the time of the weigh-in that Mr. Gatti was overweight, there is no dispute he became aware of the extraordinary variance between the 141 lb. qualifying weight and the 161 lbs. Mr. Bos says he was told Mr. Gatti weighed at the HBO weigh-in on "fight day," and also that Mr. Gamache said he realized Mr. Gatti appeared "huge." The quantum of proof necessary for the element of reliance in the fraud claim simply cannot be met here. (See e.g. [NM IQ LLC v. OmniSky Corp.](#), 31 AD3d 315, 316 [1st Dept 2006] ("[A] fraud cause of action is 'fatally undermined' when the plaintiff learns of all the material facts, yet still decides to close on the deal") (quoting [Chelsea, LLC v. Seventh Chelsea Assocs., LLC](#), 304 AD2d 498 [1st Dept 2003])).

Claimants' negligence claim presents the question of reliance in an entirely different context, however, and is governed by a fair preponderance evidentiary standard. First, claimants allege the Athletic Commission negligently conducted the official weigh-in because Mr. Russo and his immediate superior, Mr. Southard, called Mr. Gatti's weight as 141 lbs., pronouncing he made the weight requirement for the fight even though he weighed much more than that.<sup>6</sup> For this, claimants point to evidence that Mr. Gatti was permitted to get off the scale before the beam ever settled on a number, and that Messrs. Russo and Southard paid no attention to the objections of the Gamache camp. The second aspect of this claim is that the Athletic Commission negligently allowed the fight to take place even after the result of the unofficial HBO weigh-in was widely publicized to have shown Mr. Gatti weighed 160 lbs. - almost a twenty pound variance from the 141 lbs. qualifying weight called by Mr. Russo at the weigh-in. Claimants' verified bill of particulars asserts defendant "failed in its intended and statutorily and legislatively prescribed mission, which is to protect the health and well-being of boxers . . . and further failed to safeguard and protect the claimant in that

claimant was compelled to enter the boxing ring and fight an opponent whose weight was greater than his own by more than the legal limit of 12 [sic] pounds." Ex. C to Herman Affirmation at ¶6. Claimants also allege the Commission permitted Mr. Gatti to fight with 8 oz. gloves instead of the 10 oz. ones that the Athletic Commission requires all fighters to wear if they weigh more than 154 lbs.

Defendant counters that "because the weigh-in was a discretionary determination performed by a New York State official, the acts complained of do not give rise to liability against the State, even if the conduct was negligent." It argues that the official who conducts the weigh-in "exercises his judgment that the needle has settled to accurately indicate the boxer's weight," and thus, absent a "special relationship" between the Athletic Commission and Mr. Gamache (which, defendant asserts, did not exist here), defendant cannot be held liable for conducting a faulty weigh-in.

The court does not agree. Judge Simons, writing for the Court of Appeals, observed:

As Prosser has noted, almost any act admits some discretion in the manner of performance, even driving a nail (see Prosser, Torts [4th ed], §132, p 990). Nevertheless, the rule to be derived from the cases is that discretionary or quasi-judicial acts involve the *exercise of reasoned judgment* which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.

([Tango v. Tulevech](#), 61 NY2d 34, 41 [1983] [citations omitted] (emphasis added)). Ascertaining weight from a scale does not involve the kind of "reasoned judgment" Judge Simons had in mind. When a person is weighed - be it a judge weighing himself on a bathroom scale, a nurse weighing a patient in a doctor's office or an Athletic Commission official weighing a boxer to determine his eligibility to fight in a certain weight category - he or she simply gets on the scale and the needle moves or the counterweights cause the beam to float until each comes to rest on the weight that is registered. If the act of weighing is done honestly and carefully, the result is one number. Claimants have alleged facts from the conduct of the official weigh-in itself which may show a sufficient deviation from the duty of care Messrs. Russo and Southard<sup>7</sup> should have exercised in calling Mr. Gatti's weight at 141 lbs. That HBO allegedly weighed Mr. Gatti at 160 lbs. the next day<sup>8</sup> may be further evidence defendant negligently performed this ministerial act. Absent persuasive evidence on this

motion that a fighter can rehydrate and take other dietary measures to gain almost 20 lbs. within a 24 hour period, a question of fact exists whether Mr. Gatti's weight exceeded the 141 lb. limit at the official weigh-in.

The second aspect of the negligence claim, going well beyond merely alleging a wrong "call" of Mr. Gatti's weight at the weigh-in, relates to the almost 20 lb. difference in weight between the two boxers. According to claimants, to have allowed the fighters into the ring where there was such a great disparity in their weights placed Mr. Gamache's well-being in serious jeopardy, and the Athletic Commission thus was negligent in not exercising its authority to call off the fight. Rule 214.8 of the Athletic Commission's regulations precludes a bout between junior welterweights in which there is a weight differential in excess of 11 lbs. (19 NYCRR Â§214.8). Claimants contend that the Athletic Commission violated its own regulation by permitting mismatched junior welterweight boxers, separated by more than 11 lbs. in weight, to fight each other - and with the wrong gloves, as well.<sup>9</sup>

Because these allegations are directed at the Athletic Commission's failure to enforce regulations or rules governing the specifically enumerated weight differences between fighters and the weight of the gloves they must wear, they also may be viewed as challenging the Athletic Commission in its performance of "a ministerial act [which] envisions direct adherence to a governing rule or standard with a compulsory result." [Tango v. Tulevech, supra at 41](#). On the other hand, to the extent the allegations also may be read as challenging the Athletic Commission's allegedly negligent failure to discharge its broader administrative responsibilities to ensure the safety of boxers fighting under its jurisdiction and control, this alleged nonfeasance arguably may be viewed as a discretionary act. With regard to the latter, the court now examines the nature of the Athletic Commission's regulatory regime and the Commission's special relationship to the fighters over whom it has jurisdiction.

The common law of New York contained no specific offense for engaging in prize fighting, although those engaged in such contests were answerable for assault and battery, or breach of the peace or riot, depending on the circumstances. [Fitzsimmons v. New York State Athletic Commission, 15 Misc 2d 831 \(Sup Ct, NY Co 1914\), affd 162 AD 904 \(1st Dept 1914\)](#); [Rosensweig v. State of New York, 5 NY2d 404, 409-10 \[1959\]](#). Then, because of the perceived brutality of the fights and unsavory aspects accompanying it, the State Legislature

enacted a Penal Code provision in 1856 completely banning prize fighting in this State. This continued for more than fifty years until 1911 when certain boxing exhibitions were exempted from the Penal Law prohibitions as long as they were held under the jurisdiction and control of a newly created State Athletic Commission with the power to make stringent rules governing the conditions under which the contests could be held. [Rosenweig v. State of New York, supra](#); [Fitzsimmons v. New York State Athletic Commission, supra at 833](#). The Fitzsimmons case, decided in 1914 by Justice Seabury three years after the Athletic Commission was first created by the State Legislature, confirmed the Commission's total "control" over the bouts and the contestants. Bob Fitzsimmons had been a boxer for the greater part of his life, having engaged in 370 ring contests and having held the title of "Champion of the World" and then "Light Heavy Weight Champion Boxer of the World." In 1913, at the age of 51, he contracted with a fight promoter that had been licensed by the Athletic Commission for a series of bouts, but when the Commission learned of his age and then consulted with a physician, the Commission found him "incapacitated by reason of his age and physical condition from competing in a boxing contest." It prohibited the licensed promoter from allowing him to fight. Fitzsimmons sued to enjoin the Commission from depriving him of his right to engage in his occupation. Despite the fact he wanted to fight, Justice Seabury upheld the Commission's order as being within the agency's purview because "to allow the plaintiff to engage in such a contest would be to run the risk of serious injury to him." [15 Misc 2d at 835](#).

In 1920, the so-called Walker Boxing Law was enacted which further strengthened the Athletic Commission's authority to provide for "rigid supervision . . . of all who participate . . . and of the methods of conducting the matches." Judge Fuld noted, "[t]he statute itself reflects a high concern for the physical fitness of the fighters scheduled to engage in the matches. Such fitness will, of course, enhance the competitive character of the contest and it may be fairly assumed that the Legislature was at least as concerned with the physical welfare of the contestants themselves." [Rosenweig v. State of New York, supra at 410](#).

The Athletic Commission, accordingly, has been "vested with sole discretion, management, control and jurisdiction" of boxing contests and "over all licenses to any and all persons" who participate in such contests (Title 25 of McKinney's Unconsolidated Laws of NY Â§8906). In furtherance of this authority, the Commission promulgated rules governing them. (19 NYCRR Ch VII). Under these rules the

Commission is required to approve each match in advance, and, in so doing, must determine whether the boxers "are suitable opponents." It may disapprove any match which is "not in the best interest of . . . the health of any of the participants." ( Â§209.1). The boxers, managers and promoters must contract on forms that are approved by the Athletic Commission ( Â§208.2), and the parties are required to carry out the terms and conditions of such contracts, subject to disciplinary action by the Athletic Commission for failure to do so, including license suspension.<sup>10</sup> ( Â§208.3).

The Athletic Commission is required to have a deputy physically present wherever an authorized boxing match is held, and the deputy must ascertain "the exact conditions surrounding such match." ( Â§8905). The Athletic Commission's official representative in charge of a match has complete authority "over all phases of the weigh-in . . . the ring and ringside . . . and in general over all matters under the jurisdiction of the commission." (19 NYCRR Â§206.5). The weigh-in of the fighters must be conducted in the presence of Athletic Commission representatives, on scales approved by the Commission ( Â§210.6); the gloves of each boxer must conform to the 8 oz. minimum weight requirement of the statute or whatever other weight the Commission directs ( Â§8923); and the gloves must be put on in the dressing room under the direct supervision of an Athletic Commission representative in attendance. ( Â§210.8). All boxers are required to remain in their dressing rooms "until directed to the ring by the commission representative in charge." ( Â§210.7). At a match, each commissioner and each deputy has the full power to enforce all rules of the Athletic Commission, including a licensed boxer's failure to carry out the terms and conditions of his contract, including a failure to make the weight at which he agreed to fight. The Athletic Commission today may act summarily to suspend a boxer's license, without prior notice, for violation of its rules (19 NYCRR Â§Â§206.4; 208.3), thus stopping him from fighting.

"[I]t has long been the rule in this State that, in the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation." ([O'Connor v. City of New York, 58 NY2d 184, 192 \[1983\]](#)). Defendant relies on this rule in seeking summary judgment dismissing the negligence claim here. The court is not persuaded. In the court's view, the statutory and regulatory scheme governing boxing recounted [supra](#) does indeed create such a duty of care which runs from the Athletic Commission directly to the licensed boxers under its jurisdiction and control.

The Walker Boxing Law, as amended through the years, clearly establishes a direct relationship between the Athletic Commission and the boxers it licenses, from the time a match is proposed through the fight and its aftermath. Unlike the lead paint regulations in [Palaez v. Seide, 2 NY3d 186 \(2004\)](#), the regulatory regime for boxing is not simply a program "of oversight in which the role of government is, in the main, administrative and advisory" ([Id. at 201](#)), but rather one where the regulatory body is directly responsible for a specific bout between two fighters. Just as the Athletic Commission acted in its earliest days to stop its licensee-promotor from staging fights for a 51-year old gladiator who knew little else and wanted to enter the ring in spite of himself ([Fitzsimmons v. New York State Athletic Commission, supra](#)), today's Athletic Commission must determine in the first instance whether two fighters are suitable opponents and may reject the match if it is not in the best interests of the health of either. The Athletic Commission is required to have a representative present at the match with complete on-site authority over the bout. Each boxer is required by the regime to have on-going direct contact with the Athletic Commission throughout, from the time each signs the Athletic Commission's required form of contract, to the time each steps on the scale to be weighed by the Athletic Commission's representative, to the time each dons gloves under the direct supervision of that representative in his dressing room, to the time the representative tells each fighter he may leave that room to proceed to the ring for the fight. At any point along the way and until the Athletic Commission-appointed ring officials - independent contractors - assume responsibility for the conduct of the bout itself, the Athletic Commission and its agents are in direct control of everything that happens. The Athletic Commission's representatives are seated at ringside and its inspectors have reserved places in each boxer's corner ( Â§209.36). If any regulatory regime can be said to be within that narrow class of cases in which a duty runs from a governmental entity directly to a benefitted class, and where the law is best read to assure that government must be made to bear ultimate responsibility for ensuring compliance with the statutory and regulatory mandates ([Pelaez v. Seide, supra, at 201](#)), this is it.

No court has directly addressed the issue whether the State can be held liable for the Athletic Commission's breach of its statutory duty to see that a boxing match does not take place where one or more of the Commission's regulations intended to safeguard the well-being of the fighters is violated. The closest case is [Collins v. State of New York, 162 Misc 2d 770, 776 \[Ct Cl 1994\], affd, 224 AD2d 273 \[1st Dept](#)

1996], *Blinder, J.*, where the court concluded that "while the existence of a special duty of care would form the basis of liability despite the defendant's governmental immunity," there was no explicit regulation requiring the Athletic Commission's agents to inspect boxing gloves worn by claimant's opponent for alteration by removal of padding. That is hardly the case here, where explicit regulations govern weight classifications for the bouts, the conduct of the weigh-in, differences in weight between the boxers, the weight of the gloves and gloving, and the ability of the Athletic Commission to stop boxers mismatched by weight from entering the ring by summary suspension of licenses. For such a regime regarding the weight requirements of the contestants in a boxing match to have been put in place to directly protect the two fighters involved, but then not to afford each of them the right to sue the agency for failing to enforce it, would neither promote the legislature's purpose when it enacted the Walker Boxing Law nor would it be consistent with its legislative scheme (see *Pelaez v. Seide*, supra, at 200; *O'Connor v. City of New York*, supra, at 189-190; see also *Sheehy v. Big Flats Community Day*, 73 NY2d 629, 633 [1983]). This court thus holds that Mr. Gamache's right to sue may be fairly implied here.

It is in this context that the court turns to the question of reliance. This issue, in negligence, should not preclude a trial. That the regulatory regime recounted here exists at least in part for the "physical welfare of the contestants themselves" (*Rosensweig v. State of New York*, supra at 410) is beyond dispute. The extent to which Mr. Gamache can prove he is entitled to have relied on this regime to his detriment is thus for the trier of fact. For unlike the fraud claim, Mr. Gamache need not demonstrate he was entirely free from fault when he proceeded with the bout despite what he knew of Mr. Gatti's actual weight, only that his was not the sole proximate cause of the harm he sustained. See, *Frankson v. Philip Morris Inc.*, 4 Misc 3d 1002A [Sup Ct Kings Co 2004], affd, 31 AD3d 372 [2d Dept 2006] ["where fault on the part of the plaintiff is implicated, the only time that fault is relevant exclusively to proximate cause and not to an assessment of comparative fault is where, as a matter of law, that fault is the sole proximate cause of the harm or where because of a legal impediment, plaintiff's fault cannot be considered"].

Defendant argues that Mr. Gamache, "armed with knowledge" of the faulty weigh-in, nevertheless proceeded with the fight "rather than seeking remedies that were available to him," and thus he cannot demonstrate defendant's liability for negligence (Herman Affirmation at ¶¶5 and 6). Defendant cites remedies available to Mr. Gamache

without having to proceed with the fight, such as seeking another weigh-in and negotiating "for a monetary consideration" if Mr. Gatti failed to make weight a second time, or even having the fight cancelled and collecting half of the purse. *Id.* ¶21. This argument is premised on the court's accepting defendant's factual assertion that Mr. Gamache and his representatives did not effectively protest the weigh-in which, as noted *supra*, is disputed. There is a discrepancy between the affidavits submitted by Messrs. Duffy and Southard over whether the Gamache camp lodged a sufficient protest to require the Athletic Commission to conduct another weigh-in or take other action, and also an apparent discrepancy between Mr. Russo's deposition testimony and the weigh-in video itself. Mr. Russo testified that Mr. Bos did not protest Mr. Gatti's weigh-in until a "couple of minutes" after Mr. Gatti got off the scale. Ex. H to Herman Affirmation at p 29. But the video (Ex. A to Sullivan Affirmation) appears to show someone from Mr. Gamache's camp complaining while Mr. Gatti was still on the scale. Under these circumstances, the court cannot conclude as a matter of law that the Athletic Commission did not breach its duty to ensure the weigh-in was done fairly and accurately so that Mr. Gatti, in fact, was not over the weight the parties agreed on and that if he did not make weight, Mr. Gamache could avail himself of the remedies defendant refers to. (*Gniewek v. Consolidated Edison Co.*, 271 AD2d 643 [2d Dept 2000] ["The court should refrain from making credibility determinations" on a motion for summary judgment]). To the extent claimants must prove Mr. Gamache relied on the Athletic Commission to protect him from fighting against an opponent who was substantially, and dangerously, over the agreed-on catch weight and the permitted difference in the weight between boxers, Mr. Gamache's decision to fight Mr. Gatti is thus best considered in the context of comparative negligence. (*Shea v. New York City Tr. Auth.*, 289 AD2d 558, 559 [2d Dept 2001] ["Whether a plaintiff is comparatively negligent is almost invariably a question of fact and is for the jury to determine in all but the clearest cases."]).

Endemic to the nature and training of boxers - their DNA so to speak (Mr. Gamache's father had been a professional boxer, and his 16 year old son, was an amateur boxer, at the time of the bout) - is the projection of a "macho" persona. It is alleged that Messrs. Russo and Southard allowed Mr. Gatti to exceed the 141 lbs. agreed-upon "catch weight" over protests of Mr. Gamache's manager and trainer, and then allowed the fight to proceed the next day even though HBO allegedly weighed Mr. Gatti at 160 lbs. and a public controversy over his "rehydration" had ripened sufficiently to have been referenced by an announcer before and during the fight. Under these circumstances it

was arguably foreseeable that despite Mr. Gamache's awareness of the faulty weigh-in and the alleged huge weight disparity at fight time, he would continue to do what was expected of a fighter - that is, fight. Indeed, Mr. Gamache testified at his deposition that while he did not really look at Mr. Gatti at the weigh-in because he was concerned about his own weight, when he saw him with his shirt off in the ring, he thought "oh my God he's huge and we're fighters. I mean we're in the trenches . . . so me I never quit a fight. I've never been backed down from a fight or been intimidated whatever may be the case." Ex. F to Herman Affirmation at pp 114-115. The court needs no more eloquent a statement of why the question of reliance does not preclude claimants' recovery in negligence but goes only to determining relative fault. (See [Fitzsimmons v. New York State Athletic Commission](#), [supra](#).)

Claimants' contract claim fails because there exists no contract between Mr. Gamache and defendant. As noted, the contract Mr. Gamache entered into was a two-page form contract with the promoter. Ex. K to the Herman Affirmation. The agreement is not signed by the Athletic Commission or the State of New York.<sup>11</sup> While the State is given the regulatory authority to enforce the terms of the contract between fighters (see discussion of the negligence claim and the Athletic Commission's "special relationship" [supra](#)), there is nothing in the contract that purports to bind the State to the terms of the contract itself. In [Collins](#), [supra](#), a case also involving virtually the identical form contract, the Court of Claims rejected the identical argument claimants assert here:

As to the cause of action for breach of contract, claimants have failed to make a prima facie showing that the defendant was a party to the contract entered into between decedent and Top Rank. Although the one-page document stated that "Top Rank, Inc. and State of New York, a duly licensed Boxing Club under the laws of the State of New York" was the "party of the first part", the contract was signed only by the promoter and decedent. Although the instrument was apparently a "boilerplate" contract previously approved as to form by the Commission, there was nothing in the contract other than the above-quoted passage that purported to bind the defendant. Just as the quoted passage misstated that the State of New York was a boxing club, it misstated that the State of New York was a party to the contract. The \$10,000 contract was not signed by a representative of the defendant nor approved by the Attorney-General nor the Comptroller as required by State Finance Law Â§112. Thus, the representations in the contract that the fight would be conducted in

accordance with the Commission's rules imposed duties and obligations upon the promoter and the decedent only, and in no way upon the defendant.

[162 Misc 2d at 777](#). For the same reasons the court found in the Collins case, claimants' breach of contract claim here cannot be sustained and is dismissed.<sup>12</sup>

In sum, the court grants summary judgment dismissing claimants' claims for fraud and breach of contract, but denies defendant's motion for summary judgment with respect to claimants' claim for negligence. The record before the court presents a number of genuine issues of material fact pertaining to this cause of action; and although claimants may have a steep hill to climb to resolve all of them in their favor, if they are able to do so the relationship and duty of care running directly from the State Athletic Commission to the licensed boxers under its jurisdiction and control would permit a recovery in negligence.

1. In deciding the motion, the court considered the following: Notice of Motion for Summary Judgment, dated November 14, 2007, and Affirmation in Support of Motion for Summary Judgment, dated November 14, 2007, together with exhibits annexed thereto; Affirmation in Opposition, dated January 30, 2008, together with exhibits annexed thereto; Reply Affirmation in Support of Motion for Summary Judgment, dated February 15, 2008, together with exhibits annexed thereto; letters to the court from Keith M. Sullivan, dated March 7, 2008 and March 19, 2008 (enclosing signed affidavit of Robert Duffy); letter to court from Ross N. Herman, dated March 13, 2008; letter to the court from Ross N. Herman, dated October 23, 2008, together with exhibits annexed thereto; letter to the court from Keith M. Sullivan, dated November 5, 2008, together with exhibits annexed thereto; letter to the court from Ross N. Herman, dated November 26, 2008, together with annexed affirmation and affidavit; letter from Keith M. Sullivan to the court, dated November 26, 2008; and letter from Ross N. Herman to the court, dated November 26, 2008.

2. Boxing contestants are permitted to exceed the 140 lbs. weight specified for junior welterweights by agreement. An agreed upon weight over a regulated weight limit is known as a "catch weight." Ex. F to the Herman Affirmation at pp 64-65. In this case they agreed to fight at a "catch weight" of 141 lbs., one lb. over the junior welterweight limit.

3. The regulation and conduct of boxing matches in the State of New York is the responsibility of the Athletic Commission. See Title 25 of McKinney's Unconsolidated Laws of NY Â§8901, et seq., and the rules governing boxing contests, 19 NYCRR Â§206.1, et seq. 19 NYCRR Â§210.6 specifically assigns the responsibility for handling weigh-ins to the Athletic Commission.

4. At the time he agreed to fight Mr. Gatti, Mr. Gamache was aware Mr. Gatti had a reputation of having problems making weight for fights. The record indicates Mr. Gamache understood that Mr. Duffy of the Athletic Commission had offered his agent, Mr. Bos, the option of having the weigh-in on the day of the fight itself. Messrs. Gamache and Bos declined the option because Mr. Gamache wanted time to "replenish and recover between the weigh-in and the fight." Ex. F to Herman Affirmation at pp 107-08.

5. Although Mr. Bos says he was told Mr. Gatti weighed 161 lbs. at the HBO weigh-in, other reports of that weigh-in were that he weighed 160 lbs.

6. In their claim, claimants also allege, upon information and belief, that Mr. Russo "had prior knowledge that [Gatti] would be unable to make his required weight." Ex. A to Herman Affirmation and Â¶3. Nowhere do claimants cite any evidence to support this allegation, however.

7. In a letter to the court, dated March 7, 2008, counsel for claimants, Keith M. Sullivan, takes issue with Mr. Southard's affidavit (Ex. 1 to Reply Affirmation) as to how close Mr. Southard was to the scale during the Gatti weigh-in, claiming Mr. Southard's affidavit is inconsistent with the video of the weigh-in. Ex. A to Sullivan Affirmation. Counsel for defendant, in a letter to the court dated March 13, 2008, objects to Mr. Sullivan's letter as an improper surreply, and argues that, in any event, Mr. Southard's affidavit is accurate and consistent with the video. The court has reviewed the video and concludes Mr. Southard was in close proximity to the weigh-in and was closely monitoring it.

8. Messrs. Russo and Southard claimed at their depositions that they did not know about the results of the HBO weigh-in prior to the bout (Ex. H to Herman Affirmation at 34; Ex. G to Herman Affirmation at 55-56). There still appears to be a factual issue, however, as to whether they were aware that the claimed disparity in the boxers'

weights was in excess of the permitted 11 lbs. because the announcer on the video of the Gamache-Gatti bout (Ex. A to Sullivan Affirmation) made references before and during the fight to the existence of a public controversy which already existed over the weight disparity.

9. In response to the court's request for clarification regarding Rule 214.8, defendant submits three affidavits, including one from Mr. Southard and one from the current director of the Athletic Commission, contending that the weight differential permitted by Rule 214.8 is measured at the time of the official weigh-in, i.e. February 25, 2000, the day before the bout. See Ross N. Herman's letter dated October 23, 2008 and affidavits attached thereto. In reply, claimants submit an affidavit from Robert Duffy who, as noted, was employed as a deputy commissioner of the Athletic Commission at the time of the weigh-in, contending that "[h]istorically, [19 NYCRR 214.8](#) has been applied at various times leading up to a fight," and that in this case the rule "was not adhered to as the weigh-in was not conducted properly." See Affidavit of Robert Duffy, sworn to on November 3, 2008, annexed to the letter of Keith M. Sullivan, dated November 5, 2008. Apart from this apparent dispute as to when the Â§214.8 differential is measured, there remains a genuine fact issue as to whether the permitted 11 lb. differential was met or exceeded at the official weigh-in the day before the bout.

10. The contract (Exs. K and L to Herman Affirmation) requires the parties to agree that the bout "shall be with gloves, as provided by the Unconsolidated Laws and Rules Regulating Boxing of the New York Athletic Commission . . . and shall be conducted in all respects in conformity with the laws of the State of New York and the Unconsolidated Laws and Rules Regulating Boxing of the New York Athletic Commission, which are hereby made a part of this Agreement." *Id.* Messrs. Gamache and Gatti each entered into such contracts with the promoter.

11. As noted, Mr. Gatti also entered into the identical form contract with the same promoter, Main Events. See Ex. L to the Herman Affirmation. It is not clear whether claimants are asserting a claim under that agreement, but, if so, such a claim must fail as a matter of law as Mr. Gamache is not a party to that contract, and neither is defendant.

12. In letters to the court dated November 26, 2008, the parties dispute whether claimants adequately raised the provision in the Gamache-Main Events contract (Ex. K to the Herman Affirmation)

requiring the weigh-in to be conducted eight hours before the fight. Claimants argue in their letter that the Commission's failure to hold the weigh-in within eight hours prior to the fight is another aspect of their breach of contract cause. This dispute, then, is moot in light of the court's decision that claimants have no contract claim against defendant.