SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/24/18 | DEPT. 46

HONORABLE Frederick C. Shaller JUDGE | Y. Hiroto, DEPUTY CLERK

HONORABLE JUDGE PRO TEM | ELECTRONIC RECORDING MONITOR

No Deputy Sheriff | No Reporter

8:30 am BC462891

TODD McNAIR

VS

THE NATIONAL COLLEGIATE ATHLETIC ASSOC ET AL

170.1 RECUSAL SCHEPER/DAU

Plaintiff Counsel

Defendant Counsel

(No Appearance)

NATURE OF PROCEEDINGS:

TENTATIVE DECISION and PROPOSED STATEMENT OF DECISION

The Court issues a Tentative Decision and Proposed Statement of Decision. A copy of which is mailed to all parties.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the TENTATIVE DECISON & PROPOSED STATEMENT of DECISION upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in LOS ANGELES, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: August 24, 2018

Sherri R. Carter, Executive Officer/Clerk

By: ______________________

Y. Hiroto, Judicial Assistant

MINUTES ENTERED
08/24/18
COUNTY CLERK

08/29/2018

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NATURE OF PROCEEDINGS:

[SEE ATTACHED CLERK'S CERTIFICATE OF MAILING]

MINUTES ENTERED
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COUNTY CLERK

08/29/2018

CERTIFICATE OF MAILING

L.A. Superior Court Central

Civil Division

TODD McNAIR VS. THE NATIONAL COLLEGIATE ATHLETIC ASSOC ET AL	BC462891

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08/29/2018

C E R T I F I C A T E   O F   M A I L I N G

L.A. Superior Court Central

Civil Division

TODD McNAIR VS. THE NATIONAL COLLEGIATE ATHLETIC ASSOC ET AL	BC462891

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08/29/2018

Case Number: BC462891
TODD MCNAIR VS THE NATIONAL COLLEGIATE ATHLETIC ASSOC ET AL

8/24/2018
Tentative Decision & Proposed Statement of Decision

1. The following tentative decision issued pursuant to CRC 3.1590 relates only to the single remaining declaratory relief cause of action that the court severed from the other causes of action that were tried to a jury between 4/18/218 and 5/21/2018 with a verdict entered on 5/21/2018 in favor of NCAA and adverse to Plaintiff ("McNair") on the defamation cause of action. The parties stipulated to a briefing schedule and that the matter may be determined by the court without further hearing based upon the evidence admitted during the trial and the briefs submitted by counsel. The last brief was filed on 8/13/2018 and the matter was taken under submission on that date. This tentative decision does not constitute a judgment and is not binding on the court and is subject to a party's right to file objections, requests for findings on issues not yet covered by the decision, and requests for clarification pursuant to CRC 3.1590(g) within 15 days. A non-appearance suspense calendar entry for the court to receive and rule on objections is set for 9/14/2018 at 8:30 a.m. in Dept. 46. If no objections or requests are filed on or before 9/14/2018, then this decision shall be the final statement of decision without modification. If objections or requests are filed by 9/14/2018, then the matter will again be taken under submission and a separate final Statement of Decision will be issued. Please lodge a conformed courtesy copy of any objections and requests in Dept. 46.

2. The declaratory relief cause of action is pleaded as the seventh cause of action of the Complaint filed on 6/3/2011 and is based upon Business & Professions Code §16600 ("§16600"). §16600 states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." McNair now seeks declaratory relief determination that the "Show-Cause Order" provisions in the NCAA bylaws under which he was penalized and which were a substantial factor in his suffering continuing harm are void pursuant to §16600.

3. Infractions Report 323 (Trial Exhibit 27) was issued by the NCAA Division 1 Committee on Infractions on 6/10/2010 and was confirmed after McNair's appeal. The report refers to and penalizes an unnamed "assistant football coach," but it is undisputed and trial testimony establishes this reference is to McNair. As shown by

08/29/2018

Trial Exhibit 27 at page 63, McNair was penalized by the findings of the NCAA Infractions Committee to a "Show-Cause Order." Under the Order, McNair was prohibited from engaging in any on or off-campus recruiting at USC and if any NCAA member institution other than USC sought to employ McNair, then that institution must comply with the penalty imposed and, under NCAA Bylaw 19.5.2.2-(1), such institution is required to show cause why that institution should not be penalized for not complying with the "penalties ***restricting*** the athletically related duties of" (emphasis added) McNair. The trial testimony of McNair supports the conclusion that this bylaw, to which NCAA member schools agreed to be bound as a condition to their NCAA membership, not only restricted, but was intended to restrict, McNair from securing unrestricted employment at any NCAA school during the original one year of the penalty. Evidence at trial proves to a preponderance standard that the penalty had the effect of restricting McNair's ability to become employed at another NCAA member school during the one-year penalty period and was a substantial factor in McNair's continuing unemployment at an NCAA member school after the end of the one-year show-cause penalty up until the time of trial.

4. As described in Trial Exhibits 714 and 723 and consistent testimony adduced in the trial of this action, the NCAA is an unincorporated association of hundreds of members, including virtually all public and private universities and 4-year colleges conducting major athletic programs in the United States. NCAA contends that one of its goals is to retain the amateur status of college athletics by adopting rules that apply to the conduct of member schools and their employees, such as McNair. By joining the NCAA, each member agrees (covenants or contracts) to abide by bylaws and rules established by the NCAA and to enforce such rules. The bylaws are included in the NCAA manual.

5. Trial Exhibit 714 is the NCAA manual including bylaws operative at the time of McNair's "Show-Cause Order." Bylaw 19 relates to enforcement. Bylaw 19.01.4 states that "[i]nstitutional staff members found in violation of NCAA regulations shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures." Bylaw 19.02.1 describes the "Show-Cause Order as one that requires a member institution to demonstrate to the satisfaction of the Committee on Infractions (or the Infractions Appeals Committee) per Bylaw 19.20 why it should not be subject to a penalty (or additional penalty) for not taking appropriate disciplinary or corrective action against an institutional staff member or representative

of the institution's athletic interests identified by the committee as having been involved in a violation of NCAA regulations that has been found by the committee. "

6.The trial testimony and reasonable inferences drawn from such testimony established to a preponderance of evidence that the Show-Cause Order imposed as a penalty against McNair was, in his case, in essence equivalent to a college coaching career-terminating sanction since no NCAA member school, including USC, would likely risk the exposure to sanctions that would impact their athletic programs and lucrative media-related and athletic program income or status by even considering hiring or retaining McNair at any later date after sanctions expired because his reputation was tainted by the penalty.

7. NCAA argues that the declaratory relief requested by McNair is inappropriate because (1) McNair's claim does not present a justiciable, actual controversy as required by CCP §1060; (2) declaratory relief is not necessary or proper; and, in any event, (3) §16600 does not apply to the facts and circumstances of this case.

(1) Question 1: Does McNair's claim present a controversy sufficiently ripe to present an actual controversy pursuant to CCP §1060? Answer: Yes.

8. The analysis of the propriety of a declaratory relief cause of action proceeds in two stages. First, the court must determine if the controversy presented is sufficiently *ripe* to present an actual controversy within the meaning of Section 1060. Artus v. Gramercy Towers Condominium Association (2018) 19 C.A.5th 923, 930. Second, the court must determine whether the actual controversy merits declaratory relief as necessary and proper under Section 1061. Id. If no actual controversy exists, the inquiry is over and the second step is irrelevant. Communities for a Better Environment v. State Energy Resources Conservation and Development Commission (2017) 19 C.A.5th 725, 739 fn. 8. By contrast, once there *is* an actual controversy, the court has wide discretion in its analysis of the second step. Id.; Environmental Defense Project of Sierra County v. County of Sierra (2008) 158 C.A.4th 877, 885.

9. In determining whether a controversy is ripe in the context of a request for declaratory relief, the California Supreme Court in Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal.3d 158 utilized a two-pronged analysis: (1) whether the dispute is sufficiently concrete to make declaratory relief appropriate; and (2) whether the withholding of judicial consideration will result in a hardship to the parties." Farm Sanctuary, Inc. v. Department of Food & Agriculture (1998) 63

08/29/2018

Cal.App.4th 495, 502. "Under the first prong, the courts will decline to adjudicate a dispute if 'the abstract posture of [the] proceeding makes it difficult to evaluate ... the issues' [citation], if the court is asked to speculate on the resolution of hypothetical situations [citation], or if the case presents a 'contrived inquiry' [citation]. Under the second prong, the courts will not intervene merely to settle a difference of opinion; there must be an imminent and significant hardship inherent in further delay." Farm Sanctuary, Inc., *supra.,* at p. 502; see also Wilson & Wilson v. City Council of Redwood City (2011) 191 Cal.App.4th 1559, 1582, and Communities for a Better Environment v. State Energy Resources Conservation & Development Com. (2017) 19 Cal.App.5th 725, 733 -734.

10. The controversy between McNair and NCAA is sufficiently ripe to present an actual controversy within the meaning of CCP §1060. There is a continued and concrete dispute over whether McNair was illegally harmed by the imposition of a show-cause sanction that placed a restraint on McNair's ability to be employed by another NCAA member school and the lingering effect upon McNair's career. The past impact and continuing effect of the penalties on McNair is not hypothetical or speculative or confined to the past. These issues have not been litigated in the early portions of the trial and could not reasonably have been pleaded as a different cause of action as the assertion of these rights does not fit any existing cause of action. Without the declaratory relief cause of action, McNair will have no right to redress as no other cause of action pursued by or available to McNair provides a remedy for this violation. "[T]he court must do complete justice once jurisdiction has been assumed," and "there is a present legal right in judicial assurance that certain advantages will be enjoyed or liabilities escaped in future." Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind (1967) 67 C.2d 536, 541-542 & fn.2 –citing Borchard, Declaratory Judgments (2d ed.) pp. 927-929. McNair will suffer hardship if the matter is not decided as the stigmatizing effect of the sanctions and the damage to McNair's reputation as a result of the penalties remain as does the related impediment to the reestablishment of his coaching career at the college level.

Question 2: Is declaratory relief necessary and proper under all the circumstances? Answer: Yes.

11. The second step in the analysis is the determination of whether declaratory relief is necessary and proper under all the circumstances. CCP §1061. Determination of this

issue is within the "wide discretion" of the court. Environmental Defense Project of Sierra County v. County of Sierra (2008) 158 C.A.4th 877, 885.

12. Initially, the determination of declaratory relief is necessary and proper due to public policy disfavoring the restrictions to McNair's employment caused by the Show Cause Order. California has an established public policy in favor of the right of persons to engage in a business or occupation of their choosing. In 1872, in enacting a predecessor statute to §16600, California departed from common law which permitted a rule of reasonable restrictions on employment and declared its strong public policy in favor of open competition. Edwards v. Arthur Andersen LLP (2008) 44 Cal.4th 937, 945-946. "Section 16600 evinces a settled legislative policy in favor of open competition and employee mobility." See D'Sa v. Playhut, Inc. (2000) 85 Cal.App.4th 927, 933. The law protects Californians and ensures "that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." Metro Traffic Control, Inc. v. Shadow Traffic Network (1994) 22 Cal.App.4th 853, 859. It protects "the important legal right of persons to engage in businesses and occupations of their choosing." Morlife, Inc. v. Perry (1997) 56 Cal.App.4th 1514, 1520; Metro Traffic Control, Inc. v. Shadow traffic Network (1994) 22 Cal.App.4th 853, 859. Whether, and to what extent, §16600 applies to the existing NCAA member contract is important not only to McNair but also to NCAA-member schools have had their complementary rights to pursue their competitive business interests by hiring McNair similarly restrained and to other similarly situated staff members and schools.

13. Declaratory relief is also necessary and proper because McNair's declaratory relief action addresses an issue of first impression in statutory interpretation and application pertinent to a remedy sought by McNair that no other existing cause of action can address. Both parties have a present legal right in judicial assurances regarding the viability of NCAA sanctions. A determination of the declaratory relief action will not only serve as a practical means of resolving the current controversy but will also serve to allow NCAA and member schools to conform their conduct to the law and prevent future litigation.

Question 3: Does §16600 apply to McNair? Answer: Yes.

14. The determination of whether §16600 applies to McNair is first a question of statutory construction. Pursuant to established principles, the first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of

08/29/2018

the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. California Mfrs. Assn. *v.* Public Utilities Com. (1979) 24 Cal.3d 836, 844; Moyer *v.* Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230; Brown *v.* Superior Court (1984) 37 Cal.3d 477, 484-485.

15. On its face §16600 is not ambiguous. §16600 states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." NCAA argues that the statute should be interpreted as relating only to those *parties* to a contract that contains a restrictive employment provision. However, as argued by McNair, the statute is not limited to "parties to a contract" – rather it broadly pertains to "anyone" who is restrained by the contract. Certainly the legislature could have limited the remedy to only parties to the contract if they had intended to narrow the remedy. (See, for example, the legislature uses of the term "parties" in Civil Code §§1558, 1559, 1578, 1689, and 1697.) Aside from the clear language of the statute, interpreting the scope of the statute to include "anyone," not just "parties" is consistent with the public policy behind §16660 that the statute be broadly interpreted in favor of its application to protect the important legal right of persons to engage in businesses and occupations of their choosing. When the legislature departed from the common law general rule of permitting reasonable restrictions on persons' rights, it is clear that the legislature intended to broadly remove any impediments in contracts by which the right to engage in business and occupations of one's choosing could be abridged. Thus application of this statute to McNair is consistent with the obvious intent of the legislature. Furthermore, it is consistent with other case law interpreting §16600: in interpreting the word "restrain" in the statute, several cases have broadly construed that term consistent with the legislative intent disfavoring restrictions on employment. Edwards, *supra.*, at page 947; Retirement Group v. Galante (2009) 176 Cal.App.4th 1226, 1234.

16. NCAA argues that every case decided in the past has involved a contract between two parties and that an application of §16600 outside "the context of contractual

restraints" is unwarranted. NCAA argues that no case interpreting §16600 has invalidated a contractual provision other than involving a contract between an employee and former employer or business associate, but the absence of any authority does not imply that §16600 cannot be given effect according to its clear wording and legislative purpose. NCAA also hastens to point out that McNair did not qualify as a third party beneficiary to the USC contract with NCAA and that, in any event, that cause of action was dismissed during trial, but this argument serves to support rather than hinder the use of declaratory relief as demonstrates that declaratory relief is the only remedy available to McNair. NCAA also argues that because §16600 has never been found to void a restrictive regulation prohibiting the unlicensed practice of medicine, law, or accounting or used to invalidate collective bargaining agreements that it therefore, by analogy, should not be applicable in this case. As cited by Plaintiff in his reply brief, the arguments regarding regulation of unlicensed practice of medicine and collective bargaining agreements are totally inapposite to the application of §16600. Restrictions on the practice of law, medicine, and accounting as well as collective bargaining agreements are authorized by federal or state legislation, not private contract. For example, the federal NLRA authorizes collective bargaining agreements and preempts state law interfering with these federally-legislated rights. It is consistent, therefore that §16600 has not been found to invalidate such restraints as §16600 is not applicable to those issues. That the NCAA is a purely private and not a state or governmental actor has been settled by the U.S. Supreme Court in the case of National Collegiate Athletic Ass'n v. Tarkanian (1988) 488 179, 193 -199.

17. NCAA's citation to the Hebert v. Los Angeles Raiders (1991) 23 Cal.App.4th 414 is also inapposite. Hebert raises the issue of a state statute (§16600) interfering with the NFL which was precluded by the dominant Commerce Clause in the United States Constitution. NCAA has not raised the issue of the Commerce Clause as a basis for its defense to this action and cannot because it is a non-profit, amateur organization, without collective bargaining agreements.

18. The question of whether §16600 should be applied to the NCAA member contracts then leads back to statutory interpretation and legislative intent. Since the express terms of §16600 void "every" "contract" involving "anyone" that "restrains" a person from engaging in a lawful profession, trade, or business, a logical and common sense construction that gives effect to every word of the statute leads to the conclusion that

08/29/2018

§16600 is applicable to McNair and the restrictions imposed by the contract between NCAA and member schools. Following the legislative intent to promote open competition and employee mobility, the court interprets the statute to apply to the contractual restrictions imposed on institutional staff members of member institutions of the NCAA. There is even more reason to void the contractual Show-Cause Order enforcement provisions in the NCAA bylaws pursuant to the policy behind §16600 because the NCAA-member schools are pervasive and therefore the restrictive covenants provide a much greater restriction than a single non-compete agreement between employee and employer or business partners. McNair's ability to practice his profession as a college football coach has been restricted, if not preempted, not only in Los Angeles and California, but in every state in the country.

19. Having found that declaratory relief is proper in this matter, the court now rules as follows:

> **The "Show-Cause Order" provisions of the NCAA bylaws set forth in the 2009-2010 NCAA Manual at Paragraph 19.02.1 (Trial Exhibit 714.299) and retained in subsequent manuals including at Paragraph 19.02.3 of the 2017-2018 Manual (Trial Exhibit 723.241) are void as they constitute an unlawful restraint on engaging in a lawful profession pursuant to §16600.**

IT IS SO ORDERED:

Frederick C. Shaller, Judge