IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WILLIAM R. SLOWE,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 08C-08-029 PLA
v.	)	
	)	
PIKE CREEK COURT CLUB, INC.	)	
	)	
Defendant.	)	

ON DEFENDANT'S MOTION TO DISMISS
DENIED

Submitted: October 22, 2008
Decided: December 4, 2008

Benjamin C. Wetzel, III, Esquire, WETZEL & ASSOCIATES, P.A., Wilmington, Delaware, Attorney for Plaintiff.

William J. Cattie, III, Esquire, RAWLE & HENDERSON, LLC, Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

I. Introduction

Plaintiff William R. Slowe ("Slowe") brought a negligence action against Defendant Pike Creek Court Club, Inc. ("PCCC") after he allegedly fell on a set of removable pool steps at a health club owned by PCCC. Slowe claims that the steps were negligently maintained and that PCCC failed to warn of the hazard they presented. In response, PCCC filed the instant Motion to Dismiss, asserting that Slowe's claim is barred by a liability waiver he signed before receiving a pass to use the health club facilities.

For several reasons discussed more fully hereafter, the Court concludes that the liability waiver will not bar Slowe's claim. First, the terms of the liability waiver do not release PCCC from claims based upon its own negligence. Second, by signing the liability waiver, Slowe did not assume the risk of injuries resulting from negligent maintenance of the premises. Finally, enforcing a liability waiver to bar a negligence claim related to the operation and maintenance of a public pool could impermissibly undermine statutory standards set forth in Delaware's public pool regulations. Accordingly, PCCC's motion is **DENIED.**

II. Factual Background

On September 9, 2006, Slowe visited a health club owned by PCCC and received a guest pass to use the facilities. In order to receive this pass, Slowe signed a liability waiver that reads as follows:

> LIABILITY WAIVER. I agree that I am voluntarily participating in activities and use of the facilities and premises (including the parking lot) and assume all risk of injury, illness, damage or loss to me or my property that may result in any loss or theft of any personal property. I further agree that I shall hold this club, its shareholders, directors, employer's representatives and agents harmless from any and all loss, claims, injury, damages or liability sustained by me.[1]

Slowe's signature appeared directly below the waiver.

Slowe claims that he was injured when he fell on a set of removable steps leading into the club's swimming pool. On August 4, 2008, Slowe filed suit in this Court, alleging that PCCC created an unsafe condition by permitting treads on the pool steps to become worn and by negligently failing to inspect or give warning of the steps' condition.[2]

III. Parties' Contentions

Now before the Court is a Motion to Dismiss filed by PCCC pursuant to Superior Court Civil Rule 12(b)(6). PCCC asserts that Slowe's claim is barred by the signed liability waiver. PCCC urges that the liability waiver

[1] Docket 3, Ex. A.

[2] Docket 1 (Pl.'s Compl.), ¶ 2.

satisfies Delaware law because it is clear in precluding any negligence suit arising from use of the facilities and premises of the club, is not unconscionable, and would not violate public policy if enforced.[3]

In response, Slowe attacks all three of the prerequisites for enforcing a liability waiver. First, Slowe argues that enforcement would be contrary to public policy because the liability waiver lacks explicit language releasing PCCC from liability for its own negligence. Second, Slowe contends that the waiver is ambiguous because the reasonable person would expect it to release the club from liability for injury caused by "the use of properly maintained exercise equipment," whereas his injury was caused by negligently maintained steps, which he argues are not "exercise equipment." Finally, Slowe submits that the liability waiver is unconscionable because it purports to release PCCC from liability for risks not inherent in using the club.[4]

IV. Standard of Review

The Court must determine whether to adjudicate PCCC's motion as presented or convert it to a motion for summary judgment. Superior Court Civil Rule 12(b)(6) provides that a motion to dismiss shall be treated as a

[3] Docket 3 (Def.'s Mot. to Dismiss).

[4] Docket 5 (Pl.'s Resp. to Def.'s Mot. to Dismiss).

motion for summary judgment under Rule 56 if "matters outside the pleading are presented to and not excluded by the Court."[5] PCCC has submitted a copy of the signed liability waiver at issue, which Slowe also addresses in his Response. The Court must consider the liability waiver in rendering its decision. Therefore, this motion will be treated as one for summary judgment.

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[6] Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[7]

V. Analysis

Health clubs and their members are generally free to use signed liability waivers to contractually redistribute risk.[8] Such waivers of liability usually do not implicate the public interest, and are thus not intrinsically

[5] Super. Ct. Civ. R. 12(b)(6).

[6] Super Ct. Civ. R. 56(c).

[7] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005).

[8] *See Zipusch v. LA Workout, Inc.*, 66 Cal. Rptr. 3d 704, 709 (Cal. Ct. App. 2007).

void as against public policy, because recreational activities are considered "non-essential."[9] However, a health club liability waiver must meet the requirements for enforceability under Delaware law and will not be given effect if it is ambiguous, unconscionable, or contrary to public policy.[10]

The liability waiver at issue in this case contains two provisions: (1) an assumption of risk clause, and (2) a liability release or "hold harmless" clause. The liability waiver does not appear to be unconscionable, as nothing before the Court suggests that Slowe lacked a "meaningful choice" when he voluntarily signed a waiver to receive a health club guest pass or that the waiver terms unreasonably favor one of the parties.[11] However, both the assumption of risk clause and the release language raise public policy concerns that bar its enforcement and preclude summary judgment in favor of PCCC.

1. The Waiver Did Not Release PCCC from Liability for Negligent Acts

First, the language of the waiver is insufficient to exculpate PCCC from its own negligence. The law disfavors contractual provisions releasing

[9] *See Hallman v. Dover Downs, Inc.* 1986 WL 535, at *5 (D. Del. Dec. 31, 1986); *Zipusch*, 66 Cal. Rptr. 3d at 709.

[10] *See Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 985 (Del. 1981); *Tucker v. Albun, Inc.*, 1999 WL 1241073, at *2 (Del. Super. Sept. 27, 1999) (discussing enforceability of pre-injury release).

[11] *See Hallman*, 1986 WL 535, at *3 (citing *Tulowitzki v. Atlantic Richfield Co.*, 396 A.2d 956 (Del. 1978)).

a party from the consequences of its own fault or wrong. Therefore, as a matter of public policy, a provision exonerating a party for its own negligence will only be given effect if the language "makes it crystal clear and unequivocal that the parties specifically contemplated" such a release.[12] Consistent with this requirement, Delaware courts have found provisions exculpating a party for its own negligence to be sufficiently "crystal clear" when they include language "specifically referr[ing] to the negligence of the protected party."[13]

The parties have disputed the application of *Evans v. Feelin' Good, Inc.*, in which this Court ruled that a pre-injury liability release was admissible at trial despite the plaintiff's claim that it failed to "specifically name the party to be released for its own negligence," but instead referred only to "the salon where such equipment is to be used."[14] The opinion in *Evans* does not contain the full language of the release. Defendant relies upon *Evans* to support its assertion that an exculpatory provision need not

[12] *J.A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540, 553 (Del. Super. 1977).

[13] *See Hallman*, 1986 WL 535, at *4 (collecting cases).

[14] 1991 WL 18066, at *1 (Del. Super. Feb. 1, 1991).

expressly invoke the term "negligence" to exculpate a party for a negligent act.[15]

The Court considers *Evans* to be far afield from the case at bar. Although the absence of the release language from the *Evans* opinion renders its holding somewhat unclear, it appears that the release in *Evans* was challenged for omitting the exact name of the party to be released, *not* for failing expressly or specifically to refer to negligence. Moreover, to the extent that *Evans* could suggest that "negligence" need not be treated as a magic word, it is evident that an exculpatory clause cannot be "crystal clear" in relieving a party from the consequences of its negligence in the absence of *some* explicit reference to the parties' intent to exculpate the released party for its own fault or wrongdoing.[16]

Here, the liability waiver is devoid of any language indicating that the parties contemplated that the waiver would cover acts of negligence

[15] Docket 3, ¶ 5.

[16] Other jurisdictions are divided as to whether an exculpatory provision must expressly mention negligence to release a party from liability for its own negligence. *Compare Powell v. Am. Health Fitness Ctr. of Fort Wayne, Inc.*, 694 N.E.2d 757, 761 (Ind. Ct. App. 1998) ("We hold that . . . an exculpatory clause must both specifically and explicitly refer to the negligence of the party seeking release from liability."), *with Zimmer v. Mitchell & Ness*, 385 A.2d 437, 439 (Pa. Super. 1978) ("The mere fact that the word 'negligence' does not appear in the agreement is not fatal to [the defendant's] position."). Because the Court finds that the liability waiver in this case fails Delaware's "crystal clear" standard for enforcement to bar a negligence action, it will not address the issue of whether an exculpatory provision could achieve the necessary clarity without expressly employing the word "negligence."

committed by PCCC. Not only does it fail to mention the word "negligence," it also lacks alternative language expressing that PCCC would be released for its own fault or wrongdoing. Slowe could reasonably assume that the effect of the release would have been to relieve PCCC of liability only for injuries or losses resulting from risks inherent in his use of the club and its premises, not for losses resulting from PCCC's negligence.[17] The waiver's reference to "any and all" injuries, without any reference to injuries caused by PCCC, is insufficient to undermine this assumption or indicate that the parties contemplated releasing PCCC for acts of negligence.[18] The liability waiver therefore is not "crystal clear" in releasing PCCC from Slowe's claim that it was negligent.

2. Slowe Did Not Expressly Assume the Risk of PCCC's Negligence

The omission from the liability waiver of any reference to injuries caused by PCCC's negligence also prevents the Court from finding that Slowe expressly assumed the risks of negligent maintenance and inspection of the premises. By assuming a risk, a party "in advance, [gives] his express

[17] *See infra* notes 23-24 and accompanying text.

[18] *See* RESTATEMENT (SECOND) OF TORTS § 496B cmt. d (1965) ("[G]eneral clauses exempting the defendant from all liability for loss or damage will not be construed to include loss or damage resulting from his intentional, negligent, or reckless misconduct, unless the circumstances clearly indicate that such was the plaintiff's understanding and intention.").

consent to relieve another of obligations towards himself, and to assume the chance of injury from a *known risk* arising from what the other is to do or leave undone."[19] If a plaintiff is found to have expressly assumed a risk, the defendant is relieved of any duty to the plaintiff and is entitled to summary judgment.[20]

An express agreement to assume a risk can only be effective if it is clear "that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm."[21] Accordingly, while an exculpatory clause need not itemize every conceivable injury or loss intended to fall within its ambit, it must nonetheless "clearly, explicitly and comprehensibly" state the risks the parties intend to cover, especially where it is claimed that a party has assumed risks not inherent to "the endeavor for which the release is signed."[22]

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[19] *Leon v. Family Fitness Ctr. (No. 107), Inc.*, 71 Cal. Rptr. 2d 923, 61 Cal. App. 4th 122, 1234 (Cal. Ct. App. 1998) (emphasis in original).

[20] *Storm*, 898 A.2d at 880.

[21] *Leon*, 71 Cal. App. 4th at 1234; *see also McDonough v. Nat'l Off-Road Bicycle Ass'n*, 1997 WL 309503, at *5 (D. Del. June 2, 1997).

[22] *Zipusch*, 66 Cal. Rptr. 3d at 710; *see also McDonough*, 1997 WL 309503, at *5 ("In an express agreement to assume a risk, a plaintiff may undertake to assume all risks of a particular relation or situation, whether they are known or unknown to him. However, for the release to be effective, it must appear that the plaintiff understood the terms of the agreement, or that a reasonable person in his position would have understood the terms.").

The California Court of Appeals considered a health club liability waiver for injuries arising from "use of the facilities or participation in any sport, exercise or activity" in *Leon v. Family Fitness, Inc.* The plaintiff in that case was injured when a health club sauna bench on which he was reclining collapsed. As the *Leon* Court observed:

> [A]n individual who understandingly entered into the membership agreement at issue can be deemed to have waived any hazard known to relate to the use of the health club facilities. These hazards typically include the risk of a sprained ankle due to improper exercise or overexertion, a broken toe from a dropped weight, injuries due to malfunctioning exercise or sports equipment, or from slipping in the locker-room shower.[23]

However, the collapse of a properly-utilized sauna bench was not such a known hazard, and a health club member could not be charged with having appreciated it merely because he signed a waiver for risks associated with the use of the facilities.[24]

In a somewhat different context, the United States District Court for the District of Delaware addressed the issue of known hazards in *Hallman v.*

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[23] *Leon*, 71 Cal. App. 4th at 1234.

[24] *Id.*; *see also Zipusch*, 155 Cal. App. 4th at 1292 ("[W]e find nothing to support the contention that negligent inspection and maintenance of exercise equipment is an inherent risk of exercising at a health club. . . . [H]ealth club members pay dues in exchange for access to a safe and well-maintained exercise environment. Instead of chilling exercise at a health club, reasonably inspecting and maintaining exercise equipment should have the opposite effect.").

Dover Downs, Inc. The plaintiff in *Hallman*, a news reporter, was injured while observing a motor racing event when a wooden railing on a photographers' platform gave way, causing him to fall on to a concrete surface beneath the platform. The plaintiff had signed a pre-injury release for "any loss, damage or injury" arising while on the premises "from any cause whatsoever[,] including negligence" of the premise-owners.[25] Further, the plaintiff acknowledged in the release that he "[knew] the risks and dangers inherent in entering the premises and . . . observing . . . motor racing events, [and] realize[d] that conditions may become more hazardous . . . [and] that unanticipated and unexpected dangers may arise."[26] The *Hallman* Court found that, despite the expansive language of the release and the express mention of negligence, the risk of a defective structure was not a "foreseeable risk" of observing the race, particularly where the plaintiff could not enter the premises and "know the risks and dangers" prior to signing the release.[27]

[25] *Hallman*, 1986 WL 535, at *1 n.2.

[26] *Id.*

[27] *Id.* at *3-4. The *Hallman* Court explored foreseeability of risk as it pertained to the unconscionability of the liability waiver at issue in that case. Its analysis and conclusions, however, are pertinent to the question of whether the plaintiff has assumed a known risk.

Here, the liability waiver is prefaced by a statement that Slowe was "voluntarily participating in activities and use of the facilities and premises (including the parking lot)." The language is strikingly similar to that provided in *Leon*, as it encompasses both injuries related to exercise and to use of the health club facilities. A reasonable interpretation of the liability waiver would construe it to bar suit for injuries and losses arising from Slowe's participation in fitness activities and use of the facilities and premises. As the *Leon* Court observed, such a waiver can cover a parade of horribles traceable to causes other than the health club's negligence, from exercise-related muscle strains to shower slip-and-falls. Dangers arising from negligent maintenance and inspection of the premises, however, were not among the "known risks" of using PCCC's facilities.

Although a properly-worded release might effect a waiver of premises liability,[28] the liability waiver here does not "clearly, explicitly and comprehensibly" notify Slowe that he was assuming the risk that PCCC would negligently fail to maintain and inspect the premises. In *Hallman*, much more precise waiver language that incorporated specific references to premises hazards and to the risks of the defendant's negligence was insufficient to transform a latent premises defect into a known or foreseeable

[28] *See, e.g.*, *Benedek v. PLC Santa Monica*, 129 Cal. Rptr. 2d 197 (Cal. Ct. App. 2002).

risk. The liability waiver in this case, which is even more narrowly worded, therefore cannot provide PCCC with a defense based on primary assumption of the risk.

3. The Waiver Cannot Release PCCC from Statutory Duties

Finally, enforcing the liability waiver to bar Slowe's claim could contravene public policy by releasing PCCC from liability for actions that violate public health and safety regulations. A release of tort liability is unenforceable to exculpate a party for statutory violations where the plaintiff is a member of the class protected by the statute.[29] By extension, "a plaintiff's express agreement to assume the risk of a defendant's violation of a safety statute enacted for the purpose of protecting the public will not be enforced," as the statutorily-created safety obligation is "owed to the public at large and is not within the power of any private individual to waive."[30]

Although many aspects of a health club's operations are not subject to health and safety regulations,[31] Delaware has adopted extensive regulations

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[29] *See Murphy v. N. Am. River Runners, Inc.*, 412 S.E.2d 504, 509 (W. Va. 1991) (citing RESTATEMENT (SECOND) OF CONTRACTS § 195 cmt. a (1979)); *see also* 8 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 19:26 (4th ed. 2007) ("A purported exemption from statutory liability is usually void, unless the purpose of the statute is merely to give an added remedy which is not based on any strong policy.").

[30] *Murphy*, 412 S.E.2d at 509.

[31] 40 AM. JUR. 3D *Proof of Facts* § 111 (2008) ("Because the health club industry is not now widely regulated, negligence per se will rarely arise in an action against a health club or like facility. The author is not aware of any reported decision in which the doctrine of

governing swimming pools, in 16 Del. Admin. C. § 4464.[32] The regulations apply to "public pools," defined to include those pools "open to either the general public, or a limited section of the public, with or without a fee."[33] The intent of the regulations is "to provide minimum standards for design, construction, maintenance and operation of public pools in the State of Delaware, and to assure a clean, healthful, and safe environment for all bathers using these pools."[34]

Several provisions of Delaware's public pools regulations are at least potentially applicable to this case. First, the regulations set a standard of care by requiring that "[a]ll pools, their premises, and appurtenances . . . be operated and maintained at all times with regard to the safety of bathers and employees."[35] In addition, the regulations provide detailed specifications for pool steps: "All steps shall have a minimum tread length of twenty-four (24) inches, [and] a tread depth of at least ten (10) inches . . . . The tread surface

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negligence per se was applied in a suit against a health club."); *but see Capri v. L.A. Fitness Int'l, LLC*, 39 Cal. Rptr. 3d 425 (Cal. Ct. App. 2006) (negligence per se claim based on health club's alleged violation of regulatory scheme governing public swimming pools).

[32] Delaware's public pool regulations were initially adopted in 1958 and were most recently amended in 2003, well before the events of this case.

[33] 16 Del. Admin. C. § 4464-1.0.

[34] *Id.* § 4464-2.1.

[35] *Id.* § 4464-7.1.

shall be slip resistant."[36] To be considered "slip resistant" within the meaning of the regulations, the treads must consist of "a textured surface that is neither conducive to slipping when wet nor abrasive to bare feet" and must meet a designated minimum static coefficient.[37]

Delaware's public pool regulations reflect a clear intent by the legislature to impose statutory duties upon public pool operators in order to protect the public's health and safety. A health club pool such as the one involved in this case would constitute a "public pool" subject to the regulations. Even if its liability waiver were a model of clarity and specificity, PCCC could not secure from Slowe, or any other guest or member, a waiver of its duty to operate and maintain its pool in compliance with the state's public pool regulations, because these are intended to benefit the public as a whole.

Rather perplexingly, Slowe has not raised the possibility of a negligence *per se* claim based upon the public pool regulations in either his Complaint or his Response to PCCC's motion. The record before the Court lacks sufficient detail to reveal whether Slowe might be able to maintain a claim based upon a violation of § 4464-3.7.1, the provision pertaining to

[36] *Id.* § 4464-3.7.1.

[37] *Id.* § 4464-1.0.

stair construction and tread materials. However, at the very least, Slowe's claim implicates the standard of care set forth in the regulations that requires pools "be operated and maintained at all times with regard to the safety of bathers." Slowe has raised a triable issue of fact as to whether PCCC violated this statutory duty, and further discovery may be necessary before the full implications of the public pool regulatory scheme to this case are understood. Because the facts before the Court and the state's involvement in regulating public pools suggest that enforcing the liability waiver in this case could impermissibly release PCCC from liability for violating a statutory duty, summary judgment in favor of PCCC would be inappropriate.

VI. Conclusion

Based on the foregoing, the Court concludes that the liability waiver signed by Slowe does not bar his suit against PCCC. Slowe's claim presents triable issues of fact as to whether he was injured as a result of PCCC's alleged negligence. Because PCCC is not entitled to judgment as a matter of law, its Motion to Dismiss, treated as a Motion for Summary Judgment, is hereby **DENIED.**

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Benjamin C. Wetzel, III, Esq.
William J. Cattie, III, Esq.