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

JAHNDEE HONG, as Guardian/Next Friend of JADEN HONG, a minor	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N12C-05-004 PLA
	)	
HOCKESSIN ATHLETIC CLUB, and EASTERN ATHLETIC CLUBS, LLC, a Delaware limited liability company,	)	
Defendants.	)	

ON DEFENDANTS HOCKESSIN ATHLETIC CLUB AND EASTERN ATHLETIC CLUBS, LLC'S MOTION TO DISMISS

Submitted: June 4, 2012
Decided: July 18, 2012

This 18th day of July, 2012, it appears to the Court that:

1. Defendants Hockessin Athletic Club ("HAC") and Eastern Athletic Clubs, LLC (collectively, "Defendants") have filed a Motion to Dismiss pursuant to Superior Court Civil Rule 12(b)(6), asserting that Plaintiff's negligence claim is barred by a liability waiver that was executed as part of the club's Membership Agreement. For the reasons set forth below, the Court agrees that the liability waiver bars Plaintiff's claim. Accordingly, Defendants' Motion to Dismiss is GRANTED.

2. Plaintiff Jahndee Hong ("Hong") brought this negligence action against Defendants on behalf of her son Jaden Hong ("Jaden"). On March 16,

2011, when he was three years old, Jaden fell from indoor playground equipment at the HAC and broke his right arm.[1] On October 30, 2010, Hong and her husband Minsuk Hong executed a Membership Application and Agreement ("Agreement") with the HAC. The membership application listed the names and ages of the Hongs' three children, including Jaden. The Agreement includes a waiver and release of liability. The Agreement defines a Member as "the individual signer and any and all other persons included in his/her membership with HAC." Under the heading "WAIVER AND RELEASE OF LIABILITY AND INDEMNITY AGREEMENT," the Agreement provides as follows:

> Member hereby acknowledges that in using the facilities, programs and equipment of HAC, he/she does so entirely at his/her own risk and assume[s] the risk of any injury and/or damage while engaging in any physical exercise or activity or use of any club facility on the premises. This assumption of the risk included, without limitation, Member's use of any exercise equipment (mechanical or otherwise), the locker room, sidewalk, parking lot, stairs, pool, whirlpool, sauna, steam room, racquet courts, lobby hallways, or any equipment in the facility. Member further agrees to assume the risk in participating in any activity, class, program, instruction, or any

[1] Complaint at ¶ 8. The Complaint makes no specific allegations as to what was wrong with the playground equipment or how HAC's negligence caused or contributed to Jaden's injury. Rather, the Complaint alleges that HAC was negligent in that they (a) failed to take reasonable measures to make premises safe for invitees; (b) failed to properly and reasonably inspect the premises; (c) failed to take reasonable measures to make the premises safe; (d) failed to supervise the plaintiff and other invitees on the property to make sure the invitees were safe at all relevant times herein; and (e) were otherwise negligent. *See* Compl. at ¶ 9. The Court observes that playground injuries are a fairly typical hazard of childhood and that the mere fact that a child broke his arm while at the playground ordinarily would not, by itself, demonstrate negligence on the part of the owner of the premises. The Court further notes that Delaware's rules of pleading prohibit plaintiffs from using a complaint as a fishing expedition to see whether a wrong has been committed. *See, e.g.*, *Leary v. Eschelweck*, 2012 WL 1664236, at *2 (Del. Super. May 8, 2012). The Complaint as presented in this case comes dangerously close to running afoul of that rule.

event sponsored by HAC. Insurance liability conditions and HAC prohibit any personal training lessons or services by non-HAC staff. Violations of such can result in membership termination.

By executing this Agreement, Member does HEREBY WAIVE, RELEASE AND FOREVER DISCHARGE, HAC and its past, present and future subsidiaries, affiliates, successors, predecessors, executors, committees, fiduciaries, trustee, employee benefit plans, workers compensation carriers, plan administrators, administrators, partners, employees, insureds, assigns, agents, and representatives in their personal and professional capacities (collectively "HAC"), from all claims, demands, injuries, damages, actions or causes of action, and from all acts of active or passive negligence on the part of such company, corporation, club, its servants, agents, or employees of any nature whatsoever, including attorneys' fees and costs arising out of or connection with the aforementioned activities. Member further agrees to indemnify and hold harmless HAC from any claims, demands, injuries, damages, actions or causes of action, loss, liability, damage or cost which HAC may incur due to Members['] presence at or use of the facility. Member further agrees that the foregoing warranty, waiver and indemnity agreement is intended to be as broad and inclusive as permitted by the law of the State of Delaware and that if any portion is deemed to be invalid, it is expressly agreed that the remaining terms shall remain in full legal force and effect.

MEMBER ACKNOWLEDGES THAT HE/SHE HAS CAREFULLY READ THIS AGREEMENT AND FULLY UNDERSTANDS THAT IT IS A RELEASE OF LIABILITY AND EXPRESS ASSUMPTION OF RISK AND INDEMNIFICATION. MEMBER IS AWARE AND AGREES THAT BY EXECUTING THIS WAIVER AND RELEASE, HE/SHE IS GIVING UP THE RIGHT TO BRING LEGAL ACTION OR ASSERT A CLAIM AGAINST HAC FOR ITS NEGLIGENCE AND/OR FOR ANY DEFECTIVE PRODUCT THAT MAY BE IN THE FACILITY OR ON ITS PREMISES. BY SIGNING BELOW, MEMBER SIGNIFIES THAT HE/SHE HAS READ AND VOLUNTARILY SIGNED THIS AGREEMENT AND THAT NO ORAL REPRESENTATIONS, STATEMENTS OR INDUCEMENTS APART FROM THIS FOREGOING AGREEMENT HAVE BEEN MADE.

HAC contends that the liability waiver bars Plaintiff's suit. Plaintiff responds that the waiver does not bar Plaintiff's claim because the waiver, which refers to "all acts of active or passive negligence […] arising out of or in connection with the aforementioned activities," is ambiguous and can be interpreted as applying only to the Member's assumption of the risk of HAC's negligence in participating in "any activity, class, program, instruction, or any event sponsored by HAC."

3. The Court must first determine whether to adjudicate Defendants' motion as presented or convert it to a motion for summary judgment.[2] Superior Court Civil Rule 12(b)(6) provides that a motion to dismiss shall be treated as a motion for summary judgment under Rule 56 if "matters outside the pleadings are presented to and not excluded by the Court."[3] HAC has submitted a copy of the signed liability waiver at issue, which Hong also addresses in her Response. Therefore, this motion will be treated as one for summary judgment.

When considering a motion for summary judgment, the Court examines the record to determine whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[4] Summary judgment will be granted if, after viewing the evidence in the light most favorable

[2] *Slowe v. Pike Creek Court Club, Inc.*, 2008 WL 5115035, at 2 (Del. Super. Dec. 4, 2008).
[3] Super. Ct. Civ. R. 12(b)(6).
[4] Super. Ct. Civ. R. 56(c).

to the non-moving party, there are no material facts in dispute or judgment as a matter of law is appropriate.[5]

4. In the factual context of this case, the question of whether the liability waiver that Hong signed as part of the Membership Agreement with HAC now bars her claim against Defendants is an easy one. In *Slowe v. Pike Creek Court Club*, which involved a guest who fell on a set of negligently maintained stairs in the swimming pool at the Pike Creek Court Club, a forerunner to the Hockessin Athletic Club, this Court held that "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."[6] Delaware courts have held that the requirement of "crystal clear and unequivocal" language is satisfied where contractual provisions include language "specifically refer[ring] to the negligence of the protected party."[7] The Court found that the liability release at issue in *Slowe* included no specific language indicating that the parties contemplated that the waiver would extend to PCCC's own acts of negligence.[8] Moreover, as the Court noted in *Slowe*, PCCC's liability release lacked "alternative language expressing that PCCC would be released for its own fault or

[5] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005).
[6] *Id.* (quoting *J.A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540, 553 (Del. Super. 1977)) (internal quotation marks omitted).
[7] *Id.*; *see also Hallman v. Dover Downs, Inc.*, 1986 WL 535, at *4 (D. Del. Dec. 31, 1986) (collecting cases).
[8] *Slowe*, 2008 WL 5115035, at *3.

wrongdoing," concluding that the plaintiff could reasonably have concluded that the release would only relieve PCCC of liability for injuries or losses resulting from risks inherent in his use of the club.[9]

5. The Court similarly found that Slowe did not expressly assume the risk of PCCC's negligence by signing the liability waiver because the waiver did not "clearly, explicitly and comprehensibly notify Slowe that he was assuming the risk that PCCC would negligently fail to maintain and inspect the premises."[10] The *Slowe* Court left open the possibility, however, that "a properly-worded release might effect a waiver of premises liability."[11]

6. Here, Hong signed a comprehensive waiver of liability and release in connection with her Membership Agreement that expressly stated that she (and all others on her membership) assumed the risk of "any injury or damage incurred while engaging in any physical exercise or activity or use of any club facility on the premises," including the use of "any equipment in the facility" and

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[9] *Id.*

[10] *Id.* at *5.

[11] *Id.* The *Slowe* Court cited to *Benedek v. PLC Santa Monica LLC*, 129 Cal.Rptr. 2d197 (Cal. Ct. App. 2002), which held that the defendant health club's release barred plaintiff's claim for negligence and premises liability arising out of injuries he sustained when he tried to catch a falling television set. The *Benedek* court reasoned, "[t]he release Benedek signed was clear, unambiguous, and explicit. It released [the health club] from liability for any personal injuries suffered while on [the health club's] premises, 'whether using exercise equipment or not.'" The court further noted that given the unambiguous broad language of the release, it "reached all personal injuries suffered by Benedek on [the health club's] premises, including the injury Benedek suffered because of the falling television" and rejected as "not semantically reasonable" plaintiff's argument that the release applied or should be interpreted to apply only to injuries suffered while actively using exercise equipment. 129 Cal.Rptr.2d at 204.

participation "in any activity, class, program, instruction, or any event sponsored by HAC." Plaintiff's suggestion that "the aforementioned activities" specified in the second paragraph of the liability waiver applies only to activities sponsored by HAC, such as a group exercise class, is an implausible reading of the contract. Accordingly, the Court finds that the Membership Agreement and the included liability waiver and release bar Plaintiff's claims against HAC.

7. Alternatively, notwithstanding the liability waiver, summary judgment should still be granted based on Plaintiff's failure to make a *prima facie* case of negligence against Defendants.[12] The Complaint contains no specific allegations about the nature of HAC's negligence and how it caused Jaden's injury. Rather, the Complaint asserts, in vague and conclusory fashion, that Defendants negligently

> (a) failed to take reasonable measures to make premises safe for invitees;
> (b) failed to properly and reasonably inspect the premises;
> (c) failed to take reasonable measures to make their premises safe;
> (d) failed to supervise the plaintiff and other invitees on the property to make sure the invitees were safe at all relevant times herein; and
> (e) were otherwise negligent.[13]

In the absence of specific, particularized allegations about the nature of HAC's negligence and how it caused Jaden's injuries, the Complaint must fail.

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[12] To the extent that Plaintiff believes that she is entitled to discovery to meet her burden, the Court considers the allegations of negligence in the Complaint too vague and generic to allow Plaintiff to conduct what would essentially be a fishing expedition to discover evidence of Defendants' unspecified negligence. *See supra* note 1. Summary judgment is therefore appropriate even at this early stage of the litigation.

[13] Compl. at ¶9.

8. The Delaware Supreme Court recently upheld this Court's grant of summary judgment in favor of a car dealership where a would-be customer walked into a plate-glass window at the dealership, noting that while owners and occupiers of commercial property have a duty to maintain their premises in a reasonably safe condition for their customers, patrons also have an affirmative obligation to exercise reasonable care while on the business owner's premises.[14] In a personal injury action, the plaintiff-customer bears the burden of proving that: (i) there was an unsafe condition on the defendant's premises; (ii) the unsafe condition caused the plaintiff's injuries; and (iii) the defendant had notice of the unsafe condition or should have discovered it by reasonable inspection.[15]

9. Plaintiff here has failed to make any allegations that even raise a clear issue of fact with regard to Defendants' negligence. Unlike in *Slowe*, Plaintiff has not alleged the existence of any dangerous condition on the premises that was the result of the health club's failure to perform its duties, which were statutory and could not have been disclaimed by liability waiver in any event.[16] Here, Plaintiff has made no allegation that the playground equipment was defective, that the premises otherwise suffered from a latent defect that HAC should have known

[14] *Talmo v. Union Park Automotive*, 38 A.3d 1255, 2012 WL 730332, at *3 (Del. Mar. 7, 2012) (TABLE); *see also DiOssi v. Maroney,* 548 A.2d 1361, 1366-7 (Del. 1988); Howard v. Food Fair Stores, New Castle, Inc., 201 A.2d 638, 640 (Del. 1964); *Walker v. Shoprite Supermarket, Inc.*, 864 A.2d 929 (Del. 2004) (holding that it is negligent for a patron not to see what is plainly visible when there is nothing obscuring the patron's view).
[15] *Talmo*, 38 A.3d 1255, 2012 WL 730332, at *3.
[16] *Slowe*, 2008 WL 5115035, at *5-*6.

about and either repaired or warned its invitees to avoid, or that HAC failed to fulfill a duty to supervise Jaden. Rather, this appears to be a typical incident of a child who was injured on a playground. Such incidents, while unfortunate, do not indicate negligence on the part of the premises-owner any more than does the case of the man who walked into a plate-glass window at a car dealership. Accordingly, based upon Plaintiff's failure to make a prima facie case of negligence under a theory of premises liability, summary judgment should be granted in favor of Defendants.

10. For all of the reasons set forth above, Defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

/s/ Peggy L. Ableman
Peggy L. Ableman, Judge

Original to Prothonotary
cc: