COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-24

JACKSON ZAMMUTO[1]

vs.

SKY ZONE LLC & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Plaintiff Jackson Zammuto brought this action after suffering an injury at a trampoline park owned and operated by defendants Sky Zone LLC and Jump City LLC. Following entry of summary judgment in the defendants' favor, Zammuto appealed. He argues that a Superior Court judge erred in allowing summary judgment on his ordinary negligence claims, erred in allowing summary judgment on his gross negligence or recklessness claims, and erred in denying his motion for sanctions for alleged spoliation. We affirm.

The following facts are undisputed. Five or six times prior to the date of the accident, Zammuto visited various of the defendants' trampoline parks. On each occasion, Zammuto's

[1] By his father and next friend, Gregory Zammuto.

[2] Jump City LLC.

father signed a waiver of liability. On October 12, 2018, a day before the accident, Zammuto's father signed a waiver that warned of the risks of trampoline activities and that provided as follows: "this agreement extends forever into the future and will have full force and legal effect each and every time I or my child[] visit[s] Sky Zone, whether at the current location or any other location or facility." On October 13, 2018, the day of the accident, Zammuto was attending a birthday party. Zammuto's father was not present, but the father was "fine with" the parent who was hosting the party signing the waiver.[3] While at the trampoline park, another child briefly jumped on Zammuto's trampoline, causing Zammuto to fall and suffer an injury.

On February 25, 2019, Zammuto brought this action and subsequently amended his complaint two times. On April 24, 2020, the defendants moved for summary judgment, arguing that Zammuto's ordinary negligence claims were barred by the October 12 waiver. While the summary judgment motion was pending, Zammuto filed a motion for sanctions predicated on the claim that the defendants had spoliated evidence. He also sought leave to file a third amended complaint. The judge denied his

[3] Any waiver that was signed on the day of the accident is not in the summary judgment record and is not relied on by the defendants.

motions for sanctions and for leave to file a third amended complaint for the following reasons: (1) there was no evidence of spoliation and (2) allowing Zammuto to file a third amended complaint would have been futile. The judge then allowed the defendants' motion for summary judgment, concluding that the October 12 waiver unambiguously barred Zammuto's ordinary negligence claims and that Zammuto had not asserted a claim for gross negligence or recklessness.

1. Ordinary negligence. It is well established that parties may, by agreement, exempt themselves from liability incurred because of their own ordinary negligence. See Sharon v. Newton, 437 Mass. 99, 105, 110 n.12 (2002). Moreover, a parent may sign a waiver on behalf of a child. See id. at 107-109. Zammuto does not dispute these general propositions, but argues that summary judgment erroneously entered on his ordinary negligence claims because the October 12 waiver was ambiguous as to whether it remained in effect on October 13. Zammuto acknowledges that the October 12 waiver purported to have "full force and legal effect each and every time [the signor] or [the signor's] child[] visit[ed] Sky Zone," but he argues that this provision is inconsistent with the fact that, as a matter of practice, the defendants required a new waiver every time he visited one of their trampoline parks. According to Zammuto, the inconsistency creates an ambiguity. We disagree.

"Contractual language is ambiguous if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one" (quotation and citation omitted). James B. Nutter & Co. v. Estate of Murphy, 478 Mass. 664, 669 (2018). The plain meaning of the contractual language at issue is that the waiver would remain in effect every time Zammuto visited one of the defendants' trampoline parks, and Zammuto does not offer a different meaning.[4] The fact that the defendants required a new waiver every time Zammuto visited one of their trampoline parks does not render the unambiguous contractual language ambiguous; rather, such a practice is a sound one that serves to remind customers of the rights they have waived. In light of the unambiguous October 12 waiver, summary judgment properly entered on Zammuto's ordinary negligence claims. See, e.g., Sharon, 437 Mass. at 112.

2. Gross negligence or recklessness. Zammuto next argues that he asserted a claim for gross negligence or recklessness that survives regardless of the waiver. See Rafferty v. Merck & Co., 479 Mass. 141, 155-156 (2018) (party may contract against liability for harm caused by ordinary negligence but not gross negligence or reckless or intentional conduct). He further

[4] We specifically do not address whether there should be a time limitation on waivers that contain this sort of language, as the parties do not address the issue. We further note that the waiver here was signed the day before the accident.

argues that he should have been granted leave to file a third amended complaint to set forth additional facts in support of such a claim.

Construing the evidence in the summary judgment record in the light most favorable to Zammuto, as we must, the evidence does not support a claim for gross negligence or recklessness. See Drakopoulos v. U.S. Bank Nat'l Ass'n, 465 Mass. 775, 777 (2013). The defendants warned Zammuto of the risks associated with trampoline activities. The defendants also had a rule prohibiting customers from jumping on a trampoline being used by someone else, which they communicated to customers by verbal instruction. The defendants' rules were sometimes disobeyed,[5] however, such as when another child jumped on Zammuto's trampoline for two seconds. These facts do not show "the want of even scant care" required for gross negligence. Aleo v. SLB Toys USA, Inc., 466 Mass. 398, 410 (2013) ("long-standing definition of gross negligence" includes "very great negligence, or the absence of slight diligence, or the want of even scant care" [citation omitted]). Nor do the facts demonstrate the

[5] Zammuto asserts that video footage shows instances of the defendants not enforcing their rules, but as explained in the waiver that Zammuto's father signed, "while the trampoline and other activities that take place at the [trampoline park] are monitored by . . . employees, it is not feasible for such employees to monitor the activities and actions of all customers at all times or all customers simultaneously."

"intentional or unreasonable disregard of a risk" required for recklessness. Sandler v. Commonwealth, 419 Mass. 334, 336 (1995). The facts on the summary judgment record before us instead show that the defendants appreciated the risks associated with trampoline activities and took appropriate steps to warn customers of and ameliorate those risks.

Thus, assuming that Zammuto did assert a claim for gross negligence or recklessness, summary judgment properly entered on any such claim. In these circumstances, allowing Zammuto to amend his complaint would have been futile. Accordingly, the judge did not abuse his discretion in denying the motion for leave to file a third amended complaint. See Dzung Duy Nguyen v. Massachusetts Inst. of Tech., 479 Mass. 436, 461 (2018).

3. Spoliation. Finally, the judge did not abuse his discretion in denying the motion for sanctions. See Zaleskas v. Brigham & Women's Hosp., 97 Mass. App. Ct. 55, 75 (2020). Zammuto contends that the defendants have "hidden evidence concerning the child who jumped on [Zammuto's] trampoline." The

claim is speculative and conclusory, and the judge acted well within his broad discretion in denying the motion.[6]

Judgment affirmed.

By the Court (Neyman, Singh & Grant, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: January 14, 2022.

[6] Zammuto's corollary argument that the defendants must have blurred the video footage is without any factual basis.

[7] The panelists are listed in order of seniority.