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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 29

FELITA LEE, as Administratrix of the Estate of L.M., FELITA LEE, as the parent and natural guardian of L.M. and FELITA LEE, individually

Plaintiff,

-against-

KIDS N CULTURE, INC., EXPLORICA INC., JAMES W. DOYLE and JOHN and JANE DOES said names being fictitious and intended to represent individual employees of KIDS N CULTURE, INC. and EXPLORICA INC.

Defendants

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DECISION/ORDER

Present:
HON. Paul L. Alpert

The defendants move for an order pursuant to CPLR §3211(a)(7) to dismiss the complaint or in the alternative for an order pursuant to CPLR §3212 awarding summary judgment dismissing the complaint. This is an action sounding in negligence which seeks compensation for the tragic death of the plaintiff , L.M., who died while on an educational trip to Tanzania. On February 19, 2016 while swimming at a resort pool where her group was staying, L.M. drowned. L.M.'s mother and administratrix of her estate now sues for wrongful death alleging that the defendants were negligent in their supervision of her daughter. The defendants argue that they cannot be held liable for L.M.'s death as the plaintiff's signed a waiver absolving

them from any liability. Moreover they contend that they cannot be held liable for her death because L.M. assumed the risk of injury inherent in swimming in a pool.

The plaintiff opposes the motion on several grounds. First the plaintiff argues that she did not sign the waiver which allegedly absolves the defendants from liability in this case. She argues that only L.M., who was a minor, signed the agreement, rendering any waiver as void. The plaintiff argues that even if there is an inherent risk in swimming in a pool, the assumed risk would only result in possible comparative negligence and not serve as a basis for dismissal of the action. Finally the plaintiff contends that summary judgment at this juncture is unwarranted as discovery has not yet been held in the action and she cannot adequately address the arguments advanced in the motion without full discovery.

The trip to Tanzania was organized and supervised by defendant Kids N Culture (KNC) under the auspices of its founder and director defendant, James W. Doyle. According to Mr. Doyle, KNC is a "not for profit academic enrichment organization designed for High School students with the goal to ensure that all communities have the opportunity to engage with, learn from and advocate for other cultures." Mr. Doyle was a teacher at the school where L.M attended. In November of 2018 he contacted L.M. about a trip he was arranging for a group of students to travel to Tanzania.

KNC hired defendant Explorica as a tour operator, whose function was to coordinate and arrange transportation and local activities such as tour and excursions at the destination. Explorica hired a company called gapForce, a destination management company, which was responsible for arranging tour, service missions and excursions while the students were in Tanzania. As part of the registration for the trip each of the students was required to fill out a registration form provided by Explorica. According to Mr. Doyle, L.M. signed the agreement. He

then sent an email to the plaintiff in which he asked for relevant information which was needed to complete the registration form. The e-mail states that "[B]y forwarding her information you allow us to complete the registration form for Explorica." In signing the agreement it was to be understood that the parties were to be bound by Explorica's "Participation Release and Binding Arbitration Agreement". That agreement provides in pertinent part that "Explorica Inc., its owners, directors, officers, employees and affiliates, your sponsoring school, teachers, chaperones and group leaders (collectively "Explorica")...[w]ithout limitation ... is not responsible for any injury, loss, or damage to person or property , death , delay or inconvenience in connection with...dangers incident to recreational activities such as scuba diving, zip lining, snorkeling, paddle boarding, surfing, swimming". It is based on this provision in the agreement that both defendants move to dismiss.

Interestingly, both parties initially move for dismissal pursuant to CPLR §3211(a)(7) for failure to state a cause of action and ask for summary judgment in the alternative. Presumably this was done because no discovery has been conducted. Plaintiff contends that without the benefit of conducting discovery, she cannot adequately address the summary judgment motion.

On a motion to dismiss for failure to state a cause of action the sole criterion for the court is to determine whether from the four corners of the pleadings, facts and allegations are discerned which when taken together manifest any claim cognizable at law (Weiner v. Lenox Hill Hospital 193 A.D.2d 380). Dismissal of a case under CPLR §3211(a)(7) is only appropriate when the facts as alleged do not fit within any cognizable legal theory (Sokol v. Leader 74 A.D.3d 1180). Here the court finds from a review of the complaint that the plaintiff has asserted a valid cause of action. Notwithstanding the defendants argument that the waiver contained in the travel agreement absolves them of liability the court finds that a valid cause of action still exists.

It is well settled law that absent a statute or public policy to the contrary, a contractual provision absolving a party from its own negligence will be enforced (Sommer v. Federal Signal Corp. 79 N.Y.2d 540). However, it is the public policy in New York State that a party may not insulate itself from damages caused by grossly negligent conduct (Id; Kalisch-Jarcho Inc. v. City of New York 58 N.Y.2d 377). Here there are allegations of gross negligence made by the plaintiff. Thus, even were this court to find that the agreement absolved the defendants from their own negligence, the plaintiff still may maintain the action by establishing that the defendants were grossly negligent. The defendants motion to dismiss for failure to state a cause of action is therefore denied.

The court is not prepared at the early stage of this action and without the benefit of allowing the plaintiff to conduct discovery to transform this motion to one for summary judgment. A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (Elliott v. County of Nassau 53 A.D.3d 561; Fabrizio v. Brandywine Realty Trust 23 A.D.3d 939; CPLR §3212[f]). Here no discovery has taken place. The plaintiff should have the opportunity to depose witnesses in order to properly develop her case and to attempt to oppose any subsequent motion that may be made. The facts surrounding the underlying incident involving the death of plaintiff's daughter are totally outside the plaintiff's knowledge. An award of summary judgment at this juncture would be unjust. The defendants may renew the motion after discovery has been completed.

Accordingly the defendants motions to dismiss this case for failure to state a cause of action or in the alternative for summary judgment is denied without prejudice and with leave to

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renew after the completion of discovery.

This shall constitute the decision and order of the Court

Dated: January 11, 2019

Hon. Paul L. Alpert, A.S.C.J

HON. PAUL L. ALPERT
A.J.S.C.