UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARK URE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil No. 3:03cv1491 (MRK)
	:	
FINELINE INDUSTRIES, INC., ET AL.,	:	
	:	
	:	
Defendants.	:	

MEMORANDUM OF DECISION

Defendant Camp Sloane YMCA, Inc. ("Camp Sloane") moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Count Five of plaintiff's Amended Complaint [doc. #13] ("Am. Compl.") for failure to state a claim. Camp Sloane, plaintiff's employer, argues that plaintiff's claims against Camp Sloane are barred by the exclusivity provisions of Connecticut's Workers' Compensation Act. *See* Conn. Gen. Stat. § 31-284. Plaintiff counters that the allegations of its Amended Complaint are sufficient to state a claim under a recognized exception to the exclusivity provisions of the Workers' Compensation Act. For the reasons set forth below, the Motion to Dismiss Count FIVE of the Amended Complaint [doc. #21] is DENIED.

The allegations of Count Five, which the Court must accept as true at this stage of the proceeding, are as follows. On or about August 13, 2001, plaintiff was seriously injured in the course of employment while working as a camp counselor when the propeller blades of a boat driven in reverse by a fellow camp counselor struck plaintiff while he was in the water assisting and instructing a camper in water skiing. Am. Compl., Count Five, ¶ 2. Camp counselors were required to operate the boat, which was leased by Camp Sloane, and to teach campers how to

water ski while the boat was operated by other camp counselors. *Id.* ¶¶ 2, 3. Camp Sloane was aware of plaintiff's inexperience in the operation of boats and, despite this knowledge, Camp Sloane failed to instruct plaintiff and other camp counselors in the proper operation of the boat and in safety protocols, including the dangers of the propeller blades, when operating the boat in the vicinity of individuals in the water, thereby creating a dangerous condition. *Id.* ¶¶ 3, 4. Plaintiff alleges that Camp Sloane's conduct made plaintiff's injuries "substantially certain to occur." *Id.* ¶ 5.

Connecticut's Workers' Compensation Act, Conn. Gen. Stat. § 31-284, states, in pertinent part as follows:

> (a) An employer shall not be liable to any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment or on account of death resulting from personal injury so sustained, but an employer shall secure compensation for his employees as provided under this chapter, except that compensation shall not be paid when the personal injury has been caused by the willful and serious misconduct of the injured employee or his intoxication. All rights and claims between employer and employees, or any representatives or dependents of such employees, arising out of personal injury or death sustained in the course of employment are abolished other than rights and claims given by this chapter . . .

Plaintiff does not take issue with the exclusive nature of the remedy provided by the Workers' Compensation Act. *See* Plaintiff's Memorandum of Law in Support of Opposition to Motion to Dismiss [doc. #25] at 5. Rather, the point of contention between the parties centers around the construction and application of the intentional tort exception to the exclusivity of the Workers' Compensation Act as enunciated by the Connecticut Supreme Court in *Suarez v. Dickmont Plastics Corp.*, 229 Conn. 99 (1994) (*Suarez I*)(*rev'd on other grounds*)*; Suarez v. Dickmont Plastics Corp.*, 242 Conn, 255 (1997) (*Suarez II*), and subsequent decisions applying

Suarez I and *II*.

In most cases, the exclusive remedy provisions of the Workers' Compensation Act bar independent actions by employees against their employers for injuries occurring in the workplace. *See* Conn. Gen. Stat. § 31-284. "There is an exception, however, to the exclusivity provision of the workers' compensation statute. That one exception exists when the intentional tort of an employer injures an employee or when the employer has engaged in wilful or serious misconduct." *Suarez I*, 229 Conn. at 106. The employer must have engaged in intentional misconduct. "The exception does not include accidental injuries caused by gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute or other misconduct of the employer short of genuine intentional injury. " *Perille v. Raybestos-Manhattan-Europe, Inc.*, 196 Conn. 529, 533-34 (1985) (citing *Mingachos v. CBS, Inc.*, 196 Conn. 91 (1985); *see Sorban v. Sterling Engineering Corp.*, 79 Conn. App. 444, 450 (2003).

The Connecticut Supreme Court has explained that to fall within the intentional tort exception to Worker's Compensation Act exclusivity, the plaintiff must "prov[e] either that the employer actually intended to injure the plaintiff (actual intent standard) or that the employer intentionally created a dangerous condition that made the plaintiff's injuries substantially certain to occur (substantial certainty standard)." *Suarez II*, 242 Conn. at 257-58. "Whereas the intentional tort test requires that both the act producing the injury and the specific injury to the employee must be intentional, the substantial certainty standard requires a showing that the act producing the injury was intentional or deliberate and the resulting injury, from the standpoint of the employer, was substantially certain to result from the employer's act or conduct." *Ramos v. Branford,* 63 Conn.App. 671, 679-80 (2001); *see Suarez II*, 242 Conn. at 280. "'The substantial

certainty test provides for the intent to injure exception to be strictly construed and still allows for a plaintiff to maintain a cause of action against an employer where the evidence is sufficient to support an inference that the employer deliberately instructed an employee to injure himself.'" *Id.*, 242 Conn. at 257 (quoting *Suarez I*, 229 Conn. at 109-10).

To satisfy the substantial certainty test, the Connecticut Appellate Court has held that an "employee must show that a reasonable person in the position of the employer would have known that the injury or death suffered by the employee was substantially certain to follow from the employer's actions. Substantial certainty means more than substantial probability, but does not mean actual or virtual certainty, or inevitability." *Sorban*, 79 Conn.App. at 455. Moreover, "[a] wrongful failure to act to prevent injury is not the equivalent of an intention to cause injury." *Ramos v. Branford*, 63 Conn.App. 671, 685 (2001). As the Connecticut Supreme Court emphasized in *Suarez II*, to bypass the exclusivity of the workers' compensation scheme on the basis of the substantial certainty standard, the plaintiff must show not only that the employer's actions were taken with "substantial certainty that the plaintiff's injury would ensue, but the evidence [must also establish] that they were done for the express purpose of accomplishing such a result." *Suarez II* , 242 Conn. at 280.

It is clear, therefore, that plaintiff's task in this case insofar as Camp Sloane is concerned is a formidable one. In the face of the demanding substantial certainty test, the allegations of the Amended Complaint are admittedly thin. However, the standard on a motion to dismiss is low. "On a Rule 12(b)(6) motion to dismiss, the Court must construe the Complaint in the light most favorable to the plaintiff, accepting all the allegations in the complaint as true." *Desiano v. Warner-Lambert Co.*, 326 F.3d 339, 347 (2d Cir. 2003). The Court should grant such a motion

"only if, after viewing the plaintiff's allegations in this favorable light, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* "Recovery may appear remote and unlikely on the face of the pleading, but that is not the test for dismissal." *Id.*

As the Supreme Court emphasized recently in reversing a Rule 12(b)(6) dismissal of a plaintiff's complaint, the "simplified notice pleading standard [of the Federal Rules] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). Therefore, in deciding whether to dismiss for failure to state a claim, the merits of plaintiff's claim are not at issue; rather on a motion to dismiss the Court merely decides whether "'the claimant is entitled to offer evidence to support the claims.'" *Bernheim v. Litt,*79 F.3d 318, 321 (2d Cir. 1996) (citation omitted).

Here, taking all inferences from the pleaded facts in plaintiff's favor, the Court cannot say that plaintiff can prove no possible set of facts that would allow him to satisfy the substantial certainty standard and fit within the intentional tort exception to the worker's compensation bar. In particular, plaintiff's Amended Complaint (if generously construed) has alleged conduct by Camp Sloane that could conceivably satisfy the demanding standards for intentional misconduct under Connecticut case law. Plaintiff has also alleged that Camp Sloane's misconduct made plaintiff's injuries substantially certain to occur. Compl., Count Five, ¶ 5. The Court is not prepared at this early stage of the case to conclude that plaintiff should be prevented from offering evidence in support of his allegations against Camp Sloane.

In this regard, the Court notes that even when the Connecticut Supreme Court or

Appellate Court have ruled against an employee seeking to fit within the exception, the courts have done so either after trial (as in *Suarez II*) or on summary judgment, after all facts are known and presented (as in *Ramos, Sorban*, and *Morocco v. Rex Lumber Co.*, 72 Conn.App. 516 (2002)). Notably, Camp Sloane has not directed the Court's attention to any decision dismissing an employee's complaint on the pleadings where, as here, the employee has alleged intentional misconduct that made an employee's injuries substantially certain to occur.

Accordingly, defendant Camp Sloane YMCA, Inc.'s Motion to Dismiss Count FIVE [doc. #21] is hereby DENIED.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
U.S.D.J.

Dated at New Haven, Connecticut: January 29, 2004.