UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARK URE,	:	
	:	
Plaintiff,	:	
v.	:	Civil No. 3:03-CV-1491 (MRK)
	:	
FINELINE INDUSTRIES, INC., *et al.*,	:	
	:	
Defendants.	:	

RULING AND ORDER

Pending before the Court is the Motion to Dismiss [doc. # 26] of Defendants YMCA of the USA, Inc. and The National YMCA Fund, Inc. (collectively, the "National YMCA")[1] under Fed. R. Civ. P. 12(b)(6) for failure to state a claim for which relief can be granted. The motion is GRANTED in part and DENIED in part.

This action arises from injuries that Plaintiff Mark Ure sustained as a result of being struck by the propellers of a water skiing boat during the course of his employment as a counselor at Camp Sloane YMCA, Inc. ("Camp Sloane YMCA") in 2001. The Sixth Count of the Amended Complaint [doc. # 13] (the "Complaint") is directed to the National YMCA and alleges negligence in numerous respects, including an alleged failure to implement and enforce safety and training standards under which camps such as Camp Sloane YMCA are operated. *See* Complaint at 25-26. The Seventh Count alleges that the National YMCA is the owners of the

[1] The arguments in the Motion to Dismiss do not distinguish between the movants. Similarly, the Complaint does not distinguish YMCA of the USA, Inc. and The National YMCA Fund. *See* Complaint at 21-32.

"Y" marks and "YMCA" and alleges negligence and trademark violations in the manner in which the National YMCA has purportedly allowed others to use its marks. Complaint at 30-32.

The standard for assessing motions to dismiss is a familiar one. "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.* Furthermore, 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).

Applying that liberal standard to the facts alleged in the Complaint, the Court will not dismiss the allegations of negligence in Count Six against the National YMCA. 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 establish his claim against the National YMCA. While the National YMCA asserts that it owed Plaintiff no duty, the Court cannot make that

determination on the basis of the pleadings alone, particularly in light of Plaintiff's allegation of an agency relationship between Camp Sloane YMCA and the National YMCA. *See, e.g., Herman v. Monadnock PR-24 Training Council, Inc.*, 802 A.2d 1187 (N.H. 2002) (evidence sufficient to jury's verdict of an agency relationship between national non-profit corporation and instructor employed by state agency, making non-profit corporation vicariously liable for instructor's alleged negligence). Therefore, the Court will not grant the National YMCA's Motion to Dismiss the Sixth Count.

Count Seventh stands on a different footing. In that count, Plaintiff seeks to assert what can only be characterized as a combination negligence/trademark violation claim. However, Plaintiff has not provided the Court with any case law that would support such a hybrid claim. Plaintiff has certainly not stated a viable claim for trademark violation in the Seventh Count[2], and to the extent Plaintiff alleges negligence against the National YMCA, Plaintiff should pursue that claim in his Sixth Count. Accordingly, the Court grants the Motion to Dismiss the Seventh Count of the Complaint.

Accordingly, the Court GRANTS the Motion to Dismiss [doc. # 26] and dismisses the Seventh Count of the Complaint but DENIES the Motion insofar as it asks the Court to dismiss

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[2] The Plaintiff in this case is not seeking protection for a trademark to which Plaintiff claims he is rightfully entitled. "To prevail on a statutory or common law claim of trademark infringement, a party must establish that the symbols *for which it seeks trademark protection* are valid, legally protectable marks and that another's subsequent use of a similar mark is likely to create confusion as to the origin of the product." *Tri-Star Pictures, Inc. v. Leisure Time Prods., B.V.*, 17 F.3d 38, 44 (2d Cir. 1994) (citation omitted) (emphasis added); *see Dana Braun, Inc. v. SML Sport Ltd.*, No. 03 Civ. 6405, 2003 WL 22832265, at *8 (S.D.N.Y. Nov. 25, 2003) ("In order to prevail on a claim of infringement of its registered mark, plaintiff must demonstrate that it (1) has a valid mark subject to protection; and (2) the defendant's use of its mark results in a likelihood of confusion." (citing *Gruner + Jahr USA Pub. v. Meredith Corp.*, 991 F.2d 1072, 1074 (2d Cir.1993)).

the Sixth Count of the Complaint.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Court

Dated at New Haven, Connecticut: June 24, 2004