| | | |
|---|---|---|
| DOCKET NO. CV-24-6028788-S | : | SUPERIOR COURT |
| HANNAH TOOMBS | : | J.D. OF TOLLAND |
| V. | : | AT ROCKVILLE |
| JARON ZIMMITTI | : | MAY 24, 2024 |

**MEMORANDUM OF DECISION**

HON. CODY N. GUARNIERI, JUDGE, before this court is the defendant's motion to strike the second and third counts of the complaint. The court heard oral argument at short calendar on May 21, 2024. For the reasons discussed herein, the motion to strike the second and third counts of the complaint is DENIED.

## I. BACKGROUND

On January 10, 2024, the plaintiff, Hannah Toombs, filed a three-count complaint against the defendant, Jaron Zimmitti, alleging the following facts. On or about July 1, 2023, the plaintiff was an invited guest at a July 4 party at an address in Coventry. At that party the defendant ignited illegal fireworks, some of which went into a crowd of people and struck the plaintiff, causing her serious injuries. In the first count of the complaint the plaintiff alleges that the defendant was negligent in causing her injuries in various ways.

In the second count, the plaintiff alleges common law recklessness by incorporating her negligence allegations and adding three ways in which the plaintiff's injuries were due to the

S. Pappas
STEVEN PAPPAS
ASSISTANT CLERK

Notice of memorandum sent on 5-24-24 to:
-Reporter of judicial decisions
-All counsel of record ijono

received
5-24-2024

defendant's reckless disregard for the safety of other persons, including the plaintiff, who were lawfully present at the party. Specifically, the plaintiff alleges that the injuries and losses she suffered were caused by the defendant's reckless disregard for the safety of others, including the plaintiff, in having: (1) knowingly and consciously put her safety at risk by igniting illegal fireworks in close proximity to her, without having the proper training, permitting and certification required by statute; (2) knowingly and consciously ignited illegal fireworks knowing it was in violation of Connecticut law and that if an illegal firework struck a person it would cause serious injury; and (3) recklessly and consciously failed to properly place and/or secure the illegal fireworks in such a way that would cause them to shoot up into the air, and not sideways towards the plaintiff, which he knew would place the plaintiff and others in serious danger of incurring serious injuries such as the plaintiff did.

Following the summons and complaint, the defendant filed a motion to strike the second and third counts of the complaint on March 14, 2024 (entry at Docket No. 105.00). The plaintiff filed her objection on April 12, 2024 (entry at Docket No. 107.00). The defendant filed a reply (entry at Docket No. 115.00), to which the plaintiff then responded (entry at Docket No. 116.00).

## II. STANDARD OF REVIEW

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "[A] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no

factual findings by the trial court . . . [the court] construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . Moreover, [the court notes] that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 350, 71 A.3d 480 (2013).

"If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action . . . the complaint is not vulnerable to a motion to strike." *Bouchard* v. *People's Bank*, 219 Conn. 465, 471, 594 A.2d 1 (1991). On the other hand, "[a] motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Citation omitted; internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 349, 63 A.3d 940 (2013).

## III. DISCUSSION

### A. Second Count – Common Law Recklessness

"Recklessness requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger

to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent . . . More recently, we have described recklessness as a state of consciousness with reference to the consequences of one's acts . . . . It is more than negligence, more than gross negligence . . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them . . . . Wanton misconduct is reckless misconduct. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 382, 19 A.3d 1462 (2015).

Under common law, a plaintiff's claim of recklessness may survive a motion to strike if the facts allege that the defendant consciously engaged in highly unreasonable conduct that involved an extreme departure from ordinary care. See *Elliott* v. *Waterbury*, 245 Conn. 385, 415, 715 A.2d 27 (1998). "The allegations of one count of a complaint based on common law recklessness conduct must be separate and distinct from the allegations of a second count sounding in negligence." *Hanchar* v. *Silver Hill Hospital*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-980163502 (February 29, 2000, *D'Andrea, J.*). "A plaintiff cannot transform a negligence count into a count for willful and wanton misconduct merely by appending a string of adjectives to allegations that clearly sound in negligence." *Brown* v. *Branford*, 12 Conn. App. 106, 110, 529 A.2d 743 (1987).

In support of her recklessness count, the plaintiff first incorporates her allegations of negligence in paragraphs one through six of her first count. The court notes that while counts one through five allege facts underlying the circumstances giving rise to this action, paragraph five and its subparts a) through n) are the ways in which the plaintiff alleges the defendant's conduct was negligent.

The plaintiff then alleges in her second count under paragraph seven and its subparts a) through c) that the injuries and losses she suffered were caused by the defendant's reckless disregard for the safety of others, including the plaintiff, in having: (1) knowingly and consciously put her safety at risk by igniting illegal fireworks in close proximity to her, without having the proper training, permitting and certification required by statute; (2) knowingly and consciously ignited illegal fireworks, knowing it was in violation of Connecticut Law and that if a an illegal firework struck a person it would cause serious injury; and (3) recklessly and consciously failed to properly place and/or secure the illegal fireworks in such a way that would cause them to shoot up into the air and not sideways towards the plaintiff, which he knew would place the plaintiff and others in serious danger of incurring serious injuries such as the plaintiff did.

The court agrees that the same underlying conduct may give rise to causes of action sounding in both negligence and recklessness, however, there still must be sufficient facts alleged regarding the defendant's requisite state of mind and that the defendant's conduct was an extreme departure from ordinary care. See *Craig* v. *Driscoll*, 262 Conn. 312, 343, 781 A.2d 440 (2003), *Matthiessen* v. *Vanech*, 266 Conn. 822, 831-33, 836 A.2d 394 (2003).

The plaintiff alleges in her second count that the defendant recklessly disregarded the safety of others, including the plaintiff, by igniting illegal fireworks without appropriate training, permitting and certification, knowing that to do so was illegal and it would cause serious injury if a firework were to strike a person, and nevertheless failing to place and/or secure the fireworks in such a way that they would shoot up into the air and not at a crowd nearby. The allegations of the complaint go further than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury, but support a reckless disregard for the safety of others. As such, the second count is sufficiently pleaded as a matter of law.

B. Third Count – Strict Liability for an Ultrahazardous Activity

"The issue of whether an activity is abnormally dangerous ... is a question of law for a court to decide." *Green* v. *Ensign Bickford Co.*, 25 Conn. App. 479, 485, 595 A.2d 1383, cert. denied, 220 Conn. 919, 597 A.2d 341 (1991).

The superior courts which have considered whether illegal fireworks constitute an ultrahazardous activity have essentially agreed that they do. See, e.g., *Holt* v. *Adams*, Superior Court, judicial district of Hartford, No. CV 16-6070761-S (April 4, 2017, *Dubay, J.*); *Wyatt* v. *Stafford Springs Enterprises, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV 13–6039638–S (September 12, 2014, *Elgo, J.*) ("the operation of fireworks is plainly an ultrahazardous activity"); *Colangelo* v. *Bay View Imp. Ass'n*, Superior Court, judicial district of Waterbury, Docket No. CV 13-6018781-S (November 4, 2013, *Zemetis, J.*); *Lipka* v. *DiLungo*, Superior Court, judicial district of New Haven, Docket No. CV–407399 (March 8, 2000, *Blue, J.*)

("Fireworks are capable of causing extremely serious injuries. If they cause harm, the harm is likely to be great.")

The well-reasoned approach to evaluating the sufficiency of the complaint's claim to strict liability is to apply the six factor test of *Green* v. *Ensign Bickford Co.*, to determine whether an illegal firework display constitutes an abnormally dangerous (i.e., ultrahazardous) activity. See *Green* v. *Ensign,* supra, 25 Conn. App. Like in *Holt*, the plaintiff in this case has sufficiently pled facts to support the *Green* factors. *Holt* v. *Adams*, supra, Superior Court, Docket No. CV-16-6070761. In support of the claim of a high degree of risk of harm to others, the plaintiff alleges the defendant promoted, allowed, permitted, or personally ignited illegal fireworks in an unsafe manner without warning guests who were near enough to be injured. The plaintiff further alleges that the illegal fireworks were ignited by persons (i.e., the defendant) without appropriate training, certification and permitting under state and local regulation. With respect to the quantum of the harm, the plaintiff alleges that the illegal fireworks were allowed or permitted notwithstanding the risk of serious injury, and that the plaintiff was in fact seriously injured when fireworks detonated on her body.

Further, as the plaintiff alleges the fireworks were illegal and ignited or detonated by persons without appropriate training, certification, and permitting, she has sufficiently pled an inability to eliminate the risk of harm. See *Lipka* v. *DiLungo*, supra, Superior Court, Docket No. CV-407399. Moreover, this court agrees with the court in *Holt*, that a plaintiff need not allege facts regarding the common usage when alleging that the subject activity was unlawful. Having pled that the defendant did not have the appropriate training, certification and permitting for displaying fireworks, the plaintiff has sufficiently supported the inappropriate nature of the activity. Finally,

the plaintiff's allegation that the fireworks were illegal is sufficient to support the inappropriateness of the activity at the place it was carried out. As such, this court finds that the plaintiff has pled sufficient facts to support that the defendant's detonation of fireworks at the July 4 party constituted an ultrahazardous activity.

The defendant asks the court to strike the plaintiff's third count notwithstanding if the activity was ultrahazardous as the plaintiff, concededly an invited guest to the defendant's July 4 party, knew of the risk when she remained for the fireworks and took part in the same by remaining and watching, or by being present within the area which would be endangered by the miscarriage of the fireworks. Thus, the defendant argues, the plaintiff was akin to a participant in the ultrahazardous activity.

"The rule of strict liability for engaging in ultrahazardous activities does not apply where the person harmed has reason to know of the risk that makes the activity ultrahazardous and takes part in it or brings himself within the area which will be endangered by its miscarriage ... In other words, the benefit of strict liability does not run to a person participating in the activity deemed to be ultrahazardous." (Internal quotation marks omitted.) *Heaslip* v. *Mota's Sewer Service, LLC*, Superior Court, judicial district of New London, Docket No. CV–5002500–S (October 15, 2007, *Hurley, J.T.R.*).

The defendant makes the fatal mistake of drawing inferences from the complaint in the defendant's favor. The court is obliged in considering a motion to strike to construe the complaint in the manner most favorable to sustaining its legal sufficiency. *Coppola Construction Co.*, supra,

309 Conn. at 350. Construing the facts alleged in the complaint in a manner favorable to sustain its legal sufficiency, there is no reason to infer that the plaintiff, a guest to the party, knew that the defendant's fireworks were illegal, or that he was untrained, unlicensed, and unpermitted in their use. Nor would it be reasonable to infer from the plaintiff's complaint that she knew she was endangered where she stood by the defendant's miscarriage of the illegal fireworks at some distance from her and chose to stay in that area. As such, the court cannot conclude that the plaintiff was taking part or participating in the detonation of the illegal fireworks such to defeat her claim in strict liability.

## IV. CONCLUSION

For the reasons stated previously, the second and third counts of the complaint of the plaintiff's complaint are sufficiently pleaded as a matter of law and, therefore, the motion to strike is DENIED.

(Guarnieri, J.)