

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

KRISTEN BEHRENS, as Guardian Ad Litem for
ZAIR MARTIN

Plaintiff

vs.

DAYS INN HOTEL d/b/a DAYS HOTEL WEST
CHESTER BRANDYWINE VALLEY,
VASANT PATEL,
DINESH PATEL,
PRAVIN PATEL,
WYNDHAM WORLDWIDE CORPORATION,
WYNDHAM HOTEL GROUP, LLC,
DAYS INN WORLDWIDE, INC.,
WEST CHESTER LODGING, LLC,
SAGE-W.C. CORPORATION, and
CHERYL HEYWARD

Defendants

BUCKMAN'S INC.,
CORTZ, INC. d/b/a IN THE SWIM, INC.,
CLEARON CORPORATION d/b/a
NAVA CHEMICALS,
CHEM-WAY CORPORATION d/b/a
NAVA CHEMICALS,
MEGA, AN UNKNOWN BUSINESS ENTITY AND
MEGA CHEMICALS d/b/a OMEGA CHEMICALS
POOL AND SPA CHEMICALS, and
ELAM POOL SUPPLIES, INC. d/b/a ELAM POOLS
AND SPAS

Additional Defendants

BRIAN HEYWARD

Additional Defendant

JUNE TERM, 2013

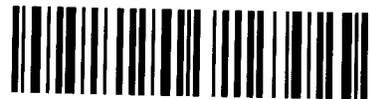
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**N. ERICKSON
DAY FORWARD**

Martin Etal Vs Days Inn-ORDER



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ORDER

And Now, this 14th day of October, 2015, after consideration of the Motion for Summary Judgment filed by Wyndham Worldwide Corporation, Wyndham Hotel Group, LLC, and Days Inns Worldwide, Inc., and Responses thereto, and after oral argument held on September 21, 2015, and for the reasons set forth in Court Exhibit "A", attached hereto, it is hereby is **ORDERED** that the Motion for Summary Judgment is **DENIED**.

BY THE COURT:

Frederica A. Massiah-Jackson

FREDERICA A. MASSIAH-JACKSON, J.

Court Exhibit “A”

The Wyndham Defendants contend that the Plaintiffs have failed to establish either direct or vicarious liability for the catastrophic injuries suffered by Zair Martin. The record does not support these arguments.

Direct Liability

Defendants insist that in order to assess whether a duty of care exists, the Court must focus on the “relationship” between the Wyndham Defendants (the Franchisor) and West Chester Lodging (the Franchisee), Memorandum, pages 14-17. In this case when considering the Standards of Operation and Design Manual (2011) with Restatement (Second) of Torts, §323, the relationship confirms the Wyndham Defendants’ duty to exercise care when they undertook to render the standards, policies and procedures for the operations of West Chester Lodging in general and the operation of the swimming pool, §508.6, in particular. See also, Sharpe v. St. Luke’s Hospital, 821 A.2d 1215, 1219 (Pa. 2003); Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178, 182 (Pa. Superior Ct. 2002).

Restatement (Second) of Torts, §323 states in pertinent part:

“One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.”

The Standards of Operation Manual does establish that Defendants undertook to render mandates and guidelines for its hotel franchisee. Plaintiffs have identified in part at Memorandum, page 8:

“Most importantly, Moving Defendants required that new construction pools be between three and five feet deep. (*See id.* at section 508.6(H).) Moving Defendants did not limit the depth of existing pools, even though this presented an obvious public safety issue and West Chester Lodging would have complied with the requirement of a maximum depth of five feet. (Gandhi Dep. at 54:11-55:3, attached as Ex. F.) Moving Defendants required that the pool deck surface be non-slip. (*See* 2011 Standards at section 508.6(I).) Moving Defendants required signage at the pool, including pool rules, hour limits, legal liabilities and disclaimers, life guard status, emergency info/phone numbers, no glass containers, no diving allowed. (*See id.* at section 508.6(J).) Moving Defendants required that the following pool equipment be present at the pool: life ring, life hook, ladder at the deep end, and steps or a ladder at the shallow end. (*See id.* at section 508.6(K).)

Additionally, Moving Defendants required that the pool water be ‘clean and clear.’ (*See id.* at section 508.6(P).) Moving Defendants even described how the water would be clean and clear by requiring West Chester Lodging to have a ‘properly maintained filtration/chlorination system.’ (*See id.* at section 508.6(L).) The filtration system was required to have the capacity to re-circulate the entire pool content in a six hour period. (*See id.*)”

This Court concludes as a matter of law that the Wyndham Defendants did undertake to regulate the services provided, including the manner of operation of the hotel swimming pools, and the filtering systems. Restatement §323 does impose a duty on Wyndham to exercise reasonable care toward Zair Martin.

The Plaintiffs experts have opined that the failures of the Wyndham Defendants to order closure of hotel pools when the water was murky, the failure to reduce hotel pool depth to 5 feet, and, the failure to consider guest safety were clearly indicative of Defendants' failure to exercise reasonable care in the manner of operating swimming pools. It will be up to a jury to determine whether these Wyndham Defendants breached their duty of care to Zair Martin.

Vicarious Liability

The Wyndham Defendants assert that the Franchise Agreement renders West Chester Lodging independently owned and operated, with full and complete control over its business operations and property. Defendants contend that here, as in Myszkowski v. Penn Stroud Hotel, Inc., 634 A.2d 622 (Pa. Superior Ct. 1993), the franchisee "controls its own destiny." Memorandum, at page 20.

This Court is not able to conclude as a matter of law what is the precise relationship between the entities. The lines of "control" between master-servant or principal-agent or franchisor-franchisee are obviously blurred where there exists the Standards of Operation and Design Manual, site inspections, correspondence and guidelines, evaluations, as well as the threats of suspension, termination and/or "other remedies available" in the event of failure to abide by the Standards. See, Standards Manual, pages 2-3.

It is well-settled that the issue of control to determine a master-servant relationship is a function for the jury when the precise nature and relationship and the right to control is at issue.

In the Myszkowski opinion Judge Wieand noted in his Dissent at 634 A.2d 631:

“Broadly stated, if the agent is under the control of the employer, he is a servant; if he is not under such control, he is an independent contractor. *Feller v. New Amsterdam Casualty Co.*, 363 Pa. 483, 486, 70 A.2d 299, 300 (1950). The actual control exercised by an employer over the manner of work, however, is not determinative of the relationship; rather, it is the employer’s right or authority to control which renders one an employee or servant and not an independent contractor. See: *Lutz v. Cybularz*, *supra* 414 Pa.Super. at 583, 607 A.2d at 1091. ‘It is the exclusive function of the jury to determine, from the evidence, the precise nature of the relationship, except where the facts are not in dispute, in which latter event the question becomes one for determination by the court.’ *Melmed v. Motts*, 341 Pa.Super. 427, 430-431, 491 A.2d 892, 893 (1985) (citations omitted).”

The record herein, including oral argument, documents, discovery and expert reports, raise many issues of fact, accordingly, Summary Judgment is Denied.

A handwritten signature in black ink, appearing to be 'J. W. J.', is located in the lower right quadrant of the page.