No. CV-02-0817088 S	:	SUPERIOR COURT
	:	
RHONDA DUNCAN, Administratrix of Estate of Kashif Broomes	:	J.D. OF HARTFORD
	:	
	:	AT HARTFORD
vs.	:	
	:	
PEH I, A LIMITED PARTNERSHIP, STARWOOD HOTELS AND RESORTS WORLDWIDE, INC.	:	July 15, 2002

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO MOTION TO STRIKE

INTRODUCTION

The above-captioned action arises out of the death by drowning of Kashif Broomes as a result of defendants' failure to maintain proper and legally required safety equipment, procedures and personnel at the recreational pool located at the Sheraton Hartford Hotel in East Hartford and defendants' misrepresentations regarding the security of the pool area. On July 9, 2002, defendants moved to strike plaintiff's second and fourth causes of action that allege violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), arguing that (1) plaintiff has failed to allege that defendants engaged in unfair practices and (2) defendants did not maintain the pool in the conduct of "any trade or commerce." Defendants' Memorandum of Law in Support of Motion to Strike, pp.3-6. The court should deny the Motion to strike because plaintiff has adequately alleged facts that meet each of the elements of a CUTPA violation.

ARGUMENT

A. STANDARD FOR GRANTING MOTION TO STRIKE

"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. In ruling on a motion to strike, the court is limited to the facts alleged in the complaint. The court must construe the facts in the complaint most favorably to the plaintiff." Faulkner v. United Technologies Corp., 240 Conn. 576, 580, 693 A.2d 293 (1997). Additionally, "in deciding upon a motion to strike . . . a trial court must consider as true the factual allegations, but not the legal conclusions set forth in the complaint." Liljedahl Bros., Inc. v. Grigsby, 215 Conn. 345, 348, 576 A.2d 149 (1990).

B. THE COMPLAINT ALLEGES THAT DEFENDANTS ENGAGED IN UNFAIR ACTS OR PRACTICES

As defendants acknowledge, an act or practice violates CUTPA where it (1) "offends public policy," or (2) is immoral , unethical, oppressive or unscrupulous, or (3) causes substantial injury to consumers. Def. Br., pp.3, 5; Willow Springs Condo. Assoc., Inc. v. Seventh BRT Devel. Corp., 245 Conn. 1, 43, 717 A.2d 77 (1998). Contrary to defendants' argument, however, plaintiff's allegations meet all of the hallmarks of a CUTPA violation.

First, the complaint alleges more than the mere conclusion that defendants' conduct violated public policy. Contra Def. Br., p.4. Among other things, the complaint alleges that defendants maintained their pool in an unsafe manner and in violation of various provisions of the Health Code that are specifically designed to ensure public safety and prompt, efficient emergency response to drowning at recreational pools such as the one in which plaintiff's decedent died. Complaint, ¶ 16(i), (k), (l), (m). Plaintiff has thus alleged that defendants

engaged in conduct that "offends public policy as it has been established by statutes" and that is "within at least the penumbra of some common law, statutory or other established concept of unfairness." Willow Springs, 245 Conn. at 43; Hartford Electric Supply Co. v. Allen Bradley Co., Inc., 250 Conn. 334, 368-369, 731 A.2d 824 (1999) (violation of state statutes offends public policy for purposes of CUTPA); Simms v. Candella, 45 Conn.Supp. 267, 711 A.2d 778 (1998) (landlord's failure to make a structural repair required by state habitability statutes violates public policy for purposes of CUTPA), citing, Conaway v. Prestia, 191 Conn. 484, 493, 464 A.2d 847 (1983) (landlord's violation of standards of housing safety and habitability set forth in the landlord tenant statutes offends public policy and amounts to an unfair act or practice under CUTPA).

Second, defendants' advertisement and maintenance of a recreational pool to which minors had unrestricted access in blatant disregard of not only the state mandated safety laws, but also without taking even the most basic safety precautions, as described in paragraphs 8, 9, 11, 12, 15, 16 and 18, is plainly immoral, unethical, oppressive or unscrupulous. Defendants' assertion that "maintaining a pool in a hotel is in no way immoral, unethical, oppressive, or unscrupulous" conveniently disregards the complaint's allegations regarding the unsafe and illegal manner in which defendants' maintained the pool, as well as the complaint's allegation that defendants misrepresented the accessibility of the pool. See Def. Br., p.4; Complaint, ¶¶ 16(a), 18.

Third, defendants' advertising and maintenance of a public pool in an unsafe manner and in violation of the regulations designed to ensure such safety, creates a risk of injury to consumers, and indeed has caused the death of one such consumer. Defendants' argument, that

plaintiff's decedent's death was an "isolated incident," and thus not within the reach of CUTPA is without any merit. As a preliminary matter, CUTPA specifically provides that "any person who suffers and ascertainable loss . . . may bring an action . . . **Proof of** public interest or **public injury shall not be required** . . ." C.G.S. §42-110g(a). Thus, plaintiff's decedent need not wait until more deaths or injuries occur at the defendants' pool prior to bringing action. Moreover, there is nothing "in the text of CUTPA, its legislative history or the interpretation of the Federal Trade Commission Act by the Federal Trade Commission or the federal courts that requires the commission of multiple unfair or deceptive acts or practices before civil liability in a private cause of action may be imposed." Pollock v. Panjabi, 47 Conn.Supp. 179, 198-199, 781 A.2d 518 (2000). Accordingly, "the majority of Superior Court decisions have held that a party need not allege more than a single act of misconduct to bring an action under CUTPA." Pollock, 47 Conn.Supp. at 198-199 & fn.10.[1]

Finally, the case of Simms, supra, which also involved a CUTPA claim based on personal injuries caused by the defendant's failure to comply with safety laws, is instructive. In Simms,

[1] See also New England Mortgage Group, Inc. v. Lebowitz, 2001 Conn.Super.LEXIS 2018 at * 8-10 (July 20, 2001) (D'Andrea, J.) (attached); Lovick v. Nigro, 1997 Conn.Super.LEXIS 448 at * 37-38 (February 24, 1997) (Lager, J.) (attached) (rental of apartment with improper levels of lead based paint in violation of statutes);Yale University School of Medicine v. Wurtzel, 1990 Conn.Super.LEXIS 1720 at * 7-8 (November 9, 1990) (Flanagan, J.) (attached).

supra, the plaintiff slipped and fell on a wet stairway caused by a landlord's failure to install gutters as required by the state habitability statutes. The court explained that, unlike a typical slip and fall negligence action, the Simms complaint alleged a violation of CUTPA because it implicated the entrepreneurial aspect of the landlord's business: "Renting an apartment building without adequate gutters may be financially advantageous to the landlord and increase his margin of profit. Conforming to the requirements of the Landlord and Tenant Act costs money. Public policy nevertheless requires landlord to expend such money. When they do not, CUTPA is properly invoked." Id. Similarly, in this case, maintaining a pool without supplying adequate safety equipment, personnel and facilities may be financially advantageous to the hotel and increase its profit margin. Conforming to the requirements of the Health Code costs money. Public policy nevertheless requires those who provide public pool facilities to expend such money. When they do not, CUTPA is properly invoked.

C. DEFENDANTS PROVIDED THE POOL FACILITIES IN THE CONDUCT OF THEIR TRADE AND COMMERCE

Defendants' argument, that they cannot be liable under CUTPA because the pool is "incidental" to their primary business is similarly without merit. First, CUTPA contains no requirement that the violation be central to the defendants' business.

> CUTPA, by its own terms, applies to a broad spectrum of commercial activity. The operative provision of the act, 42-110b(a), states merely that 'no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.' Trade or commerce, in turn, is broadly defined as 'the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.' General Statutes 42-110a(4). . . . **there is no requirement that a person be in the business of selling [or leasing or renting] such property or commodities in order to be engaged in trade or commerce within the meaning of the act** . . . Rather, the defendant's activities which

> allegedly violate CUTPA must constitute "trade or commerce" as that term is defined.

Holeva v. M & Z Associates, Inc., 1998 Conn.Super.LEXIS 3757 at * 9-14 (November 9, 1998) (Levin, J.) (emphasis added) (attached). The act specifically defines "trade or commerce" to include the advertising, rental and distribution of property, which would include the pool facilities at issue in this case.

Second, construed as true, and most favorably to the plaintiff, the complaint alleges that defendants provide a full-range hospitality service that includes lodging, pool and fitness center all of which defendants highlight in their advertising and promotional literature. Complaint, ¶ 15. Having undertaken to provide pool facilities to guests of the hotel as a part of the benefits of lodging with defendants, defendants cannot now disclaim that the pool is merely "incidental" to their business. See Marten Transport, Ltd. v. Mac Dermid, 2001 Conn.Super.LEXIS 1063 (March 26, 2001) (Doherty, J.) (attached). Nothing in the complaint supports defendants' self-serving claim that the pool is "incidental" to defendants' business, and defendants have cited no authority on point with their argument.[2]

[2] While some courts have refused to apply CUTPA to the one time sale of property or a business by one who was not in the business of selling property or businesses, there is no authority to support a refusal to apply CUTPA to the provision of facilities or services that defendants regularly provided as part and parcel of the lodging fee.

In Marten Transport, Ltd. v. Mac Dermid, 2001 Conn.Super.LEXIS 1063 (March 26, 2001) (Doherty, J.) (attached), the defendant, which was in the business of manufacturing, marketing and distributing specialty chemicals. Id., at *4. The defendant made arrangements with carriers for the distribution of its product, wherein the defendant agreed to prepare, package, and brace its products in the carrier's trailers. Id. The defendant moved to strike the CUTPA count of a complaint filed by one of the defendant's carriers on the ground that defendant could not be held liable under CUTPA for failing to properly package and brace its products because trucking the products was "merely incidental to its primary trade or business." Id., at *4-5. The court rejected the defendant's argument and denied the motion to strike, concluding that defendant made preparing, packaging, and bracing its products a primary part of its business when it undertook such responsibility. Id. Similarly in this case, when defendants chose to provide public pool facilities at the hotel, defendants made this a primary part of their business.[3]

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the court deny defendants' Motion to Strike.

[3] Significantly, the landlord in Simms could also have argued that providing gutters was incidental to his primary business of renting apartments. However, the gutters in Simms and the pool in this case, are an integral part of the facilities provided by the business.