2013 IL App (1st) 123720-U

THIRD DIVISION
December 18, 2013

No. 1-12-3720

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JUN YOP LEE and ELLEN LEE, Plaintiffs-Appellants,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 09 L 13107
HEE WOONG KIM, WOO RI VILLAGE, INC., an ILLINOIS CORPORATION, Defendants-Appellees,	)	
BRIAN S. KIM, JASON SUH, SAM KIM and PETER AHN, Defendants.	)	Honorable Jeffrey Lawrence, Judge Presiding.

JUSTICE Mason delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Court erred in granting summary judgment for restaurant on customers' claims of failure to protect from and assist during attack by third parties outside the restaurant; duty to protect business invitees from reasonably-foreseeable third-party criminal acts does not necessarily end at the property line.

¶ 2 Plaintiffs Jun and Ellen Lee appeal from an order of the circuit court granting partial summary judgment for defendants Woo Ri Village, Inc., and Hee Kim (collectively, Woo Ri) in

plaintiffs' personal injury action. Plaintiffs contend on appeal that the court erred in granting summary judgment for Woo Ri. For the reasons stated below, we reverse and remand.

¶ 3 In their third amended complaint, plaintiffs raised claims of negligence and liability under the Dram Shop Act (Act) (235 ILCS 5/6-21 (West 2010)), against Woo Ri, a restaurant in Niles, and Hee Kim, its president. Plaintiffs also asserted a battery or intentional tort claim against customers Brian Kim (Brian), Sam Kim (Sam), Peter Ahn, and Jason Suh (collectively, the Customers). Plaintiffs generally alleged that, on August 15, 2009, Kim and Woo Ri employees served the Customers alcoholic beverages and permitted them to become intoxicated, and that in their intoxicated state the Customers physically attacked Jun Lee "outside in the parking lot" of the restaurant, with Jun's injuries resulting in lost wages and medical expenses. Counts I and IV alleged that Woo Ri was thus liable under the Act to Jun and his wife Ellen respectively, and Count III alleged battery of Jun by the Customers "both with bottles and their fists and feet" and sought compensatory as well as punitive damages.

¶ 4 Count II asserted a claim for common law negligence and alleged that the Customers and others left the restaurant, carrying "bottles of beer and other alcoholic beverages they had previously purchased and/or were given inside" the restaurant, and that in an altercation in the parking lot, Jun was hit twice in the head with bottles. Plaintiffs alleged that Woo Ri employees were outside during a portion of the altercation and "failed to take any action whatsoever to assist" Jun. Plaintiffs alleged that Woo Ri was negligent in: 1) allowing the Customers and others to leave the restaurant while intoxicated and carrying bottles of alcohol in violation of the Niles ordinance, 2) failing to prevent the Customers from attacking Jun or "appropriately intervening" or taking "reasonable, appropriate, and timely steps to protect" Jun, 3) failing to disperse the crowd outside the restaurant while Woo Ri employees knew Jun was being attacked, 4) acting in concert with the Customers and others by allowing them to continue attacking Jun, 5)

not calling the police "in a timely fashion" when Woo Ri knew or should have known of the fight outside the restaurant, and 6) discouraging Jun from calling the police and impeding his attempt to do so. Count II thus sought damages for Jun against Woo Ri.

¶ 5 Count V, on behalf of Ellen, reiterated Count II's allegations of negligence and further alleged that Ellen accompanied Jun when he went outside to find the address and that the Customers and others attacked Ellen in the parking lot. Ellen alleged that her injuries from the attack resulted in medical expenses and she sought damages from Woo Ri.

¶ 6 Woo Ri filed a motion for summary judgment, supported by the attached transcripts of the depositions of Jun, Kim, and Woo Ri employee Seung Kang. We summarize the evidence relevant to plaintiffs' claims gleaned from the record.

¶ 7 Woo Ri is located in a strip mall. From a picture in the record, it appears that the other tenants in the mall are retail or service establishments unlikely to be open in the late evening hours. Woo Ri houses a dining room that is open from 10 a.m. to midnight each day and nine karaoke rooms that are open from 10 a.m. to 4 a.m. each day. The karaoke rooms are rented by patrons who can also order food and drinks in the room for an additional charge.

¶ 8 Woo Ri sells several types of beer and Soju, a Korean alcoholic beverage. Beer and Soju are sold in bottles. Woo Ri does not sell Heineken beer, but the bottles in which Soju is sold are green and slightly larger than beer bottles.

¶ 9 Jun, his wife and several of his wife's business associates arrived at Woo Ri around 9:30 p.m. on August 15, 2009. They were greeted by an individual at the front desk. The group had rented one of the karaoke rooms. Sometime before midnight, Jun stepped outside to smoke a cigarette. By then, the only patrons of Woo Ri were customers using the karaoke rooms.

¶ 10 As he stood outside Woo Ri's front door, Jun noticed three men who were fighting. One of the men appeared to be the aggressor and was fighting with the other two. Jun attempted to

intervene and tell them to stop. As Jun took two or three steps toward the aggressor, who had challenged him to fight, someone threw what appeared to be a Heineken bottle, which hit Jun on the left side of his head near his eye.

¶ 11 When Jun began to look for the aggressor, Brian approached him and told him not to get involved. Brian was not the person who threw the bottle, and Jun "cannot say" where Brian came from or whether he witnessed the earlier altercation. Jun used his cellphone to call the police, describing the restaurant's location in terms of the street intersection before re-entering the restaurant to obtain the address for the police. When he entered the restaurant, Jun, whose head was bleeding, asked a person, who he assumed was a Woo Ri employee, for the restaurant's address. According to Jun, the employee refused to give him the restaurant's address and discouraged him from calling the police. Jun assumed the person was an employee because he was the same person who had greeted Jun's party when they arrived that evening.

¶ 12 Jun went back outside, where he saw several people standing around; he had not seen them in the restaurant or drinking alcohol, but several of them had Soju bottles. Jun handed his cellphone to Ellen before seeking out and then grabbing Brian, telling Brian that he could not leave. As he held Brian, Jun was struck from behind with a bottle by an unknown person. Jun fell to the ground and lost consciousness.

¶ 13 According to the deposition testimony of Kim and Kang, there had never been a fight inside or outside the restaurant before this incident, and the sidewalk and parking lot outside the restaurant are common areas of the shopping center not under Woo Ri's control. According to Kim and Kang, Woo Ri does not allow customers to leave the restaurant with bottles and that night Kang ensured that nobody left the restaurant with bottles. However, Kang also testified that there were periods of time during the evening that he was not at the desk. After Jun went

outside, Kang heard noises outside the restaurant and told Kim. While Kang kept customers from leaving until the police arrived, Kim and others "pulled the assailants apart."

¶ 14 On these facts, Woo Ri argued that it had no duty to protect or warn plaintiffs of criminal acts by third parties outside Woo Ri's premises, partially because there is no duty to anticipate criminal activity by third parties absent notice of prior similar acts and partially because Woo Ri had no duty to persons outside its premises, and, in particular, in the parking lot owned by the shopping center. Woo Ri also argued that, by Jun's own account, Jun started the altercation, first when he stepped towards the aggressor in the initial incident and later when he went outside to find Brian and made the first contact by grabbing him.

¶ 15 Plaintiffs argued that Woo Ri owed them a duty and particularly that the duty of a tavern or other business does not depend on whether an incident with a third party occurs on or off the premises but whether the third party's actions were reasonably foreseeable. Plaintiffs also argued that Woo Ri contributed to the incident outside the restaurant by allowing customers to leave with bottles from the restaurant, and by allowing the altercation to continue for several minutes by refusing to help in summoning police. Plaintiffs also contended that Woo Ri's claim – that Jun's injuries were caused by a Heineken bottle when Woo Ri does not sell Heineken – was contradicted by Ellen's testimony that Jun was struck by a Soju bottle in the second attack and that Woo Ri admittedly sells Soju.

¶ 16 On August 20, 2012, the court granted summary judgment for the Woo Ri defendants on Count II and the "negligence aspects" of Count V, finding that Woo Ri owed plaintiffs no duty. On plaintiffs' motion, the court found that there was no just reason to delay enforcement or appeal of the partial summary judgment order. *See* Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). This appeal followed.

¶ 17 Before proceeding to the merits of appeal, we note two issues. First, there is no transcript or other record (Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) of the hearing on Woo Ri's summary judgment motion. However, as our review of a grant of summary judgment is *de novo* and based on the motion pleadings and supporting discovery in the record, we find the record adequate for our review. See *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 655 (2007). Second, Woo Ri argues that plaintiffs have forfeited a particular argument – more precisely, citation to particular authority – by raising it for the first time on appeal. However, plaintiffs have consistently argued that Woo Ri owed them a duty that extended beyond the doors of the restaurant. We will not find forfeiture in a failure to cite particular authority in support of an argument where the argument itself was raised and addressed in the trial court.

¶ 18 On appeal, plaintiffs contend that the court erred in granting summary judgment for the Woo Ri defendants, contending that Woo Ri had a legal duty to plaintiffs that it breached as plaintiffs alleged.

¶ 19 A party may move for a summary judgment in its favor, which "shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(b), (c) (West 2010). A genuine issue of material fact precluding summary judgment exists where the material facts are disputed or reasonable persons might draw different inferences from the undisputed facts. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. Because summary judgment is a drastic means of disposing of litigation, the movant has the burden of production and proof, the pleadings and supporting documentation are construed strictly against the movant and liberally in favor of the opponent, and summary judgment should be granted only when the movant's right is clear and free from doubt. *Id*. That said, a plaintiff opposing a summary judgment motion must present some

factual basis – not mere speculation or conjecture – that would support his claim. *Freedberg v. Ohio Nat'l Ins.Co.*, 2012 IL App (1st) 110938, ¶¶ 25-26. Our review of an order granting summary judgment is *de novo*. *Id.*, ¶ 25.

¶ 20 In a complaint alleging negligence, a plaintiff must allege facts establishing the existence of a legal duty owed by the defendant to the plaintiff, a breach of that duty, and injury proximately caused by that breach. *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 22. A legal duty contemplates a relationship between the defendant and the plaintiff such that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff. *Id*. Absent a legal duty, recovery by the plaintiff is impossible as a matter of law, so that the existence of a duty under a particular set of circumstances is a question of law. *Id*. Generally, every person has a duty to all other persons to exercise ordinary care to guard against injury naturally flowing as a reasonably probable and foreseeable consequence of his or her acts. *Jane Doe-3 v. McLean County Unit Dist. No. 5*, 2012 IL 112479, ¶ 21. The factors used to determine whether a duty exists are the (1) reasonable foreseeability of injury, (2) likelihood of injury, (3) magnitude of the burden of guarding against the injury, and (4) consequences of placing the burden upon the defendant. *Id.*, ¶ 22.

¶ 21 Our supreme court has recognized that:

> " 'A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons *** and by the failure of the possessor to exercise reasonable care to: (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to

> enable the visitors to avoid the harm, or otherwise to protect them against it.' " *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 438 (2006), quoting Restatement (Second) of Torts § 344 (1965).

¶ 22 The basis for imposing this duty is that businesses to which the general public are invited should anticipate, from general or particular experience, that in places open to the public "what men can do, they might," – that is, those who invite the public to their business may reasonably expect that some may not behave properly – and thus are responsible for injury arising from the absence of reasonable precautions against that common expectation. *Marshall*, 222 Ill. 2d at 439. In *Marshall*, our supreme court rejected a contention that this duty arises only when the possessor has notice of a prior similar incident of third-party conduct. *Id.* at 444-46. A criminal attack by a third party is reasonably foreseeable when the circumstances put a reasonably prudent person on notice of the probability of an attack, or when a serious physical altercation has already begun. *Haupt v. Sharkey*, 358 Ill. App. 3d 212, 219 (2005).

¶ 23 This court has held that the duty of business owners to exercise reasonable care to protect invitees from reasonably foreseeable criminal acts of third parties generally does not extend outside the premises because it would impose an unjustifiable burden on a business owner to protect its patrons from injuries occurring away from its premises. *Wilk v. 1951 W. Dickens, Ltd.*, 297 Ill. App. 3d 258, 261-62 (1998). However, we have also held that "there is no bright line rule that a tavern owner's duty to protect its patrons from criminal acts of third parties absolutely ends at the precise property line of the tavern," but instead "an owner or operator of premises has a duty to provide a reasonably safe means of ingress and egress both on his premises and, within limitations dictated by the facts of the case, beyond the precise boundaries of such premises." *Haupt*, 358 Ill. App. 3d at 218. That is particularly so "where the owner contributes to the altercation by sending patrons out into it." *Id.*

¶ 24 Here, plaintiff's claims arise out of injuries allegedly inflicted by third parties outside Woo Ri's premises, but are based on alleged actions or inaction of Woo Ri employees or agents inside the premises, as we discuss below. We also note that the *Haupt* court found that the "plaintiff, a *departing* patron of defendant's tavern, remained the defendant's business invitee even while off property owned or controlled by defendant." (Emphasis added.) *Haupt*, 358 Ill. App. 3d at 217. As Jun testified in his deposition that he was stepping outdoors just before the first attack to smoke a cigarette and evidently planned to return to the premises as the rest of his group remained in the karaoke room, a finding that Jun was still Woo Ri's invitee outside the restaurant is on even more solid ground than in *Haupt*. Indeed, if Woo Ri, consistent with Illinois law, 410 ILCS 82/1, *et seq.* (West 2008), required its patrons to step outside the premises to smoke, it follows that Woo Ri owes a duty to them to take reasonable precautions for their safety while they are outside.

¶ 25 Plaintiffs allege that a Woo Ri employee refused to assist plaintiff Jun with his 911 call after the first attack by refusing to provide the restaurant's address, so that Jun went back outside to obtain it and was then attacked a second time. Contrary to Woo Ri's argument, we do not consider it speculative to infer from Jun's deposition testimony that the man who refused to provide the address was a Woo Ri employee or agent when Jun testified that the man had been standing in the lobby greeting customers upon his arrival at Woo Ri about two hours earlier. Whether this refusal occurred as Jun testified in his deposition, and whether and to what extent Jun going outside again was caused by the refusal or resulted from any contributory negligence by Jun, are issues of fact rather than law and are inappropriate for resolution on summary judgment.

¶ 26 Plaintiffs also allege that Woo Ri allowed customers to exit the restaurant carrying glass beverage bottles or failed to prevent them from doing so. It is reasonably foreseeable that

allowing customers of a tavern to leave the premises carrying glass bottles could result in those bottles being used as weapons, thus contributing to or aggravating any altercation outside. Further, Woo Ri evidently foresaw this because testimony from Kim and Kang established that Woo Ri had a policy that customers could not leave the premises carrying bottles. Whether, in fact, customers took bottles from Woo Ri on the night in question – that is, whether Woo Ri's efforts were sufficient – is a question of fact, which again cannot be resolved on summary judgment. It is undisputed, from deposition testimony by both plaintiffs and Woo Ri's witnesses, that Woo Ri sells Soju and that at least one Soju bottle was used in the second attack on Jun. Although Woo Ri argued in the trial court and argues here that there was no evidence that the people who attacked Jun in the parking lot were patrons of Woo Ri, that conclusion is, in fact, a fair inference given that Woo Ri, as far as the record discloses, was the only establishment open and selling liquor at the time and in the vicinity of the attack. While Kim testified that the Soju bottles outside Woo Ri came from elsewhere and that Heineken bottles he saw could not have come from Woo Ri, these assertions raise issues of fact as to the source of the bottles outside the restaurant and whether Jun was initially hit with a Heineken bottle or a Soju bottle, both of which are green. We conclude that the trial court erred in finding that Woo Ri had no duty to plaintiffs as a matter of law and thus in granting partial summary judgment for the Woo Ri defendants on the negligence counts. Woo Ri's further contentions regarding Jun's role in the altercation likewise present disputed issues of fact.

¶ 27 Accordingly, the trial court's order granting partial summary judgment for Woo Ri Village, Inc., and Hee Kim is reversed, and this cause is remanded for further proceedings.

¶ 28 Reversed and remanded.