2013 IL App (1st) 123036-U

FOURTH DIVISION
August 15, 2013

No. 1-12-3036

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOCELYN CONTINI, a Minor, by Her Mother and Next Friend, Samantha Contini,	)	
Plaintiff,	)	
	)	Appeal from the
v.	)	Circuit Court of
	)	Cook County
GREEN DOLPHIN, INC., a Corporation d/b/a The Green Dolphin,	)	No. 10 L 12702
Defendant-Appellee	)	Hon. William E. Gomolinski,
	)	Judge Presiding
(Samantha Contini, as Special Administrator of the Estate of Carlos Aguirre, Jr., Deceased,	)	
Plaintiff-Appellant).	)	

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in granting motion to dismiss negligence-related counts of complaint filed by the special administrator of the estate of a decedent; defendant did not owe duty to decedent, whose fatal shooting occurred away from defendant's business premises following an altercation with another patron inside the premises and subsequent verbal statements by the assailant to defendant's general manager.

¶ 2 Jocelyn Contini, a minor, by her mother and next friend, Samantha Contini, filed a lawsuit against defendant Green Dolphin, Inc., a corporation doing business as The Green Dolphin. The lawsuit relates to the fatal shooting of Jocelyn's father, Carlos Aguirre, Jr. outside of the boundaries of defendant's premises following a physical altercation inside defendant's establishment. The complaint was amended to include two additional counts brought by Samantha Contini, as Special Administrator of the Estate of Carlos Aguirre, Jr.[1] The circuit court granted defendant's motion to dismiss Counts II and III of the second amended complaint, and plaintiff filed this appeal.

¶ 3 For the reasons stated herein, we affirm.

¶ 4 BACKGROUND

¶ 5 The second amended complaint, filed March 6, 2012, alleges, in part, as follows. Defendant "operated, managed, maintained and controlled" an establishment located at or near 2200 North Ashland Avenue in Chicago, in which defendant "sold, served or gave alcoholic liquor to customers." On November 8, 2009, defendant sold, gave or served alcohol to Jose Melecio "and/or various other unnamed individuals," who became intoxicated. After Melecio "and/or various other unnamed individuals" physically assaulted Aguirre within defendant's establishment, defendant ejected Melecio "and/or various other unnamed individuals." At

[1] The two plaintiffs in the underlying action are: (i) Jocelyn Contini, a minor, by her mother and next friend, Samantha Contini, who filed the original complaint and Count I of the amended and second amended complaints; and (ii) Samantha Contini, as Special Administrator of the Estate of Carlos Aguirre, Jr., who filed Counts II and III of the first and second amended complaints. This appeal relates to the dismissal of Counts II and III of the second amended complaint. References to "plaintiff" herein are to Samantha Contini, as Special Administrator of the Estate of Carlos Aguirre, Jr., the sole appellant, and references to "plaintiffs" include Jocelyn.

approximately 3:30 a.m., after his removal, Melecio "remained outside but still upon the defendant's business premises" when he spoke with defendant's general manager. Melecio stated, among other things, that "he (Melecio) was going to get his boys and 'shut this place down.' " Aguirre remained within the establishment for "nearly an hour" after Melecio's statements to the general manager. Melecio "and/or various other unnamed individuals *** later resumed assaulting [Aguirre], including, but not limited to" shooting Aguirre "as he was leaving such premises and walking toward his vehicle[.]"

¶ 6 In Count I of the second amended complaint, Jocelyn, by her mother, sought recovery under the Illinois Dram Shop Act. See 235 ILCS 5/6-21 *et seq.* (West 2010). In Count II, plaintiff brought a claim for negligence pursuant to the Illinois Wrongful Death Act (740 ILCS 180/1 *et seq.* (West 2010)) alleging, among other things, that (a) defendant knew or should have known that Melecio was "an intoxicated, belligerent, aggressive and dangerous individual who had physically assaulted" Aguirre within defendant's business premises; (b) defendant's general manager knew or should have known that Melecio's statement that "he (Melecio) was going to get his boys and 'shut this place down' " indicated that Melecio "intended to enlist the assistance of additional accomplices and return to the aforesaid business premises later on that same date for the purpose of engaging in violent and unlawful conduct and that [Aguirre] was likely to be a specific target of such violent and unlawful conduct"; (c) Aguirre remained within defendant's business premises for "nearly an hour" after Melecio's statements, thus remaining within the "special relationship with defendant" created by Aguirre's patronage; and (d) by virtue of the special relationship of business invitor and invitee existing between defendant and Aguirre, and

the "unreasonable and foreseeable risk of physical harm which arose as aforesaid within the scope of that relationship," defendant owed a duty to "exercise reasonable care to warn and protect" Aguirre from "such reasonably foreseeable risks of injury." Plaintiff asserted that defendant: (a) failed to warn Aguirre of Melecio's stated intentions; (b) failed to offer any assistance so that Aguirre could safely exit the premises; and (c) failed to advise law enforcement authorities of Melecio's "stated violent and unlawful intentions, despite the fact that defendant knew or should have known that [Aguirre] was impaired due to alcohol consumption and was therefore particularly susceptible to further acts of violence by Jose Melecio and/or various other unnamed individuals who had previously assaulted him" within defendant's establishment. Plaintiff alleged that, as a direct and proximate result of defendant's negligent breach of its duties, Melecio "and/or various other unnamed individuals resumed assaulting" Aguirre, including inflicting fatal gunshot wounds. In Count III, plaintiff sought recovery under a section of the Illinois Survival Act for the personal injury, pain and suffering experienced by Aguirre prior to his death. See 755 ILCS 5/27-6 (West 2010).

¶ 7 In its motion to dismiss Counts II and III of the second amended complaint,[2] defendant contended that, under applicable law, it did not owe a duty to Aguirre because the "alleged injurious act" did not occur on its premises, and therefore plaintiff could not recover in tort for negligence. Defendant asserted that the location of the shooting – not on defendant's business premises – and the time of the shooting – approximately one hour after Melecio's departure from

[2]We note that plaintiff objected in the trial court to defendant's use of "excerpted portions of the Chicago Police Department Investigation Report pertaining to the incident at issue" as an exhibit to the motion to dismiss. The trial court did not consider such report, nor do we.

such premises – provided support for the conclusion that defendant did not owe Aguirre a legal duty.

¶ 8 After briefing and a hearing, the circuit court entered an order on July 26, 2012 dismissing Counts II and III of the second amended complaint with prejudice and further providing that "[t]here is no just reason for delaying appeal of this order." On August 23, 2012, plaintiffs filed a motion to reconsider the order granting the motion to dismiss Counts II and III. In an order entered September 13, 2012, the circuit court denied the motion to reconsider and further stated that "[t]he filing of Plaintiff's Motion to Reconsider tolled the time for filing an appeal of the Court's July 26, 2012, order; pursuant to Rule 304(a), there is no just reason to delay appeal of said order, from today's date." On October 11, 2012, plaintiff filed a notice of appeal relating to two orders: (a) the order granting the motion to dismiss counts II and III of the second amended complaint, entered July 26, 2012; and (b) the order denying the motion for reconsideration, entered on September 13, 2012.

¶ 9 ANALYSIS

¶ 10 On appeal, plaintiff contends that, as stated in Counts II and III of the second amended complaint: (a) defendant knew or should have known that Melecio was an "intoxicated" and "dangerous" individual who had physically assaulted Aguirre inside its establishment; (b) defendant's general manager knew or should have known that Melecio's statements – made after he was ejected from inside the establishment but while he remained on defendant's business premises – including that "he (Melecio) was going to get his boys and 'shut this place down' " indicated that Melecio intended to "return to the *** business premises later on that same date

for the purposes of engaging in violent and unlawful conduct and that [Aguirre] was likely to be a specific target"; (c) Aguirre remained within the premises for nearly an hour after Melecio's statements to the general manager, during which time he "remained within the special relationship created by his patronage" of defendant's business; and (d) these facts alerted defendant to the "unreasonable and foreseeable risk of physical harm" which gave rise to a duty to exercise reasonable care to "warn and protect" Aguirre. Plaintiff contends that she did not allege in the second amended complaint that the defendant owed a duty to protect Aguirre until he reached safety, but instead asserted that the defendant breached its duties to Aguirre when it failed to warn Aguirre of Melecio's stated intentions, to offer any assistance so Aguirre could safely exit the premises, or to advise law enforcement authorities of Melecio's remarks, despite the fact that defendant knew or should have known that Aguirre was impaired due to alcohol consumption and therefore was "particularly susceptible to further acts of violence" by Melecio or others.

¶ 11 Plaintiff further contends that imposing a duty to warn Aguirre while he remained on defendant's business premises is "consistent with sound public policy considerations." Plaintiff asserts that imposing a duty to warn and protect in this case does not pose unreasonable burdens in terms of time or expense and that the "situs of where the injury occurred is largely irrelevant to the defendant's performance of this duty." Plaintiff submits that "in this post-9/11 era, the public policy and social requirements of the time and community pertaining to protecting against the potentially violent activities and threats such as the ominous statements of Melecio require a heightened duty of care as compared to the circumstances existing when" certain prior Illinois

cases were decided.

¶ 12 Defendant responds that plaintiff's appeal "must be dismissed for want of jurisdiction, as she failed to timely file her Notice of Appeal within thirty (30) days of the trial court's July 26, 2012 Order dismissing Counts II and III of her Second Amended Complaint." Specifically, defendant asserts that because plaintiff "made no argument within the Motion attacking the trial court's basis for dismissal of Counts II and III" or otherwise "explaining why the Order necessitated reconsideration or vacation beyond removal of the 304(a) finding," plaintiff's notice of appeal was required to be filed within 30 days of the July 26, 2012 order and the October 11, 2012 notice of appeal was thus untimely.

¶ 13 In addition, defendant contends that "[i]t is well-established under Illinois law that a business owner, as a business invitor, owes a duty to his patrons to protect against the foreseeable criminal acts of third parties that occur within the business premises or while such patrons remain business invitees," but such duty does not extended to protect against "unforeseeable third party criminal actions that occur outside the premises, regardless of whether those subsequent actions may be related to prior incidents taking place inside the premises." Defendant further contends that it owed no duty to Aguirre to "protect him from an unforeseeable attack by a third-party away from the Green Dolphin's premises by giving him a warning while he was on the premises." Specifically, defendant challenges the plaintiff's claim that because defendant could have warned Aguirre of Melecio's "ambiguous threat" before Aguirre left, it had a duty to do so. Moreover, defendant contends that "general duty analysis" does not support the imposition of a duty to warn. Finally, defendant contends that plaintiff "alleges no facts to suggest that the Green

Dolphin took any affirmative action giving rise to any duty beyond those normally imposed on a business owner."

¶ 14 Timeliness of Appeal

¶ 15 As a threshold matter, defendant challenges the timeliness of this appeal. Rule 303(a)(1) governs when a notice of appeal must be filed in a civil case. Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008). Under 303(a)(1), a party generally must file an appeal no more than 30 days after the entry of a final order. *Id.* Rule 303(a)(1) further provides that the timely filing of a motion directed against the judgment "defers the running of the 30 days, and the deadline for filing a notice of appeal is then 30 days from the resolution of the last timely and proper postjudgment motion." *Heiden v. DNA Diagnostics Center, Inc.*, 396 Ill. App. 3d 135, 138 (2009).

¶ 16 Plaintiff asserts that her appeal "is brought pursuant to Illinois Supreme Court Rule 304(a)" and is timely filed "inasmuch as a final and appealable order was entered on September 13, 2012 and this Appeal was filed on October 11, 2012." Rule 304(a) provides that an order that disposes of some, but not all, claims is immediately appealable if the trial court makes an express written finding that there is no just reason for delaying either enforcement or appeal of such order. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Defendant contends that plaintiff's appeal was untimely because her motion to reconsider "did not attack the substance of the trial court's order granting Green Dolphin's Motion to Dismiss," but rather "sought only to strike the 304(a) language from the Court's July 26, 2012 Order, so that the Order would not be immediately appealable." Citing *Heiden v. DNA Diagnostics Center, Inc.*, 396 Ill. App. 3d 135 (2009), defendant contends that "[s]imply entitling a post-judgment motion as a 'Motion to Reconsider,'

is insufficient to toll the time for initiating appeal if the relief sought is not the type required by Section 2-1203." See *id.* at 140-41; see also 735 ILCS 5/2-1203 (West 2012). Arguing that a postjudgment motion extends the time for filing a notice of appeal only when it seeks rehearing, retrial, modification or vacation of the judgment, or other similar relief, defendant asserts that the plaintiffs' reconsideration motion was insufficient to toll the 30 day period to file an appeal.

¶ 17 After reviewing the motion for reconsideration, we conclude that it constitutes a "motion directed at the judgment" for purposes of Rule 303 and is thus sufficient to toll the 30 day period. In the motion, plaintiffs "ask that the Order containing the Rule 304(a) finding" – which is the July 26, 2012 order dismissing Counts II and III of the second amended complaint – "be vacated and set aside, as discovery to be conducted may possibly lead to additional information which will permit pleading of additional facts altering [*sic*] which warrant a different result."[3] We disagree with defendant's contention that, by this language, plaintiff sought only to "strike the 304(a) language" from the order. Although the motion is not detailed, plaintiffs plainly requested that the dismissal order be vacated. We agree with the *Heiden* court that the "nature of a motion is determined by its substance rather than its caption [Citation.]" *Heiden*, 396 Ill. App. 3d at 140. In the instant case, we do not view the substance and the caption as inconsistent. We conclude that plaintiff's appeal is timely, and we thus turn to its merits.

¶ 18 Defendant's Alleged Duty

[3] The text of the motion refers to "Counts I and II." We understand, as the circuit court apparently did, that plaintiff was referring to Counts II and III, in view of the fact that defendant's motion to dismiss – and the order granting same – were directed at Counts II and III of the second amended complaint.

¶ 19 Defendant filed its motion to dismiss under section 2-619(a)(9) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)), asserting that it owed no duty to Aguirre and thus plaintiff's negligence claims brought pursuant to the Illinois Wrongful Death Act and the Illinois Survival Act should be dismissed. Under section 2-619(a)(9), a defendant may file a motion for dismissal of an action because "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." *Id.* When considering a motion pursuant to section 2-619(a)(9), the trial court "must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997). The court should grant the motion if the plaintiff can prove no set of facts that would support a cause of action. See *Progressive Insurance Company v. Williams*, 379 Ill. App. 3d 541, 544 (2008); see also *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003) (stating that an "affirmative matter" in a section 2-619(a)(9) motion is "something in the nature of a defense which negates the cause of action completely ***. [Citation.]). On appeal, our review is *de novo*. *Id.* at 368.

¶ 20 A negligence claim requires "the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." *Marshall v. Burger King Corporation*, 222 Ill. 2d 422, 430 (2006). Whether a duty exists is a question of law, and depends on whether the parties "stood in such a relationship to one another that the law imposes an obligation on the defendant to act reasonably for the protection of the plaintiff." *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 47 (1991).

¶ 21 As a general rule, Illinois does not impose a duty to protect others from criminal attacks

by third parties. See *Simmons v. Homatas*, 236 Ill. 2d 459, 475 (2010); see also *Morgan v. 253 East Delaware Condominium Association*, 231 Ill. App. 3d 208, 211 (1992) (same). However, an exception is recognized where the criminal attack was reasonably foreseeable and the parties had a special relationship such as carrier-passenger, innkeeper-guest, business invitor-invitee, or voluntary custodian-protectee. See *id.*; see also *Simmons*, 236 Ill. 2d at 475 (stating that a "special relationship is required to impose a duty on the defendant to protect others from the criminal acts of a third party"); *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 216 (1988) (noting that a "special relationship" has been recognized where the parties are in a position of business invitor and invitee). In addition, whether a duty exists will depend upon "a consideration of the likelihood of injury, the magnitude of the burden to guard against it, and the consequences of placing that burden upon the defendant." *Id.* at 228; see also *Hills v. Bridgeview Little League Association*, 195 Ill. 2d 210, 243 (2000).

¶ 22 *Section 344 of Restatement (Second) of Torts*

¶ 23 Plaintiff contends that this case "presents an issue of first impression pertaining to a business premises owner's duty of care to its patron, specifically, the business owner's duty to provide its patron with a 'warning adequate to enable the visitor to avoid the harm, or otherwise to protect them against it,' recognized as part and parcel of the duty to protect against the criminal acts of third persons within the Restatement (Second) of Torts § 344 (1965)." Section 344 provides:

"§ 344. Business Premises Open to Public: Acts of Third Persons or Animals

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 or animals, 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." Restatement (Second) of Torts § 344 (1965).

Plaintiff contends that, "unlike a number of prior reported decisions," this case is based on defendant's "breach of its duty to warn, and that all of the alleged breaches of this duty occurred within and while [Aguirre] was still upon defendant's business premises."

¶ 24 Defendant counters that this case does not present an issue of first impression concerning a duty to warn. Instead, defendant asserts that "Plaintiff's claim that the Green Dolphin had a duty to warn Aguirre while he remained in the Green Dolphin is no different than claiming that the Green Dolphin had a duty to protect him from criminal acts of a third-party outside the business premises."

¶ 25 We do not consider this a case of first impression but, instead look to the considerable case law regarding the scope of the duty of a business invitor to protect its invitee from third party criminal attacks. While section 344 provides, among other things, for the giving of a "warning" under certain circumstances, such obligation is explicitly part of a broader duty to "exercise reasonable care" and "otherwise to protect" visitors against harm. Restatement (Second) of Torts, § 344. The Illinois Supreme Court has stated that section 344 articulates the

"long recognized" rule that "certain special relationships may give rise to an affirmative duty to aid and protect another against unreasonable risk of physical harm." *Marshall*, 222 Ill. 2d at 438 (2006); see also *Hills*, 195 Ill. 2d at 250 (noting that section 344 "states what is widely regarded as the appropriate test for establishing the special relationship between a possessor of land and an entrant that may give rise to an affirmative duty to protect the entrant from third-party attacks"). In accordance with section 344, certain relationships may give rise to a duty to "aid and protect" another; we do not view any potential obligation to warn as distinct from, or at odds with, the broader duty of a business invitor to exercise "ordinary, reasonable care" (*Roth v. Costa*, 272 Ill. App. 3d 594, 596 (1995)) to protect invitees from criminal attack.

¶ 26 Defendant cites a number of cases for the proposition that the duty to protect patrons "does not extend to protect against unforeseeable third party criminal actions that occur outside the premises, regardless of whether those subsequent actions may be related to prior incidents taking place inside the premises." See *Wilk v. 1951 W. Dickens, Ltd.*, 297 Ill. App. 3d 258 (1998); *Fitzpatrick v. Carde Lounge, Ltd.*, 234 Ill. App. 3d 875 (1992); *Lewis v. Razzberries, Inc*., 222 Ill. App. 3d 843, 850 (1991)*; Badillo v. DeVivo*, 161 Ill. App. 3d 596 (1987). We discuss each briefly below.

¶ 27 *Badillo v. DeVivo*

¶ 28 In *Badillo*, the plaintiff was verbally accosted and physically attacked in a tavern by another patron. *Badillo*, 161 Ill. App. 3d at 597. The tavern operator intervened, stopped the altercation, and ejected both the plaintiff and the other patron. *Id.* The plaintiff proceeded to her automobile parked one-half block away from the tavern, where she again was assaulted and

battered by the other patron who, at the time, was brandishing a police baton. *Id.* The plaintiff sued the tavern, alleging negligence based on the tavern's failure to call the police, its failure to "provide reasonable escort and security for the plaintiff after *** exiting the premises" and its instruction to the plaintiff and the other patron to leave the premises simultaneously. *Id.* The trial court dismissed this negligence count. *Id.*

¶ 29 On appeal, the court found no Illinois authority for imposing a duty on a tavern owner to protect its invitees from foreseeable dangers caused by third persons off the tavern's premises. *Id.* at 598. Although the court found "some authority that an owner or operator of a business has a duty to provide a reasonably safe means of ingress and egress," the court did not consider such "limited authority" to be analogous in this case where the injury occurred one-half block away from the defendant's property. *Id.* The court also noted that "it was not foreseeable that the fight would continue outdoors as there are no allegations in plaintiff's amended complaint that [the assailant] was intoxicated or made verbal threats to plaintiff in the tavern, or that defendant knew [the assailant] was armed with a weapon." *Id.* at 599.

¶ 30 The court then observed that, "even assuming the subsequent assault was foreseeable, foreseeability is not the only element necessary to establish duty." *Id.* The court stated that, in determining the existence of a duty, the court should also consider the likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant." *Id.* The court concluded:

> "This court has repeatedly held that requiring a business operator to protect its patrons from injuries that occur after the patron leaves the premises places an unjustifiable burden

> on the operator and on the police force. [Citations.] It would oblige tavernkeepers, as well as other business operators to, in essence, police the streets so as to ensure their patrons' safe passage to their cars or even their homes. Plaintiff's proposed remedy would be particularly burdensome as it would require establishment owners to determine which party was the aggressor in an altercation and to detain that potentially dangerous person on the premises until the victim could flee." *Id.*

The *Badillo* appellate court thus affirmed the trial court's dismissal of the negligence count against the tavern. *Id.* at 600.

¶ 31 *Lewis v. Razzberries, Inc.*

¶ 32 In *Lewis*, a tavern patron was fatally shot by another patron in a parking area adjacent to the tavern. *Lewis*, 222 Ill. App. 3d at 845. The special administrator of decedent's estate filed a wrongful death action, alleging the tavern "owed a duty of care to protect against reasonably foreseeable criminal acts; that defendant voluntarily assumed a duty to provide protection; and that the tavern owner had sufficient notice of the potential risk of danger to the plaintiff's decedent." *Id.*

¶ 33 The events preceding the shooting were as follows. The decedent and her friend drove to the tavern and parked 23 feet off the corner of the tavern's property. *Id.* Upon entering the tavern, the two women were approached by a man who the decedent's friend had previously dated. *Id.* The man began making threatening remarks to the friend and at one point, grabbed her arm and told her that, "I'm going to shoot you when you leave here." *Id.* The decedent's friend was aggravated but not afraid, and she did not inform the tavern's employees or the police

about the threats because she did not believe that man would harm her. *Id.* at 845-46.

¶ 34 The women decided to leave the tavern; the bartender wanted to have an employee escort the women to their car. *Id.* at 846. The decedent's friend saw the bartender was busy fixing drinks for another patron, and she waited approximately 20 minutes. *Id.* While waiting for the escort, the man approached the decedent's friend, grabbed her arm, and told her that he wanted her one more time. *Id.* After the friend rebuffed his advances, the man angrily walked back toward a corner of the tavern. *Id.* The friend decided not to wait any longer because she believed she had enough time to get into her car; she and the decedent quickly walked to the car. *Id.* The man exited the tavern, then banged on the car windows and pulled out a gun; the decedent's friend tried to push it away. *Id.* During the course of the struggle, the gun went off and decedent was fatally wounded. *Id.* The trial court granted summary judgment in the defendant-tavern's favor, finding the tavern owner did not owe a duty of care beyond the premises owned or controlled by it. *Id.* at 848. Additionally, the trial court concluded that the tavern did not voluntarily assume a duty to escort the women to their car. *Id.*

¶ 35 On appeal, the court found that the tavern did not owe a duty of care beyond the tavern owner's legal boundaries; from the time she left the tavern's legal boundaries, "she was no longer owed a duty of care as a business invitee." *Id.* at 850. The court also rejected the plaintiff's contention that the tavern voluntarily undertook a duty to escort the women to their car because of its policy that, upon request, it provided female patrons with escorts to their cars as a courtesy. *Id.* at 850-51. Noting that liability results from "misfeasance" – "not exercising reasonable care when acting, regardless of whether a duty to act exists" – and not from "nonfeasance" – "not

performing voluntary tasks in all instances, where there is no duty to act" – the court concluded that the plaintiff could not prevail on the theory of a reasonable assumption of a duty where the tavern's conduct "can be characterized only as nonfeasance." *Id.* at 851.

¶ 36 The court also did "not find that defendant could have reasonably foreseen that [the assailant] would have resorted to the drastic behavior that resulted in" the decedent's death. *Id.* Among other things, the decedent's friend did not alert the tavern employees to the threats. *Id.* Although the bartender was aware that the parties' "verbal exchanges became increasingly heated," the court did not find that conduct sufficient for the bartender to conclude that the man was likely to become violent. *Id.*

¶ 37 After observing that foreseeability is not the only element to establish duty, the court also considered the "likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant." *Id.* at 851-52. The appellate court affirmed the trial court's grant of summary judgment, observing that "[b]ecause it would obligate all business operators to police the streets so as to ensure their patrons' safe passage to their cars or even to their homes, this court has refused to extend liability to protect against assaults or altercations occurring after a patron leaves the owner's property." *Id.* at 852.

¶ 38 *Fitzpatrick v. Carde Lounge, Ltd.*

¶ 39 In *Fitzpatrick*, an underage patron of the defendant's tavern was served intoxicating beverages and was involved in a fight with other patrons. *Fitzpatrick*, 234 Ill. App. 3d at 877. The fight continued outside the tavern, where the minor got in his automobile and fatally struck a woman, who also had been a tavern patron. *Id.* The administrator of the decedent's estate, sued

for, among other things, the defendant's negligent failure to protect its patron from the criminal attack of a third party. *Id.* The appellate court affirmed the trial court's dismissal of this action, noting that "[b]ased on plaintiff's complaint, there is no relationship between anything which transpired inside of defendants' premises and the operation of a motor vehicle by [the minor]." *Id.* at 879. Citing *Badillo*, the court further noted that requiring a business operator to protect its patrons from injuries that occur after leaving the premises created an unjustifiable burden on the operator and the police force. *Id.*, citing *Badillo*, 161 Ill. App. 3d at 599.

¶ 40 *Wilk v. 1951 W. Dickens, Ltd.*

¶ 41 In *Wilk*, the 20-year-old decedent and his companions had a "verbal exchange" with another party at a tavern. *Wilk*, 297 Ill. App. 3d at 260. Although the confrontation did not become physical, the tavern owner instructed the decedent's party to stay at the tavern and the other group to leave. *Id.* Some time later, the decedent and his companions left the tavern. *Id.* Approximately an hour and a half after the first party left the tavern, a customer entered the tavern and informed the owner that a street fight was occurring a block away. *Id.* When the tavern owner arrived, the decedent was unconscious; he ultimately died from his injuries. *Id.* The circuit court granted the tavern and tavern owner's motion to dismiss under section 2-619(a)(9). *Id.* at 261. The appellate court affirmed, citing *Badillo*, *Lewis*, and *Fitzpatrick*, and noting that Illinois courts "have repeatedly refused to impose liability upon the business operator, reasoning that requiring business operators to protect their patrons from injuries occurring away from the premises would place an unjustifiable burden on the operator." *Id.* at 262. The court also rejected as "particularly burdensome" the plaintiff's suggestion that "the adults should have

been held at the tavern to give decedent time to flee." *Id.* at 264.

¶ 42 *Duty Extending Beyond Property Line*

¶ 43 The foregoing cases support defendant's contention that a business invitor's duty "does not extend to protect against unforeseeable third party criminal actions that occur outside the premises, regardless of whether those subsequent actions may be related to prior incidents taking place inside the premises." However, we note that there are a number of cases in which Illinois courts have found a potential duty even though the third party criminal actions occurred outside of the business premises.

¶ 44 For example, in *Shortall v. Hawkeye's Bar and Grill*, 283 Ill. App. 3d 439 (1996), the plaintiff-tavern patron was physically assaulted a "couple of steps" outside of the tavern. *Id.* at 441. The fighting patrons had an earlier altercation inside the tavern, and one of the patrons had then asked the plaintiff if he wanted to "take it outside." *Id.* The fight occurred directly outside the tavern's window as the plaintiff exited the bar, with other patrons and the tavern's employees watching. *Id.* at 441-42. The fight escalated to include other patrons who exited the tavern, including one assailant who stabbed the plaintiff. *Id.* During the fifteen minute incident, no one called the police and none of the bouncers attempted to stop the fight. *Id.* at 442. The appellate court reversed the trial court's order granting summary judgment to the tavern and its owner and remanded for further proceedings, stating:

> "We find that tavern owners may not avoid application of the duty to act to protect invitees from criminal attack by third parties simply because the disturbance giving rise to the duty occurs just out the front door, especially where the owner contributes to the

> altercation by sending patrons out into it. Since this dispute began in the bar, a challenge was extended to 'take it outside,' a brawl developed just outside the front door and continued for 15 minutes while [the bar owner] or his employees watched out the window, [the bar owner] was under the same duty as if the fight occurred inside the bar." *Id.* at 444-45.

A dissenting justice stated that he believed "the property line distinction is reasonable and sensible" and that expanding a business owner's duty to keep his premises reasonably safe "to a public sidewalk creates an unreasonable and unpredictable burden on the operator." *Id.* at 445 (J. Wolfson, dissenting).

¶ 45 In *Osborne v. Stages Music Hall, Inc.*, 312 Ill. App. 3d 141 (2000), the court similarly considered whether a nightclub owner owed a duty to protect its customer from a third party criminal attack that took place directly outside its entrance doors. *Id.* at 142. In *Osborne*, after underage patrons were forcibly removed following a fight with the bouncers, the ejected patrons banged on the doors of the then-locked bar. *Id.* at 143-44. Unsuccessful in their efforts to re-enter the bar, they moved over to the doors of the adjacent nightclub – which shared a hallway with the first bar – and banged on the door, pulled on the door handle and gestured to the bouncers to let them back inside. *Id.* One of the ejected patrons, trained in martial arts, did a "spinning heel kick" and ended up striking the plaintiff, who was exiting the nightclub. *Id.* At trial, the court granted a directed verdict to the nightclub owner, finding as a matter of law that the nightclub owed no duty to the plaintiff because the incident occurred on the public sidewalk and because the assailant's actions were not reasonably foreseeable by the club owner. *Id.* at 146.

The appellate court reversed and remanded the case, concluding that cases like *Badillo* and *Lewis* do not create "an insurmountable barrier to the existence of a duty." *Id.* at 148. The court "decline[d] to hold [the club owner's] duty to its patrons stopped at the doors of the premises, especially where [the club owner] used the sidewalk to control entry by customers." *Id.* Stating that the bouncers "exported the club's problems to the sidewalk," the court decided that the fact that the assault took place on a public sidewalk did not dispose of the issue. *Id.*

¶ 46 In *Haupt v. Sharkey*, 358 Ill. App. 3d 212 (2005), a patron who had been ejected from the tavern after shoving the plaintiff then struck the plaintiff in the face as the plaintiff exited the tavern. *Id.* at 214. As the two fought outside, the defendant-tavern owner locked the front door, closed the curtains, and told everyone to leave through the back door. *Id.* at 215. On appeal, the court considered whether the plaintiff's status as an invitee ended the "moment he stepped off the premises" of the tavern. *Id.* at 217. The court concluded that "the plaintiff retained his status as a business invitee at the point he was struck in the face ***, because the event occurred during the plaintiff's egression" from the tavern. *Id.* at 219.

¶ 47 In light of decisions such as *Shortall*, *Osborne*, and *Haupt*, we conclude 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." *Haupt*, 358 Ill. App. 3d at 218. Unlike the case at bar, however, each of those cases involves a criminal attack directly outside of the establishment, where the plaintiff was assaulted immediately upon exiting the club. Although a business invitor's duty to protect potentially extends beyond its property line, we have located no Illinois decision imposing a duty when the third party criminal attack occurred away from the

business premises; plaintiff's counsel stated during arguments on the motion to dismiss that "we know he was shot a block or so however far away it was." Despite plaintiff's attempt to frame this case as involving "an issue of first impression," she cannot avoid the applicability of the foregoing Illinois cases that have consistently declined to find potential liability for a business owner based on a third party criminal attack more than a few feet off of the owner's business premises.

¶ 48 We note that the Seventh Circuit Court of Appeals in *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143 (7th Cir. 2010), applying Illinois law, considered whether a bar owner owed a duty to protect an intoxicated patron from a criminal attack that was to occur off the bar's physical premises. *Id.* at 1150. The plaintiff in *Reynolds* left the bar after two beers to go to her hotel but discovered her car would not start. *Id.* at 1145. She returned to the bar and asked the bartender for a phone book to call for a taxi. *Id.* The bartender told her no taxis were available and that she would have to get a ride back to her hotel from someone in the bar. *Id.* Two bar patrons approached the plaintiff and offered her a ride. *Id.* Before they left the bar, however, the two patrons bought the plaintiff several drinks, allegedly " 'in an attempt to cause plaintiff to comply with their design to lure her to their apartment for sexual exploitation.' " *Id.* The plaintiff realized at some point during the ride their intent to assault her. *Id.* She escaped from the car but, because she was extremely intoxicated, she wandered onto a highway on-ramp and was struck by a car, suffering serious injuries. *Id.* In her complaint against the bar, the plaintiff alleged that the bar knew or should have known that the two patrons were getting her intoxicated for the purpose of sexual exploitation. *Id.* The plaintiff also alleged that, "[a]t worst," the

defendant's bartender was an "active accomplice in the attempt to ensnare" the plaintiff. *Id.*

¶ 49 In considering whether the bar owed a duty to protect the plaintiff, the Seventh Circuit recognized that "[t]o find in [the plaintiff's] favor would require us to wade into somewhat uncharted territory because no Illinois court of which we are aware has ever extended business invitor liability so far off premises." *Id.* at 1150. After discussing *Shortall*, *Osborne*, and *Haupt*, however, the court concluded that the fact that plaintiff's injuries were sustained more than one mile away from the bar did not necessarily preclude a finding of duty. *Id.* As in those three Illinois cases, the Seventh Circuit then focused the remainder of its analysis on the question of "reasonable foreseeability."

¶ 50 A dissenting opinion expressed concern about "reach[ing] beyond the boundaries currently drawn by the state court." *Id.* at 1153 (J. Ripple, dissenting.) The dissent stated, "I cannot accept the view that, given the facts before us, current Illinois law imposes a duty upon [the bar owner] to protect [the plaintiff] from the bartender's complicity in the criminal attack ***. Such a holding would expand drastically Illinois state law with respect to business invitor liability, and therefore, exceed our interpretative authority under the Erie Doctrine." *Id.*

¶ 51 Even assuming *arguendo* that, under the rationale of the *Reynolds* majority, the physical and temporal gap between Aguirre's departure from defendant's business premises and the subsequent off-premises attack away did not terminate any duty of defendant, we nevertheless need to consider whether the attack was reasonably foreseeable and also "the likelihood of injury, the magnitude of the burden to guard against it, and the consequences of placing that burden on the defendant." *Rowe*, 125 Ill. 2d at 228 (1988).

¶ 52 *Reasonable Foreseeability*

¶ 53 Plaintiff acknowledges that "[i]n determining whether a defendant owed a duty to the plaintiff under any particular circumstance, the court will consider", among other things, "whether the risk of harm to the plaintiff was reasonably foreseeable ***." In the second amended complaint, plaintiff alleged that Melecio told defendant's general manager that "he (Melecio) was going to get his boys and 'shut this place down.' " Plaintiff contends that the risk of harm was reasonably foreseeable in that a "reasonably prudent person should have foreseen some harm to another as likely to occur." Defendant asserts that the off-premises third party criminal attack on Aguirre was not reasonably foreseeable in that Melecio's "vague and amorphous statement could have meant anything."

¶ 54 Reasonable foreseeability "must be judged by what was apparent to defendant at the time of the complained-of conduct, and not by what may appear through hindsight." *Davis v. Allhands*, 268 Ill. App. 3d 143, 152 (1994). " 'Foreseeablity' means that which it is objectively reasonable to expect, not merely what might conceivably occur." *Id.;* see also *Osborne v. Stages Music Hall*, 312 Ill. App. 3d at 147. It is "not the precise pattern of events that must be foreseeable; rather, it is the risk of harm or danger to the one to whom the duty is owed." *Slager v. Commonwealth Edison Company, Inc.*, 230 Ill. App. 3d 894, 904 (1992).

¶ 55 Illinois courts have found off-premises third-party attacks to potentially be "reasonably foreseeable" under certain circumstances. For example, in *Osborne*, discussed above, the bouncers observed that the two men ejected from the club "did not show signs of cooling off," instead pounding on the doors, and swearing at and gesturing to the bouncers, indicating they

wanted to continue the fight; the bouncers did nothing in response. *Osborne v. Stages Music Hall, Inc.*, 312 Ill. App. 3d at 149. The court stated that "[t]here is some evidence to support the conclusion that the attack was reasonably foreseeable." *Id.* at 149. In *Shortall*, also discussed above, after the plaintiff was elbowed inside the bar and asked if he wanted to "take it outside," plaintiff said that "he did not want to go outside with them, but it they wanted to wait, he was going to have to leave some time." *Shortall v. Hawkeye's Bar and Grill*, 283 Ill. App. 3d at 441. A few minutes later, as plaintiff left the bar and took a "couple of steps," he encountered the men who had harassed him inside the bar. *Id.* The ensuing fight lasted 15 minutes and occurred directly outside the front door and window of the bar, with the bouncers watching the fight through the window and the bar owner allegedly aware of "both the argument inside and the fight outside." *Id.* at 444. The *Shortall* court, reversing the trial court's grant of summary judgment for the defendant, stated that, regardless of what the bar owner and employees may have known about the "developing altercation" inside the bar, "a criminal act was reasonably foreseeable once the fight began outside the bar." *Id.* at 443-44.

¶ 56 In the instant case, the second amended complaint alleges that defendant "ejected and removed from the interior of the aforesaid business premises Jose Melecio and/or various other unnamed individuals who had physically assaulted [Aguirre]." After such removal, but while he remained on defendant's business premises, Melecio spoke with defendant's general manager and stated, among other things, that he "was going to get his boys and 'shut this place down.' " Viewing the pleadings in the light most favorable to plaintiff, we do not consider the fatal off-premises assault on Aguirre as a harm that defendant could have reasonably foreseen. Unlike the

allegations in cases such as *Osborne* and *Shortall*, defendant did not "export" its problems off-premises. Instead, Melecio made a statement that appears to have been directed at defendant, not Aguirre. The meaning of "shut this place down" is unclear, but does not relate to Aguirre in any apparent way.

¶ 57 The complaint alleges that defendant's general manager knew or should have known that Melecio would "return to the aforesaid business premises" with violent intentions. As the Illinois Supreme Court has stated, "[i]t can be said, with the benefit of hindsight, that virtually every occurrence is foreseeable." *Widlowski v. Durkee Foods*, 138 Ill. 2d 369, 374 (1990). The off-premises attack on Aguirre was not a harm that would be objectively reasonable for defendant to anticipate. In the instant case, we decline to engage in "what if" speculation, and we conclude that the harm to Aguirre was not reasonably foreseeable to defendant.

¶ 58 *Burden on Defendant and Other Factors*

¶ 59 Even assuming *arguendo* that the harm was reasonably foreseeable, "[f]oreseeability is a necessary but not a sufficient condition for imposing a duty." *Gustafson v. Mathews*, 109 Ill. App. 3d 884, 887 (1982). Whether a duty exists also will depend upon "a consideration of the likelihood of injury, the magnitude of the burden to guard against it, and the consequences of placing that burden on the defendant." *Rowe*, 125 Ill. 2d 203, 228 (1988). Plaintiff contends that "[i]mposing the duty to warn and protect in the present case poses none of the unreasonable burdens referenced by the court in *Badillo*," instead asserting that warning Aguirre of Melecio's statements "would have only taken a few minutes." Plaintiff also submits that, "in this post-9/11 era, the public policy and social requirements of the time and community pertaining to protecting

against the potentially violent activities and threats such as the ominous statements of Melecio require a heightened duty of care as compared to the circumstances existing when decisions such as *Badillo* were decided."

¶ 60 We agree with defendant that requiring defendant to have provided a warning to Aguirre of Melecio's statement places a burden "much greater in magnitude than the Plaintiff is willing to acknowledge." Any duty to provide a warning regarding Melecio's statement presumably would need to extend to all patrons at defendant's establishment, not just Aguirre. In addition, defendant would need to offer direction to its patrons in order to avoid panic and potential injury. If Melecio did not return that day, such duty to warn presumably would continue indefinitely, or at least until Melecio and "his boys" were apprehended.

¶ 61 Plaintiff contends that "[o]nce upon a time, perhaps a tavern-keeper could ignore Melecio's statements as nothing more than drunken bluster" but "[u]nfortunately, those days are indisputably over." Defendant responds, and we agree, that "[b]eyond a broad reference to the events of September 11, 2001, Plaintiff does not suggest that any public policy or social considerations with respect to business security in Chicago, or in Illinois, generally, have changed since the *Badillo*, *Lewis*, *Fitzgerald*, or *Wilk* cases were decided." Furthermore, we decline to depart from existing Illinois law to impose any "heightened duty of care," as plaintiff suggests.

¶ 62 Voluntary Undertaking

¶ 63 Defendant contends on appeal that "Plaintiff points to cases in which duties have been imposed on defendants not because of their role as business owners, but because of some

additional, voluntary action by the defendant giving rise to a unique duty." Illinois courts have held that "even in the absence of one of the four special relationships, one may be held liable for the criminal acts of a third party under the theory of negligence in the performance of a voluntary undertaking." *Hernandez v. Rapid Bus Company*, 267 Ill. App. 3d 519, 524 (1994). We agree with defendant that "[p]laintiff alleges no facts to suggest that the Green Dolphin took any affirmative action giving rise to any duty beyond those normally imposed on a business owner." To the extent that plaintiff asserts that defendant owed Aguirre a duty pursuant to any "voluntary undertaking" theory, we hereby reject such contention.

¶ 64 CONCLUSION

¶ 65 We reject defendant's challenge to the timeliness of this appeal. Considering the merits of the appeal, we do not find that defendant owed a duty of reasonable care to Aguirre. Even assuming *arguendo* that the fact that the fatal attack occurred away from defendant's premises does not preclude liability, we conclude that the harm was not reasonably foreseeable and that the potential burden on defendant was prohibitively significant. Furthermore, we reject plaintiff's contention, if any, that defendant assumed a voluntary undertaking that would impose a duty of reasonable care even in the absence of the "special relationship" of business invitor-invitee. We affirm the judgment of the trial court dismissing Counts II and III of plaintiff's second amended complaint.

¶ 66 Affirmed.