THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Paul Burch, Circuit Court Judge

Case No. 2017-CP-04-05538
Appellate Case No: 2018-002026

Latoria R. Cooks,

Appellant,

v.

Pearlz Vista, Inc., d/b/a Pearlz Oyster Bar, Carolina Ale House Operating Company LLC, d/b/a Carolina Ale House and Art Bar, Inc.

Respondents.

BRIEF OF RESPONDENT ART BAR, INC.

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STATEMENT OF THE CASE

This case stems from an automobile accident that occurred on September 13, 2014. (R. p. 140, lines 19-22). The accident involved a collision between an individual named Emily Brown ("Ms. Brown") and the Appellant. (R. pp. 120-125). At the time of the accident, there were questions concerning whether Ms. Brown was impaired by alcohol. (Id.) John Carrigg, on behalf of Appellant, filed a lawsuit against Ms. Brown.[1] Appellant took Ms. Brown's deposition on June 19, 2017, and the matter was eventually settled. (R. p. 128; R. p. 16, ¶1).

Thereafter, on September 13, 2017, Appellant filed the current Dram Shop action against Respondents. (R. p. 94). All Respondents filed timely Answers denying liability. (R. pp. 98-119).

On June 15, 2018, the Respondents filed a Joint Motion By All Defendants for Summary Judgment. (R. pp. 21-24). On July 23, 2018, Respondents Art Bar and Carolina Ale House filed a Joint Motion for Protective Order. (R. pp. 46-49). On July 24, 2018, Appellant served a Deposition Notice scheduling Ms. Brown's deposition for September 5, 2018. (R. p. 43).

The hearing on both the Summary Judgment motion and motion for a Protective Order were heard on September 5, 2018. Appellant produced no affidavits or testimony aside from Ms. Brown's deposition transcript. (R. pp. 15, 17). At the time of the hearing, the case was scheduled for trial in two weeks. (R. p. 17, ¶4). After hearing from all parties, the lower court granted summary judgment and found the Motion for Protective Order was moot. (R. p.15).

Appellant filed a Motion for Reconsideration and to Alter or Amend the Order on

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1 Cooks v. Brown, Richland County Court of Common Pleas, 2016-CP-40-05226.

September 15, 2018. (R. p. 3). Respondent Art Bar filed a Response in Opposition to Plaintiff's Motion for Reconsideration on September 21, 2018. (R. pp. 9-12). Appellant's Motion to Reconsider and To Alter and Amend the Judgment was denied without a hearing by Order dated October 17, 2018. (R. pp. 1-2). This appeal followed.

STATEMENT OF FACTS AS TO ART BAR

This appeal stems from the lower court's grant of summary judgment to all Respondents in this Dram Shop Action. Unlike the negligence action involving Ms. Brown in the first lawsuit, Dram Shop actions require specific proof of alcohol licensees serving beer, wine, or liquor to intoxicated persons.

There appears to be no doubt that Ms. Brown collided with Appellant's vehicle and that Ms. Brown had a blood alcohol level of .16. (R. p. 152, lines 3-5). What is unknown is Ms. Brown's specific whereabouts and activities prior to the accident. (*See generally* R. pp. 141-145; p. 152)

During Ms. Brown's deposition in the first action, she was questioned extensively by Appellant's attorney, John Carrigg, as to where she had been drinking and whether she had visited any restaurants or bars. Ms. Brown testified under oath that she was unable to recall any of the events leading up to the accident other than her recollection of being "in the Vista" at a bar at some point prior to taking someone home. (Id.; R. pp. 16-17, ¶2). When Appellant's attorney asked if she remembered "what bar she was at," Ms. Brown testified she did not. (R. p. 142, lines 6-7). Ms. Brown did not recall how much she had to drink prior to the accident or the last time she consumed alcohol prior to the accident. (R. p. 142, line 11 - p. 143, line 24).

While Ms. Brown acknowledged in her deposition that the Respondent establishments were "the ones we would often go to," she could not remember whether she went to any of them on the evening in question. (R. p. 152, lines 6-15). She testified "most likely, **but I cannot be sure.**" (Id.)(emphasis added). When asked why she did not remember, Ms. Brown replied, "Because it's been about three years." (R. p. 143, lines 20-21). As stated by the lower court, "The sum total of the driver's recollection was that she had no specific recollection of the evening and provided no substantive or evidentiary assistance to Plaintiff's case." (R. p. 17, ¶2)

On July 24, 2018, Appellant served amended responses to Respondent Art Bar's Requests to Admit. Specifically, Appellant admitted she had no evidence Ms. Brown consumed alcohol at Art Bar on the evening in question:

> Request to Admit No. 1: Admit you have no witnesses or testamentary evidence physically placing Emily Brown at the Art Bar at any time on September 12, 2014 or September 13, 2014.
>
> Amended Response: Plaintiff currently does not have specific evidence placing Emily Brown at Art Bar on 9/12/14 or 9/13/14 or evidence indicating that she consumed alcohol there; however, based upon her deposition testimony, in the wreck case, she most probably was there on the above dates. Further, discovery is necessary as Plaintiff is informed and believes that such evidence does exist.

(R. pp. 57-61; R. p. 87).

During the summary judgment hearing, Appellant produced no affidavits or testimony in opposition and as such, relied solely upon the "pleadings, depositions, answers to interrogatories, and admissions on file." (R. pp. 17-18); Rule 56(c), SCRCP.

STANDARD OF REVIEW

In reviewing a trial court's grant of summary judgment, appellate courts apply "the same standard required of the circuit court under Rule 56(c), SCRCP." Springob v. Univ. of S.C., 407 S.C. 490, 757 S.E.2d 384 (2014)(internal citations omitted). Under Rule 56(c), summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." SCRCP, Rule 56(c); Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Material facts are those seen as essential elements of the claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.")

"When determining if any triable issues of fact exist, the evidence and all ***reasonable*** inferences must be viewed in the light most favorable to the non-moving party." Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011)(internal citations omitted)(emphasis added). "[T]he non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). However, "[w]hen opposing a summary judgment motion, the nonmoving party must do more than simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." Russell v. Wachovia Bank, N.A., 353 S.C. 208, 221, 578 S.E.2d 329, 335 (2003)(internal citations omitted). Where a verdict is not reasonably possible under the facts presented,

summary judgment is appropriate. Id.

ARGUMENTS

This is an appeal from a Dram Shop lawsuit where Appellant has claimed Respondents over-served Ms. Brown. An essential element of a Dram Shop action is proof that an alcohol licensee served beer, wine, or liquor to an intoxicated person whose actions thereafter resulted in injury to a third party. Here, the lower court held Appellant to the "mere scintilla" standard and found that Appellant had failed to bring forward any evidence of the required elements above, failed to satisfy Rule 56, SCRCP, and the Court properly granted summary judgment. While Appellant has argued that re-taking the deposition of Ms. Brown might result in new evidence, Appellant had four years to conduct discovery between the two cases. Moreover, Appellant provided the lower court with no affidavits that additional discovery would assist Appellant in overcoming summary judgment. As such, summary judgment was proper.

I. THE LOWER COURT APPLIED THE PROPER STANDARD.

Appellant argues that this Court applied the incorrect standard in granting summary judgment. Specifically, Appellant argues that "[t]he standard to be applied is whether the Plaintiff showed a 'scintilla' of evidence to sustain her claim." (Initial Brief of Appellant, p. 8). That is the standard the lower court applied. As set forth on page 4 of the Order Granting Summary Judgment: "Accordingly, Plaintiff is unable to offer a **scintilla of evidence** to survive summary judgment. . . The scintilla of evidence upon which a case should be sent to the jury must be real, material, and pertinent and relevant evidence, not speculative and theoretical

deductions." (R. p. 18)(emphasis added)(internal citations omitted). The lower court properly granted summary judgment as there is no evidence whatsoever that Ms. Brown consumed, purchased, or was over-served alcohol at any of the Respondents' establishments; all key elements of a Dram Shop action.

II. APPELLANT FAILED TO SHOW A SCINTILLA OF EVIDENCE TO SUPPORT HER DRAM SHOP CLAIM AND AS SUCH, SUMMARY JUDGMENT WAS PROPER.

Appellant contends the circuit court erred in granting Defendants' Motion for Summary Judgment. Specifically, Appellant asserts "[t]he fact that Ms. Brown testified that Defendants establishments were 'most likely' where she had consumed alcohol is sufficient to establish liability on the defendants." Appellant Brief, p. 9. Even adopting Appellant's characterization of the testimony in the light most favorable, it does not establish liability as it does not relate to the essential elements required in a Dram Shop action.

Dram Shop liability is set by statute. Specifically, South Carolina law prohibits the sale of beer, wine, and/or liquor to an intoxicated person. S.C. Code Ann. §61-4-580, §61-6-2220; *see* Daley v. Ward, 303 S.C. 81, 399 S.E.2d 13 (Ct. App. 1990). Under these statutes, liability arises where a plaintiff is able to prove "that the alleged violators knowingly served alcohol to an intoxicated person or were confronted with such information, from the person's appearance or otherwise, as would lead a prudent man to believe that the person was intoxicated." Hartfield v. Getaway Lounge & Grill, Inc, 388 S.C. 407, 415, 697 S.E.2d 558, 562 (2010).

In the light most favorable to Appellant, she can show only that Ms. Brown was intoxicated at the time of the accident and at some point prior to the accident was in a bar in

the Vista. (R. p. 16-17, ¶2) While Appellant argues that "most likely" is close to "most probably" and is sufficient for experts in professional negligence cases, this is not a professional negligence case. (Appellant Brief, p. 9-10).

Appellant has admitted that she has no evidence whatsoever that Respondent Art Bar served alcohol to Ms. Brown on the night in question. (R. pp. 87-88, R. p. 17). "A scintilla of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror." Turner v. Am. Motor-ists Ins. Co, 176 S.C. 260, 180 S.E. 55, 57 (1935)(internal citations omitted)(emphasis added). The South Carolina Supreme Court describes the scintilla rule as follows, "The meaning of the rule is that there must be some evidence arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative, theoretical, and hypothetical views." Id.

Here, Appellant has offered nothing, not even a mere scintilla, to support the key element of Dram Shop: that Respondent Art Bar served Ms. Brown when it knew or should have known she was intoxicated. As such, the key evidence of the Dram Shop action – service of alcohol to an intoxicated person – is nonexistent. As such, this Court should affirm the grant of summary judgment.

III. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE EVE OF TRIAL WHERE APPELLANT PRESENTED NO AFFIDAVITS DEMONSTRATING ADDITIONAL DISCOVERY WAS NEEDED.

While Appellant claims she did not have a "full and fair opportunity" for discovery, Appellant had four years between the time of the accident and the summary judgment hearing to conduct discovery, both formal and informal. (R. p. 17). During that time, Appellant deposed the at-fault driver, Ms. Brown, with testimony taken under oath. In Ms. Brown's deposition, Appellant questioned her extensively concerning her whereabouts on the day in question, any establishments she visited, and ascertained her banking information. (R. p. 140, line 19-p. 148, line 16, p. 152, lines 6-21; R. pp. 16-17, ¶2).

When the summary judgment motion was heard on September 5, 2018, the first lawsuit had concluded and nearly a year had passed since Appellant filed the Dram Shop action against Respondents. The matter was two weeks from trial. (R. p. 17, ¶4). As the lower court found:

> I find that four (4) years have elapsed since the accident, with two separate suits filed by the same Plaintiff and same counsel since 2016 with ample opportunity for Plaintiff to discover evidence in support of her case. Plaintiff's counsel concedes his efforts to discover any documentary evidence such as credit card receipts, were unsuccessful.

(R. p. 17, ¶3).

Appellant's case appears to rest on the hope, the theoretical possibility that Ms. Brown will change her testimony. While Appellant argues that additional discovery is needed, specifically Ms. Brown's deposition, no affidavit or other evidence as required by Rule 56(e-f) was produced to support such a contention. As set forth in Rule 56(e), SCRCP:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the **mere allegations** or denials of his pleading, but his response, **by affidavits** or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Id. (emphasis added).

"If the party opposing the motion for summary judgment cannot provide affidavits to justify his opposition, he must submit an affidavit providing reasons why such affidavit cannot be obtained." Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 253, 734 S.E.2d 161, 165 (2012), ftn. 4; Rule 56(f), SCRCP. No such affidavits were submitted here.

The lower court properly considered the record before it and, in the light most favorable to Appellant, concluded that Appellant had failed to produce "a scintilla of evidence" in support of her case after more than sufficient time to do so. (R. pp. 15-20). As stated by the lower court:

> I find that ample opportunity for research, investigation, formal and informal discovery have been accorded Plaintiff who simply lacks sufficient evidence to defeat summary judgment. While Plaintiff's counsel argues that Brown "most likely" visited Defendants' businesses but could not be sure, this is insufficient to defeat summary judgment. Plaintiff has offered this Court mere speculation but no opposing affidavits, and no real, material evidence for trial.

(R. pp. 17-18).

Given the length of time between the accident and the hearing coupled with the absence of any affidavits, the trial court was within its discretion in granting the motion pursuant to Rule 56(c), SCRCP based on the "pleadings, depositions, answers to interrogatories,

and admissions on file . . . ." Rule 56(c), SCRCP. As such, the lower court's grant of summary judgment should be affirmed.

CONCLUSION

For the reasons stated, this Court should affirm the lower court's grant of summary judgment.

Respectfully submitted,

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August 16, 2019

Columbia, South Carolina

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CERTIFICATION BY COUNSEL

Pursuant to Rule 210, SCACR, I certify that the Record on Appeal contains all material proposed to be included by the parties and not any other material.

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