

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION

PATSY L. HAMAKER,	*	
	*	
Plaintiff,	*	
v.	*	CASE NO.: CV-2008-901617.00
	*	
BIT, INC. (d/b/a "The Furnace"), et al,	*	
	*	
Defendants.	*	

**MOTION FOR SUMMARY JUDGMENT AND
 MEMORANDUM IN SUPPORT**

COMES NOW, the Defendant, BIT, Inc. (hereinafter referred to as "BIT"), and pursuant to Rule 56 of the Alabama Rules of Civil Procedure moves this Honorable Court for summary judgment as to Plaintiffs' complaint on the grounds that there is no genuine issue as to any material fact and that the Defendant is entitled to a judgment as a matter of law, and in support thereof, BIT relies on all pleadings filed in the present case and further submits the following memorandum; Plaintiff's Response to Defendant's Interrogatories to Plaintiff attached hereto; and Defendant's Response to Plaintiff's Consolidated Discovery attached hereto in support of this motion.

INTRODUCTION

On or about the 21st day of May, 2008, Plaintiff filed her complaint asserting two counts: (1) negligent and/or wanton hiring, supervision and training; and (2) negligently and/or wantonly causing or allowing a dangerous condition to exist by allowing Plaintiff to leave BIT's premises while intoxicated. (See Plaintiff's Complaint).

On the 20th day of June, 2008, BIT moved to dismiss Plaintiff's claims against it in that Alabama does not recognized a cause of action for the negligent dispensing of

alcohol only claims under the Civil Damages Act and/or Dram Shop Act. (See Defendant's Motion to Dismiss). On the 11th day of July, 2008, Plaintiff responded to BIT's motion to dismiss arguing that Plaintiff's complaint does not state a claim under the Dram Shop Act but rather it states valid claims for negligent/wanton hiring supervision and training and negligently/wantonly causing or allowing a dangerous condition to exist. (See Plaintiff's Response to Motion to Dismiss).

On the 14th day of July, 2008, this Honorable Court held a hearing on BIT's motion to dismiss. At said hearing the Court advised that the motion to dismiss would be denied; however, the Court would not schedule the case for trial as discovery on the issue of liability needed to take place. Furthermore to Court determined that the issue of liability should be addressed in a motion for summary judgment before the present case could proceed.

On the 15th day of July, 2008, this Honorable Court issued its order denying BIT's motion to dismiss. On the 16th day of July, 2008, this Honorable Court issued its scheduling order directing the parties to initiate all discovery, including depositions, so that it shall be completed on or before November 19, 2008. Said order further directed that dispositive motions as to the issue of liability be filed by December 5, 2008.

On the 8th day of August, 2008, BIT filed its answer denying Plaintiff's allegations and setting forth various affirmative defenses.

STATEMENT OF FACTS

Plaintiff alleges in her complaint the following:

- (1) On or about October 17, 2007, Plaintiff was employed by BIT as a dancer. (Plaintiff's Complaint, COUNT 1 ¶1).

(2) Plaintiff was encouraged by BIT to have customers buy her alcoholic drinks. (Plaintiff's Complaint , COUNT 1 ¶3).

(3) BIT and one or more fictitious parties negligently, wantonly and/or willfully caused or allowed Plaintiff to leave BIT's premises while intoxicated. (Plaintiff's Complaint , COUNT 1 ¶5).

(4) BIT and one or more fictitious parties negligently, wantonly and/or willfully caused or allowed a dangerous condition to exist by allowing Plaintiff to leave BIT's premises while intoxicated. (Plaintiff's Complaint , COUNT 2 ¶2).

(5) Shortly after leaving BIT's premises, Plaintiff was injured in a one car accident as a result of her intoxication. (Plaintiff's Complaint , COUNT 1 ¶5).

Plaintiff makes no allegations in her complaint that BIT forced her to consume alcohol while at work or that she was involuntarily intoxicated.

BIT propounded its interrogatory #3 to Plaintiff which states: "Please state in your own words how you came to wreck your car which led to your injuries, as alleged in your Complaint." (See Exhibit to BIT's Notice of Service of Discovery filed August 8, 2008). Plaintiff responded: "I had too much to drink while I was at work and wrecked my car on the way home." (See Plaintiff's Response to Defendant's Interrogatories to Plaintiff, p. 2, ¶ 3). BIT propounded its interrogatory #14 to Plaintiff which states: "Please state what you claim the Defendant did or failed to do to cause the injuries suffered as alleged in your Complaint." (See Exhibit to BIT's Notice of Service of Discovery filed August 8, 2008). Plaintiff responded: "The Defendant willfully caused or allowed me to leave work in a highly intoxicated state following my shift." (See Plaintiff's Response to Defendant's Interrogatories to Plaintiff, p. 3, ¶ 14). Plaintiff propounded interrogatory

#19 to BIT which states, in part: “why [was Plaintiff] asked to leave the premises before the end of her shift?” (See Exhibit to Plaintiff’s Notice of Service of Discovery filed October 16, 2008, p. 4, ¶ 19). BIT responded: “Plaintiff was not asked to leave the premises.” (See Defendant’s Response to Plaintiff’s Consolidated Discovery, p. 7, ¶ 19).

STANDARD OF REVIEW

“‘The party moving for a summary judgment must make a prima facie showing that there are no genuine issues of material fact and that he is entitled to a judgment as a matter of law. If this showing is made, the burden then shifts to the nonmovant to rebut the movant's prima facie showing by substantial evidence.’” *Falls v. JVC America, Inc.*, No. 1051677, 2008 WL 2406137, at *3 (Ala. June 13, 2008)(quoting *Fincher v. Robinson Bros. Lincoln-Mercury, Inc.*, 583 So. 2d 256 (Ala. 1991)). “‘Evidence is ‘substantial’ if it is of ‘such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.’” *Peterson v. City of Abbeville*, No. 1051802, 2008 WL 2469365, at *1 (Ala. June 20, 2008) (quoting *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989)).

ARGUMENT

Plaintiff attempts to state claims for (1) negligent/wanton hiring, supervision and training; and (2) negligently/wantonly causing or allowing a dangerous condition to exist by allowing Plaintiff to leave BIT’s premises while intoxicated. (See Plaintiff’s Complaint and Plaintiff’s Response to Motion to Dismiss). Although Plaintiff attempts to state claims for negligence and/or wantonness against BIT, there is really only one claim, a Dram Shop Action. Plaintiffs’ claims against BIT are for damages she suffered due to her own voluntary intoxication.

In *Williams v. Reasoner*, 668 So. 2d 541 (Ala. 1995), the Alabama Supreme Court held that no recovery is allowed for negligent dispensing of alcohol, and **no remedy for unlawful dispensing of alcohol exists other than those provided by the Civil Damages Act and/or the Dram Shop Act.** *Id.* at 542, citing *Maples v. Chinese Palace, Inc.*, 389 So. 2d 120, 124 (Ala. 1980)(**emphasis added**). Alabama’s Dram Shop Act codified at Ala.Code, 1975 § 6-5-71 provides, in part: “Every wife, child, parent, or other person who shall be injured in person, property, or means of support by any intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages.” Ala.Code, 1975 § 6-5-71(a). “[T]he intoxicated person is not a protected party under the Act.” *Weeks v. Princeton’s*, 570 So. 2d 1232, 1233 (1990)(**emphasis added**).

There is no dispute that Plaintiff claims damages of BIT for injuries she sustained due to her own intoxication. (Plaintiff’s Complaint , COUNT 1 ¶5; Plaintiff’s Response to Defendant’s Interrogatories to Plaintiff, p. 2, ¶ 3). There is no dispute that Plaintiff’s intoxication as alleged was voluntary. Although Plaintiff attempts to set up the argument that she was forced to leave BIT’s premises (See Plaintiff’s Response to Defendant’s Interrogatories to Plaintiff, p. 3, ¶ 14), she was not. (See Defendant’s Response to Plaintiff’s Consolidated Discovery, p. 7, ¶ 19). There is no genuine issue as to any material fact, and BIT is entitled to a summary judgment as a matter of law.

WHEREFORE, Defendant prays this Honorable Court will grant summary judgment in favor of Defendant as to Plaintiff's claims and dismiss Plaintiff's complaint with prejudice.

Respectfully submitted this the 5th day of December, 2008.

WHITTELSEY, WHITTELSEY & POOLE, P.C.

s/ Robert G. Poole

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document by placing a copy of the same in the United States mail, postage prepaid, to the attorneys listed below on this the 5th day of December, 2008.

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s/ Robert G. Poole

ROBERT G. POOLE