

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

PATSY L. HAMAKER ,)
)
 Plaintiff,)
) Civil Action No.
v.)
) CV 2008-901617.00
BIT, INC. (d/b/a “The Furnace”), et al.)
)
 Defendant.)

**PLAINTIFF’S RESPONSE TO BIT, INC.’S
MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Plaintiff, PATSY L. HAMAKER, by and through her attorneys of record, and submits her response to the Defendant’s Motion For Summary Judgment.

STATEMENT OF FACTS

BIT, Inc. d/b/a “The Furnace” (hereinafter “The Furnace”) is in business “TO MAKE [ITS] GUESTS HAPPY.” (See Exhibit 1 Pg. 2¹) In order to achieve this goal The Furnace strives to provide “the very best recreation and services available... by offering [its] guests outstanding values of foods and beverages ..., and professional, efficient and hospitable service, all in uniquely distinctive and interesting environments.” (Id.) As part of making its guests happy, The Furnace instructs its dancers in the manner in which they are to interact with its guests / customers. (Exhibit 1 Pg. 8) The Furnace instructs the dancers in their appearance, behavior and when to be on stage to dance, yet, The Furnace classifies its dancers as independent contractors. (See Defendant’s

¹ The Furnace Dancer Handbook – Produced by BIT, Inc. in response to Plaintiff’s Request For Production of Documents.

Response To Plaintiff's Consolidated Discovery Attached Defendant's MSJ

Interrogatory Response #3)

On or about the October 17, 2007 and into the early morning hours of October 18, 2007, Patsy L. Hamaker (hereinafter "Ms. Hamaker") completed her shift at The Furnace where she worked as a dancer entertaining customers of The Furnace. (See Complaint ¶¶ 1-2) As part of her job as a dancer, she was expected to socialize with the customers of The Furnace and participate in drinking drinks with the customers, which the customers purchased for her. (See Exhibit 2 ¶ 7) These "Dancer Drinks," as The Furnace calls them, start at a cost to the customer of \$12.00 and go up to \$2,500.00. (See Exhibit 3 ¶ 20²) The dancers receive a commission from the sell of "Dancer Drinks" ranging from \$5.00 to \$900.00, with the most popular drink costing \$22.00 for which the dancer is supposed to receive \$10.00 for each of the \$22.00 drinks sold. (Id.) As a result of drinking drinks purchased for her by customers of The Furnace, Ms. Hamaker became intoxicated. (See Complaint ¶ 5) While driving home from her shift at The Furnace, Ms. Hamaker was involved in a single car accident due to her intoxication. (Id.) Ms. Hamaker sustained substantial injuries in this single automobile accident. (Id.)

STANDARD OF REVIEW

"The burden on a party moving for a summary judgment is clearly set out in Rule 56(c), Ala.R.Civ.P." Dennis Joslin Company, L.L.C. v. Tate, 779 So.2d 217, 219 (Ala. 2000). "A summary judgment should be entered only if 'the pleadings, depositions, answers to interrogatories, 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

² The Furnace Rules – Produced by BIT, Inc. in response to Plaintiff's Request For Production of Documents.

entitled to a judgment as a matter of law.’ Ala.R.Civ.P. 56(c)(3).” Id. “The court must view the evidence in a light most favorable to the nonmoving party and must resolve all reasonable doubts against the movant.” Adams v. Sanders, 811 So.2d 542, 544 (Ala.Civ.App. 2001) (quoting Hanners v. Balfour Guthrie, Inc., 564 So.2d 412 (Ala.1990)).

“If the movant meets this burden, ‘the burden then shifts to the non-movant to rebut the movant’s prima facie showing by substantial evidence.’” Adams, 811 So.2d 542, 544 (Ala.Civ.App. 2001) (quoting Lee v. City of Gadsden, 592 So.2d 1036, 1038 (Ala.1992)). However, “[t]he burden does not shift to the opposing party to establish a genuine issue of material fact until the moving party has satisfied its burden by making a prima facie showing that there is no genuine issue of material fact.” Dennis Joslin Company, L.L.C., 779 So.2d at 219 (quoting Bass v. SouthTrust Bank of Baldwin County, 538 So.2d 794 (Ala.1989)).

ARGUMENT

This case is about The Furnace’s negligent, wanton and willful failure to protect its salespersons / dancers. However, The Furnace would have this Court believe that this case is about “negligent dispensing of alcohol” or about the “unlawful dispensing of alcohol.”

Ms. Hamaker worked in a unique industry and in a unique environment. Her job entailed socializing with The Furnace’s “guests,” and performing for The Furnace’s “guests” by dancing on the several stages and in the VIP areas. (See Exhibits 1 and 3) Ms. Hamaker earned money from the commissions from the sale of “Dancer Drinks,” and from tips for dancing. (See Exhibit 3 ¶ 20) The Furnace does not pay the dancers other

than commissions from the sale of “Dancer Drinks.” In fact, the dancers have to pay The Furnace each shift they dance. The dancers are required to pay a “House Fee” of \$35.00, a DJ fee of a minimum of \$10.00 and a “House Mom Fee” of \$3.00 each shift. (See Exhibit 3 ¶ 39 and Defendant’s Response To Interrogatories # 21) When a dancer starts her shift at The Furnace, she has to earn a minimum of \$48.00 just to break even.

The Furnace hires its dancers to be salespersons for the “Dancer Drinks.” According to its figures, the dancers generate revenues for The Furnace from the “Dancer Drinks” in the range of \$7.00 up to \$1,600.00 per “Dancer Drink.” (See Exhibit 3 ¶ 20)

The Breathalyzer

According to The Furnace Rules, “Every dancer is required to turn in their car keys when they enter the building....”, and “will have to pass a breathalyzer before [they] can get [their] keys.” (See Exhibit 3 ¶¶18-19) According to The Furnace’s response to Plaintiff’s Interrogatory whether they “own or have ever owned or had on the premises a breathalyzer”, they responded “[n]ot prior to this incident.” (Defendant’s response to Interrogatories #20) According to, Paul Lorino, the General Manager of The Furnace from the time it opened until he left in June 2007, The Furnace had a breathalyzer on its premises from approximately three (3) months after they opened and it was still there when he left. (See Exhibit 4 ¶ 4) It was purchased to be used for dancers, employees and customers to confirm if they were too intoxicated to legally drive. (Id.) However, according to Mr. Lorino, The Furnace never used the breathalyzer to check a dancer the entire time he was employed at The Furnace. (See Exhibit 4 ¶ 5)

Protection For The Dancers

According to The Furnace Rules, “Each dancer over 21 is allowed 2 alcoholic beverages per night. [They] must have a manager’s approval for both of these drinks. This is to protect [the dancer].” (See Exhibit 3 ¶ 17) As previously discussed the dancer must pay a “House Fee” to the manager, a “House Mom” fee and a “DJ Fee” before the end of their shift. This means that before a dancer is to leave The Furnace following their shift they should physically be seen by the manager on duty and the house mom. In addition, the dancer has to settle up on their commissions from “Dancer Drinks” with the bartender. (See Exhibit 2 ¶ 8) The dancers are finally supposed to be escorted to their vehicle by security for the Furnace. (See Exhibit 2 ¶ 8 and Exhibit 3 ¶ 29)

On the night of Ms. Hamaker’s accident, according to The Furnace Rules and policies, no less than four (4) employees of The Furnace should have observed her before she was allowed to get into her vehicle after her shift. Several hours after the accident, when Ms. Hamaker arrived at the hospital, she had a blood alcohol content of more than double the legal limit to drive. (See Exhibit 5) Yet, on the night of Ms. Hamaker’s accident, not a single employee or manager attempted to stop Ms. Hamaker from driving while intoxicated as they had on a previous occasion. (See Exhibit 2 ¶ 6)

Work Related Incentive To Consume Alcoholic Beverages

In Houston, Inc. D/B/A Treasures v. Melissa Love, 92 S.W. 3d 450 (Tex. 2002), the Supreme Court of Texas reviewed a nearly identical matter as the one presently before this Court. (See Exhibit 6 an attached copy of the case for the Court’s convenience.) In the Treasures v. Love case Ms. Love was a waitress and a dancer.

When she completed her shift as a waitress and started dancing, she shifted from an employee of Treasures to an independent contractor of Treasures. Houston, 92 S.W. 3d 450, 452 (Tex. 2002) At Treasures, customers paid \$25 for each table dance, of which the dancer received \$20 and the bar kept \$5. Houston, 92 S.W. 3d 450, 455 (Tex. 2002) Treasures could increase its drink sales if the customer bought drinks not only for himself, but also for the dancer. Id. The dancer at Treasures did not receive a percentage of the liquor purchases. Id. The Court in the Treasures v. Love case held that

It is reasonable to infer from this testimony that Treasures indeed had an incentive to ask dancers to drink alcohol purchased for them by customers, and that the dancers had an incentive to comply with Treasures' instructions in order to sit with high-spending customers who would order both drinks for the dancer, profiting only the bar, and table dances from the dancer, profiting both the bar and herself. Houston, 92 S.W. 3d 450, 455-456 (Tex. 2002)

The Treasures v. Love Court ultimately held: “that when an employer exercises some control over its independent contractor's decision to consume alcoholic beverages to the point of intoxication, such that alcohol consumption is required, **the employer must take reasonable steps to prevent foreseeable injury to the independent contractor caused by drunk driving.**” Houston, 92 S.W. 3d 450, 457 (Tex. 2002) (emphasis added)

The Furnace’s Failure To Support Conversion To Dram Shop

In support of its Motion For Summary Judgment, The Furnace cites two cases, Williams v. Reasoner, 668 So. 2d 541 (Ala. 1995) and Weeks v. Princeton’s, 570 So. 2d 1232 (Ala. 1990). Neither of these cases are remotely similar to the present matter before this Court.

In Williams v. Reasoner, a minor child was allowed to consume alcoholic beverages while as a guest of a homeowner. The intoxication of the minor child and

subsequent driving while intoxicated, proximately causing the death of the minor child's passenger. It should be noted that events in this case occurred prior to the passing of *Ala. Code* 1975, § 13A-11-10.1, which made it a misdemeanor for an adult homeowner to allow an "open house party" to occur at their residence where alcoholic beverages are consumed by minors. The Court in Williams v. Reasoner refused to address what affect § 13A-11-10.1, might have had on their decision had it been in effect at the time of the incident made the basis of the case.

In Weeks v. Princeton's, a patron of a bar was allowed to continue purchasing alcoholic beverages well beyond the point of intoxication, and then ejected him from the bar. While the patron was driving home, he was involved in a one car accident and was injured. The Court held that Weeks himself did not have a claim but that his wife and children did have a claim under the Dram Shop Act.

In neither of these cases was the consumption of alcoholic beverages **apart of the intoxicated person's employment** such that they were expected to drink with "guests" of their employer. In neither of these cases was the intoxicated person compensated for the number of drinks purchased for them as Ms. Hamaker was in the present matter. In neither of these cases did the employer of the intoxicated person have rules in place to protect the person from leaving the establishment and driving while intoxicated, and then completely disregarded its own rules which resulted in injury to the intoxicating person. In summary, neither of the cases cited by The Furnace in its Motion For Summary Judgment, warrants converting Ms. Hamaker's claims of negligence, wanton and willful conduct on the part of The Furnace and its employees into a Dram Shop claim.

CONCLUSION

In order for this Court to grant The Furnace's Motion For Summary Judgment, The Furnace had to demonstrate that there was no genuine issue as to material fact and that it is entitled to a judgment as a matter of law. The Furnace has failed to meet this burden on both accounts.

The Furnace claims that it did not possess a breathalyzer prior to this incident. This is in direct conflict with the sworn testimony of the former general manager of The Furnace submitted by Ms. Hamaker. Even if the manager on duty, the house mom, the bartender and the security guard, which was supposed to escort Ms. Hamaker to her vehicle, all did not believe Ms. Hamaker was to intoxicated to drive on the night of this incident, according to The Furnace's own rules, Ms. Hamaker should have been given a breathalyzer test. There is a genuine issue of fact as to whether The Furnace possessed a breathalyzer at the time of this incident, and whether it was negligent, wanton or willful on the part of The Furnace not to test Ms. Hamaker prior to her leaving.

Furthermore, The Furnace has failed to cite a single case similar to the present matter where an employee / independent contractor, as part of their job requirements, was to sell drinks and to consume the drinks they have sold. However, as noted in Weeks v. Princeton's, 570 So. 2d 1232 (Ala. 1990), Alabama Courts have looked to other jurisdictions in dealing with alcohol related cases. Ms. Hamaker has cited to this Court the Houston, Inc. D/B/A Treasures v. Melissa Love, 92 S.W. 3d 450 (Tex. 2002) case. The Houston case is nearly identical to the present matter. The Houston Court in seeking guidance in its case looked to the Iowa Courts and the Ohio Courts. The Houston Court found that in Corp. v. Fernandez, 528 N.W. 2d 124, 129-30 (Iowa 1995), it was held that

“When an employer encourages or condones excessive drinking on the job and in fact profits from an employee's drinking,... the employer ought to be held responsible for foreseeable injuries suffered by the employee because of the resulting intoxication.” The Houston Court also found that in Siegel v. Jozac Corp., 2001 Ohio App. LEXIS 3306, Nos. 380664, 385368, 2001 WL 840375, at *3 [**17] (Ohio Ct. App. July 26, 2001), discretionary appeal denied, 757 N.E.2d 774 (Ohio 2001), it was held that when “[t]he [bar] exclusively realized a profit from Ms. Siegel's duty [to drink alcohol]. It cannot then turn a blind eye when that same employee gets into her vehicle and drives home intoxicated, jeopardizing her life and the lives of other motorists.”

Ms. Hamaker was a leading seller of drinks, if not the leading seller of “Dancer Drinks,” for The Furnace, and they profited handsomely from her sales. The Furnace owed Ms. Hamaker a duty to determine if she was intoxicated beyond the legal limit to drive. They negligently, wantonly or willfully breached that duty to Ms. Hamaker, and as a result of that breach, Ms. Hamaker incurred substantial injuries.

Texas, Iowa and Ohio did not “turn a blind eye” when an employer profited from an employee’s consumption of alcohol and was subsequently injured, the State of Alabama should not as well.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully moves this Honorable Court to deny Defendant’s Motion To For Summary Judgment.

Respectfully submitted this the 19th day of December 2008.

s/ G. Alan Smith

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CERTIFICATE OF SERVICE

This is to certify that I electronically filed the foregoing with the Clerk of Court using the CM-ECF system, which will email notification of such filing to all parties requesting electronic service, and/or have served a copy of the foregoing pleading on each of the following by sending each a copy of same by first class U.S. Mail, postage prepaid and properly addressed this the 19th day of December 2008:

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