IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

PATSY HAMAKER,

Plaintiff,

vs.

BIT, INC., (d/b/a "The Furnace"), et al.,

Defendant.

CIVIL ACTION NUMBER
CV-08-901617CPP

ORDER

This matter came on for hearing on the Defendant's Motion for Summary Judgment. Based upon the submissions of the parties and the arguments of counsel, the Court finds as follows.

Defendant BIT operates a club known as The Furnace where Plaintiff worked as a dancer. Plaintiff was required to have both a dancer's license and a business license in order to dance at The Furnace. As a part of her job, she was required to socialize with customers as well as dance topless on stage or table/platforms. She was not paid as an employee, but rather she paid the Defendant for the privilege of performing at The Furnace. She earned tips from customers when she socialized with them or when she danced. Additionally, she earned commissions when customers bought her certain alcoholic beverages, specifically wine or champagne. Plaintiff was permitted, if not encouraged to consume alcoholic beverages on the job.[1] On the night of October 17, 2009 and into

[1]Plaintiff did have the option of asking that her drinks be nonalcoholic. She would still have received a commission if wine or champagne were ordered for her but she had opted to drink nonalcoholic, look-a-like beverages. Plaintiff opted for the alcoholic beverages, apparently to avoid her customers finding out that the drinks for which they were paying were not as advertised, resulting in no more such drinks being ordered and no more commissions for Plaintiff from that customer.

the morning of October 18, 2007, Plaintiff became intoxicated while working her shift at The Furnace. When driving home from The Furnace and as a result of her intoxication, Plaintiff was involved in a single vehicle accident and was seriously injured.

Several theories are advanced by Plaintiff to recover damages for her injuries from Defendant. The Court will deal with each one separately.

I. Dram Shop Act.

In a previous order, the Court declined to dismiss Plaintiff's claims pursuant to the Dram Shop Act, Code of Alabama §6-5-71 (1975). Based upon *Weeks v. Princeton's*, 570 So.2d 1232 (Ala. 1990), the Court finds that the Plaintiff does not have a cause of action under the Dram Shop Act.

II. Negligence Claims.

Plaintiff contends that Defendant was negligent in supervising and training employees at an establishment that permits and encourages dancers such as her to drink alcohol while working. Specifically, Plaintiff alleges that Defendant was negligent for failing to monitor and/or control the amount of alcohol dancers consumed while working; for failing to utilize a breathalyzer and/or confiscating her keys to prevent her from leaving the premises when she was too intoxicated to drive. Defendant contends that Plaintiff assumed the risk of driving while intoxicated and was contributorily negligent in her accident because she was driving while intoxicated, thus barring recovery from Defendant even if Defendant were negligent in its supervision of the Plaintiff.

This action does not fit into the traditional framework for negligent hiring, supervision and training cases.[2] However, the business model utilized by the Defendant vis-a-vis the dancers who

[2]Negligent hiring does not appear to be at issue herein.

perform at The Furnace is not traditional.[3] The Court finds that a genuine issue of material fact exists as to whether permitting and/or encouraging performers to drink alcoholic beverages imposes a duty on the employer: (1) to train its employees differently with regard to those it permits or encourages to drink, and/or (2) to exercise more intensive supervision of those it permits or encourages to drink.[4]

III. Wantonness Claims.

Even if Defendant had a duty to Plaintiff that was negligently performed, Plaintiff's voluntary consumption of alcohol raises the issues of assumption of the risk and contributory negligence which would bar a recovery by Plaintiff. Defendant contends that Plaintiff has presented no evidence of wanton or willful conduct by Defendant or its employees so as to overcome such defenses.

"Wantonness" is different from exacerbated negligence. Wantonness requires intentional misconduct or conduct in which there is at least a conscious disregard of the specific danger to Plaintiff. The Court finds that a genuine issue of material fact exists as to whether, on the night of the accident, Plaintiff had a second set of car keys and left the premises of The Furnace against the orders of Defendant's management, or whether there was only one set of car keys. If there were only one set of car keys, a question exists as to whether the actions of Defendant in allowing Plaintiff to have her keys despite her intoxicated state was wanton conduct on behalf of the Defendant. Moreover, the question also exists as to whether liability might attach despite Plaintiff's assumption of risk or contributory negligence.

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[3]Most employers do not permit or encourage the consumption of alcoholic beverages on the job.

[4]The Court notes that a fact question exists as to whether the Defendant just permitted or actually encouraged the consumption of alcoholic beverages.

Therefore, for the reasons set forth herein, the Defendant's Motion for Summary Judgment is **OVERRULED.**

DONE and ORDERED this 8th **day of** Dec, **2009.**

CARYL P. PRIVETT
CIRCUIT JUDGE