IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 16-cv-00307-MSK-NYW

RYAN WILTBERGER,

Plaintiff,

v.

LEE-WARD PARTNERS, LLC, a Colorado corporation d/b/a The Thirsty Parrot Bar & Grill, a/k/a The Thirsty Parrot,

Defendant.

OPINION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the Defendant Lee-Ward Partners, LLC, d/b/a The Thirsty Parrot Bar & Grill's (Thirsty Parrot) Motion for Summary Judgment (**# 44**), the Plaintiff Ryan Wiltberger's Response (**# 47**), and the Thirsty Parrot's Reply (**# 50**).

I. Jurisdiction

Mr. Wiltberger is a California resident. Lee-Ward Partners, LLC is a Colorado limited liability company with two members: Justin Myers, a Colorado resident, and Ralph Gillmore, also a Colorado resident. The amount in controversy exceeds $75,000. The Court exercises jurisdiction pursuant to 29 U.S.C. § 1332.

II. Factual Background

The following is a summary of the facts viewed in the light most favorable to the non-movant, Mr. Wiltberger. More factual details are provided as needed in the Court's discussion.

On February 13, 2015, Mr. Wiltberger went to the Thirsty Parrot, a nightclub located in Colorado Springs. He purchased a beer on the second floor, and later, he went back to the same

bar area to purchase a second. After the bartender handed him his second drink, he turned and took "two steps" before he was assaulted. He was "punched," then "hit again, and in between all that . . . stabbed in the eye" with a glass. A bartender, Nana Debordes, identified the assailant, later identified as Moses Alvarado, who had picked up a "bucket glass" from a stack on the bar and used it to strike Mr. Wiltberger in the face. A second bartender, Jordan Gambucci, confirmed this account.

Witnesses testified that there were signs of a conflict arising before Mr. Wiltberger's assault. Ms. Gambucci observed that Mr. Alvarado was "extremely animated and agitated as he was throwing his hands in the air and moving as though he was trying to get at somebody." Mr. Debordes also told police officers that before the assault Mr. Alvarado was "being aggressive and confrontational."

While medical and law enforcement personnel were assisting Mr. Witlberger before he was transported to the hospital, he identified Mr. Alvarado as his attacker. Mr. Wiltberger also identified a second participant in the assault, Eduardo Higuero. Mr. Wiltberger described both men as intoxicated, and he subsequently indicated that the EMTs and the police agreed that the men were drunk. One of the responding police officers, Officer Markwell, composed a written statement about the night, in which he described Mr. Higuero as "showing several clear signs of intoxication," including watery eyes, slurred speech, swaying, and a strong odor of alcohol. As for whether Mr. Alvarado was intoxicated, Mr. Bigelow testified that he believed Mr. Alvarado had previously been "cut off" because he had "reached his limit." However, other witnesses did not believe Mr. Alvarado was intoxicated.

The hit to Mr. Wiltberger's eye with a glass object caused two cuts to his eye, and permanently diminished his sight. He asserts two claims for relief: violation of the Colorado

Dram Shop Act, C.R.S. § 12-47-801, and violation of the Colorado Premises Liability Act, C.R.S. § 13–21–115 (the CPLA). The Thirsty Parrot moves for summary judgment in its favor on both claims.

III. Standard of Review

Rule 56 of the Federal Rules of Civil Procedure facilitates the entry of a judgment only if no trial is necessary. *See White v. York Intern. Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Thus, the primary question presented to the Court in considering a Motion for Summary Judgment or a Motion for Partial Summary Judgment is: is a trial required?

A trial is required if there are material factual disputes to resolve. As a result, entry of summary judgment is authorized only "when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1137 (10th Cir. 2016). A fact is material if, under the substantive law, it is an essential element of the claim. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if the conflicting evidence would enable a rational trier of fact to resolve the dispute for either party. *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013).

The consideration of a summary judgment motion requires the Court to focus on the asserted claims and defenses, their legal elements, and which party has the burden of proof. Substantive law specifies the elements that must be proven for a given claim or defense, sets the standard of proof, and identifies the party with the burden of proof. *See Anderson*, 477 U.S. at 248; *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 565 (10th Cir. 1989). As to the evidence offered during summary judgment, the Court views it the light most favorable to the non-moving party, thereby favoring the right to trial. *See Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1215 (10th Cir. 2013).

Motions for summary judgment generally arise in one of two contexts – when the movant has the burden of proof and when the non-movant has the burden of proof. Each context is handled differently. When the movant has the burden of proof, the movant must come forward with sufficient, competent evidence to establish each element of its claim or defense. *See* Fed. R. Civ. P. 56(c)(1)(A). Presumably, in the absence of contrary evidence, this showing would entitle the movant to judgment as a matter of law. However, if the responding party presents contrary evidence to establish a genuine dispute as to any material fact, a trial is required and the motion must be denied. *See Leone v. Owsley*, 810 F.3d 1149, 1153 (10th Cir. 2015); *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013).

A different circumstance arises when the movant does not have the burden of proof. In this circumstance, the movant contends that the non-movant lacks sufficient evidence to establish a *prima facie* case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party must identify why the respondent cannot make a *prima facie* showing; that is, why the evidence in the record shows that the respondent cannot establish a particular element. *See Collins*, 809 F.3d at 1137. If the respondent comes forward with sufficient competent evidence to establish a *prima facie* claim or defense, then a trial is required. Conversely, if the respondent's evidence is inadequate to establish a *prima facie* claim or defense, then no factual determination of that claim or defense is required and summary judgment may enter. *See Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007).

IV. Discussion

A. The Dram Shop Act Claim

Colorado's Dram Shop Act, C.R.S. § 12-47-801, outlines civil liability imposed on a vendor of alcoholic beverages for a plaintiff's injuries inflicted by an intoxicated person. As relevant to this case, subsection (3)(a) of the statute reads:

> No licensee is civilly liable to any injured individual or his or her estate for any injury to such individual or damage to any property suffered because of the intoxication of any person due to the sale or service of any alcohol beverage to such person, except when… (I) it is proven that the licensee willfully and knowingly sold or served any alcohol beverage to such person who was… visibly intoxicated….

To successfully assert a claim against a licensee[1] under the Dram Shop Act, a plaintiff must prove that the defendant willfully and knowingly both (i) served alcohol to an individual; and (ii) that the individual was visibly intoxicated. *Christoph v. Colo. Commc'n Corp.*, 946 P.2d 519, 522 (Colo. App. 1997). At the summary judgment phase, the plaintiff may present either direct or circumstantial evidence to establish each element. For example, a plaintiff might allege that third parties saw the individual purchasing large quantities of alcohol and observed the individual's "loud and rowdy" behavior. The Thirsty Parrot contends that Mr. Wiltberger cannot offer sufficient evidence of either element to establish a prima facie claim.

As to the first element, Mr. Wiltberger offers the testimony of Cresta Spitzmiller. She testified that she remembered Mr. Alvarado arriving at the bar, and that he offered to buy her a drink. Though she turned down his offer, Ms. Spitzmiller testified that she saw both Mr. Alvarado and Mr. Higuero buy drinks from the Thirsty Parrot that night.

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[1] The Thirsty Parrot appears to admits that it is a licensee as that term is used in the Dram Shop Act. An independent review of the definitions provided in C.R.S. § 12-47-103 convinces the Court that the Thirsty Parrot is in fact a licensee.

Regarding the second element – whether the assailants were visibly intoxicated – the evidence is conflicting. Mr. Wiltberger described both Mr. Alvarado and Mr. Higuero as intoxicated and stated that the EMTs who helped him thought they were as well. Jordan Bigelow testified that he thought that Mr. Alvarado had "reached his limit, where, he didn't know what was going on," and that he had been "cut-off" by the bartender because of his intoxication. As for the other participant in the fight, Mr. Higuero, one responding police officer, Officer Markwell, composed a written statement in which he described Mr. Higuero as "showing several clear signs of intoxication," including watery eyes, slurred speech, swaying, and a strong odor of alcohol. *See* Docket # 47-8.

However, Ms. Spitzmiller testified that Mr. Alvarado did not appear intoxicated because he was not slurring his words, unsteady on his feet, or showing any other signs of intoxication. Officer Ainsworth, a police officer who responded to the scene and restrained Mr. Alvarado, also described him as cooperative and not visibly intoxicated.

The showing made by Mr. Wiltberger, if taken as true, is sufficient to make a prima facie claim under the Dram Act. Evidence to the contrary creates a genuine issue of material fact requiring a trial. Accordingly, the Thirsty Parrot's Motion for Summary Judgment on Mr. Wiltberger's Dram Shop Act claim is **DENIED**.

B. The Colorado Premises Liability Claim

The Thirsty Parrot's first argument is that Mr. Wiltberger's CPLA is preempted by the Dram Act which precludes all civil liability – including liability arising from both a common law cause of action *and* a civil statutory violation – in cases involving claims against the vender of alcoholic beverages by plaintiffs injured by an intoxicated patron of that vender. This is a

threshold legal issue. If the Thirsty Parrot is correct, then it does not matter whether a *prima facie* showing on the premises liability claim has been made.

Unfortunately, the Dram Shop Act is not entirely clear on its face as to whether it preempts only common law claims, or whether it preempts all civil claims, including those arising under statute (such as the CPLA). On the one hand, as noted above, C.R.S. 12-47-801 provides that "no licensee [will be] *civilly liable*" for covered claims against the vendor of alcoholic beverages except as provided in the Dram Shop Act. This statutory language makes no distinction between civil liability arising from the common law and civil liability arising from a statute. Nor is this the only instance in which C.R.S. 12-47-801 uses such broad language to define its preemptive scope. Other subsections in the statute similarly preclude all "civil liability" (except as set forth therein) for claims involving social hosts and culinary school instructors. On the other hand, when the Colorado General Assembly passed the Dram Shop Act, it included what appears to be a sort of statement of legislative purpose codified in the statute itself. The relevant provision specifies:

> The general assembly hereby finds, determines, and declares that this section shall be interpreted so that *any common law cause of action* against a vendor of alcohol beverages is abolished and that in certain cases the consumption of alcohol beverages rather than the sale, service, or provision thereof is the proximate cause of injuries or damages inflicted upon another by an intoxicated person except as otherwise provided in this section . . .

Id. at (1) (emphasis added). This subsection could be taken to imply that the intent of the legislature was only to preempt *common law* claims against the vendor of alcoholic beverages. It is silent as to any preemptive effect of the Dram Shop Act on civil *statutory* claims.

The question before the Court, then, is whether the reference to "any common law cause of action" in subsection (1) of the statute effectively limits the scope of the "no licensee [will be] civilly liable" language in subsection (3) of that law to encompass only civil claims arising from

the common law. Because this is a diversity case, the question is answered by application of Colorado law.

Colorado courts have held that declarations of legislative purpose or policy can be useful when construing or interpreting a statute, at least when that statute is ambiguous. *See, e.g., People v. Cross*, 127 P.3d 71, 74-76 (Colo. 2006), However, as a general rule, a broad statement or declaration of legislative purpose – even when codified into statute – cannot be used to create an ambiguity in an otherwise unambiguous more-specific statutory provision. *See United States v. Husted*, 545 F.3d 1240, 1245-46 (10th Cir. 2008).

The Thirsty Parrot's that subsection (3)(a)'s mandate that "no licensee [will] be civilly liable" encompasses both common law and statutory civil claims is founded on a decision from the Colorado Court of Appeals, *Strauch v. Build It and They Will Drink It*, 226 P.3d 1235 (Colo. App. 2009), which addresses the precise issue. In *Strauch*, the plaintiff was stabbed by an intoxicated person a block or so away from a nightclub at which the assailant had been drinking. The plaintiff brought a number of claims including negligence, premises liability under the CPLA, and Dram Shop liability. The trial court dismissed all claims against the defendant. The Colorado Court of Appeals reversed the dismissal of the Dram Shop Act claim but affirmed dismissal of the CPLA claim. In doing so, it stated:

> The [trial] court properly entered judgment for defendants on the remaining claims alleging civil conspiracy, negligence, *and violations of the premises liability statute*. The Colorado statute provides the *exclusive civil remedy* against licensed alcohol vendors and their agents *in cases such as this*. [C.R.S. §] 12–47–801(3)(a) makes explicit that "[n]o licensee is civilly liable" under these circumstances except as provided therein.

226 P.3d at 1239 (emphasis added). The Colorado Supreme Court subsequently granted *certiorari* with respect to another (unrelated) issue in the case, and without addressing the interplay between the Dram Act and the CPLA, it affirmed. *Build It & They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 304 (Colo. 2011).

The Thirsty Parrot argues that because the Colorado Supreme Court did not review the conclusion of the Colorado Court of Appeals that the preemptive effect of the Dram Shop Act extends to CPLA statutory claims, that aspect of the decision remains in effect. The Thirsty Parrot is correct. Where, as apparently was the case in *Strauch*,[2] the Colorado Supreme Court denies a petition for *certiorari* on one or more issues, "[t]he denial of certiorari does not determine the merits of the case, but reflects only that the case is not properly postured for review." *Allison v. Indus. Claim Appeals Office*, 884 P.2d 1113, 1118 (Colo. 1994). As such, the fact that the Colorado Supreme Court chose not to review the Colorado Court of Appeals' conclusion in *Strauch* that the Dram Shop Act preempted the plaintiff's CPLA claim does not affect that aspect of the court's holding. It remains just as instructive or precedential as it would be if the Colorado Supreme Court had declined *certiorari* in its entirety, or if the losing party had not sought *certiorari* in the first place.

That then raises the question of how much weight the Court of Appeals' *Strauch* decision should be afforded by this Court. The general rule for federal courts is that intermediate state appellate decisions can provide persuasive – though not binding – guidance in diversity jurisdiction cases involving unsettled questions of state law. *Clark v. State Farm Mut. Auto. Ins. Co.*, 319 F.3d 1234, 1240 (10th Cir. 2003). "Although [federal courts] are not bound by a lower state court decision, decisions of a state's intermediate appellate courts are some evidence of how the state supreme court would decide the issue, and [federal courts] can consider them as

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[2] The Colorado Supreme Court's order granting *certiorari* in the case specifically stated that review was limited to "[w]hether the court of appeals erred in holding that reasonable foreseeability (proximate cause) of the injury-causing event is not an element, or an appropriate consideration, in determining the liability of a licensee under [C.R.S. § 12-47-801, C.R.S.]," and it was "DENIED AS TO ALL OTHER ISSUES." *Build It and They Will Drink It v. Strauch*, Case No. 09-SC-1011, 2010 WL 894040 (Mar. 15, 2010).

such, even if they are not binding precedent under state law." *Id.*; *accord May v. Travelers Prop. Cas. Co. of Am.*, 263 Fed. App'x 673, 680 (10th Cir. 2008).

The Court finds that the Colorado Court of Appeals' reasoning represents Colorado law for several reasons. First, C.R.S. § 12-47-801(3)(a)'s admonition that "no licensee [to sell alcoholic beverages] is civilly liable" for an injury caused by an intoxicated patron of that licensee-vendor is not ambiguous . It is broad, to be sure, but it nonetheless encompasses on its face any "civil liability" without distinguishing between common law and statutory civil claims. The fact that the Colorado General Assembly chose to repeat the broad "civil liability" formulation multiple times in the statute underscores the seemingly affirmative intent of the legislature to give the Dram Shop Act preemption provision broad scope. There is no doubt that the reference to "any common law cause of action" in subsection (1) of the statute appears to be contrary to the broad "civil liability references"[3], but as a statement of legislative intent or purpose, it cannot be used to render a subsequent, more specific substantive statutory provision ambiguous. *Husted*, 545 F.3d at 1245-46.

The relative longevity of *Strauch* also strongly supports the view that it was correctly decided and remains good law. The Colorado Court of Appeals handed down the decision in 2009. Yet despite the fact that *Strauch* is the only appellate decision to interpret and construe the preemptive effect of the Dram Shop Act on statutory claims against licensee-vendors, in all the time since, the Colorado General Assembly has never taken any action to change the statute to

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[3] Moreover, it is not entirely clear that the statement of legislative purpose actually *does* contradict or is inconsistent with an interpretation of C.R.S. § 12-47-801 that extends its preclusive effect to both common law and statutory civil claims. The applicable language merely indicates that the Dram Shop Act should be interpreted to preempt common law causes of action; it says nothing about whether it also might preempt statutory civil claims. Insofar as a subsequent provision goes on to also preempt or preclude such statutory claims, it could be viewed as merely supplementing that legislative purpose or intent, and not undercutting it.

address that issue and reverse the holding in the case. This includes in 2014, when the legislature specifically amended C.R.S. § 12-47-801 to reflect recent statutory codification changes – but it did not make any effort to alter the law to say that it was only intended to preempt or preclude common law claims against covered vendors, and not all civil claims. 2014 Colo. Legis. Serv. Ch. 387 (S.B. 14-129) (West). That is a very telling omission for the purposes of the Court's analysis. "Under an established rule of statutory construction, the [Colorado] legislature is presumed, by virtue of its action in amending a previously construed statute without changing the portion that was construed, to have accepted and ratified the prior judicial construction." *People v. Swain*, 959 P.2d 426, 430–31 (Colo. 1998). This principle applies fully where the prevailing judicial interpretation of the statute in question was handed down by the Colorado Court of Appeals and not the Colorado Supreme Court. *See, e.g., A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862, 869 (Colo. 2005).

Mr. Wiltberger's two primary arguments on the Dram Shop Act preemption issue are not persuasive. First, he cites a Colorado Court of Appeals decision, *Legro v. Robinson*, 328 P.3d 238 (Colo. App. 2012), involving the interplay between the CPLA and the Colorado Dog Bite Statute (C.R.S. § 13-21-124). Mr. Wilberger argues that because the plaintiff in that case was permitted to pursue claims under both statutes, he should be allowed to proceed under both the CPLA and Dram Shop Act. As Thirsty Parrot correctly points out, however, the Dog Bite Statute does not have the sort of "exclusive remedy"or preemption language that is present in the Dram Shop Act. The *Legro* case therefore is wholly inapposite.

Second, Mr. Wiltberger cites to a Colorado state district court case in which the plaintiff apparently was permitted to proceed with both CPLA and Dram Shop Act claims. Setting aside the fact that a Colorado state trial court decision has no precedential value, there is no indication

that the preemption issue was raised in the case. It is entirely possible that the defendant in that proceeding determined that other arguments or theories were more likely to be successful, or that the defendant was unaware that a preemption argument even existed, and it did not raise it.

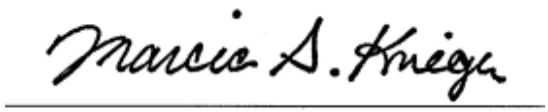
In sum, (i) the Colorado General Assembly defined the scope of Dram Shop Act preemption to broadly extend to all civil claims without distinguishing between common law and statutory claims; (ii) it did so at multiple places in the relevant statute; (iii) the only Colorado appellate court to have considered this issue endorsed that broad scope of preemption, holding that it encompasses CPLA claims; and (iv) the Colorado legislature has never taken any step to change the Dram Shop Act in light of this prevailing interpretation, despite amending the statute in 2014. The Court holds that C.R.S. § 12-47-801(3)(a) should be interpreted to bar Mr. Wiltberger's CPLA claim against the Thirsty Parrot involving his injury allegedly caused by an intoxicated patron of that establishment. The Thirsty Parrot's Motion for Summary judgment on this claim is **GRANTED**.

V. Conclusion

The Court hereby **DENIES IN PART** and **GRANTS IN PART** the Thirsty Parrot's Motion for Summary Judgment (**# 44**) as follows. Summary Judgment is **DENIED** on Plaintiff's Colorado Dram Shop Act claim (First Claim for Relief). That claim will proceed to trial. Summary Judgment is **GRANTED** on the Plaintiff's Colorado Premises Liability Act claim (Second Claim for Relief) which is dismissed. Within fourteen days of this Order the parties are directed to jointly contact chambers at (303) 335-2289 to set this matter for a final pretrial conference.

DATED this 19th day of July, 2017.

BY THE COURT:



Marcia S. Krieger
United States District Court