STATE OF MICHIGAN

COURT OF APPEALS

HEATHER ALLEN,

Plaintiff-Appellant,

v

ANGELA GENTS, CHAKISMA, and JESSIE,

Defendants,

and

ALEXUS ENTERPRISES, INC., d/b/a BODY ROCK CAFÉ,

Defendant-Appellee.

UNPUBLISHED
August 6, 1999

No. 200469
Wayne Circuit Court
LC No. 95-534081 NO

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant Alexus Enterprises, Inc. We affirm.

Plaintiff seeks damages for injuries sustained when she was attacked by the three individual defendants, all of whom were independent contractors retained by the corporate defendant as exotic dancers. Plaintiff asserted three counts. She claims error as to only one count: a claim entitled negligent hiring and supervision. Plaintiff alleges that, notwithstanding the name she gave this count, the allegations asserted within it are sufficient to sustain a premises liability claim. To the extent this count does not assert a premises liability claim, plaintiff argues the trial court erred in its failure to allow plaintiff to amend her complaint to more specifically allege a premises liability claim.

A trial court's ruling regarding a request to amend pleadings is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Michigan courts have long held that leave to amend pleadings should be freely granted. *Ben P Fyke & Sons v Gunter Co*,

390 Mich 649, 658; 213 NW2d 134 (1973). As a general rule, a motion to amend ordinarily should be granted. *Id.* However, where an amendment is futile, leave to amend need not and should not be granted. An amendment is futile where the amended pleading would nonetheless be subject to dismissal under MCR 2.116(C). *McNees v Cedar Springs Stamp,* 184 Mich App 101; 457 NW2d 68 (1990).

In the instant case, the trial court found that leave to amend would be futile because the undisputed facts simply did not support plaintiff's theory of premises liability. We shall therefore assume that plaintiff's complaint adequately states a premises liability claim and review this case under the standards of MCR 2.116(C)(10) to determine whether there existed a jury submissible question regarding plaintiff's premises liability theory.

A motion for summary disposition based on MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *State Farm Fire and Casualty Co v Fisher,* 192 Mich App 371, 374; 481 NW2d 743 (1991). A court must consider the pleadings, affidavits, depositions, admissions and other available documentary evidence. *Id.* The party opposing the summary disposition motion has the burden of showing that a genuine issue of material fact exists. *Skinner v Square D Co,* 445 Mich 153, 160; 516 NW2d 475 (1994). The grant or denial of a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998).

The general rule governing premises liability is that a person does not have a duty to aid or protect another person endangered by a third person's conduct. *Mason v Royal Dequindre, Inc,* 455 Mich 391, 397; 566 NW2d 199 (1997). However, an exception exists where there is a special relationship between the plaintiff and the defendant. *Id.* at 397. While owners and occupiers of land have a special relationship to their invitees, merchants do not have a duty to protect invitees from unforeseeable criminal acts of third parties. *Id.* at 398. In order to impose a duty on a merchant to protect his or her invitees from the criminal acts of others, the merchant's invitee must be "readily identifiable as [being] foreseeably endangered." *Murdock v Higgins,* 454 Mich 46, 58; 559 NW2d 639 (1997). The *Mason* Court defined "readily" as "promptly; quickly; easily." *Mason, supra* at 398.

In the instant case, we find that defendant owed no duty to protect plaintiff from the criminal acts of the individual defendants because plaintiff was not readily identifiable as being foreseeably endangered. Although she was not paid a wage by defendant, plaintiff functioned as a waitress in defendant's bar.[1] As plaintiff prepared to leave the premises for the night, she walked past the individual defendants who verbally assaulted plaintiff. And, as plaintiff walked toward the locker room area, one of the individuals allegedly threw a bottle at plaintiff. The bottle missed plaintiff, but struck one of the bouncers. The bouncer escorted plaintiff out of the bar. At that time, the individual defendants remained in the bar. Shortly thereafter, the three individual defendants went outside and began what plaintiff described as a semi-civil discussion about what had transpired earlier. The individual defendants did not direct any verbal assaults toward plaintiff nor did they physically confront or intimidate plaintiff in any way prior to the attack.

Plaintiff's own testimony demonstrates that the attack outside the bar was not foreseeable. Plaintiff testified that before one of the dancers struck her with the bottle, she "didn't feel threatened at all" by the three women. The attack caught plaintiff off guard. Plaintiff admitted that if she had felt threatened she would have asked the valet to get a bouncer.

Plaintiff was in the best position to assess her risk of harm. Plaintiff knew and worked with her assailants. As a party to the original altercation, plaintiff was able to assess the seriousness of the underlying dispute. Plaintiff was not intoxicated and had not consumed anything that would have clouded her judgment. Her testimony clearly establishes that had she foreseen any appreciable risk to her well-being, she would have summoned appropriate security personnel. We find that since the attack was not foreseeable to plaintiff, it likewise was not foreseeable to defendant as a matter of law.

We note that the cases addressing the question of whether a plaintiff is readily identifiable as being foreseeably endangered have often looked to the plaintiff's subjective assessment of the situation. In *Goodman v Fortner*, the companion case to *Mason, supra,* the Supreme Court found that the plaintiff was readily identifiable as being foreseeably endangered where, after a fight broke out in the defendant's bar, the plaintiff specifically asked the defendant's employees to call the police. The defendant's employees refused and instead sent the plaintiff outside where his assailants were visible and yelling at the plaintiff. *Id*. at 404-405.

Similarly, in *Mills v White Castle System, Inc,* 167 Mich App 202, 421 NW2d 631 (1988), the plaintiffs and two companions parked on the defendant's premises where they were confronted by several people in the parking lot who were drinking alcoholic beverages and acting disorderly. The plaintiffs and their companions ignored the group and went inside the restaurant. Upon leaving the restaurant, the plaintiffs were attacked by the same group of people. A companion of plaintiffs reentered the restaurant and asked the defendant's manager to call the police. The manager refused. The companion's plea for help identified the plaintiff as being foreseeably endangered.

A premises owner is not an insurer against all injuries to its invitees. The mere fact that some prior assaultive conduct occurred does not turn a premises owner into an insurer against all subsequent assaults by the same assailant. In this case, defendant's actions did not knowingly expose plaintiff to an obvious or imminently dangerous situation. As a result, the case at hand is factually distinguishable from the scenario in *Schneider v Nectarine Ballroom, Inc (On Rem),* 204 Mich App 1, 3-4; 514 NW2d 486 (1994). There, two men were harassing the plaintiff and his friend at a club. One of the men proceeded to punch the plaintiff and a fight ensued. The bouncers ejected the two men and other participants of the fight. The bouncers then ordered the plaintiff to leave and pushed him out the door where the two men were waiting. The two men inflicted serious injuries upon the plaintiff. This Court held that the defendant-bar owner owed the plaintiff-patron a duty to ensure that his assailants had vacated the area outside the bar once defendant's staff had ejected them. *Id.* at 7. Consequently, this Court held that the defendant had breached its duty to the plaintiff when its employees ejected him into a known, obvious, and imminently dangerous situation. *Id.*

Here, there is no evidence to suggest that defendant ejected plaintiff into a known, obvious, and imminently dangerous situation where her alleged assailants were waiting. When defendant's staff escorted plaintiff out of the bar, the three individual defendants were still inside the bar. Defendant reasonably believed that plaintiff had safely left the premises and was not in danger. Additionally, plaintiff's testimony that she did not feel threatened before the attack further supports the conclusion that defendant did not place plaintiff in an obvious or imminently dangerous situation.

We therefore conclude that defendant did not owe a duty to plaintiff to protect her from the criminal actions of her assailants. Summary disposition on plaintiff's premises liability claim was appropriate. The trial court did not err by finding plaintiff's request to amend her complaint futile.

Affirmed.

/s/ Hilda R. Gage
/s/ Michael R. Smolenski
/s/ Brian K. Zahra

[1] Defendant has raised the issue that this matter is barred by the exclusive remedy provisions of the Michigan Workers' Disability Compensation Act ("WDCA"). Plaintiff contests that she was an employee and further argues that there are no damages which she may recover under the WDCA presumably because: 1) she was not paid a wage by defendant (she worked for tips); and 2) she did not miss any work because of this incident. We need not decide whether plaintiff's claim is barred by the WDCA since, viewing the facts in a light most favorable to plaintiff, we find that defendant is nonetheless entitled to judgment pursuant to MCR 2.116(C)(10) on plaintiff's premises liability claim.