

STATE OF MICHIGAN
COURT OF APPEALS

RON SIMPSON,

Plaintiff-Appellee,

v

FRATERNAL ORDER OF EAGLES,

Defendant/Cross-Plaintiff,

and

REBECCA KRAMER, Personal Representative of
the Estate of ERIC FOSTER,

Defendant/Cross-Defendant-
Appellant.

UNPUBLISHED

January 25, 2002

No. 221685

Sanilac Circuit Court

LC No. 97-025207-NI

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

PER CURIAM.

This appeal arises from a dramshop liability action in which plaintiff Ron Simpson sued defendant Fraternal Order of Eagles and defendant Rebecca Kramer, personal representative of the estate of Eric Foster. The Eagles filed a cross-claim against Kramer under MCR 2.203(D), seeking indemnity in the event that the Eagles were found liable to Simpson. The trial court entered judgment on the cross-claim, ordering Kramer to indemnify the Eagles in the amount of \$50,000. Kramer appeals as of right from that order. We reverse and vacate the trial court's order that Kramer indemnify the Eagles.

At the conclusion of trial, the jury awarded Simpson \$50,000 in damages against the Eagles and \$75,000 in damages against Kramer. Although the Eagles participated in the early stages of this action, the Eagles failed to appear for trial. Therefore, the Eagles failed to assert any defense to Simpson's primary claim and failed to present any proofs on its third-party indemnity claim. Before jury selection, Kramer moved for dismissal of the Eagles' cross-claim, given the Eagles' failure to appear. The trial court took the matter under advisement. At the close of proofs, Kramer renewed her motion for dismissal, and the trial court again took the matter under advisement, pending the jury's verdict. During post-trial proceedings, Kramer

renewed her motion for dismissal, based on the Eagles' failure to prosecute its cross-claim.¹ The trial court denied Kramer's motion, reasoning that Kramer was strictly liable for indemnifying the Eagles under MCL 436.22(7), and that the Eagles were not required to submit any proofs regarding the issue. Subsequently, the trial court ordered Kramer to indemnify the Eagles in the amount of \$50,000, the full amount of Simpson's judgment against the Eagles. We review a trial court's decision regarding a motion to dismiss for an abuse of discretion. *In re Contempt of Tanksley*, 243 Mich App 123, 127; 621 NW2d 229 (2000).

Simpson's cause of action against both defendants and the Eagles' cause of action for indemnification against Kramer accrued in 1997. Therefore, we apply the language of the dramshop act in effect at that time:²

(3) A retail licensee shall not . . . directly or indirectly, individually or by clerk, agent, or servant sell, furnish or give alcoholic liquor to a person who is visibly intoxicated.

(4) Except as otherwise provided in this section, an individual who suffers damage or is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death . . . shall have a right of action in his or her name against the person who by selling, giving or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person . . .

* * *

(7) Any *licensee* subject to the provisions of subsection (4) regarding the unlawful selling, furnishing, or giving of alcoholic liquor to a visibly intoxicated person shall have the right to full indemnification from the alleged visibly intoxicated person for all damages awarded against the licensee. [MCL 436.22 (emphasis added).]

According to the statute's plain language, in order to acquire the right of indemnification, the entity that furnished the alcohol to the allegedly intoxicated person must qualify as a "licensee" under the statute. MCL 436.22(7). Given the Eagles non-appearance at trial, that entity obviously failed to prove its status as a "licensee" on the date in question. Furthermore, the record reveals that the Eagles admitted several times during discovery that it was not a licensee under MCL 436.22(7) when the incident occurred.³ Based on these facts, the trial court

¹ The Eagles also failed to appear at the motion hearing.

² See 1989 PA 118.

³ In its answer to Simpson's complaint, the Eagles specifically admitted that it was "a private club without a liquor license." In its affirmative defenses, the Eagles specifically denied that it was "a licensee pursuant to MCL 436.22." Finally, in its cross-claim against Kramer, the Eagles alleged that it was only entitled to indemnification in the event that the Eagles should "be found to be a licensee pursuant to [MCL 436.22]."

was required, as a matter of law, to enter judgment in favor of Kramer on the Eagles' indemnification claim. We conclude that the trial court abused its discretion when it denied Kramer's motion to dismiss and when it entered judgment in favor of a party which never appeared for trial and which never advanced any proofs supporting its recovery on the indemnity claim. We therefore reverse the trial court's order denying Kramer's motion to dismiss, and vacate the indemnification order.

Reversed.

/s/ Brian K. Zahra

/s/ Michael R. Smolenski

/s/ Michael J. Talbot