

JEWEL MITCHELL * **NO. 2007-CA-0048**
VERSUS * **COURT OF APPEAL**
BSP, LLC; SLEEPING GIANT * **FOURTH CIRCUIT**
ENTERTAINMENT, LLC;
PLATINUM 1 * **STATE OF LOUISIANA**
ENTERTAINMENT, LLC;
WINGARD IMPORTS, LTD; * * * * *
AND INTERNATIONAL
HOTEL

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2005-41, DIVISION "E-7"
Honorable Madeleine Landrieu, Judge
* * * * *
CHIEF JUDGE JOAN BERNARD ARMSTRONG
* * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Michael E. Kirby and Judge Roland L. Belsome)

BELSOME, J., CONCURS IN THE RESULT.

NATACHA M. HUTCHINSON
700 CAMP STREET
SUITE 400
NEW ORLEANS, LA 70130

COUNSEL FOR PLAINTIFF/APPELLANT

GREGORY W. RONIGER
LAW OFFICES OF SHERYL STORY
ONE GALLERIA BOULEVARD
SUITE 1610
METAIRIE, LA 70001-7508

AFFIRMED

The plaintiff-appellant, Jewel Mitchell, appeals a summary judgment signed on October 23, 2006, dismissing her claim for personal injury damages against the defendant-appellee, Wingard Imports, Ltd. (“Wingard”). We affirm.

The plaintiff alleges that she attended a New Year’s Eve party on December 31, 2003 at the Loft 523 nightclub located in the International House Hotel. She further alleges that the party was hosted by the defendants, BSP, Platinum 1 Entertainment and Sleeping Giant Entertainment. During the party, Hypnotic (a trade name for the defendant, Wingard) conducted a promotion involving young ladies wearing apparel identifying them as promoters of the company. Shortly after midnight, one of the Hypnotic promoters threw a drink on the plaintiff and struck her over the head with a Hypnotic bottle. Thereafter, two or three other of the Hypnotic promoters battered the plaintiff. All of the participants in the altercation were ejected onto the street by the event security, as a result of which the plaintiff was assaulted on the street by the Hyponotic promoters. The melee persisted until a third party intervened and rushed the plaintiff to safety.

As a result of personal injury damages sustained in this altercation, the plaintiff filed a petition on January 3, 2005, naming as defendants, BSP, LLC; Sleeping Giant Entertainment, LLC; Platinum 1 Entertainment, LLC; Wingard Imports, LTD, d/b/a Hypnotic; and Ekistics, Inc., d/b/a Loft 523.

Ekistics, Inc. was dismissed as a defendant by consent judgment on May 24, 2006.

In connection with its summary judgment motion, Wingard asserts in a “Statement of Uncontested Fact” that in order to promote its beverage, “Hypnotic,” Wingard retained the services of an independent contractor, Nick Carter, who in turned hired the ladies who passed out the “Hypnotic” drinks at the party while wearing T-shirts imprinted with the word, “Hypnotic.” Wingard also asserts as an uncontested fact that neither Nick Carter nor Keisha LeBlanc nor anyone hired by Nick Carter is or was an employee of Wingard Imports, Ltd.

In support of the motion for summary judgment is an affidavit of Nick Storm, National Director of Promotions for Heaven Hill Distilleries Inc. d/b/a Wingard Imports attesting to the above facts.

In opposition to Wingard’s motion for summary judgment, the plaintiff offers no affidavits, depositions, documents or any other form of evidence. Instead, the plaintiff makes three arguments: (1) Discovery is still

ongoing and summary judgment is premature; (2) independent contractor is a factual determination to be made on a case-by-case basis and Wingard has not provided sufficient information to shift the burden to the plaintiff on this issue; and (3) because the assailants were wearing Hypnotic T-Shirts the plaintiff “could reasonably have believed that there was an agency relationship between Wingard and the assailants,” citing *Boulos v. Morrison*, 503 So.2d 1,3 (La.1987).

Taking the plaintiff’s agency argument first, we note that, in essence, it raises the issue of apparent authority. The Supreme Court in *Boulos*, *supra*, notes that:

For the doctrine of apparent authority to apply . . . the third party must rely reasonably on the manifested authority of the agent.

Id.

In the instant case, the plaintiff did nothing in reliance upon the acts of the ladies wearing “Hypnotic” T-shirts. Therefore, the plaintiff may not rely on the doctrine of apparent authority in order to establish an agency relationship between the ladies and Wingard.

As to plaintiff’s argument that Wingard’s summary judgment motion was premature because discovery was incomplete, we find no motion by the plaintiff for a continuance in the record. Plaintiff argued to the trial court

that she needed more time to review certain unspecified discovery responses made by Wingard on August 7, 2006, and that she needed to take certain unspecified depositions to inquire further. Plaintiff's claim was filed on January 3, 2005. Wingard's motion for summary judgment was not filed until June 29, 2006, a year and a half later. It was then set for hearing on September 8, 2006, over two months after it was filed. Based on these facts we are not persuaded that the trial court erred in failing to find that Wingard's summary judgment motion was premature.

The final argument of the plaintiff to be considered by this Court is that the Wingard failed to furnish sufficient information to shift the burden to the plaintiff on motion for summary judgment on the question of independent contractor status of Nick Carter, Keisha LeBlanc or anyone else hired by Nick Carter.

Nick Storm's affidavit in support of Wingard's motion for summary judgment makes the following statements relevant to this independent contractor issue:

8. That in order to promote the sales of Hypnotic, Wingard did contract with an independent contractor, Nick Carter, to promote the drinks at the party;
9. That in order to promote the advertisement and sale of the Hypnotic product at the parties, Nick Carter, as an independent contractor, would hire ladies to pass out the Hypnotic

drinks while wearing T-shirts with the words “Hypnotic” imprinted thereon;

10. That Nick Cater, as an independent contractor, did hire several ladies to distribute its product, Hypnotic, at the party on New Year’s Eve at the Loft;
11. That Nick Carter nor Keisha LeBlanc nor anyone hired by Nicci [sic] Carter is or was an employee of Wingard.

In favor of the plaintiff’s case, we note that in general:

[D]espite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. See *Independent Fire Insurance Co. v. Sunbeam Corp.*, 99-2181, 99-2257 at pp. 16-17 (La.2/29/00), 755 So.2d 226, 236 (noting the court "must draw those inferences from the undisputed facts which are most favorable to the party opposing the motion"); See also *Hebert v. St. Paul Fire and Marine Ins. Co.*, 99-0333 (La.App. 4th Cir.2/23/00), 757 So.2d 814.

Willis v. Medders, (La. 2000), 775 So.2d 1049, 1050.

However, of more particular relevance to the instant case we note that:

[A]ccording to La. C.C.P. 966(C)(2), the mover need not negate all essential elements of the adverse party's claim, action, or defense, but rather need point out to the court that there is an absence of factual support of one or more elements of the claim. Once the movant negates such a necessary element(s) of the adverse party's claim, the burden then shifts to the adverse party to produce factual support sufficient to establish that he will be able

to satisfy his evidentiary burden of proof at trial. *Lozier v. Security Transfer and Inv. Corp.*, 96-2690 (La.App. 4 Cir. 4/30/97), 694 So.2d 497. The effect of the legislature's 1996 amendment to La. C.C.P. art. 966 is that the non-moving party is not allowed to rely on the allegations of its pleadings in opposition to a properly supported motion for summary judgment. *Oakley v. Thebault*, 96-0937 (La.App. 4 Cir. 11/13/96), 684 So.2d 488.

Moody v. City of New Orleans, 99-0708 (La.App. 4 Cir. 9/13/00), 769 So.2d 670, 671. Here, we find that Nick Storm's affidavit is sufficient to point out "that there is an absence of factual support of one or more elements of the claim," thereby shifting the burden to the plaintiff "to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial." *Id.* Therefore, the plaintiff is not entitled to rely on the mere allegations of her pleadings in opposition to Wingard's motion for summary judgment. As the plaintiff offered no affidavits, depositions, documents or other evidence over a year and a half after the filing of her petition, we find no error in the trial court's decision to grant Wingard's motion for summary judgment.

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED