

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

Cheri Cannatello, as special administrator)
of the estate of Phillip Levato, Jr., deceased,)

Plaintiff,)

v.)

No. 19 L 10906

Seven West Division, Inc., an Illinois)
corporation, d/b/a Room Seven,)

Defendant.)

MEMORANDUM OPINION AND ORDER

Recovery under the Wrongful Death Act requires the decedent to have had a cause of action for damages at the time of death. Here, the plaintiff-administrator cannot establish the defendant's duty of reasonable care after ejecting the patron from the premises before his death. The absence of the defendant's duty means the condition precedent under the Wrongful Death Act cannot be satisfied and, therefore, the defendant's summary judgment motion must be granted.

Facts

On November 20, 2016, Phillip Levato, Jr. was a business invitee at a nightclub commonly known as Room Seven, located at 7 West Division Street in Chicago. Seven West Division, Inc. owned, managed, and operated Room Seven. While Levato was a business invitee at Room Seven, he became intoxicated and ill. Room Seven's agents, representatives, or employees forcibly escorted Levato off the premises. Shortly after being ejected, Levato was struck and killed by a vehicle while attempting to walk across a street.

On May 10, 2017, Cheri Cannatello, as special administrator of Levato's estate, filed a single-count complaint based on a wrongful

death cause of action against Seven West. A discovery dispute led to an interlocutory appeal the appellate court later dismissed. On October 4, 2019, the circuit court reinstated the case under its current case number.

Cannatello alleges Seven West owed Levato a duty of reasonable care for his safety given that he was a business invitee who became ill and could not exercise reasonable care for his own safety. Cannatello further alleges Seven West knew or should have known of Levato's intoxication and illness, lack of proper clothes to protect himself from freezing temperatures, and inability to exercise reasonable care for his own safety. Cannatello claims Seven West breached its duty to Levato by: (1) ejecting and leaving him in an area where motor vehicles travel on public roadways; (2) failing to help him get home safely by arranging for transportation; (3) failing to allow Levato to remain on the premises until he sufficiently recovered; and (4) failing to obtain or offer medical attention. Seven West's acts and omissions are alleged to have proximately caused Levato's injuries and death.

On March 3, 2021, Seven West filed its motion for summary judgment. The parties subsequently submitted response and reply briefs.

Analysis

Seven West brings its motion pursuant to the Code of Civil Procedure section 2-1005. 735 ILCS 5/2-1005. Summary judgment is appropriate when the record reveals that "there is no genuine issue as to any material fact . . . and the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c). To determine the existence of a genuine issue of material fact, a court is to "construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). A defendant may move for summary judgment in one of two ways: (1) by affirmatively showing that some element of the case must be resolved in the defendant's favor; or (2) by the kind of motion recognized by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), "in which a defendant points out

the absence of evidence supporting [the] plaintiff's position." *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 368 (1st Dist. 2006). If the defendant carries this initial burden of production on a *Celotex* motion, the burden shifts to the plaintiff to show a factual basis to support the elements of their claim. *Id.* at 369. "While parties opposing a summary judgment motion are not required to prove their case, they are under a duty to present a factual basis which would arguably entitle them to judgment in their favor, based on the applicable law." *Id.* "Mere speculation, conjecture, or guess is insufficient to withstand summary judgment." *McGath v. Price*, 342 Ill. App. 3d 19, 27 (1st Dist. 2003) (quoting *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 131, 328 (2d Dist. 1999)).

Seven West argues the complaint must be dismissed for two reasons. First, the complaint sounds in alcohol-related liability and is, therefore, preempted by the Dram Shop Act. *See* 235 ILCS 5/6-21. Second, Cannatello has failed to establish that Seven West owed Levato a duty of care after ejecting him from the premises or that Seven West's conduct proximately caused Levato's death.

As a preliminary matter, this court acknowledges the Wrongful Death Act, 740 ILCS 180/0.01 – 180/2.2, and the Dram Shop Act, 235 ILCS 5/6-21, "create different statutory rights and duties," such that "there is nothing in either act which is a delimitation or enlargement of the other." *Farmers State Bank & Trust Co. v. Lahey's Lounge, Inc.*, 165 Ill. App. 3d 473, 480 (4th Dist. 1988) (citing *Slone v. Morton*, 39 Ill. App. 2d 495 (2d Dist. 1963) (Dram Shop and Wrongful Death Acts create different statutory rights and duties). In other words, "the pursuit of a remedy under one [act] against a certain class of wrongdoers is [not] an election to abandon any suit against another class of wrongdoers under the other [act]." *Slone*, 39 Ill. App. 3d at 499. Thus, even if Cannatello's complaint sounded in liability under the Dram Shop Act, which it does not, that fact would not automatically result in preemption of Cannatello's Wrongful Death Act claim.

Here, Seven West argues Cannatello cannot state a claim pursuant to the Dram Shop Act because it does not provide an

intoxicated person with a cause of action against a tavern owner after a patron has become intoxicated. As written:

Nothing in this Act shall be construed to confer a cause of action for injuries to the person or property of the intoxicated person himself, nor shall anything in this Act be construed to confer a cause of action for loss of means of support or society on the intoxicated person himself or on any person claiming to be supported by such intoxicated person.

235 ILCS 5/6-21(a). While Seven West correctly points out the act's limited scope, Seven West misconstrues the basis of Cannatello's claim. The complaint does not fault Seven West for having caused Levato's intoxication or having overserved him. Rather, Cannatello complains Seven West breached its duty of care to Levato *after* he became intoxicated and *after* his ejection. In short, the Dram Shop Act does not apply to the facts of this case.

In any event, a plaintiff's wrongful death complaint may be barred "if the decedent, at the time of death, would not have been able to pursue an action for personal injuries." *Williams v. Manchester*, 228 Ill. 2d 404, 421 (2008) (quoting *Varelis v. Northwestern Mem'l Hosp.*, 167 Ill. 2d 449, 454-55 (1995)). As *Williams* explains:

In this sense, an action under the Wrongful Death Act may be said to be derivative of the decedent's rights, for the ability to bring the wrongful death action 'depends upon the condition that the deceased, at the time of his death, had he continued to live, would have had a right of action against the same person or persons for the injuries sustained.'

Id. (quoting *Varelis*, 167 Ill. 2d at 454-55, quoting, in turn, *Biddy v. Blue Bird Air Serv.*, 374 Ill. 506, 513-14 (1940)).

Here, Cannatello has not alleged any facts indicating that Seven West did anything beyond monitoring and ejecting Levato from the establishment. Simply put, this is not enough to establish that Seven West owed Levato a duty of care. See *Bell v. Hutschell*, 2011 IL 110724,

¶ 26 (voluntary undertaking theory requires plaintiff to show defendant acted to ensure plaintiff's protection). Absent some showing that Seven West voluntarily assumed a duty to care for Levato, put Levato in a position of peril, or failed in its general duty to keep the premises safe, Seven West's duty to Levato ended at the point of ejection. *See, e.g., Vogt v. Round Robin Enters.*, 2020 IL App (4th) 190294, ¶ 27 (defendant's ejection of intoxicated patron who later died did not constitute voluntary undertaking of decedent's care). *Cf. Harris v. Gower, Inc.*, 153 Ill. App. 3d 1035, 1037-38 (5th Dist. 1987) (Dram Shop Act was not plaintiff's only remedy to defendants placing intoxicated person into car despite freezing temperatures); *Lessner v. Hurtt*, 55 Ill. App. 3d 195, 197 (2d Dist. 1977) (regardless of sale to or consumption of liquor by patron, bar owner owes duty to prevent patron's injury by another while on premises).

Cannatello also argues that Seven West's internal security policies required it to care for an ill or "obstructive" patron, such as Levato. This argument is unavailing. "Where the law does not impose a duty, one will not generally be created by a defendant's rules or internal guidelines. Rather, it is the law which, in the end, must say what is legally required." *Doe v. Coe*, 2019 IL 123521, ¶ 36 (citing *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 238 (1996)). The act of "[p]enalizing a defendant by imposing a duty on it to comply with self-imposed safety measures that exceed any duty imposed by law . . . would discourage employers from creating policies intended to protect their employees and the public." *Id.* In sum, there is no question of material fact as to whether Seven West owed Levato a duty of care.

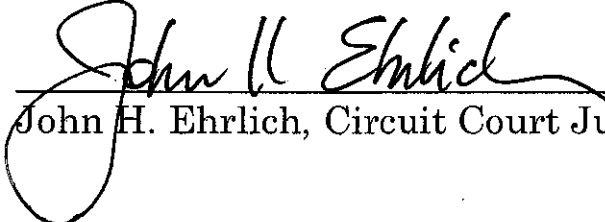
Cannatello seeks to legitimize its argument by relying on Rico Paone's expert opinion that Levato's death could have been prevented but for Seven West's failure to follow its internal security policies. This argument is not well taken. While the Code of Civil Procedure permits a plaintiff to file a counter-affidavit in opposition to a summary judgment motion, 735 ILCS 5/2-1005(e), ~~Seven West did not submit an affidavit in support of its motion that would have authorized Cannatello to submit Paone's counter-affidavit.~~

Given Cannatello's inability to establish a duty owed by Seven West to Levato, the court does not reach the parties' arguments relating to proximate cause.

Conclusion

For the reasons presented above, it is ordered that:

1. Seven West's motion for summary judgment is granted; and
2. The complaint is dismissed with prejudice.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075