

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

Robert P. Spear, II,)	
)	
Plaintiff,)	
)	
v.)	No. 19 L 3042
)	
Alexander N. McCort, Reggies Bar & Grill, LLC,)	
2105-2109 S. State, LLC, Danielle Terese Call)	
d/b/a Viva La Pole Show, and John Does 1 through)	
10, inclusive,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

A business invitor generally owes a duty of care for the safety of a business invitee on the invitor's property. Although the plaintiff's injury in this case is highly unusual, there remain questions of material fact as to whether previously installed barriers sufficiently protected a stage performer from an audience member and whether the barriers permitted the physical assault that occurred. For that reason, the defendant's summary judgment motion must be denied.

Facts

Reggies Bar & Grill is a restaurant and bar located at 2105 South State Street in Chicago. Reggies also has a venue for live performances. At some point unclear in the record, Danielle Call, on behalf of her company, Viva La Pole Show, entered into an oral agreement with Reggies to lease its entertainment space for a March 25, 2017, burlesque-style show. Viva La Pole Show had previously leased Reggies' performance space in 2015 and 2016.

Call recruited Robert Spear to perform at the March 25, 2017, show. For his performance, Spear wore a costume that included a mask, hat, shirt, jacket, pants, shoes, and a thong. During the show, Spear took off most of his clothing, leaving only his boots, kneepads, hat, and thong. Spear had a Prince Albert piercing through his urethra and the bottom of his penis head. From the Prince Albert piercing and through his thong, Spear had hooked a cord from which a four-ounce, glitter-covered, wooden ball dangled at the end. The cord and ball would swing around while Spear performed.

At some point during Spear's performance, certain audience members called for his attention. Spear moved in their direction, stage left. While Spear was performing in that area of the stage, Alexander McCort reached up with his hand and swatted Spear's leg. Seconds later, McCort reached up with his hand and pulled on the ball and hook apparatus attached to Spear's Prince Albert piercing. McCort pulled so hard that he ripped the entire Prince Albert piercing from Spear's penis. Spear left the stage, collapsed backstage, and was taken to Mercy Hospital.

On March 21, 2019, Spear filed a five-count complaint against the defendants. Count four is brought against Reggies based on premises liability. Spear alleges that Reggies owed Spear a duty of care to protect him from acts committed by third persons, including McCort's intentional and negligent acts. Spear claims that Reggies breached its duty of care by: (1) providing inadequate security; (2) failing to have barriers or other mechanisms to separate performers from the audience; (3) failing to provide warnings to the audience; (4) failing to remove or stop McCort from assaulting Spear after McCort had touched Spear the first time; (5) failing to supervise the venue, including identifying and removing dangerous persons; and (7) violating one or more safety codes under federal, state, or local law.

The case proceeded to discovery. In response to written discovery, Reggies produced a visual recording of the incident. The camera is positioned at the right, rear portion of the stage and is elevated above the performers. The recording is of poor quality, but captures McCort's assault during Spear's performance.

The parties deposed Ellie Quintana, the talent buyer for Reggies who arranged the March 25, 2017, show. Quintana indicated that there was no written agreement between Viva La Pole Show and Reggies; rather, the agreement was oral, while part of it was through Facebook. Quintana testified that Jake Sears, Reggies' head of security, determined how many security guards were needed for a particular show. Quintana also testified that she knew that members of the audience at Reggies reached over the bars to high five performers or shake their hands. She stated that the bars provided a little bit of a barrier between the audience and the performers.

Danielle Call testified that the agreement between Viva La Pole Show and Reggies was oral and by e-mail. Call spoke only with Quintana and no one else at Reggies about booking the show. Call indicated that Reggies was to provide security and locate guards at the front of the stage and at the entrance to the dressing room to keep performers safe and not let anyone

backstage. Call watched the recording, but did not see any security guards within the camera's view.

Donald MacEachron, Reggies' general manager, confirmed that Reggies does not necessarily sign a written contract with a booking agent; the agreement is handled mostly by e-mail. MacEachron confirmed that Reggies provides security for all shows, a service that is part of the agreement with each show. The number of security guards at a particular show depends on the size of the audience. MacEachron did not know how many security guards had been assigned to the March 25, 2017, show, but typically, one guard would be positioned on stage next to the curtain while others would walk through the audience.

Many years before the March 25, 2017 show, MacEachron had installed bars at the edge of the stage to prevent members of the audience from getting onto the stage and to protect the performers. The bars MacEachron had installed were pipes that extended approximately one foot from the stage. Audience members watching performances typically leaned against the bars. Although the bars bent toward the audience to keep them away from the stage, there was space between the bars that allowed audience members to extend their arms past the barriers. MacEachron was unaware of any prior incident in which an audience member had assaulted a performer.

Colin Hughes testified that he worked as a security guard at Reggies for four years and worked on March 25, 2017. Hughes testified that he frequently saw members of the audience reach up and touch a performer on stage. Generally, the touching was in the form of sharing a high five.

Robert Spear testified that he was the only performer he knew of who dangled a glitter ball from a cord attached to a Prince Albert piercing. He indicated that during his performance, some members of the audience tried to get his attention. After Spear moved down stage left, McCort reached his arm between the barriers and swatted Spear's leg as a way of getting Spear's attention. Spear acknowledged that this was not an aggressive contact. Based on that non-aggressive contact, Spear had no expectation that McCort would next make a violent assault. Spear was compensated \$50 for his performance.

Reggies filed a summary judgment motion that the parties fully briefed. Reggies' motion argued essentially that it owed Spear no common law duty. After reviewing the pleadings' contents, this court requested the parties to address whether the Reggies-Viva La Pole Show agreement

established any contractual duty Reggies owed to Spear. The parties supplied their supplemental briefs on that issue.

Analysis

Reggies brings its summary judgment motion pursuant to the Code of Civil Procedure. The statute authorizes the issuance of summary judgment “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002). If a defendant presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen’l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.*

Reggies argues that it owed Spear no duty. Duty is a question of law to be decided by the court. *Burns v. City of Centralia*, 2014 IL 116998, ¶ 13. To determine if a duty exists, a court is to analyze whether a relationship existed between the plaintiff and the defendant for which the law would impose a duty on the defendant for the plaintiff’s benefit. *See Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Directors*, 2012 IL 112479, ¶ 22 (quoting *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006)). The “relationship” is “a shorthand description for the analysis of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant.” *Id.* (citing *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18). A court’s analysis of the duty

element focuses on the policy considerations inherent in these four factors and the weight accorded to each based on the case's particular circumstances. *Id.*

Reggies argues specifically that it owed Spear no duty to protect him from McCort's criminal conduct. In Illinois, a landowner generally owes no duty to protect a person on its property from the criminal acts of third persons. Restatement (Second) of Torts § 314A (1965); *see also Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 438 (2006). That proposition is true unless there exists a special relationship between the parties. *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 215-216 (1988). Illinois courts recognize four special relationships that impose a legal duty to warn or protect a person from harm: (1) carrier-passenger; (2) innkeeper-guest; (3) business invitor and invitee; and (4) voluntarily undertaking the custody of another so as to deprive that person of normal opportunities for protection. *Lutz v. Goodlife Entertainment, Inc.*, 208 Ill. App. 3d 565, 569 (1st Dist. 1990). The Illinois Supreme Court has also recognized that Restatement (Second) of Torts section 344 represents a specific statement of the general rule articulated in section 314A. *Marshall*, 222 Ill. 2d at 438. Section 344 provides, in part, that:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons . . . and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts § 344. A landowner may, therefore, owe a duty to its patrons from criminal attacks if prior incidents gave the owner knowledge of the danger. *Cooke v. Maxum Sports Bar & Grill, Ltd.*, 2018 IL App (2d) 170249, ¶ 55. In determining whether such a duty exists in a given case, the question is whether the criminal activity was reasonably foreseeable such that the business should be held to have a duty to protect its patrons from such activity. *Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d 210, 243 (1st Dist. 2000). The precise mechanism of injury is not the focus of the inquiry; rather, a duty of care exists if there is a potential for contact with and, therefore, an injury to the plaintiff. *Colonial Inn Motor Lodge, Inc. v. Gay*, 288 Ill. App. 3d 32, 41-42, 45 (2d Dist. 1997) ("If the defendant's conduct is a substantial factor in bringing about the injury, it is not necessary that

the extent of the harm or the exact manner in which it occurred could reasonably have been foreseen.”).

As an initial matter, it is plain that Spear was a business invitee at Reggies. A business invitee is defined as a person who has entered a landowner’s property by express or implied invitation, in connection with the landowner’s business or other activities, and resulting in mutual benefit to the landowner and the invitee. *Jackson v. Shell Oil Co.*, 272 Ill. App. 3d 542, 548 (1st Dist. 1995). In this instance, Reggies, through Viva La Pole Show, invited Spear to perform at Reggies for its and his financial benefit.

The factual record supports the conclusion that an injury to Spear, though perhaps not the precise one he suffered, was reasonably foreseeable. MacEachron testified that years earlier he had installed barriers at the edge of the stage to separate the audience from the performers and to protect those on stage. Whether the barriers MacEachron installed were sufficient for that purpose is an open question. The evidence in the record indicates there were gaps between the bars, and various witnesses testified that audience members used those gaps to reach up and touch, shake hands with, or high five performers on stage. Spear’s injury must, therefore, be considered reasonably foreseeable as the barriers were insufficient to prevent contact between McCort and Spear.

Illinois law provides little guidance as to the likelihood-of-injury element. On one hand, if unwanted contact between McCort and Spear was reasonably foreseeable, it follows that there was a likelihood of injury in a general sense. For example, instead of ripping out Spear’s Prince Albert piercing, McCort could have tripped Spear and caused him to fall. Thus, the reasons that make a harm foreseeable are the same reasons that make an injury more likely. *See Jones v. Chicago, HMO, Ltd.*, 191 Ill. 2d 278, 304 (2000). If, on the other hand, the likelihood of injury focuses on the particular injury Spear suffered, the record does not support a finding that his specific injury was likely. Spear admitted that he was the only performer he knew of who dangled a glitter ball from a cord attached to a Prince Albert piercing. As no one had previously attempted to grab the ball or cord, there was no likelihood that Spear’s particular injury would occur. Yet even if the likelihood-of-injury factor focuses on a plaintiff’s particular injury rather than a general likelihood of injury, the remaining two factors weigh in favor of finding that Reggies owed Spear a duty of care.

The magnitude of the burden of protecting performers from the audience was not great. Reggies had long before realized the need to separate audience members from performers on stage, and MacEachron testified that he installed the stage barriers for that very reason. That the

barriers Reggies had installed left open spaces for audience members to touch performers on stage permits the inference that Reggies failed to address the issue sufficiently and allowed unwanted touching of stage performers to continue.

Finally, the consequences of placing the burden on Reggies to prevent the unwanted touching of stage performers is not unwarranted. Reggies booked Viva La Pole Show explicitly for the purpose of making money. It is, therefore, only proper that Reggies also assume the downside risks of unwanted outcomes from failing to provide a safe stage for performers.

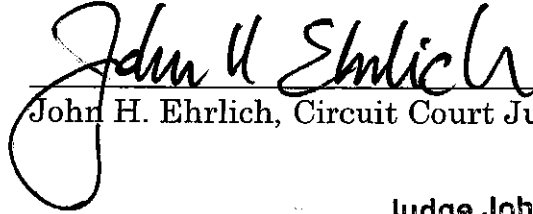
This court requested the parties to address in supplemental briefs whether the Reggies-Viva La Pole Show agreement independently imposed a contractual duty on Reggies for Spear's benefit. There exists under Illinois law a presumption that contracting parties intend that a contract will apply exclusively to them and not third parties. *Martis v. Grinnell Mut. Reinsurance Co.*, 388 Ill. App. 3d 1017, 1020 (3d Dist. 2009). A non-party to a contract may enforce it only if the contracting parties intentionally entered into the contract for the non-party's direct benefit. *Id.* Whether a non-party is a third-party beneficiary to the agreement depends on the contracting parties' intent, as shown by the contract's language. *Id.* Even if the contracting parties know, expect, or intend for others to benefit from the agreement, their knowledge, expectation, or intention is insufficient to overcome the presumption against third-party beneficiaries. *Id.* Rather, a contract's language must show that the parties entered into the agreement for the non-party's direct, not incidental, benefit. *Id.* "Such an intention must be shown by an express provision in the contract identifying the third-party beneficiary by name or by description of a class to which the third party belongs." *Id.*

It is uncontested that the Reggies-Viva La Pole Show agreement was oral, with insignificant approvals by e-mail. The record is void of any mention of third-party beneficiaries in general, let alone identifying Spear by name. While it is also uncontested that Reggies would supply security for the March 25, 2017, show, there is nothing in the record suggesting that the security Reggies was to provide was for the sole benefit of the performers in general or Spear in particular. In sum, absent the identification of Spear as a beneficiary to the Reggies-Viva La Pole Show agreement, it is not possible as a matter of fact or law to conclude that the contract established a duty of care by Reggies on Spear's behalf.

Conclusion

For the reasons presented above, it is ordered that:

The defendant's summary judgment motion is denied.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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