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

Jaron Srain, as independent administrator of the estate of Charles A. Schauer, deceased,	)	
Plaintiff,	)	
v.	)	No. 20 L 8609
Erin Zilka; MK Deliveries, Inc.; Felix O'Campo, Jr.; Maria Kadushkina; Tipsy's Tap, Inc. d/b/a Tipsy's Tap, and Rodrigo Marin,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The sole cause of action available to a plaintiff for a defendant's provision of alcohol is one brought pursuant to the Dramshop Act. To avoid preemption by the Dramshop Act and survive a motion to dismiss, a plaintiff must bring a cause of action under a theory independent from the sale of alcohol. Here, the plaintiff's Wrongful Death Act and Survival Act counts stem solely from the defendant's sale of alcohol; therefore, the defendant's motion to dismiss must be granted.

Facts

On the evening of January 18 and early morning of January 19, 2020, Erin Zilka and the plaintiff's decedent, Charles Schauer, were business invitees at Tipsy's Tap ("Tipsy's") in Berwyn, Illinois. They consumed alcohol at Tipsy's until leaving at 5:00 a.m. on January 19, 2020. Zilka drove her car away from Tipsy's with Schauer as a passenger.

On January 19, 2020, Felix O'Campo, Jr. was operating a box truck owned by MK Deliveries. Inc. As O'Campo drove south on Interstate 55 in Plainfield, Illinois, Rodrigo Marin struck the box truck with his vehicle. O'Campo allegedly abandoned the box truck in the right travel lane of the interstate without using road flairs or artificial light. At approximately 6:02 a.m., the vehicle operated by Zilka collided with the box truck, causing injuries leading to Schauer's death.

Tipsy's alleged sale of alcohol after 3:00 a.m. on the morning in question ran counter to a City of Berwyn ordinance restricting the hours during which businesses may sell alcohol. The ordinance states in relevant part:

> No person shall sell, offer for sale, at retail, or give away, in or upon any licensed premises, any alcoholic liquor between 1:00 a.m. and 6:00 a.m. Monday through Friday, between 3:00 a.m. and 8:00 a.m. Saturday, or between 3:00 a.m. and 11:00 a.m. Sunday, except as to those holders of a retail liquor dealer's license of the classification of A—between 3:00 a.m. and 8:00 a.m. Saturday and Sunday.

Berwyn, Ill., Code § 804.17(A) (2005).

On January 12, 2022, Jaron Srain, as independent administrator of Schauer's estate, filed his second amended complaint. The complaint alleges Wrongful Death Act and Survival Act causes of action against Zilka, O'Campo, Marin, MK Deliveries, Maria Kadushkina, the owner of MK Deliveries, and Tipsy's. Srain also brings a cause of action against Tipsy's under the Dramshop Act.

On January 25, 2022, Tipsy's filed a motion to dismiss counts nine and 10 of the second amended complaint, the Wrongful Death Act and Survival Acts counts. On February 28, 2022, Srain filed a response to the motion arguing in-concert and voluntary undertaking theories of negligence to support counts nine and 10.

<u>Analysis</u>

Tipsy's brings its motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure. A section 2-615 motion to dismiss attacks a complaint's legal sufficiency. *See DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). A section 2-615 motion must identify the complaint's defects and specify the relief sought. *See* 735 ILCS 5/2-615(a).

A court considering a section 2-615 motion is to consider only the allegations presented in the pleadings. *See Illinois Graphics*, 159 Ill. 2d at 485. All well-pleaded facts and reasonable inferences arising from them must be accepted as true, *see Doe v. Chicago Bd. of Educ.*, 213 Ill. 2d 19, 28 (2004), but not conclusions unsupported by facts, *see Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). Conclusory statements cannot state a cause of action even if they generally inform the defendant of the nature of the claims. *See Adkins v. Sarah*

Bush Lincoln Health Cntr., 129, Ill. 2d 497, 519-20 (1989). The paramount consideration is whether the complaint's allegations, construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action for which relief may be granted. *See Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. If not, section 2-615 authorizes the dismissal of a cause of action. *See DeHart*, ¶ 18; *Illinois Graphics*, 159 Ill. 2d at 488.

At issue in the current motion to dismiss is whether Srain pleads facts that are legally sufficient to establish Survival Act and Wrongful Death Act causes of action against Tipsy's. Tipsy's does not move to dismiss the Dramshop Act cause of action. The Survival Act and Wrongful Death Act causes of action are predicated on Srain's claim that Tipsy's acted negligently in providing Schauer and Zilka with alcohol after legal serving hours. Tipsy's seeks to dismiss on duty and preemption grounds. These issues are related and will be treated together.

The motion presents an issue of liability stemming from the provision of alcohol. A brief review of this State's case law on the issue is appropriate. "[F]ew rules of law are as clear as that no liability for the sale or gift of alcoholic beverages exists in Illinois outside of the Dramshop Act." *Charles v. Seigfried*, 165 Ill. 2d 482, 490 (1995). In Illinois, "there is no cause of action for injuries arising out of the sale or gift of alcoholic beverages." *Id.* at 486. The Dramshop Act "provides the only remedy against tavern operators and owners of tavern premises for injuries to person, property or means of support by an intoxicated person or in consequence of intoxication." *Cunningham v. Brown*, 22 Ill. 2d 23, 30-31 (1961).

While there is no common law cause of action for injuries stemming from the sale of alcohol, "[t]he Dramshop Act does not preempt claims based on legal theories independent from the defendant's provision of alcohol." *Hicks v. Korean Airlines Co.*, 404 Ill. App. 3d 638, 648 (2010). Our supreme court has also held that the Dramshop Act does not preempt a cause of action based on an in-concert theory of liability. *See Simmons v. Homatas*, 236 Ill. 2d 459, 477 (2010). Likewise, a claim under a voluntary undertaking theory of liability escapes preemption. *See Wakulich v. Mraz*, 203 Ill. 2d 223, 242 (2003). In *Simmons*, the Illinois Supreme Court succinctly described the relevant jurisprudence of alcohol-related liability:

> [T]he Dramshop Act provides a framework for determining whether a provider of alcohol will be exposed to liability. If the provider is a business that sells alcohol, liability may attach, but only under the Dramshop Act, not under the common law. If the provider is merely a social host, liability will not attach, either under the statute or under the common law.

Simmons, 236 Ill. 2d at 470.

As a business selling alcohol, Tipsy's may be held liable only for its provision of alcohol under the Dramshop Act. *See id.* The question before this court is, therefore, whether Tipsy's had a duty to Schauer independent of its provision of alcohol. Absent such a duty, the Survival Act and Wrongful Death Act causes of action must dismissed.

In his response to the motion to dismiss, Srain uses the same factual basis to argue two theories of liability: in-concert and voluntary undertaking. Following the reasoning in *Simmons*, Srain is correct that a finding of duty through either an in-concert or voluntary undertaking theory would allow his causes of action to avoid preemption by the Dramshop Act. *See Simmons*, 236 Ill. 2d at 477; *Bell v. Hutsell*, 2011 IL 110724, ¶ 17. His error is stretching these theories beyond their applicability.

Srain's argument rests on Tipsy's disregard for Berwyn's ordinance restricting the sale of alcohol between 3:00 a.m. and 11:00 a.m. He does not point to any authority that suggests failing to follow this ordinance creates a duty independent of the provision of alcohol. Instead, he relies on theories of duty from alcohol-related liability cases with facts that are far removed from the present dispute.

Srain asserts that Tipsy's acted in-concert with Zilka in tortious conduct. His argument rests on precedent from *Simmons*. In *Simmons*, the defendant was an adult entertainment club that allowed patrons to bring their own alcohol and consume it on the premises. *Simmons*, 236 Ill. 2d at 462. The club's valet service took control of a patron's car. *Id.* at 464. Then, when the patron became intoxicated, the club ordered him and the plaintiff to leave and into the patron's car. *Id.* The court reasoned from this series of facts that the question of in-concert liability was for the jury. *Id.* at 477-78. The court found the defendant club may have a duty based on in-concert liability as articulated in section 876 of the Restatement (Second) of Torts. *Id.* at 476. In other words, defendants have "a duty to refrain from assisting and encouraging such tortious conduct." *Id.* The court laid out what must be shown in order to survive a section 2-615 motion to dismiss: "plaintiffs must demonstrate that [the defendant] knew [the patron's] conduct constituted a breach of duty and that [the defendant] gave substantial assistance or encouragement to [the patron] in committing that breach of duty." *Id.* at 478.

Srain relies on Tipsy's disregard for Berwyn's regulation of hours during which drinking establishments may do business. While Tipsy's erred in its decision to operate after hours unlawfully, this unlawful operation is outside the scope of the matter before this court. Srain argues that staying open later than allowed by law constitutes the kind of "substantial assistance or encouragement" found in *Simmons*. This argument goes too far. Nothing in the complaint suggests Tipsy's operation after hours amounted to anything beyond its normal business of selling alcohol. Srain argues that because Tipsy's knew that remaining open would result in Zilka's intoxication, Tipsy's acted in-concert with Zilka. Setting aside the fact that staying open later than allowed by law does not guarantee the intoxication of each patron, Tipsy's knowledge of whether Zilka was intoxicated is not analogous to the allegations from *Simmons*. The club in *Simmons* had control of the patron's car, ordered him to leave because he was intoxicated, and ordered him into his car knowing he would drive away.

Srain also argues that by staying open past legal serving hours, Tipsy's voluntarily undertook a duty of care. He cites section 324A of the Restatement on voluntary undertaking, which imposes a duty if someone "undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person. . . ." Restatement (Second) of Torts § 324A (1965). The issue before this court is whether Tipsy's rendered services constituting a voluntary undertaking. Taken in view of this State's case law, Srain's complaint alleges no facts suggesting that Tipsy's rendered such services.

In *Bell*, our Supreme Court held that parents who expressed an intention to their son that they would prohibit underage consumption of alcohol at their residence did not have a duty to an underage plaintiff who died in a single-car accident after consuming alcohol at the residence. *Bell*, 2011 IL 110724 ¶¶ 26-29. The court distinguished the case from *Wakulich*. *Id.* ¶ 29. In *Wakulich*, the court found a duty to the plaintiff's decedent would exist if defendant brothers induced a minor to drink until unconscious, "placed her in the family room," and "later removed her vomit-saturated blouse and placed a pillow under her head to prevent aspiration." *Wakulich*, 203 Ill. 2d at 226-27. The defendants also refused to drive the plaintiff's decedent home or seek medical attention. *Id.* at 227.

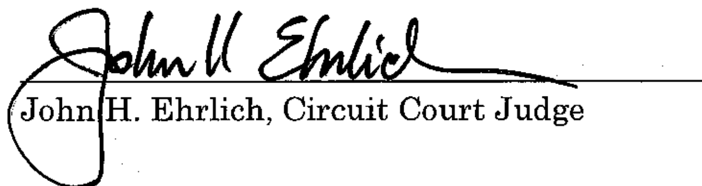
The allegations in Srain's complaint do not even reach the level of the actions found *not* to be a voluntary undertaking in *Bell*. In *Bell*, there was an expression of intent to monitor the activity of the partygoers. In the complaint at issue, Srain fails to allege any such intention, and even if this intention were alleged, it would not in itself create a duty. *See Bell*, 2011 IL 110724, ¶¶ 26-29. Moreover, staying open later than allowed by ordinance does not rise to the level of voluntary

undertaking that was at issue in *Wakulich.* Srain does not allege that Tipsy's took any actions resembling the kind of care rendered to the plaintiff's decedent by the defendants in *Wakulich.* Unlike in *Wakulich*, in which the defendants observed the plaintiff's decedent drink alcohol until passing out and placed her in a room and removed her "vomit-saturated blouse," Tipsy's merely continued to provide its patrons with alcohol after legal serving hours. A duty cannot be found in this instance because it would rest on the provision of alcohol and, as noted above, there is no "common law liability for the negligent sale or supply of liquor." *McKeown v. Homoya*, 209 Ill. App. 3d 959, 961 (1991).

<u>Conclusion</u>

For the reasons presented above, it is ordered that:

1. Tipsy's motion to dismiss counts nine and ten is granted; and
2. Counts nine and ten are dismissed with prejudice; and
3. The case continues as to Tipsy's as to count eleven.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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