Filed 2/27/17 Maldonado v. R Lounge CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DERICK ALEXANDER ENRIQUES MALDONADO et al., Plaintiffs and Appellants, v. R LOUNGE et al., Defendants and Respondents.	B266536 (Los Angeles County Super. Ct. No. BC485962)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Law Office of Herbert C. Rubinstein, Herbert C. Rubinstein; Hannemann Law Firm, and Brian G. Hannemann, for Plaintiffs and Appellants.

Koletsky, Mancini, Feldman & Morrow, Andrew M. Morrow, and Kathy E. Wallace for Defendants and Respondents.

Marilian Maldondo was killed when she became intoxicated at a bar and subsequently lost control of her car while driving. Maldondo's family sued the bar's owner and manager, claiming they were negligent in serving her alcohol and in allowing her to drive while intoxicated. The trial court sustained respondents' demurrer to appellants' third amended complaint without leave to amend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The decedent, Marilian Maldondo, was a 27-year-old woman who was married and the mother to a minor child. Appellants are the son, husband and parents of the decedent. On June 6, 2010, decedent died in an automobile accident, which occurred when she lost control of her vehicle while driving under the influence of alcohol in the early hours of the morning after leaving the R Lounge.

A. Complaint and Default

On August 25, 2012, appellants served respondents, R Lounge, and its owners (Rahami Investments, LLC, Najiba Rahami) and manager, Bobby Rahami, with the original complaint. Within one week of being served, respondents sent the complaint to their insurance broker. Respondents relied on their insurance broker to timely tender the complaint to the insurance company's defense counsel. On October 10, 2012, appellants filed a request for entry of default against all respondents, which the clerk entered on that same day. On October 23, 2012, newly-retained counsel for respondents contacted appellants' counsel, and provided a stipulation that the parties set aside the default. Appellants' counsel refused to sign the stipulation.

On November 19, 2012, respondents filed a motion to set aside the default in the trial court. On January 10, 2013, the trial court issued a written decision setting aside the default and reinstating the matter, and the case continued to be litigated.

B. First Amended Complaint

On July 18, 2013, respondents filed an amended complaint alleging that respondents breached several duties and were negligent based on serving alcohol to the decedent. The trial court sustained respondents' demurrer to the amended complaint with leave to amend, stating "[i]nsufficient facts are alleged regarding the incident resulting in the death of . . . Maldonado and how defendants[] are legally responsible based upon [her] alleged patronage at their establishment shortly before that incident."

C. Second Amended Complaint[1]

On September 17, 2013, appellants filed their second amended complaint, alleging that "[i]n the immediate hours before her death, decedent was a patron at [appellants'] premises . . . and had consumed alcohol provided and furnished by [appellants]." Additionally, it alleged that decedent was provided alcohol after 2:00 a.m. at an " 'after-hours' social gathering" with customers. The trial court again sustained respondents' demurrer to the amended complaint with leave to amend.

---

[1] Appellants erroneously titled this document the "First Amended Complaint." The parties and the trial court, however, properly refer to this as the second amended complaint.

D. Third Amended Complaint

On May 1, 2014, appellants filed their third amended complaint, alleging for the first time that respondents are liable under a respondeat superior theory of liability because decedent was an employee of the R Lounge, who attended a company function on the night of the fatal accident.

In their demurrer to this complaint, respondents contended that these new facts, constituted a sham allegation made for the sole purpose of shielding the complaint from dismissal. Respondents argued that appellants were decedent's survivors and would have known at the time of the accident on June 6, 2010, almost four years earlier, if she was an employee of the R Lounge attending a company function on the night of her death. Appellants' opposition to the demurrer did not explain the inconsistencies between the third amended complaint and the prior complaints, nor did appellants address the delay in pleading the new facts. The trial court sustained the demurrer without leave to amend.

Appellants timely appealed.

DISCUSSION

I. Respondents Are Not Liable For Decedent's Death

Appellants argue that respondents are liable for decedent's death because she was an employee of the R Lounge and attending a work function when she became intoxicated. We disagree.

California provides robust protection from civil liability for any injury caused by an alcohol consumer. This statutory immunity specifically provides that "the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries." (Civ. Code, § 1714, subd. (b).) Thus, under this statute, appellants cannot be held liable for serving decedent alcohol, even to the point of intoxication, because the serving of alcohol was, as a matter of law, not the cause of her fatal accident. (*Williams v. Saga Enterprises,* Inc. (1990) 225 Cal.App.3d 142, 148, citing Civ. Code, § 1714 ["[B]y statute, a defendant cannot be held liable in a civil action for merely furnishing alcohol to an intoxicated person who then injures someone else because of his intoxication. Obviously this statutory immunity applies to bartenders, and vicariously to their employers."].)

Appellants, however, argue that there is an exception to this rule under a "respondeat superior" theory of liability as articulated most recently in *Purton v. Marriott Internat., Inc.* (2013) 218 Cal.App.4th 499.[2] In *Purton*, the employee of a hotel killed

---

[2] The other case appellants rely upon is a workers' compensation case and is therefore inapplicable. (*McCarty v. Workmens' Comp. Appeals Bd.* (1974) 12 Cal.3d 677.)

another motorist when driving while intoxicated after the hotel's annual holiday party, a party designed to "improve relations among employees" and "increase the continuity of employment by providing a fringe benefit." (*Id*. at p. 504.) The Fourth District held that "if a commercial enterprise chooses to allow its employees to consume alcoholic beverages for the benefit of the enterprise, fairness requires that the enterprise should bear the burden of injuries proximately caused by the employees' consumption." (*Id*. at p. 511.) Liability against the employer under this theory requires: (1) an employer-employee relationship between the defendant and the driver; (2) the employee's consumption of alcohol must have been for the benefit of the enterprise; and (3) the employee's action caused injury to a third party. (*Ibid*.)

Assuming, *arguendo*, that decedent was an employee of the R Lounge, a fact which is disputed by the parties, appellants' claim still fails the second and third prongs of the *Purton* test for establishing liability. Appellants failed to allege that decedent's consumption of alcohol on the night in question was for the benefit of the enterprise. And, perhaps most fatal to appellants' claims, decedent's actions involved a single car accident where she was the only injured party.

In sum, if the decedent was a patron, appellants' claims are barred by Civil Code section 1714, and if she was an employee, appellants' claims fail to allege a viable cause of action under the narrow exception to Civil Code section 1714 under the *Purton* theory of liability. The trial court, therefore, properly sustained respondents' demurrer without leave to amend.

II. The Trial Court Did Not Abuse Its Discretion When It Set Aside the Default

Appellants argue that the trial court exceeded its authority when it set aside the default. We disagree.

Code of Civil Procedure section 473, subdivision (b) provides: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

"When the moving party promptly seeks relief and there is no prejudice to the opposing party, very slight evidence is required to justify relief. We will more carefully scrutinize an order denying relief than one which permits a trial on the merits." (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1343.)

Here, within one week of being served, respondents sent the complaint to their insurance broker. Respondents relied on their insurance broker to timely tender the complaint to the insurance company's defense counsel. But the insurance broker failed to take action. On October 3, 2012, the court entered respondents' default. On October 23, 2012, the insurer received the notice of default and took immediate action by hiring counsel who sought court intervention in setting aside the default by filing a timely motion and accompanying evidence of excusable neglect. Less than 30 days passed between the entry of default and respondents' request. Substantial evidence supports the trial court's finding that appellants suffered no prejudice by this delay. Under these circumstances, the trial court did not abuse its discretion by setting aside the default.

DISPOSITION

The trial court's orders granting respondents' motion to set aside the default and sustaining respondents' demurrer to the third amended complaint without leave to amend are affirmed. Respondents are entitled to costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.