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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Butte)

DENISE JOHNSON et al.,
Plaintiffs and Appellants,
v.
ELKS LODGE OF OROVILLE et al.,
Defendants and Respondents.

C063903
(Super. Ct. No.
142508)

This is an appeal from a judgment of dismissal of plaintiffs' action for damages alleged to have resulted from the shooting death of Kevin Kimble (Kimble) at a bar owned and operated by defendant Elks Lodge of Oroville (the Lodge). Defendant Kevin Jenkins is alleged to have been the Lodge manager and the bartender at the Lodge on the date of the killing.

Defendants Lodge and Jenkins demurred to those causes of action alleged against them in the fourth amended complaint.

The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. Plaintiffs appeal. We affirm the judgment.

DISCUSSION

I

Legal Principles

“On appeal from the [sustaining] of a demurrer, ‘we independently review the complaint to determine whether the facts alleged state a cause of action under any possible legal theory.’ [Citation.] We will affirm ‘if proper on any grounds stated in the demurrer, whether or not the court acted on that ground.’ [Citation.] On appeal, ‘the plaintiff bears the burden of demonstrating that the trial court erred’ in sustaining the demurrer. [Citation.]” (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 528 (*Melton*).

“‘In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.”’ [Citations.] Further, ‘we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.’ [Citation.] ‘If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer.’ [Citation.]” (*Melton, supra*, 183 Cal.App.4th at pp. 528-529.)

“‘If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment.’ [Citation.] ‘The burden of proving such reasonable possibility is squarely on the plaintiff.’ [Citation.] ‘As a general rule, if there is a reasonable possibility the defect in the complaint could be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend.’ [Citation.] ‘Nevertheless, where the nature of the plaintiff’s claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result.’ [Citation.]” (*Melton, supra*, 183 Cal.App.4th at p. 529.)

II

The Fourth Amended Complaint

As they pertain to these defendants, the “well-pleaded” facts set forth in the Fourth Amended Complaint are as follows:

The Lodge owned and operated a bar in Oroville, California. Jenkins was “the bartender and managed and operated the bar.” Jenkins was an experienced Lodge operator and bar manager.

On February 25, 2006, plaintiff’s decedent, Kevin Kimble, was a patron of the bar. While Kimble was there, Allen Fairman came into the bar carrying a loaded gun. Fairman was served liquor at the bar and, when Kimble tried to get Fairman to stop threatening the bar’s patrons, Fairman shot and killed Kimble.

There were no security personnel at the bar.

As to this latter allegation, we note that plaintiff, inconsistently, alleged in paragraph 7 of the complaint that, "[d]oe 4 is a bouncer and/or member of the support staff working at the Lodge facility on February 25, 2006, who had a duty to protect and failed to protect decedent KEVIN KIMBLE." We disregard that allegation because it names a fictitious defendant. At the time of the hearing on the demurrer, this defendant remained fictitious, that is, for purposes of judging this pleading, legally non-existent, given the fact that plaintiff had not by then moved to amend the complaint to allege the name of a defendant who was a "bouncer" or otherwise was charged with security for the Lodge bar.

Other than this passing reference to a fictitious defendant, there is no factual allegation in the complaint that defendants hired a "bouncer" or other security personnel to provide for the safety of the patrons on the evening in question. In fact, the allegations are to the contrary. For those reasons, we are not required to discuss *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224 (*Delgado*) or *Mata v. Mata* (2003) 105 Cal.App.4th 1121 both of which deal with the law relating to the requirement of a bar owner to hire security personnel and the responsibilities of such personnel once they are in place.

We note in this regard that plaintiff does not at any point in the fourth amended complaint allege that defendants had a duty to hire security personnel.

We hold that the allegations of the fourth amended complaint other than those we have set forth above are contentions, deductions or conclusions of fact or law and, thus, are not well pleaded. We will disregard them.

Plaintiffs contend the fourth amended complaint alleges facts sufficient to state a cause of action for negligence and wrongful death.

"The elements of a cause of action for negligence are duty, breach, causation, and damages. [Citations.]" (*Melton, supra*, 183 Cal.App.4th at p. 529.) The same foundational elements must be established to sustain a cause of action for wrongful death. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263 [elements of cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the pecuniary loss suffered by the heirs].)

"Duty 'may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship.' [Citation.] The existence of a legal duty "'depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability.'" [Citations.]" (*Melton, supra*, 183 Cal.App.4th at pp. 529-530.)

"[A]s a general matter, there is no duty to act to protect others from the conduct of third parties. [Citations.]" (*Delgado, supra*, 36 Cal.4th at p. 235.) However, "[a] defendant may owe an affirmative duty to protect another from the conduct of third parties if he or she has a 'special

relationship' with the other person," such as the relationship between a bar owner and its patrons or invitees. (*Ibid.*) In such a case, the general duty of maintenance "include[s] the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 (*Ann M.*), disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5.)

Here, the fourth amended complaint alleged that the Lodge owned and operated the bar and Jenkins acted as its manager and bartender, and that Kimble was a Lodge member and a bar patron. Those allegations are sufficient to allege a special relationship between defendants and Kimble such that defendants owed a duty to Kimble to act reasonably to secure the bar "against foreseeable criminal acts of third parties that are likely to occur in the absence of . . . precautionary measures." (*Ann M., supra*, 6 Cal.4th at p. 674.)

This complaint ultimately falters on the question of foreseeability. It does not allege facts sufficient to have made it foreseeable to defendants that Fairman would, during the course of a verbal disagreement, draw a weapon and shoot the decedent in the head. There is, for example, no allegation that Fairman or anyone else had behaved in a similar fashion in the past, that Fairman or other patrons were known to carry firearms or other deadly weapons into the bar and, most importantly, there is no allegation that Jenkins or anyone else in the bar

saw the weapon before the shooting or otherwise knew that Fairman was armed with a gun.

Plaintiffs allege the shooting death of Kimble "should have been reasonably anticipated by the bar manager, bartender, and security staff" because Fairman was "an acknowledged gang member wearing his colors"; Jenkins "would know gang members carry weapons"; he "should have recognized Fairman as an outsider and gang member, likely to cause trouble, especially if served liquor"; "Fairman and his companions . . . were allowed into the bar wearing and displaying gang symbols, clothing and 'colors'"; and "[i]t is common knowledge gang members carrying guns inside bars present a danger to patrons."

The above allegations are not allegations of fact, but are instead contentions, deductions and conclusions of fact not supported by well-pleaded factual statements. They are insufficient to support a cause of action based on foreseeability given the absence of specific factual allegations, such as how it was Fairman was an "acknowledged gang member"; what gang symbols, clothing and colors identified him as such; how Jenkins would have recognized Fairman's dress as indicating gang membership, how Jenkins would know gang members carry weapons; or how Jenkins would have known Fairman was in possession of a concealed, loaded weapon. Plaintiffs have not met their burden to plead facts that support a cause of action that is based in part on foreseeability.

We recognize that defendants owe a duty of care "to respond to events unfolding in [their] presence by undertaking

reasonable, relatively simple, and minimally burdensome measures" to protect patrons from imminent or ongoing criminal conduct. (*Delgado, supra*, 36 Cal.4th at p. 245.)

Plaintiffs allege that, on the night of the shooting, Fairman "entered the bar with a companion displaying visibly he was a gang member," he "was served liquor while carrying a loaded gun," and "[w]ithout provocation," he "executed Kimble with a close range shot when Kimble had tried to get the agitated Fairman to stand down as he was threatening the patrons at the bar." But nothing in the allegations of the fourth amended complaint sets forth facts to show how long the incident took from start to finish, whether Fairman made it known that he had a weapon prior to actually shooting Kimble, whether Jenkins was in a position to see the incident as it unfolded, or whether, once Fairman brandished the weapon, Jenkins had time to intercede or call for help. Without more, the allegations fail to establish that Jenkins (or any other employee present at the bar) could have safely taken action which would have prevented the shooting, such as escorting Fairman out of the bar or calling 911, or that doing so would have been reasonable under the circumstances.

Plaintiffs urge that the facts in this case are analogous to those in *Morris v. De La Torre* (2005) 36 Cal.4th 260 (*Morris*). We disagree. In *Morris*, defendant restaurant's employees watched from inside the establishment as an altercation between the plaintiff and several gang members unfolded approximately 25 feet away in the parking lot. (*Id.* at

pp. 266-267.) During the fight, one of the gang members, Cuevas, ran into the restaurant and demanded a knife, barged through a gate into the kitchen, found a knife and took it with him as he ran back out of the restaurant and proceeded to use it to stab the plaintiff. (*Ibid.*) The restaurant employees continued to watch as Cuevas then chased the plaintiff's two companions out of the parking lot, then returned to puncture the tires of plaintiff's car. One of the plaintiff's companions ran to a nearby restaurant and used a pay phone to call 911. Cuevas and his cohort drove away, but returned and stabbed the plaintiff, who had stopped on a nearby public sidewalk, several more times. The entire incident lasted "approximately seven to eight minutes." (*Id.* at p. 267.)

The trial court granted summary judgment in favor of the defendant, holding that, because the plaintiff remained in the parking lot, he was not a customer and thus the defendant owed no special-relationship-based duty to assist him during the attack "that took place in full view of [the] defendant's employees." (*Morris, supra*, 36 Cal.4th at p. 268.) The Court of Appeal reversed, concluding that although the plaintiff failed to establish that the defendant had a duty to hire guards or undertake other preventive measures to protect against *future* third party criminal conduct against patrons or invitees, the defendant did owe a duty "to take reasonable and minimally burdensome measures to aid [the] plaintiff in the face of an *ongoing* attack occurring upon the premises and in the presence of the proprietor's employees." (*Id.* at pp. 268-269.)

Our state's Supreme Court affirmed. While agreeing that "neither a business proprietor nor his or her employees have an absolute obligation to call 911 in the face of ongoing criminal conduct," given that "in some situations, doing so actually might increase the danger to customers or invitees or might unreasonably place proprietors or their employees in danger," the Supreme Court stated that, under the circumstances presented, where the restaurant's telephone was "mounted *behind* the counter and *below* counter height--and thus presumably could have been used unobserved from the outside by one crouching below the counter," it could not "conclude as a matter of law that defendant's employees acted reasonably in declining to place a 911 call or undertake any other similar minimally burdensome measure on the plaintiff's behalf. (*Morris, supra*, 36 Cal.4th at pp. 277-278.)

Here, plaintiffs alleged only that "[w]ithout provocation," Fairman "executed Kimble with a close range shot when Kimble had tried to get the agitated Fairman to stand down as he was threatening the patrons at the bar." Unlike *Morris*, it was not alleged that Jenkins or any other Lodge employee watched an incident unfold between Fairman and Kimble over a number of moments, during which Jenkins had time to assess the situation and determine that a 911 call was necessary or, if so, safely make the call without endangering himself or others in the bar.

Given the facts as alleged, it was not foreseeable that Fairman would take out a concealed weapon and shoot Kimble. Nor is there anything alleged to suggest there were any reasonable,

relatively simple and minimally burdensome measures defendants could have undertaken to prevent Kimble's death. Thus, the allegations of the fourth amended complaint fail to establish that defendants owed Kimble a duty to prevent the shooting.

While the shooting death of Kimble was, without question, senseless and tragic, plaintiffs' fourth amended complaint fails to state facts sufficient to state a cause of action against defendants Lodge and Jenkins for that tragedy.

III

Leave to Amend

We can find no request by plaintiffs for leave to again amend the complaint, but had there been such a request here, the request would have been denied.

Plaintiffs make no effort to demonstrate how their complaint could be amended to overcome four attempts to allege facts sufficient to state a cause of action against defendants. Under the circumstances, we do not find there is a reasonable possibility the defects in this complaint could be cured by amendment.

IV

Dismissal of All Defendants

Plaintiffs contend the fourth cause of action for negligence as to "the parent entity" survived the demurrer and was therefore improperly dismissed by the trial court.

The trial court sustained the demurrer to the fourth amended complaint as to the first, second, and third causes of

action. The formal order, approved as to form by plaintiffs' counsel, states that "the demurrers of Elks Lodge of Oroville and Kevin Jenkins to plaintiffs' fourth amended complaint are sustained without leave to amend." Notice of entry of the order was filed on August 14, 2009.

The judgment of dismissal was filed on November 24, 2009, ordering that "this action be, and the same hereby is, DISMISSED with prejudice as against defendants ELKS LODGE OF OROVILLE and KEVIN JENKINS; plaintiffs to take nothing by said action." Notice of entry of the judgment of dismissal was filed on December 2, 2009.

Plaintiffs filed their notice of appeal on January 4, 2010. Thereafter, the court vacated the order to show cause on its own motion.

Plaintiffs never objected to the order sustaining the demurrer or the judgment of dismissal.

In any event, plaintiffs failed to sufficiently allege facts describing the so-called "parent entity" or "parent organization" or the basis for its liability in its individual capacity.

The "parent entity" is missing from the caption and general allegations of the fourth amended complaint, but is again included in the fourth cause of action for negligence, which alleges that "the Parent Organization *if there was one*" (italics added), was negligent. Those allegations are insufficient to allege the "parent entity" as a proper defendant.

Moreover, the allegations in the fourth amended complaint do not distinguish between the liability of the parent entity and that of the Lodge and Jenkins, the former being directly tied to the latter. As such, the insufficiency of the allegations against the Lodge and Jenkins as discussed at length in part II above is equally fatal to plaintiffs' attempt to state a cause of action against the "parent entity."

DISPOSITION

The judgment of dismissal of the entire action is affirmed. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

HULL, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.