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

SHARI DUGODANSBY,

Plaintiff and Appellant,

v.

TEAM ISLANDER, LLC et al.,

Defendants and Respondents.

C069561

(Super. Ct. No. 39-2011-
00259324-CU-PA-STK)

Plaintiff Shari Dugodansby appeals from the order dismissing her personal injury complaint against Team Islander, LLC and its owners, Bruce Hopper, Derrol Elliott and Daniel Boyle (collectively, defendants). Defendants' demurrer was sustained without leave to amend on the ground Business and Professions Code section 25602¹ precludes

¹ Undesignated statutory references are to the Business and Professions Code.

plaintiff's claim against them for injuries caused when an intoxicated guest drove away from their premises and subsequently injured plaintiff.

Plaintiff contends the trial court erred in applying Business and Professions Code section 25602, because she styled her complaint against defendants solely as a claim for damages arising from defendants' operation of a "disorderly house"² in violation of sections 25601 and 24200, subdivisions (e) and (f), and Penal Code section 316. (See fns. 4, 5 and 6, *post*.)

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because this is an appeal following a successful demurrer, we accept as true all facts properly pleaded in plaintiff's complaint. (*Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 200.)

Defendants own and operate Islander Tavern in Manteca. According to the complaint, defendants kept and operated the establishment as a "disorderly house," in that Islander Tavern attracted "common drunks" and facilitated loitering of drunks on the premises by providing outside benches and other seating accommodations.

One such "common drunk," Frank Ferreira, had been loitering on the Islander Tavern premises before the accident. Ferreira was intoxicated when he drove his motorcycle off the property. While on a public road, Ferreira collided with plaintiff, who was also driving a motorcycle. The complaint describes the distance between the establishment and the collision as "2[,]500 feet" and "less than 1/2 mile." Plaintiff was seriously injured, and her left leg was amputated below the knee.

² A "disorderly house" is one " 'where acts are performed which tend to corrupt morals of the community or promote breaches of peace' "; a house is also disorderly if it is " 'kept as a place where acts prohibited by statute are habitually indulged or permitted.' " (*Los Robles Motor Lodge, Inc. v. Department of Alcoholic Beverage Control* (1966) 246 Cal.App.2d 198, 203.)

Plaintiff sued Ferreira and defendants, seeking damages for her injuries. The operative (first amended) complaint alleges Ferreira knowingly consumed alcohol to the point of intoxication, drove his motorcycle under the influence of alcohol, and Ferreira's negligent operation of his motorcycle caused the collision in which plaintiff was injured.

As relevant to this appeal, the complaint also alleges defendants violated sections 25601 (see fn. 4, *post*) and 24200, subdivisions (e) and (f) (see fn. 5, *post*), and Penal Code section 316 (see fn. 6, *post*), which statutes were "designed to protect the neighborhood from common drunks," and plaintiff "was a part of th[at] neighborhood[.]" Defendants breached their duty under these statutes to prevent the Islander Tavern from becoming a disorderly house and a danger to the public morals, health, convenience and safety of the neighborhood. Moreover, plaintiff alleged, defendants were fully aware that Ferreira was a common drunk on their premises, and did nothing to discourage him. This "misfeasance" by defendants, plaintiff concludes, was a direct and proximate cause of the injuries she sustained in the collision with Ferreira.

Defendants demurred to the complaint on the grounds the complaint was uncertain and failed to state a cause of action. They argued that California law imposes no civil liability on commercial hosts for injuries caused by their intoxicated guests to third parties, whether the commercial hosts provide alcohol to a habitual (or common) drunkard or only allow the consumption of alcohol on their premises. Defendants also argued that the statutes upon which plaintiff relied create no private cause of action for damages but, even if they did, plaintiff had failed to allege any causal connection between improper maintenance of the Islander Tavern and her injuries.

Plaintiff responded that defendants' unlawful maintenance of a disorderly house constituted a tort, and defendants are not immune from liability by virtue of section 25602, because her complaint did not allege they furnished alcohol to Ferreira.

Following a hearing and argument, the trial court sustained defendants' demurrer without leave to amend and ordered the complaint against defendants dismissed with prejudice, finding that plaintiff's claims were precluded by section 25602.

DISCUSSION

I. Standards of Review

Our review is de novo, both because this is an appeal from an order of dismissal after a demurrer was sustained (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415), and because the issues presented are ones of statutory interpretation (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531).

The rules governing our review following a successful demurrer are well established. We give the complaint a reasonable interpretation and treat the demurrer as admitting all material facts properly pleaded, but we do not assume the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) A demurrer may be sustained without leave to amend “ ‘where the facts are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists.’ ” (*Seidler v. Municipal Court* (1993) 12 Cal.App.4th 1229, 1233.)

II. Preclusion of Liability Under Business and Professions Code Section 25602

The trial court sustained defendants' demurrer without leave to amend because it concluded any civil liability on defendants' part for plaintiff's injury is precluded by section 25602. Subdivision (b) of section 25602 provides that “[n]o person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage [to any habitual or common drunkard or to any obviously intoxicated person] shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.” As subdivision (c) explains, the purpose of the statute is to “ ‘reinstate prior judicial

interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.’ ” (See *Cory v. Shirloh* (1981) 29 Cal.3d 430, 435-436.)

The only reasonable interpretation of the complaint’s allegations is that plaintiff was injured when Ferreira drove his motorcycle while intoxicated and collided with plaintiff. The damages plaintiff seeks are all related to the injuries she suffered in that accident. Plaintiff’s injuries were inflicted by an intoxicated person, and the Legislature enacted section 25602 to reaffirm that such injuries are caused by *the consumption of* alcoholic beverages. (§ 25602, subd. (c).) Ferreira is alleged to have consumed alcohol; Ferreira, not defendants, caused plaintiff’s injuries.

Plaintiff insists section 25602 has no application because her complaint does not allege defendants furnished alcohol to Ferreira. As the trial court noted, this argument was expressly rejected in *Leong v. San Francisco Parking, Inc.* (1991) 235 Cal.App.3d 827 (*Leong*). In *Leong*, the court sustained without leave to amend the demurrer by defendants SF Parking, Inc., the Giants baseball organization and the City and County of San Francisco to plaintiffs’ complaint after their son was killed by a person who drank beer in the ballpark parking lot before and after a baseball game. The plaintiffs attempted to defeat the demurrer -- and avoid the operation of section 25602 -- by omitting allegations the defendants provided alcohol; they alleged only that the defendants knew or should have known that patrons would consume alcohol on their premises and thereafter drive under the influence, but failed to take reasonable steps to prevent such conduct. (*Id.* at pp. 831, 832.)

The court in *Leong* reasoned that, even without allegations of “furnishing” alcohol to the patron-turned-driver, the plaintiffs’ claim that the defendants are liable based on their failure to prevent or prohibit persons from drinking on their premises fails as a matter of law to state a cause of action. (*Leong, supra*, 235 Cal.App.3d at pp. 832-833.) Section 25602 “ ‘specifically abrogate[s]’ ” the “application of common law negligence

principles to alcohol consumption-related injuries’ ” and its effect cannot be avoided by couching a complaint “ ‘in language apart from furnishing or selling liquor.’ ” (*Id.* at p. 834 & cases cited therein.) Otherwise, tort recovery would be permitted against the nonsupplier defendant, but barred against a defendant who supplied alcohol, notwithstanding that a supplier of alcohol is “ ‘better able to foresee the risk of harm to others and thus engages in the more culpable conduct’ ” (*id.* at p. 833); such a result would be “ ‘anomalous’ ” and “ ‘whimsical’ ” (*ibid.*, quoting *Strang v. Cabrol* (1984) 37 Cal.3d 720, 725).

Here, defendants’ culpability is even more attenuated than was the defendants’ in *Leong*. Plaintiff alleges only that defendants “attracted and facilitated” drunks to gather on their premises. Section 25602 prevents plaintiff from assigning responsibility to defendants for the injuries caused by Ferreira’s driving while intoxicated after leaving defendants’ tavern.

This reasoning is also consistent with the general rule that “business owners do not have a duty to prevent persons either under the influence of alcohol or otherwise incompetent to drive from driving while impaired.” (*Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398, 414 (*Sakiyama*)). Absent a special relationship, a business owner has no duty to control the conduct of another and, specifically, no duty to prevent an intoxicated person from leaving his premises, even if he or she is “aware of the foreseeable consequences of [the driver’s] driving intoxicated.” (*Knighten v. Sam’s Parking Valet* (1988) 206 Cal.App.3d 69, 74; see *id.* at pp. 74-75; *DeBolt v. Kragen Auto Supply, Inc.* (1986) 182 Cal.App.3d 269, 274-275; see also *Sakiyama, supra*, 110 Cal.App.4th at p. 414.)

In sum, the trial court did not err in concluding as a matter of law that section 25602 precludes plaintiff from assigning legal blame to defendants for injuries she suffered as a result of Ferreira’s intoxication, even if Ferreira was intoxicated on

defendants' premises, or became intoxicated there. (*Leong, supra*, 235 Cal.App.3d at pp. 833-834; *Sakiyama, supra*, 110 Cal.App.4th at p. 414.)

III. "Disorderly House" Statutes

Plaintiff contends on appeal the trial court erred in sustaining the demurrer because the complaint adequately states a cause of action against defendants under sections 25601 and 24200 (see fns. 4 and 5, *post*), and Penal Code section 316 (fn. 6, *post*). Defendants respond that plaintiff has no standing to seek damages under these statutes. We agree with defendants. Plaintiff has failed to establish she has a private right of action based on these statutes.

"A violation of a state statute does not necessarily give rise to a private cause of action. [Citation.] Instead, whether a party has a right to sue depends on whether the Legislature has 'manifested an intent to create such a private cause of action' under the statute." (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 596 (*Lu*)). "Such legislative intent, if any, is revealed through the language of the statute and its legislative history." (*Ibid.*)

When the Legislature has created private rights of action, it has generally done so in such a way that the legislative intent is clear. "A statute may contain 'clear, understandable, unmistakable terms,' which *strongly and directly* indicate that the Legislature intended to create a private cause of action. [Citation.] For instance, the statute may expressly state that a person has or is liable for a cause of action for a particular violation. (See, e.g., Civ.Code, § 51.9 ['A person is liable in a cause of action for sexual harassment' when a plaintiff proves certain elements]; Health & Saf. Code, § 1285, subd. (c) ['Any person who is detained in a health facility solely for the nonpayment of a bill has a cause of action against the health facility for the detention'].) Or, more commonly, a statute may refer to a remedy or means of enforcing its substantive provisions, i.e., by way of an action." (*Lu, supra*, 50 Cal.4th at p. 597, italics added.) "If, however, a statute does not contain such obvious language, resort to its

legislative history is next in order.” (*Ibid.*) Whether based on the statutory language or the legislative history, a private right of action will not be found in a statute unless the Legislature has “*clearly* manifest[ed] an intent to create a private cause of action under a statute. (*Id.* at p. 601, fn. 6, italics added.) A court must begin its determination of whether a private right of action can be found in a statute “with the premise that a violation of a state statute does not necessarily give rise to a private cause of action.” (*Id.* at p. 603.) And our high court has rejected the theory that a private right of action can be implied from legislative silence. (*Id.* at pp. 601-603.)³ “ ‘Thus, when neither the language nor the history of a statute indicates an intent to create a new private right to sue, a party contending for judicial recognition of such a right bears a heavy, perhaps insurmountable, burden of persuasion.’ [Citation.]” (*Id.* at p. 601.) Here, plaintiff offered no legislative history, so our analysis is necessarily limited to the language of the statutes cited by plaintiff and related constitutional and statutory provisions.

The California Constitution establishes the Department of Alcohol and Beverage Control (ABC), and grants it the “exclusive power” to issue and revoke licenses to manufacture and sell alcohol according to the specifications delineated by the Legislature, and to deny, suspend or revoke licenses in accordance with the public welfare or morals. (Cal. Const., art. XX, § 22.)

Plaintiff’s claims against defendants are based on the provisions of sections 25601⁴ and 24200.⁵ These statutes are part of the Alcoholic Beverage Control

³ This approach is consistent with the Legislature’s mandate in Code of Civil Procedure section 1858, which provides that a judge may not “ ‘insert what has been omitted’ ” from a statute. (*Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 133 (*Crusader*).)

⁴ Business and Professions Code section 25601 provides: “Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which

Act (§ 23000 et seq.; hereinafter, the Act), which represents “an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals” of the state’s citizenry, the “eliminat[ion of] the evils of unlicensed and unlawful manufacture, selling, and disposition of alcoholic beverages” and the “promot[ion of] temperance in the use and consumption of alcoholic beverages.” (§ 23001.) Among other things, the Act sets forth the standards for issuance, suspension and revocation of liquor licenses, establishes rules and regulations to carry out the purposes and intent of the constitutional mandate, regulates matters related to alcoholic beverages within the state, and regulates the conduct by licensees of their business. (§§ 23052, 23053.5,

people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor.”

⁵ Business and Professions Code section 24200 sets forth the grounds for suspension or revocation of a license to sell alcoholic beverages by ABC. It states in pertinent part: “The following are the grounds that constitute a basis for the suspension or revocation of licenses: [¶] . . . [¶]

“(e) Failure to take reasonable steps to correct objectionable conditions on the licensed premises, including the immediately adjacent area that is owned, leased, or rented by the licensee, that constitute a nuisance, *within a reasonable time after receipt of notice to make those corrections from the department*, under Section 373a of the Penal Code. For the purpose of this subdivision only, ‘property or premises’ as used in Section 373a of the Penal Code includes the area immediately adjacent to the licensed premises that is owned, leased, or rented by the licensee.

“(f) Failure to take reasonable steps to correct objectionable conditions that occur during business hours on any public sidewalk abutting a licensed premises and constitute a nuisance, *within a reasonable time after receipt of notice to correct those conditions from the department. This subdivision shall apply to a licensee only upon written notice to the licensee from the department. The department shall issue this written notice upon its own determination, or upon a request from the local law enforcement agency in whose jurisdiction the premises are located, that is supported by substantial evidence that persistent objectionable conditions are occurring on the public sidewalk abutting the licensed premises.*” (Italics added.)

23950 et seq., 24200 et seq., 25600 et seq.; see, e.g., *Stroh v. Midway Restaurant Systems, Inc.* (1986) 180 Cal.App.3d 1040, 1048.)

The complaint attempts to state a cause of action for damages against defendants for a violation of section 25601, which makes a liquor licensee who allows his licensed premises to be used as a “disorderly house” guilty of a misdemeanor, and section 24200, which declares that the holder of a liquor license may have his or her license suspended or revoked for failing to take reasonable steps to abate conditions on his or her property or the adjacent public sidewalk, which constitute a nuisance. (§ 24200, subs. (e), (f).) Our reading of the Act discloses nothing in those statutes to suggest the Legislature contemplated that a private citizen may sue based on alleged violations of its provisions. Rather, the Act contemplates that the ABC (§ 23049 et seq.) is the proper entity to bring an action to enjoin violations of any provision of the Act (§ 23053.1), and the case law contemplates that the ABC will seek to discipline the license of a liquor licensee who fails to meet his affirmative duty to maintain lawfully conducted premises. (See *Coleman v. Harris* (1963) 218 Cal.App.2d 401, 404; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 533-534; *Maloney v. Department of Alcoholic Beverage Control* (1959) 172 Cal.App.2d 104, 107-108.) Indeed, the language of section 24200, subdivisions (e) and (f) (see fn. 5, *ante*), expressly references enforcement by the ABC. Subdivisions (e) and (f) establish as a ground for license suspension a failure to take reasonable steps to correct objectionable conditions within a reasonable time after receipt of notice from the ABC to make those corrections. Subdivision (f) further provides that the ABC “shall issue this written notice *upon its own determination, or upon a request from the local law enforcement agency* in whose jurisdiction the premises are located.” (Italics added.) The presence of an administrative remedy together with the absence of any reference to a private right of action, is strong evidence the Legislature did not intend to create such a private right to sue for damages. (*Vicko Ins. Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.4th 55, 66.)

The complaint also suggests defendants may be liable to plaintiff for violating Penal Code section 316,⁶ a misdemeanor.⁷ But again, plaintiff cites no statutory language or legislative history to suggest the Legislature intended to create a civil cause of action against a liquor licensee who allowed a disorderly house to exist upon his premises, or who failed to abate a nuisance on his premises. Nor does she cite any case in which a private right of action has been allowed for violation of any of the statutes upon which her complaint is grounded, and we are aware of none. Instead, she simply asserts that maintaining a disorderly house is a public nuisance, and an individual injured by the maintenance of a public nuisance may bring a private cause of action for damages.

True, operating a disorderly house can constitute a public nuisance. (Pen. Code, §§ 316, 370; Civ. Code, § 3479 [defining a nuisance as “[a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . .”].) A public nuisance is “one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.” (Civ. Code, § 3480.)

And a private party can maintain an action based on a public nuisance “if it is specially injurious to himself, but not otherwise.” (Civ. Code, § 3493; *Koll-Irvine Center*

⁶ Penal Code section 316 provides, “Every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner; and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor.”

⁷ Plaintiff does not assert a violation of Penal Code section 316 as evidence of the standard of care in a claim of negligence. Even if she did, “In such a case, the statute does not create a new private right to sue. The statute instead serves the subsidiary function of providing evidence of an element of a preexisting common law cause of action.” (*Crusader, supra*, 54 Cal.App.4th at p. 125.)

Property Owners Assn. v. County of Orange (1994) 24 Cal.App.4th 1036, 1040; see 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 158, p. 483 [general rule is “A private person has no direct remedy against a public nuisance unless he or she is injuriously affected; in other words, unless it is also a private nuisance”].)

But *causation* is among the necessary elements for proof of a cause of action based on a public nuisance. (*In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988; Restatement 2d Torts, § 824(b) & com. a, p. 116.) And plaintiff cannot state a cause of action effectively alleging that defendants’ maintenance of a disorderly house caused the injury she sustained in the collision with Ferreira. Assuming for the sake of this review that defendants maintained the tavern as a disorderly house, plaintiff was not injured by the noise, traffic, or compromised morals that could attend its presence in the neighborhood. She was injured when she collided some distance from the tavern with an intoxicated motorcycle driver who just happened to have recently departed defendants’ premises. As we have noted, the legislature has determined it is the consumption of alcoholic beverages that is the proximate cause of traffic injuries inflicted by an intoxicated driver. (§ 25602, subd. (c); *Leong, supra*, 235 Cal.App.3d at pp. 833-834.)

Thus, to the extent plaintiff purports to rest her claim on defendants’ alleged violation of Penal Code section 316, the result is the same as for her claims under sections 25601 and 24200. Although a violation of a legislative enactment can be used under some circumstances to establish a breach of the standard of care or other element of an ordinary tort cause of action (*Crusader, supra*, 54 Cal.App.4th at p. 125), plaintiff cannot establish the causation element required to maintain a tort cause of action, given the legislative determination that injuries such as hers are caused by the consumption of alcohol.

DISPOSITION

The order dismissing the complaint as to the demurring defendants is affirmed. Defendants are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

MURRAY, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.