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NEW JERSEY'S DRAM SHOP ACT DOES NOT PREEMPT A COMMON LAW CAUSE OF ACTION FOR NEGLIGENT SUPERVISION WHERE PLAINTIFF PROVES SERVER ALLOWED VISIBLY INTOXICATED PERSON TO DRIVE

NEW JERSEY

✓ NEW JERSEY'S DRAM SHOP ACT DOES NOT PREEMPT A COMMON LAW CAUSE OF ACTION FOR NEGLIGENT SUPERVISION WHERE PLAINTIFF CAN SHOW THAT A LICENSED ALCOHOLIC ESTABLISHMENT ALLOWED A VISIBLY INTOXICATED PERSON TO DRIVE FROM THAT ESTABLISHMENT.

NEW YORK

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Bauer v. Nesbitt

Superior Court of New Jersey, Appellate
Division

A-2343-06T2 (March 20, 2008)

This case stands for the proposition that the preemption clause (N.J.S.A. 2A:22A-4) of the Dram Shop Act, will not apply to a negligent supervision action against a licensed alcoholic beverage server where no evidence exists that the licensed alcoholic beverage server negligently served alcohol to the tortfeasor who injured the plaintiff.

The twenty-one year-old decedent in the underlying lawsuit received an automobile ride at his residence from Defendant Frederick Nesbitt to the C View Inn, the defendant-respondent in this matter. En route to the Inn, the two men drank beer intermittently over the course of ninety minutes. At the Inn, they joined three other friends at a table located a few feet from the Inn's bar. There were no tables obstructing them from the bar's perspective, and with no one at the head of the table to block the bartenders' view of the patrons seated thereat. Although the Inn that night was "somewhat crowded," one of the friends present later testified that the Inn's noise level that night was "medium." Their server was an acquaintance of Nesbitt who, without express solicitation, continually refilled the party's mugs whenever emptied that night. Although no evidence indicated that the Inn

served Nesbitt alcohol, as he was underage, Nesbitt testified at his deposition that the decedent slipped alcohol into his two Cokes. According to a friend, the decedent became visibly intoxicated, as manifested by his exposing himself and talking unduly loudly at intervals. Nesbitt also became increasingly loud during the night, using "boisterous and inappropriate language." There was no evidence that the Inn's employees ceased serving Nesbitt's friends alcohol or took any other preventive measures towards the party, such as calling a cab, which the Inn had done on previous occasions. Nesbitt eventually drove the decedent away, as the latter leaned halfway outside the passenger-side window, continuing to yell and otherwise manifest clear signs of intoxication. Approximately one hour later, Nesbitt skidded on the highway while speeding, and crashed into a guardrail, thereby causing his vehicle to overturn and killing the decedent.

Plaintiff sued as the *administratrix ad prosequendum* of the decedent's estate for wrongful death and survivorship claims, premised upon both alleged violations of the aforementioned Dram Shop Act and upon common-law negligence. Upon granting Defendant C View Inn's motion for summary judgment on both statutory and common-law claims, the lower court found that there was no evidence that the Inn served alcohol to Nesbitt. Moreover, the court held that the Dram Shop Act preempted common-law remedies.

The Appellate Division, reviewing the evidence in a light most favorable to Plaintiff, reversed judgment on both issues. The Dram Shop Act provides that "[a] person who sustains personal injury...as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server may recover damages from [that]...server only if (1) [t]he server is deemed negligent..." As defined by the statute further on, the server is negligent "only when the server served a visibly

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intoxicated person, or served a minor, under circumstances where the server knew, or reasonably should have known, that the person served was a minor.” The Act further required a showing that “(2) [t]he injury...was proximately caused by the negligent service” and that “(3) [t]he injury...was a foreseeable consequence of the negligent service.” Here, the Appellate Division found sufficient factors to raise a question of triable fact as to whether the underage Nesbitt, who did not appear to have been served alcohol by the Inn, was visibly intoxicated. The Court pointed to Nesbitt’s own admissions of intoxication that night and his behavior in the Inn as well as his blood alcohol level of .199 at or shortly following the time of the accident, such so that the Inn would have had a duty to protect Nesbitt from the foreseeable risk of injury to himself and to others. Moreover, if the decedent’s behavior manifested or reasonably could have manifested his intoxication to the Inn, then the Inn would have had a “duty to protect him from foreseeable injury as the result of an automobile accident by insuring that he did not drive and that he did not ride as a passenger with a patron who was similarly impaired.” The Court noted that the medium noise level and the readily visible actions of both Nesbitt and the decedent at their table, as well as the continual replenishing the party of friends with alcohol, raised a permissible inference that the intoxicated behavior of both the decedent and Nesbitt was or should have been perceived by the Inn’s bartenders.

The Dram Shop Act indicates that it provides “the exclusive civil remedy for personal injury...resulting from the negligent service of alcoholic beverages by a licensed alcoholic beverage server.” Notwithstanding such language, the Court found that such preemption is not absolute; rather, a cause of action for negligent supervision exists where Plaintiff lacks evidence of the server’s negligent service of alcoholic beverages to the tortfeasor. The Court analogously applied case law recognizing related claims against bars for failing to reasonably protect plaintiffs from assault or rape by visibly intoxicated patrons. Thus, the Court permitted both claims to survive summary judgment as alternative actions against Defendant C View Inn.

Dram Shop Act: generally, a statute that sets forth a tortious cause of action against establishments and/or hosts serving alcoholic

beverages, litigated by third persons who are injured by intoxicated persons served by said establishments or hosts.

NEW YORK

EMPLOYER’S LESSEE IS NOT A “SPECIAL EMPLOYER” SO AS TO BE EXEMPT FROM LIABILITY UNDER WORKER’S COMPENSATION LAW.

Fung v. Japan Airlines, Co.
New York Court of Appeals
9 N.Y.3d 351 (December 13, 2007)

In this action, the issue was whether a party who leases premises from the injured party’s employer can claim limited liability under the Worker’s Compensation Law, so as to bar any personal injury lawsuit brought by the injured employee. The Court scrutinized the fact-intensive relationship among these parties and concluded that the lessee could not.

Plaintiff was employed by the Port Authority as an electrician. The Port Authority leased its Building 14 premises, located at John F. Kennedy International Airport, to Defendant Japan Airlines Management Corp. (JAMC); at the same time, JAMC subleased 70% of said premises back to the Port Authority. The agreement between Port Authority and JAMC provided that “[t]his Agreement does not constitute JAMC as the agent or representative of the Port Authority for any purpose whatsoever.” The lease required JAMC to contract with other entities to conduct snow removal and electrical lighting for the entire premises. JAMC contracted with Aero Snow Removal Corp. to perform snow removal in addition to, upon request by JAMC, salting and sanding the premises. The Port Authority and JAMC shared maintenance expenses at a ratio of 70%-30%, respectively.

On January 22, 2001, Plaintiff slipped and fell on a patch of ice at the parking lot of Building 14. Plaintiff thereupon brought a consolidated action, joining negligence claims against both JAMC and Aero. Both defendants brought motions to dismiss Plaintiff’s claims; the Supreme Court, Queens County, denied said motions. The Appellate Division reversed the decision, thereby dismissing both claims. The Court of Appeals reversed as to JAMC’s motion, finding that JAMC did not fit within the definition of an “employer,”

which would otherwise exempt it from suit by an employee under the Worker’s Compensation Law. This statute sets forth that any employee who sustains accidental injury in the course of his employment, and who is entitled to worker’s compensation under its provisions, shall be reimbursed by the same, exclusive of any suit against its employer or co-employee. Notwithstanding JAMC’s arguments that it signed the lease as managing agent for Port Authority, the court found that such status would not by itself render JAMC Plaintiff’s employer. Rather, the Court would examine whether an actual working relationship existed between the two parties. A “special employer,” for example, who would enjoy limited liability, similar to that of a general employee, is “one who is transferred for a limited time of whatever duration to the service of another.” Such status may exist where Defendant “controls and directs the manner, details and ultimate result of the employee’s work.” Here, the Court found no contact between JAMC and Plaintiff and by contrast, found that Port Authority continued to direct and supervise all of Plaintiff’s work. Moreover, JAMC failed in its effort to claim that it was Plaintiff’s co-employee.

The Court did uphold dismissal of Plaintiff’s action against Defendant Aero, reasoning that said defendant owed no duty towards Plaintiff under the circumstances. Here, Aero had cleared and salted the related premises the day before Plaintiff’s injury and had no duty to take further action absent JAMC’s express request. Thus, the Court remanded the action against Defendant JAMC only, for consideration of the above issues which it raised.

Brief Latin:

Administratrix ad prosequendum: literally, “the administrator (or in this case, administratrix) during the prosecution”; such party is the court appointee authorized to bring a lawsuit on behalf of an estate; also known as an administrator/administratrix ad litem.

- Black’s Law Dictionary

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