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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-852

Filed: 6 February 2018

Mecklenburg County, No. 16 CVS 9789

ERIN KEENA, Plaintiff

v.

CEDAR STREET INVESTMENTS, LLC. d/b/a DRAUGHT, a Domestic for Profit, LLC, and JOHN DOE EMPLOYEE and/or AGENT, jointly and severally, directly and vicariously, Defendants

Appeal by plaintiff from order entered 6 April 2017 by Judge Adam M. Conrad in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 November 2017.

Law Offices of Daniel C. Flint, P.C., by Daniel C. Flint, for plaintiff-appellant.

Bolster, Rogers & McKeown, LLP, by Melissa R. Monroe and Jeffrey S. Bolster, for defendant-appellees.

CALABRIA, Judge.

Erin Keena ("plaintiff") appeals from the trial court's order dismissing her complaint and granting a directed verdict to Cedar Street Investments, LLC ("Draught"). After careful review, we affirm.

I. Background

In the afternoon of 20 September 2015, plaintiff was socializing with friends at Draught, a restaurant and bar located in uptown Charlotte. At around 4:00 p.m., plaintiff was standing in line for the women's restroom when a man approached her and introduced himself as "Omar." When Omar began to harass plaintiff, a second man, who was seated directly outside of the men's restroom, directed plaintiff to use that facility, instead. Plaintiff asked the man twice whether he worked for the restaurant. After the man confirmed that he was a Draught employee, plaintiff entered the men's restroom.

There was only one toilet in the men's restroom, which did not have any internal doors. Due to a 12-inch gap between the wall and the doorframe, the restroom's interior was visible from the lobby even after the door was closed. After plaintiff entered the restroom, Omar stuck his head through the gap and watched plaintiff while she was on the toilet. When plaintiff screamed, Omar removed his head from the gap. However, when plaintiff exited the restroom, both Omar and the bathroom attendant were gone. Although plaintiff informed a security guard and several Draught employees about the incident, neither Omar nor the bathroom attendant were ever identified.

On 27 May 2016, plaintiff filed a complaint in Mecklenburg County Superior Court against Draught and "JOHN DOE EMPLOYEE and/or AGENT" (collectively,

"defendants"), seeking to hold defendants "jointly and severally, directly and vicariously" liable for (1) invasion of privacy; (2) negligent hiring; (3) negligent supervision; (4) negligent retention; (5) intentional infliction of emotional distress; (6) "general pain and suffering"; and (7) punitive damages. Prior to jury selection on the first day of trial, 3 April 2017, plaintiff made an oral motion to amend her complaint, which the trial court denied. Following plaintiff's presentation of evidence, Draught moved for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50 (2017). After considering arguments from both parties, on 6 April 2017, the trial court entered an order granting Draught's motion for a directed verdict and dismissing plaintiff's complaint with prejudice. Plaintiff appeals.

II. Analysis

A. Plaintiff's Motion to Amend

On appeal, plaintiff first argues that the trial court erred by denying her motion to amend her complaint to assert an ordinary negligence claim against defendants. We disagree.

"A motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). "Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of

amendment, and (e) repeated failure to cure defects by previous amendments." *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985).

Motions to amend are governed by Rule 15 of the North Carolina Rules of Civil Procedure, which provides, in pertinent part:

> (a) A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.
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> (b) When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

N.C. Gen. Stat. § 1A-1, Rule 15(a)-(b).

On the first day of trial, plaintiff made an oral motion to amend her complaint to assert an ordinary negligence claim against defendants. Draught opposed plaintiff's motion, arguing that the proposed claim was based on previously known issues and therefore, "should have been pled at the beginning[.]" Although plaintiff asserted her motion as an "amendment to conform to the evidence" pursuant to Rule 15(b), the trial court found no "expressed or implied consent for that purpose." Accordingly, the court determined that it was "really a motion under 15(a)" and denied plaintiff's motion to amend for undue delay.

Once Draught answered plaintiff's complaint and the action was calendared for trial, plaintiff could amend her complaint "only by leave of court" or with Draught's written consent. N.C. Gen. Stat. § 1A-1, Rule 15(a). Although based on alleged "discovery disputes that began in December[,]" plaintiff waited until the first day of trial to assert her motion. At that point, whether to allow plaintiff to amend her complaint was within the trial court's discretion, *Calloway*, 281 N.C. at 501, 189 S.E.2d at 488, and the court did not abuse its discretion by denying plaintiff's motion on the basis of undue delay.

B. Draught's Motion for Directed Verdict

Plaintiff next asserts that the trial court erred by granting Draught's motion for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50. We disagree.

In considering a motion for a directed verdict, the issue for the trial court "is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). "[A]ll of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). We review the trial court's order on a motion for directed verdict *de novo*. *Denson v. Richmond Cty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003).

It is well established that a business owner typically "is not liable for injuries to his invitees which result from the intentional, criminal acts of third persons." *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981). "[S]uch acts cannot be reasonably foreseen by the owner, and therefore constitute an independent, intervening cause absolving the owner of liability." *Id.* (citations omitted). However, where circumstances exist which give "the owner reason to know that there was a likelihood of conduct on the part of third persons which endangered the safety of his invitees, a duty to protect or warn the invitees could be imposed." *Id.* at 639, 281 S.E.2d at 38.

In the instant case, all of plaintiff's claims against Draught are predicated on either (1) a theory of agency, or (2) Draught's alleged negligence in hiring, supervising, and retaining the unidentified bathroom attendant.

"An agency relationship can impose vicarious liability on a principal for the torts committed by an agent when he is acting within the line of his duty and exercising the functions of his employment." *Green v. Freeman*, 233 N.C. App. 109, 112-13, 756 S.E.2d 368, 373 (2014) (citation and internal quotation marks omitted). "To establish an agency relationship, the principal must intend that the agent shall act for him, the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them." *Id.* at 112, 756 S.E.2d at 372 (citation and quotation marks omitted).

"While proof of agency, as well as its nature and extent, may be made by the direct testimony of the alleged agent," an alleged agent's out-of-court statements or declarations are inadmissible against the principal "to prove the fact of agency or its nature and extent." *Commercial Solvents, Inc. v. Johnson*, 235 N.C. 237, 240-41, 69 S.E.2d 716, 719 (1952) (citations omitted). An alleged agent's out-of-court statement or declaration generally should not be admitted, unless

> (1) the fact of agency appears from other evidence, and also unless it be made to appear by other evidence that the making of such statement or declaration was (2) within the authority of the agent, or (3) as to persons dealing with the agent, within the apparent authority of the agent.

Id. at 241, 69 S.E.2d at 719 (citations omitted). "When these preliminary factors have been proved by evidence *aliunde*, then evidence of extra-judicial statements of the agent, when otherwise relevant and competent, may be introduced as corroborative of other evidence, or as substantive evidence bearing on the main issue in suit as a part of the *res gestae*." *Id.* (citations omitted).

In her complaint, plaintiff alleged, *inter alia*:

> 8. . . . Defendant JOHN DOE EMPLOYEE and/or AGENT ("Draught bathroom attendant" or "bathroom attendant"), was seated directly outside the men's bathroom and directed [plaintiff] to use the men's restroom instead of the women's restroom.
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> 9. The bathroom attendant was an employee and/or agent of Draught and was acting within the scope of his employment at all relevant times.
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> 10. [Plaintiff] asked the bathroom attendant twice if he worked [at] Draught, to which he replied yes each time. [Plaintiff] then entered the men's restroom as instructed by the bathroom attendant.

However, at trial, plaintiff failed to establish that the unidentified bathroom attendant was Draught's agent or employee. During cross-examination, plaintiff conceded that she had "no way to definitively say that this person worked for or was an agent for Draught other than what he allegedly told [her.]" Yet, before the alleged attendant's statements could be admitted against Draught as proof of agency, plaintiff was first required to prove "the apparent authority relied on . . . by evidence *aliunde*." *Id.* at 242, 69 S.E.2d at 720 (explaining that "[t]he controverted extra-

judicial statements and declarations may not be used for the purpose of enlarging the agent's authority").

Plaintiff failed to do so. Draught's owner, Jason J. Astephen, testified that the restaurant does not employ a "bathroom attendant." Although there is sometimes a "shoeshine guy" on the premises, the individual "work[s] for tips" and is not employed by Draught. The role is filled by various individuals who are referred to Draught by other restaurants and bars. However, neither Astephen nor Steven Johnson, Draught's manager during the incident, recalled the name of any individual who served in that capacity on 20 September 2015.

"Agency is a fact to be proved as any other, and where there is no evidence presented tending to establish an agency relationship, the alleged principal is entitled to a directed verdict." *Green*, 233 N.C. App. at 112, 756 S.E.2d at 372 (citations and quotation marks omitted). Here, plaintiff failed to prove that the alleged bathroom attendant was an agent or employee of Draught. Since all of plaintiff's claims were predicated on theories of agency or employment, the trial court did not err by granting Draught's motion for directed verdict and dismissing plaintiff's complaint.

III. Conclusion

The trial court did not err by (1) denying plaintiff's motion to amend her complaint; or (2) granting Draught's motion for a directed verdict. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).