NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RACHEL ANNE RAINWATER et al., Plaintiffs and Appellants, v. SERGIO'S EL RANCHITO, INC., Defendant and Respondent.	G054025 (Super. Ct. No. 30-2014-00754265) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Paoli & Purdy, William M. Delli and Court B. Purdy for Plaintiffs and Appellants.

Horvitz & Levy, Karen M. Bray and Emily V. Cuatto; Cannon & Nelms, Robert W. Nelms and Garrett F. Smith for Defendant and Respondent.

Eighteen-year-old Enrique Bravo was intoxicated when he was involved in a hit and run accident with Rachel Anne Rainwater's vehicle, injuring Rachel and her daughter. Rachel's husband, Matthew Rainwater, was driving in his vehicle nearby and witnessed the collision.[1] The Rainwaters filed a personal injury lawsuit against Bravo and his employer Sergio's El Ranchito, Inc. (the Restaurant). This appeal challenges the trial court's decision to grant the Restaurant's motion for summary judgment. Finding the Rainwaters' contentions lack merit, we affirm the judgment.

FACTS

The vehicle collision took place at approximately 11:11 p.m. in the City of Huntington Beach, California. Bravo ran a red light, hit Rachel's vehicle, and then fled the scene. He was later detained, convicted, and incarcerated. Rachel and her daughter sustained serious injuries.

The Rainwaters filed a lawsuit in which Rachel and her daughter alleged negligence, and Mathew filed a claim for bystander negligent infliction of emotional distress. The complaint alleged the Restaurant employed Bravo and he consumed alcoholic beverages while at work. "[Bravo] had access to or was readily provided alcoholic beverages while at [the Restaurant,] which was negligent in its supervision of its underage employees . . . ."

The Rainwaters alleged the Restaurant was aware Bravo and employees consumed alcoholic beverages on the "premises during and after their work shifts end for the evening." Their theory of liability against the Restaurant was as follows: "[Bravo] caused the subject accident as a direct and proximate result of his employer, [the Restaurant's] negligence in providing and supplying him, as an underage employee, with alcoholic beverages" at its place of business. In addition, they asserted the Restaurant

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[1] Because the parties share the same last name, we will refer to them by their first names or collectively as the Rainwaters to avoid confusion. No disrespect is intended.

owed a duty of care "when supervising its underage employees" and that Bravo had access to or was provided alcoholic beverages "while at his place of employment."

I. Summary Judgment Motion

The Restaurant filed the summary judgment motion after the parties had one year to conduct discovery. The motion raised three reasons why the lawsuit should be dismissed. First, through the discovery process, the Restaurant learned the Rainwaters had "no facts or evidence to support their allegations that Bravo was intoxicated at his place of employment[,] . . . no facts that Bravo became intoxicated as a result of any express or implied policy by [the Restaurant,]" and "no facts as to when Bravo ended his shift or where Bravo was in the hours before the accident." In short, there was no evidence to support any theory the Restaurant directly breached any duty of care with respect to the Rainwaters.

The Restaurant's summary judgment motion maintained the Rainwaters had many opportunities during the discovery process to present evidence and explain their theory of the case against the Restaurant. Instead, the Rainwaters did "not respond in any meaningful way." The Restaurant explained, "Despite ample opportunity, [the Rainwaters] have not provided any facts by which to support the allegations that [the Restaurant] provide[d] alcohol to Bravo either on the job or after his shift ended. In fact, [they] cannot provide any facts to support the contention Bravo came from [the Restaurant] in any relevant time before the incident occurred. [Citations.] . . . [Rachel] was served with form interrogatories and special interrogatories. [Citations.] . . . [Accordingly, she] was given the opportunity to provide her version of the incident . . . [and] state her case as against [the Restaurant]. For some reason, [she] lodged objections to the interrogatories and failed to provide any facts about [the Restaurant's] involvement in Bravo's intoxication. [Citations.] This may have been a calculated 'hide the ball' or [she] simply [did] not have any facts to support the allegations in the complaint."

Second, the Restaurant noted the complaint alleged the Restaurant "allowed Bravo" to consume alcohol either during or after work and "illegally served alcoholic beverages" to Bravo until he became intoxicated. The complaint did not clarify if *allowing* Bravo to drink was because the Restaurant condoned underage drinking or was liable for negligent supervision. The Restaurant maintained the Rainwaters "declined" to respond to discovery requests for more information concerning these specific allegations. The Restaurant explained Rachel's answers to form interrogatories referred "only to the police report as a source of information." The report did not contain information about where Bravo became intoxicated or whether he was coming from work. Rachel's responses indicated there were no other interviews or recorded statements. When asked how the incident occurred, she referred to how the collision happened and did not mention the Restaurant. In response to direct questions about how the Restaurant was involved, Rachel responded only with "unfounded objections" and that Bravo's sister, Claudia Valdes Bravo, may have information about Bravo's alcohol consumption.

Third, the Restaurant argued the Rainwaters could not proceed on a theory of respondeat superior because of the lack of evidence that the tort was committed in the scope of Bravo's employment as a dishwasher. The Restaurant also discussed the going and coming rule, arguing, "[w]hen and where Bravo became intoxicated is completely unknown." The Restaurant concluded it could not be held vicariously liable for Bravo's tortious conduct.

The motion was supported by the Restaurant manager's declaration, stating the following: the Restaurant had a strict policy that forbids employees from drinking alcohol during work hours; that employees, of legal drinking age, were permitted to purchase alcoholic beverages for full price after their work shift; and the Restaurant required those employees to sit at a table inside the premises while consuming alcohol. In addition, the Restaurant provided exhibits containing copies of the relevant discovery requests and the Rainwaters' responses.

II. The Opposition

The trial court approved the parties' stipulation for a continuance to allow the Rainwaters to depose Bravo, who was incarcerated, before preparing an opposition to the summary judgment motion. Based on Bravo's testimony, the Rainwaters claimed they were proceeding under a negligent supervision theory of recovery. The Rainwaters explained Bravo testified that while working at the Restaurant he was pressured by older co-workers to drink beers during his shift and on the premises. Bravo stated that on the night of the accident, the Restaurant's manager had left by 10:00 p.m., which was before his co-workers gave him alcohol. Bravo recalled he left the Restaurant at approximately 10:50 p.m., and he was driving home when the collision occurred at 11:11 p.m. Based on this new information, the Rainwaters argued many triable issues of fact existed regarding the Restaurant's supervision of underage employees, and the motion for summary judgment relied on "outdated information."

The Rainwaters argued the "playing field" in the case "dramatically changed" after Bravo's deposition because "we now know that on [the night of the incident], once his manager left [the Restaurant] around 10:00 p.m., [Bravo] was supplied beer, made readily available to him and his co-workers, which he was then pressured to consume at his place of employment." They maintained, "Surely, if [the Restaurant's] manager had not left the restaurant early and had instead continued to provide the necessary supervision to [the] employees as require[d] under the law, no alcohol would have been provided or consumed by [Bravo] and this accident would have been averted. We cannot imagine that this [m]otion would have been filed if this damning and highly probative testimony had been available in February 2016, when this [m]otion was filed." They concluded the motion focused on vicarious liability and ignored the complaint's allegations of direct liability for negligent supervision.

The Rainwaters asserted Bravo's testimony proved he and his co-workers were left unsupervised because as soon as the manager left the premises several adult

employees "grabbed beers from the unsecured cooler, provided [beer] to [Bravo], and pressured him to drink while he was still 'on the clock.'" They noted the Restaurant was a well-known establishment "where alcohol consumption [was] prevalent and supply [was] abundant." They opined the beer should have been "locked away or secured from the employees." They concluded, "It [was] completely foreseeable that, without any supervise[r] or manager present to stop them, the employees would access and consume alcohol once the 'boss' left early which is exactly what happened on that evening." And, "It is equally foreseeable that the older employees would apply pressure to the younger [Bravo] to drink beer on the job to 'fit in' and to be accepted."

III. The Reply

The Restaurant provided several responses to the opposition. It maintained the Rainwaters relied on irrelevant portions of Bravo's testimony. "[The opposition] completely ignore[d] the reality of the undisputed scope of employment arguments . . . and [asserted what] is in essence a strict liability argument based solely on [their] contention that as an employee of [the Restaurant, Bravo's] actions, while admittedly criminal, intentional[, against company rules,] and actively concealed . . . [were] somehow the responsibility of [the Restaurant]."

The Restaurant asserted Bravo's deposition contained the following relevant facts: (1) Bravo knowingly consumed stolen beer; (2) he knew he was drinking the beer illegally while he was underage; (3) he knew the terms of his employment forbid drinking while working and the sanction for this misconduct was immediate termination; (4) he actively concealed his actions from any manager at the Restaurant; and (5) after drinking, Bravo decided to drive a vehicle. "[The Rainwaters] fail[ed] to explain how any of the above activities were within the scope of [Bravo's] employment . . . *as a dishwasher* and how his actions should give rise to liability . . . ."

The Restaurant maintained it was "absurd" to suggest it "should have somehow known that when a manager leaves the restaurant their employees will steal,

consume alcohol and then choose to drive a vehicle." (Italics omitted.) It argued, "It appears [the Rainwaters'] position is that anytime a restaurant manager is not visually observing the employees so that those employees cannot act in a knowingly criminal and intentional manner, that manager is being negligent. This is an . . . incredible burden to put on a restaurant owner or manager and is tantamount to strict liability." It concluded, there were no triable issues of fact with respect to negligent supervision and the motion should be granted.

The Restaurant described relevant portions of Bravo's deposition testimony that the Rainwaters overlooked. Bravo testified the alcohol he consumed the day of the car accident was *the first time* he drank alcohol at the Restaurant. To prevail on a theory of negligent supervision, the Rainwaters needed proof the employer "'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' [Citation.]" (*Delfino v. Agilent Technologies Inc.* (2006) 145 Cal.App.4th 790, 815 (*Delfino*).) There was no evidence to establish the Restaurant knew or should have known Bravo's employment created a risk he would illegally acquire and consume alcohol before driving a vehicle home. There were no prior incidents involving Bravo or other underage employees. Bravo stated it was his first time drinking while at work.

The Restaurant also pointed out portions of Bravo's testimony that conclusively negated the theory of liability for wrongful acts committed during the scope of employment. Bravo's misconduct was not foreseeable. The Restaurant hired Bravo to work as a dishwasher and it was not part of his job duties to consume stolen alcohol before driving home. He knew drinking the beer was illegal due to his age and was against the company's policy. He understood that if he had been caught, he would have been fired.

IV. The Court's Ruling

The hearing was unreported. The court's written order contained the following findings and conclusions: "1. The [Rainwaters] failed to present any evidence that [the Restaurant] had any prior notice that . . . Bravo either engaged in the alleged conduct or presented any increased risk of engaging in such conduct as would require increased vigilance or scrutiny of his conduct while employed as a dishwasher.

"2. The Court finds there was no evidence of prior notice presented and the only evidence on this issue was that of the deposition testimony of . . . Bravo, which indicated that the first occurrence of the alleged conduct was on the date in question and said conduct was intentionally conducted out of the presence of [the Restaurant] to prevent detection of what . . . Bravo admittedly knew would be a terminating event for his employment. The [c]ourt finds that the absence of the [s]upervisor precluded notice to the restaurant on the date in question.

"3. The [Rainwaters] failed to present any evidence that the alleged conduct of . . . Bravo was within the scope of his employment as a dishwasher or any evidence that his alleged conduct had any nexus to this employment or that it advanced the business pursuits of [the Restaurant] such that respondeat superior liability was warranted.

"4. The [Rainwaters] failed to present any evidence that the actions of . . . Bravo were foreseeable by [the Restaurant]."

DISCUSSION

The Rainwaters do not challenge the court's legal analysis of the issues. Instead, they maintain we should reverse the judgment because the ruling was based on procedural defects. Namely, the Restaurant's moving papers did not specifically address the negligent supervision allegations and, therefore, did not properly shift the burden of proof to the Rainwaters. Additionally, they contend the Restaurant's efforts to address negligent supervision for the first time in its reply brief was improper and the trial court

should not have considered it when deciding the motion for summary judgment. Neither contention has merit.

I. Elements of Negligent Supervision

"California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee. [Citation.] Liability is based upon the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes. [Citation.]" (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 (*Doe*).) "'"Liability results . . . not because of the relation of the parties *but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. . . .*" [Citation.]' [Citations.]" (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1214 (*Federico*).)

Thus, a successful negligent supervision claim requires evidence the employer knew of the risk of the particular harm suffered by the victim (*Doe, supra,* 50 Cal.App.4th at p. 1054), was aware of the employee's misconduct and that it "arose out of" or was "connected with his employment." (*Delfino, supra,* 145 Cal.App.4th at pp. 815-817.) "[W]here reasonable jurors could draw only one conclusion from the evidence presented, lack of negligence may be determined as a matter of law, and summary judgment granted. [Citation.]" (*Federico, supra,* 59 Cal.App.4th at p. 1214.)

As described in more detail above, the complaint alleged the Restaurant negligently supervised its underage employees because Bravo either had access to, or was directly provided, alcoholic beverages on the premises. Thus, the Rainwaters' theory for recovery was that the Restaurant should have known their unsupervised underage employees were going to drink while at work and, therefore, it was foreseeable they would drive intoxicated and injure a third party. To prove this claim, the Rainwaters needed proof the Restaurant was aware the underage employees had access to, or were

provided, alcohol during work hours, and that it failed to adequately supervise these underage employees by locking up the alcohol.

II. Burden of Proof for Summary Judgment Motion

Based on our review of the record, we conclude the Restaurant's moving papers adequately addressed the negligent supervision allegation raised in the complaint. "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*).) The burden of production, however, shifts between the parties. (*Ibid.*) A defendant may satisfy its initial burden of production by showing an absence of evidence through "factually devoid discovery responses." (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590; see also *Collin v. Calportland Co.* (2014) 228 Cal.App.4th 582, 589 ["Evidence that the defendant propounded sufficiently comprehensive discovery requests and that the plaintiff provided factually insufficient responses can raise an inference that the plaintiff cannot prove causation"].)

By producing evidence of factually devoid discovery responses, a defendant can shift the burden of production to the plaintiff, who must then "make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar, supra,* 25 Cal.4th at p. 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) However, a plaintiff may not simply rest on allegations in the pleadings but must instead set forth specific facts showing the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)

The Restaurant satisfied its initial burden by showing the Rainwaters' discovery responses were inadequate to prove negligent supervision. Although, the Restaurant did not use the words "negligent supervision" in the moving papers, it did discuss the total lack of evidence supporting all allegations in the complaint. It argued there was no evidence suggesting liability under *any direct theory of liability* or vicarious

liability. The separate statement of undisputed facts noted there was no evidence Bravo became intoxicated while at work or after his shift. In addition, the separate statement explained why there was nothing to support the allegation Bravo was coming from work when he was driving while intoxicated. The Restaurant affirmatively established it had policies and procedures in place to prevent employees from consuming alcohol while at work. Absent evidence to the contrary, it could be inferred the Restaurant did not know or expect Bravo or other employees were violating the terms of their employment.

The dearth of evidence supported the reasonable inference there was nothing connecting Bravo's dishwashing duties to any foreseeable misconduct. Indeed, in the vicarious liability discussion, the Restaurant specifically stated being intoxicated "was not incidental to his employment." Negligent supervision was not a viable theory of recovery because there were no facts suggesting the Restaurant knowingly supplied Bravo alcohol as part of his duties as a dishwasher, no facts proving Bravo was drinking at work, no facts the managers were aware its employees were drinking on the job and then driving home, and no facts indicating the Restaurant knew Bravo was an "unfit employee" in any respect. (*Doe, supra,* 50 Cal.App.4th at p. 1054.)

In light of all the above, we conclude that because the Rainwaters' discovery responses failed to state specific facts showing there was negligent supervision, the burden shifted to them to establish a triable issue of material fact regarding this claim. We find no procedural error with respect to the Restaurant's moving papers or the court's decision to shift the burden of proof to the Rainwaters.

III. No Procedural Error with the Reply

The Rainwaters argue the Restaurant untimely included an argument regarding the negligent supervision claim in its reply. They assert the topic was not covered in the moving papers or separate statement. They acknowledge the arguments raised in the reply do not "constitute 'late filed evidence'" but improperly discussed evidence not included in the separate statement.

As discussed above, the topic was covered in the moving papers. The Restaurant's motion was based on the lack of evidence produced during discovery to support *all direct theories* of liability raised in the complaint, which included the claim of negligent supervision. The burden of proof then shifted to the Rainwaters, who produced *new evidence* in their opposition in attempting to save their claim for negligent supervision. "A proper function of the reply is to respond to the opposing party's statement of additional disputed facts (e.g., by demonstrating why these additional facts do not undermine the material facts set forth in the moving party's statement). (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 10:220.5, p. 10-96.) Under the circumstances of this case, it would have been unfair to prohibit the Restaurant from offering rebuttal argument in its reply brief. The Restaurant had the right to respond to the Rainwaters' arguments and object to new evidence submitted in their opposition.

In addition, as aptly noted by the Restaurant in its briefing, there is nothing in the record to show the Rainwaters objected to the reply brief, sought to continue the hearing to file supplemental opposition briefs, or desired to present new evidence or arguments in response to the reply brief. The Rainwaters do not assert they alerted the trial court to their concerns about the reply. They also do not suggest what more they could have submitted or argued in response to the reply brief. We reject the Rainwaters' suggestion the court had a sua sponte duty to issue an order permitting them to file "supplemental papers and to take whatever further discovery may have been necessary to properly oppose these never before raised issues." The contention lacks legal support.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.