

STATE OF MICHIGAN
COURT OF APPEALS

MORENE KOTHS,

Plaintiff-Appellant,

v

3-B, INC., d/b/a
WOODSIDE MEADOWS LOUNGE,

Defendant-Appellee,

and

WILLIAM JOSEPH KLINGENSMITH,

Defendant.

UNPUBLISHED
September 13, 1996

No. 177377
LC No. 92-231402

Before: Cavanagh, P.J., and Marilyn Kelly and J.R. Johnson,* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendant 3-B, Inc.'s motion for summary disposition pursuant to MCR 2.116(C)(10).¹ We affirm.

I.

Plaintiff argues that the trial court erred in ruling that she violated the name and retain provision of the dramshop act, MCL 436.22 *et seq.*; MSA 18.993 *et seq.*, and therefore granting defendant's motion for summary disposition. On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open

* Circuit judge, sitting on the Court of Appeals by assignment.

an issue upon which reasonable minds might differ. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

The dramshop act provides:

An action under this section against a retail licensee shall not be commenced unless the minor or the allegedly intoxicated person is a named defendant in the action and is retained in the action until the litigation is concluded by trial or settlement. [MCL 436.22(6); MSA 18.993(6).]

The purpose of the name and retain requirement is to avoid collusion between a plaintiff and the allegedly intoxicated person by ensuring that the latter has a financial stake in each stage of the litigation. *Zoll v Brinkerhoff*, 170 Mich App 210, 214-215; 427 NW2d 610 (1988). To satisfy the name and retain provision, an allegedly intoxicated person must be retained as an interested party throughout the litigation. *Spalo v A & G Enterprises (After Remand)*, 437 Mich 406, 409-412; 471 NW2d 546 (1991). A settlement of any kind which negates the allegedly intoxicated person's position as a real party in interest violates the name and retain requirement. *Riley v Richards*, 428 Mich 198, 211-213; 404 NW2d 618 (1987).

There are some exceptions to the name and retain provision. For example, a plaintiff will be excused from the requirement when, after the exercise of due diligence, the identity of the allegedly intoxicated person remains unknown,² when the allegedly intoxicated individual cannot be located for service of process,³ or when the plaintiff has no cause of action against the allegedly intoxicated person and the circumstances suggest no potential for collusion.⁴

In the present case, plaintiff sought and was awarded a default judgment against William Klingensmith, the allegedly intoxicated person who caused her injuries. Thus, plaintiff failed to retain Klingensmith as a party in violation of the name and retain provision of the dramshop act. Accordingly, the trial court properly granted defendant's motion for summary disposition. See *Spalo, supra*.

Plaintiff argues that she sought a default judgment against Klingensmith because defendant accused her of colluding with him, and that it would therefore be unjust to allow her claim to be dismissed for failing to retain him as a party. However, even a cursory reading of the statute should have alerted plaintiff to the consequences of obtaining a judgment against Klingensmith. As the Supreme Court has stated, "We believe the statute must be applied as written, and suggest that those who consider the result harsh should direct their arguments to the Legislature." *Spalo, supra* at 410.

II.

Plaintiff also contends that the trial court abused its discretion by refusing to set aside the default judgment against Klingensmith. The decision whether to set aside a default or a default judgment is within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion. *Gavulic v Boyer*, 195 Mich App 20, 24; 489 NW2d 124 (1992).

This case presents the unusual circumstance of the party that initiated the default judgment, rather than the party against whom judgment was entered, seeking to set aside the judgment. We conclude that plaintiff failed to present any extraordinary circumstances to the trial court that would warrant setting aside the default judgment. See MCR 2.16(C)(1)(f). Plaintiff knew, or should have known, the implications of obtaining a default judgment against Klingensmith on her dramshop claim. Because relief from judgment is not warranted, the trial court did not abuse its discretion in denying plaintiff's motion to set aside the default judgment.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Marilyn Kelly

/s/ J. Richardson Johnson

¹ Defendant moved for summary disposition pursuant to both MCR 2.116(C)(8) and (10). The trial court did not specify under which court rule it granted defendant's motion. However, because it is clear that the trial court considered matters outside the pleadings, we assume that summary disposition was granted pursuant to MCR 2.116(C)(10).

² *Salas v Clement*, 399 Mich 103, 109-110; 247 NW2d 889 (1976).

³ *Woodbeck v Curley*, 85 Mich App 605, 609-610; 272 NW2d 152 (1978).

⁴ *Newman v Hoholik*, 138 Mich App 66, 72; 359 NW2d 253 (1984).