2016 IL App (1st) 141405-U

SIXTH DIVISION
June 30, 2016

No. 1-14-1405

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

LUCIA LEON, as Special Administrator for the Estate of Carlos Rios-Olivares, Deceased, and as Mother and Next Friend of Nicole Rios and Angie Rios Leon, Minors,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	No. 2011 L 7773
v.	)	
S AND S INTERNATIONAL, INC., OVERHEAD MATERIAL HANDLING ILLINOIS, INC., OVERHEAD MATERIAL HANDLING SERVICES, INC., DEMAG CRANES AND COMPONENTS CORP. and MAGNETEK, INC., Doing Business as Electronic Systems,	)	Honorable Kathy M. Flanagan, Judge Presiding.
Defendants	)	
(S and S International, Inc.,	)	
Defendant-Appellee.)	)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Rochford and Justice Delort concurred in the judgment.

O R D E R

¶ 1 HELD: Summary judgment was proper where there was no genuine issue of material fact and as a matter of law the circuit court properly determined that the deceased was a borrowed employee for purposes of the Workers' Compensation Act.

¶ 2 Carlos Rios-Olivares (Carlos) was fatally injured while operating an overhead crane at the defendant, S and S International, Inc.'s, warehouse. The plaintiff, Lucia Leon, filed a wrongful death and survival action as special administrator for Carlos's estate and as mother and next friend of Nicole Rios and Angie Rios Leon, the minor children of Carlos and the plaintiff. The circuit court granted summary judgment to the defendant finding as a matter of law that Carlos was a borrowed employee and therefore, the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)) provided the plaintiff's exclusive remedy. The sole issue on appeal is whether the award of summary judgment to the defendant was proper. The grant of summary judgment to the defendant was proper, and we affirm judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The plaintiff's first amended complaint alleged that Carlos was employed by U.S. Staffing, Inc. as a forklift operator. U.S. Staffing was in the business of providing machine operators to perform work for other companies. The defendant was in the business of supplying stainless steel sheets, plates, coils and other structural shapes of steel to other companies. On January 9, 2010, while working at the defendant's warehouse, Carlos suffered

fatal injuries when the controls of the overhead crane he was operating failed to work properly, and he was crushed by a load of steel sheets.

¶ 5 The plaintiff alleged that the defendant was guilty of negligence resulting in Carlos's death, *inter alia*, by allowing him to operate the crane without proper training. The defendant filed an answer and two affirmative defenses; (1) Carlos was guilty of comparative fault in his operation of the crane, and (2) section 5(a) of the Act (820 ILCS 305/5(a) (West 2010)) precluded a tort action by the plaintiff.

¶ 6 The defendant filed a motion for summary judgment. The defendant maintained that a borrowed-employment relationship existed between U.S. Staffing and it, and the plaintiff's sole remedy was under the Act. In her response to the defendant's motion for summary judgment, the plaintiff maintained that, as a matter of law, there was no borrowed-employment relationship between U.S. Staffing and the defendant, or, in the alternative, there was a genuine issue of material fact as to whether such a relationship existed.

¶ 7 Both parties supported their arguments with deposition testimony taken during discovery. The pertinent testimony is set forth below.

¶ 8 Renee Lyons was the director of operations and vice-president of U.S. Staffing, which functioned as an employment agency providing trained temporary and permanent employees, to clients in the area of machine and clerical jobs. A client has no control over the employee's employment by U.S. Staffing but can fire or reject them from working at the client's business. When requesting an employee, the client informs U.S. Staffing what the work schedule is. A job order would list certain qualifications, and U.S. Staffing would send its employees with those qualifications to perform the job requested by the client. U.S. Staffing also provided their employees with holiday and vacation pay which was not reimbursed by

the clients. According to Carlos's employment file, he first applied for employment with U.S. Staffing in February 2008, and again in October 2009.

¶ 9 Ms. Lyons dealt with Erasmo Chaidez, the plant manager at the defendant's warehouse. Some time prior to January 2010, Mr. Chaidez requested a crane operator from U.S. Staffing, but it had been unable to locate one. Subsequently, Mr. Chaidez requested a forklift operator. When Ms. Lyons told Carlos about the job order for a forklift operator, he accepted the assignment. U.S. Staffing sent Carlos to the defendant as a forklift operator.

¶ 10 Ms. Lyons explained that the contract between U.S. Staffing and the client spelling out the terms of their relationship and what the parties were providing for each other would be on the back of the work ticket the employee would present to the client. However when the defendant was accepted as a client, it was allowed to use time cards instead of the job tickets. Therefore, there was no written agreement between U.S. Staffing and the defendant. U.S. Staffing did not provide any supervisory personnel at the defendant's warehouse.

¶ 11 As plant supervisor for the defendant, Mr. Chaidez expected the employees under him to be able to operate both a forklift and a crane. Employees were given an on-site test to determine if they could operate forklifts and cranes. Ordinarily, temporary hires were not allowed to operate the cranes. Carlos was an exception because he was hired for a particular job that required him to operate an overhead crane. Training to operate a machine such as the overhead crane was done by the individual operating the machine. In late 2009, Mr. Chaidez had requested both a forklift driver and an experienced overhead crane operator from U.S. Staffing. There was no written contract between the defendant and U.S. Staffing.

¶ 12 On January 4, 2010, U.S. Staffing sent Carlos to the defendant's warehouse. During his interview with Mr. Chaidez, Carlos told Mr. Chaidez that he was familiar with forklifts and

gib cranes but not overhead cranes, which were very different. After speaking with Carlos, Mr. Chaidez instructed Leobardo Aguilla and Juventino Gonzalez to train Carlos to operate the overhead crane and not to let him operate the crane until he was capable. Mr. Chaidez arranged Carlos's work schedule so that he could be trained during the first shift by Mr. Aguilla and during the second shift by Mr. Gonzalez. Carlos would clock in during the first shift and leave when the last truck was loaded or when Mr. Gonzales dismissed him during the second shift.

¶ 13 Juventino Gonzalez had trained six to seven workers at different companies to operate an overhead crane. He trained two of the defendant's employees to operate the overhead crane. Mr. Chaidez told him that Carlos had been training for two or three weeks to operate the crane in order to work in shipping. Carlos received his training on the overhead crane during the first shift and then would watch Mr. Gonzales operate the crane during the second shift. Carlos told him that he was going to learn to be a crane operator. Mr. Gonzales spent with Carlos about four to six hours with Carlos.

¶ 14 On the day of the accident, Mr. Gonzalez watched Carlos operate the crane loading some steel sheets on to a truck. In his opinion, Carlos operated the crane safely. When Carlos asked to operate the crane to load a second truck, Mr. Gonzalez agreed and left the area to drop off some documents at the office. He was in the office at the time of Carlos's accident.

¶ 15 According to Mr. Gonzalez, 15 days of training was necessary before he would allow an individual to operate a crane unsupervised. Four days would not be sufficient. Except for the fact that he had watched Carlos load the pallets, had he known that Carlos had only received four days training, he would not have permitted him to operate the crane unsupervised.

¶ 16 On April 23, 2014, the circuit court granted the defendant's motion for summary judgment and dismissed the complaint as to the defendant. Pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), the circuit court found that there was no reason to delay enforcement or appeal of the court's order. This appeal followed.

¶ 17 ANALYSIS

¶ 18 I. Standard of Review

¶ 19 A grant of summary judgment is reviewed under the *de novo* standard. *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 48. A grant of summary judgment will be affirmed, if and only if, the pleadings, depositions, admissions, affidavits and other relevant matters demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Wolinsky*, 2013 IL App (1st) 111186, ¶ 48.

¶ 20 "Summary judgment is precluded where the material facts are disputed or where reasonable people might draw different conclusions from undisputed facts." *Wolinsky*, 2013 IL App (1st) 111186, ¶ 48. The existence of factual disputes will not preclude summary judgment where the disputed facts are not material to the essential elements of the cause of action or defense. *Wolinsky*, 2013 IL App (1st) 111186, ¶ 52. To determine the existence of a genuine issue of material fact, the court construes the relevant portions of the record against the movant and liberally in favor of the nonmovant. *Wolinsky*, 2013 IL App (1st) 111186, ¶ 48.

¶ 21 II. Discussion

¶ 22 Under section 5(a) of the Act, an employer assumes liability for employees injured while performing their duties for the employer, in exchange for which employees relinquish any common law or statutory right to damages from the employer. *Prodanic v. Grossinger City*

Autocorp, Inc., 2012 IL App (1st) 110993, ¶ 14. An employee who is in the general employment of one entity may be loaned to a second entity for the performance of special work, thereby becoming the employee of the second entity. *Prodanic*, 2012 IL App (1st) 110993, ¶ 15. Section 5(a) also precludes a loaned employee from bringing a civil action against a borrowing employer. *Prodanic*, 2012 IL App (1st) 110993, ¶ 14.

¶ 23 Whether an employee is a loaned employee is usually a question of fact, but where the facts are undisputed and capable of one inference, the question becomes one of law. *Prodanic*, 2012 IL App (1st) 110993, ¶ 15. In *A.J. Johnson Paving Co. v. Industrial Comm'n*, 82 Ill. 2d 341 (1980), our supreme court set forth a two-pronged inquiry: whether the borrowing employer has the right to control and direct the manner in which the employee performed the work and whether a contract of hire existed between the borrowing employer and the employee. *A.J. Johnson Paving Co.*, 82 Ill. 2d at 348. The right to control the work is the primary factor to consider when evaluating whether a borrowed-employment relationship exists. *Crespo v. Weber Stephen Products Co.*, 275 Ill. App. 3d 638, 641 (1995).

¶ 24 The plaintiff does not contest the defendant's right to control Carlos's work. She contends that summary judgment for the defendant was improper because the evidence did not establish that Carlos consented to his employment by the defendant. The plaintiff argues that Carlos's consent to employment by the defendant was limited to his duties as a forklift operator and that he never consented to perform the duties of a crane operator.

¶ 25 The employer-employee relationship may be based on an express or implied employment contract. *Prodanic*, 2012 IL App (1st) 110993, ¶ 17. Whether express or implied, the employee's agreement to a borrowed-employment relationship is essential. *O'Loughlin v. ServiceMaster Co. Ltd. Partnership*, 216 Ill. App. 3d 27, 36 (1991). "Implied consent exists

where the employee knows that the borrowing employer generally controls or is in charge of the employee's performance." *Prodanic*, 2012 IL App (1st) 110993, ¶ 17. In *Crespo*, this court found that the plaintiff's consent to work for the defendant, the borrowing employer, was demonstrated by his appearance at the defendant's facility and his response to the instructions of the defendant's employees who were supervising the facility. In addition, there were no supervisory personnel from the loaning employer at the facility, and the loaning employer had given the plaintiff four previous temporary job assignments, making him aware of the nature of his employment with the defendant despite the absence of a written contract of employment between the defendant and the plaintiff. *Crespo*, 275 Ill. App. 3d at 641-42. In *Prodanic*, the facts that the deceased worker had keys to the borrowing employer's facility, traveled to the borrowing employer's facility and complied with tasks assigned to him by the borrowing employer's managers established that he "clearly knew that [the borrowing employer] was in charge of his performance and accepted its direction, demonstrating [the deceased worker's] acquiescence to an employment relationship with [the borrowing employer]." *Prodanic*, 2012 IL App (1st) 110993, ¶ 21.

¶ 26 It is undisputed that Carlos began work at the defendant's warehouse on January 4, 2010, and that he was working there on January 9, 2010, at the time of his fatal accident. The evidence established that Carlos's duties there were directed and supervised by the defendant's employees, Messrs. Chaidez, Aguilla and Gonzalez. There is no evidence that Carlos objected to Mr. Chaidez's decision to train him to operate the overhead crane or objected to participating in the training. According to Mr. Gonzalez, Carlos was very interested in learning to operate the overhead crane.

¶ 27 The plaintiff maintains that the defendant violated the terms of the agreement it had with U.S. Staffing because Carlos was assigned to the defendant as a forklift operator and not a crane operator. She argues that the terms of the agreement between the defendant and U.S. Staffing is a relevant factor in determining the existence of the borrowed-employment relationship. See *O'Loughlin*, 216 Ill. App. 3d at 34 (the terms of any written contract between the two employers was a relevant though not a conclusive factor in determining the existence of a borrowed-employment relationship). The parties agree that there was no written contract. Moreover, *O'Loughlin* is distinguishable.

¶ 28 In *O'Loughlin*, the dismissal of injured worker's complaint was reversed where the defendant's control of the work and the worker's consent to employment by the defendant could not be determined as a matter of law. *O'Loughlin*, 216 Ill. App. 3d at 39) (the injured worker was unaware of the contractual relationship between the school district and the defendant, and the injured worker had every reason to believe that he was employed by the school district); see *Crespo*, 275 Ill. App. 3d at 643 (this court found no conflict with *O'Loughlin* where the facts in the case before it established the worker's implied consent to the arrangement with the borrowing employer).

¶ 29 The plaintiff maintains that Carlos's consent to employment by the defendant was limited to operating a forklift and that he did not consent to operating an overhead crane, a more dangerous job since he had no experience as a crane operator and could not have appreciated the dangers he would encounter in operating the crane. The plaintiff attempts to analogize the consent issue present in this case to "informed consent" in the context of medical malpractice and criminal cases.

¶ 30 The plaintiff fails to cite any authority for her novel proposition, and her argument fails to explain why the reasons for consent in those types of cases should apply in the case before us. Therefore, her argument is forfeited. Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). In any event, her argument lacks merit.

¶ 31 In *Russell v. PPG Industries, Inc.*, 953 F.2d 326, 332 (1992), the plaintiff usually performed maintenance tasks, but he was injured while working on the more dangerous furnace testing project for the borrowing employer. The court found that he impliedly acquiesced in his employment by the borrowing employer since he knew the furnace testing project was being performed by the borrowing employer, accepted the employer's control over his work and followed the employer's instructions regarding where and how to work. *Russell*, 953 F.2d at 332. In the present case, the evidence established that Carlos accepted and cooperated in the training as an overhead crane operator in order to work in the defendant's shipping department and followed the instructions of the defendant's employees in performing his duties.

¶ 32 The plaintiff then argues that the evidence submitted by the defendant that Carlos's requested training as a crane operator was hearsay and therefore, barred by the Dead Man's Act (735 ILCS 5/8-201 (West 2010)). She argues that Mr. Chaidez's and Mr. Gonzalez's testimony that Carlos requested training as a crane operator would be barred because they had a direct interest in the outcome of the litigation involving the defendant, their employer. Other than a citation to the Dead Man's Act, the plaintiff does not support her argument with the language of the statute or with case law. The argument is forfeited. Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 33 The plaintiff maintains that questions of fact were raised by the contradictory testimony of Messrs. Chaidez and Gonzalez. She maintains that this contradictory testimony casts doubt on the general credibility of these witnesses. While the plaintiff states that the conflicting testimony concerns "timing and to the instruction given to Carlos," the plaintiff fails to identify the conflicting statements to which she refers and fails to provide a citation to the record where these alleged conflicting statements occur as required by Rule 341(h)(7). Therefore the argument is forfeited.

¶ 34 The plaintiff's reliance on *Vaughn v. BFI Waste Systems of North America*, 793 So.2d 410 (La.App. 4 Cir. 2001) is misplaced. In *Vaughn*, a meeting of the minds between the employers was one of nine factors in determining whether the plaintiff was a borrowed employee. While that factor was not fully resolved in favor of either party, the court determined that the majority of factors supported a finding that the plaintiff was a borrowed employee. However, the denial of summary judgment to the defendant, the borrowing employer, was upheld due to a factual dispute as to which staffing agency sent the plaintiff to work for the defendant. *Vaughn*, 793 So.2d at 414-15. Therefore, *Vaughn* provides no support for the plaintiff's argument.

¶ 35 Finally, the plaintiff maintains that as a matter of public policy, the defendant should be allowed to escape all liability for the accident which killed Carlos. She relies on *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274 (2007). In *Forsythe*, the supreme court determined that where certain factors are present, a parent company could have a duty to an injured employee of its subsidiary based on direct participant liability. *Forsythe*, 224 Ill.2d at 295. Where direct liability is applicable, the court concluded that the Act does not immunize the parent company from liability. *Forsythe*, 224 Ill.2d at 298.

¶ 36 The plaintiff points out the court in *Forsythe* relied on the fact, like the defendant in this case, the parent company paid no workers' compensation premiums or benefits. However, in *Forsythe*, the parent company was attempting to pierce its own corporate veil to escape liability, which the court noted was improper where it would be to the corporation's advantage. *Forsythe*, 224 Ill.2d at 297. The present case involves two unrelated entities and the existence of a borrowed-employment relationship, not a parent company attempting to avoid liability through piercing the corporate veil. The fact that the defendant here paid no premiums for workers' compensation does not defeat the existence of the borrowed-employment relationship. See *Chaney v. Yetter Manufacturing,* 315 Ill. App. 3d 823, 830 (2000) (pointing out that under the section 1(a)(4) of Act (820 ILCS 305/1(a)(4) (West 1996)), the borrowing and loaning employers are jointly and severally liable to the employee).

¶ 37 CONCLUSION

¶ 38 The essential facts in this case are undisputed and capable of only one reasonable inference, that Carlos was the defendant's borrowed employee. In the absence of any genuine issue of material fact, the defendant was entitled to summary judgment as a matter of law.

¶ 39 Affirmed.