SIXTH DIVISION
December 28, 2018

No. 1-18-0347

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTOPHER FRANCE, Plaintiff-Appellant, v. GRAPHIC PACKAGING INTERNATIONAL, INC., Defendant-Third-Party Plaintiff-Appellee, v. ADVANTAGE HUMAN RESOURCING, INC. d/b/a ADVANTAGE STAFFING, Third-Party Defendant.	)	Appeal from the Circuit Court of Cook County. No. 15 L 4607 Honorable Moria S. Johnson, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 ***Held*:** We affirm the order granting summary judgment in favor of defendant-appellee Graphic Packaging International. Plaintiff-appellant was a "borrowed employee" of defendant-appellee and this action is barred by the Workers' Compensation Act.

¶ 2 Plaintiff-appellant, Christopher France, filed this negligence action against defendant-appellee, Graphic Packaging International, Inc., after he lost a part of his arm while working on a machine at defendant's facility in Schaumburg, Illinois. Plaintiff had been assigned to work at defendant's facility by third-party defendant, Advantage Human Resourcing, Inc. d/b/a Advantage Staffing (hereinafter Advantage). Advantage is a temporary staffing agency in the business of supplying workers to local businesses in need of additional labor. After the close of discovery, defendant moved for summary judgment on the basis that plaintiff was a "borrowed employee" under the Workers' Compensation Act and therefore plaintiff's remedy was exclusively under the Act. In response, plaintiff argued defendant's contract with Advantage precluded such a finding and questions of fact remained on key elements of the borrowed employee analysis. The circuit court agreed with defendant and found the evidence demonstrated plaintiff was a borrowed employee. Since plaintiff was a borrowed employee, his negligence claim was barred by the Workers' Compensation Act. Accordingly, the court entered summary judgment in defendant's favor.

¶ 3 Before this court, plaintiff argues the circuit court erred in granting summary judgment in favor of defendant because (1) the express terms of the agreement between defendant and Advantage precluded defendant from claiming plaintiff as an employee, (2) issues of fact remain as to defendant's right to control plaintiff, and (3) issues of fact remain as to whether a contract for hire existed between plaintiff and defendant. For the reasons set forth more fully below, we reject plaintiff's arguments and affirm the summary judgment entered by the circuit court.

¶ 4 JURISDICTION

¶ 5 This action commenced on May 4, 2015. On January 23, 2018, the circuit court granted summary judgment in favor of defendant. Plaintiff filed his notice of appeal on February 20, 2018. On March 20, 2018, the circuit court modified its January 23, 2018 order to reflect that

defendant's third-party complaint against Advantage was dismissed with prejudice. Pursuant to Rule 303(a)(2), plaintiff's notice of appeal became effective when the third-party complaint was dismissed. *McMackin v. Weberpal Roofing Inc.*, 2011 IL App (2d) 100461, ¶ 16. Accordingly, this court has jurisdiction over the January 23 order pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. May 30, 2008).

¶ 6 BACKGROUND

¶ 7 Plaintiff-appellant, Christopher France, worked at the Schaumburg, Illinois facility of defendant-appellee, Graphic Packaging International Inc., after defendant had contracted with Advantage to supply temporary workers. Under the agreement setting forth defendant and Advantage's relationship, Advantage was an independent contractor to defendant.

¶ 8 In the spring of 2013, Ami Rzewnicki of Advantage contacted plaintiff about possible employment with Advantage after finding plaintiff's resume on HotJobs.com, an employment-search website. When Rzewnicki first contacted plaintiff, she informed him she would let him know when she had something for him. In June 2013, Rzewnicki again reached out to plaintiff to let him know a position had opened up and inquired if he was interested in discussing it. Plaintiff traveled to Rzewnicki's office, where she had him fill out an application and other basic information. She put plaintiff through a "basic interview." Rzewnicki explained the position was third-shift maintenance at defendant's facility. Plaintiff accepted Rzewnicki's offer and two days later Rzewnicki informed plaintiff that defendant had accepted him for the position.

¶ 9 According to plaintiff, Advantage explained to him that he would not work directly for defendant but would instead be hired by Advantage with the possibility of "getting the position with defendant through Advantage." This was explained at the Advantage interview and during

the application process. He also signed documents agreeing to follow safety procedures mandated by the company to which Advantage assigned him.

¶ 10 The plaintiff's first day of work with defendant occurred on June 21, 2013. Once he began working at defendant's facility, he never spoke with anyone from Advantage except Rzewnicki after his accident. At the same time, he claimed he spoke with Rzewnicki by phone on a weekly basis and saw her twice when she came to the facility. He believed he had been with defendant about two and half weeks before he first saw her when she came to see how he was doing. They had no direct contact the second time plaintiff saw Rzewnicki at the facility.

¶ 11 Plaintiff understood himself to be a temporary worker of defendant and he was never told he might be hired directly by defendant if he performed well. While at the facility, an employee of defendant would tell him what machines to work on or what needed to be done during the shift. No one from Advantage ever directed his work at the facility. He worked the same hours and shift as defendant's workers while also attending safety classes with defendant's employees. The tools he used to repair machines at the facility were provided and owned by defendant.

¶ 12 Rzewnicki confirmed that it was defendant who scheduled plaintiff's hours and determined the shift he would work. Defendant would also determine if plaintiff's shift or hours needed to be modified. While plaintiff had to go through Advantage in order to request time off, Advantage would then make the request to defendant. Defendant, not Advantage, would then decide whether to approve the request.

¶ 13 Rzewnicki explained that Advantage did not provide a "site or customer specific" orientation, but only a "standard Advantage orientation." Advantage asked its employees to adhere to certain standards, such as keeping a safe and orderly work area, but had no supervisor on site to ensure the standards were maintained. Advantage did not monitor safety conditions. Rzewnicki explained she worked for Advantage for over a year and in that time she visited

defendant's facility ten times or less. While there she would talk with Advantage employees, but only if they were able to talk. She explained, "[w]e do not interrupt their work."

¶ 14 According to Rzewnicki, the defendant had the authority to terminate the service of any Advantage supplied employee working at its facility. But a client, like defendant, had no authority to terminate an Advantage supplied employee from Advantage's employment. Advantage made the decision as to whether such an employee remained with Advantage. After plaintiff's accident, Rzewnicki did not speak with either the Schaumburg police or investigators from the Occupational Health and Safety Administration.

¶ 15 Joel Nevarez, a recruiter for Advantage, testified that Advantage provided its employees a general orientation to its own policies and procedures, but not those of the customer where an employee would be placed. He also stated that no one from Advantage supervised plaintiff while he was at defendant's facility. He agreed with Rzewnicki that defendant could terminate an Advantage supplied individual, but Advantage could still retain the individual and place them elsewhere. He claimed that Advantage employees on assignment were not required to make weekly check-ins; only those without a current assignment were required to call-in weekly.

¶ 16 Patty Garcia, a former human resource assistant with defendant, testified that defendant interviewed plaintiff twice. No one from Advantage was present at either interview. She agreed with plaintiff that defendant's employees trained him on defendant's policies and procedures, including safety rules. After receiving an orientation from defendant, plaintiff also received job specific training. Advantage did not participate in this training. Garcia confirmed plaintiff's supervisor at the facility decided the shift and hours plaintiff worked. The supervisor also set plaintiff's duties and responsibilities. She also agreed with Advantage that defendant did not need Advantage's permission to terminate an Advantage assigned employee working at defendant's facility.

¶ 17 Plaintiff was injured at defendant's facility on July 24, 2013. Plaintiff was cleaning a machine part when his right arm below the elbow was amputated. On May 4, 2015, he filed a complaint containing a single negligence count against defendant. After reviewing the above testimony and examining the other documents placed into the record, including the contract between defendant and Advantage, the circuit court granted summary judgment in defendant's favor. The circuit court agreed with defendant's argument that the facts demonstrated plaintiff was a "borrowed employee" and his remedy was exclusively under the Workers' Compensation Act.

¶ 18 This appeal followed.

¶ 19 ANALYSIS

¶ 20 On appeal, plaintiff challenges the grant of summary judgment in favor of defendant. He argues that the contract between defendant and Advantage precluded a finding that he was a borrowed employee of defendant. He also argues genuine issues of material fact exist under the borrowed employee analysis.

¶ 21 Summary judgment is appropriate where the pleadings, admissions on file, and depositions show there are no genuine issues of material fact so that the movant is entitled to judgment as a matter of law. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. In making that determination, courts must view such items in the light most favorable to the nonmovant. *Guterman Partners Energy, LLC v. Bridgeview Bank Group*, 2018 IL App (1st) 172196, ¶ 48. If a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). To survive this motion, the nonmoving party need not prove its case, but must present some evidentiary facts that would arguably entitle it to judgment. *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 8 (2004). While summary judgment is a drastic measure, it should be granted where the movant's

right to judgment is clear. *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). We review the circuit court's summary judgment ruling *de novo. In re Application of Will County Collector*, 2018 IL App (3d) 160659, ¶ 12.

¶ 22 The Workers' Compensation Act represents a statutory remedy which seeks to protect workers from accidental injuries by imposing liability on the employer regardless of fault. *Prodanic v. Grossinger City Autocorp, Inc.*, 2012 IL App (1st) 110993, ¶ 14. In exchange for this protection, section 5(a) of the Act abrogates an employee's right to bring a lawsuit outside of the Act. Section 5(a) states: "No common law or statutory right to recover damages from the employer * * * for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act * * *." 820 ILCS 305/5(a) (West 2016).

¶ 23 Illinois courts have "long recognized the borrowed-employee doctrine as being applicable to cases arising under the Workmen's Compensation Act." *A. J. Johnson Paving Co. v. Industrial Commission*, 82 Ill. 2d 341, 347 (1980). The borrowed employee concept was incorporated into section 1(a)(4) of the Act:

> "Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such employee under this Act and as to such employee the liability of such loaning and borrowing employers is joint and several, provided that such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph * * *.
> * * *
> An employer whose business or enterprise or a substantial part thereof consists of hiring, procuring or furnishing employees to or for other employers operating under and subject to the provisions of this Act for the performance of the work of such other employers and who pays such employees their salary or wages notwithstanding that they are doing the work of such other employers shall be

> deemed a loaning employer within the meaning and provisions of this Section." 820 ILCS 305/1(a)(4) (West 2016).

Courts engage in a two-fold inquiry to determine whether an individual is a borrowed employee: (1) whether the special employer had the right to direct and control the manner of the employee's work and (2) whether a contract of hire, express or implied, existed between the employee and the special employer. *A. J. Johnson Paving Co.*, 82 Ill. 2d at 348. Whether an individual is a borrowed employee under the Act can be a question of fact, but it can also be a question of law for the court to decide when the facts are undisputed and only one reasonable inference can be drawn from those undisputed facts. *Chaney v. Yetter Manufacturing Co.*, 315 Ill. App. 3d 823, 826 (2000).

¶ 24 Initially, plaintiff argues defendant cannot claim him as a borrowed employee because the contractual agreement between defendant and Advantage disclaims any Advantage placed individual from being an employee of defendant. In support of this argument, plaintiff relies on section 7 of the Contingency Staffing Agreement between defendant and Advantage. Section 7, titled "Status of Staffing Company," states:

> "Staffing Company [Advantage] shall act under this Agreement only in the capacity of an independent contractor. **Under no circumstances shall Contract Employees be considered employees of GPII [defendant]**, nor shall any Contract Employees be entitled to any health or welfare benefits normally provided by GPII to its employees, except to the extent such insurance or other benefits may have previously accrued to the Staffing Company or its employees as a result of employment with GPII prior to the date of this Agreement. Staffing Company has no power or authority to act for, represent, or bind GPII, its parent, subsidiaries and/or other affiliates."

Relying on the above bolded statement, plaintiff argues "the CSA trumps any assertion by [defendant], the drafter of the CSA and party to it, that Plaintiff was a borrowed employee."

¶ 25 Courts have previously held that "the terms of any written provision between alleged employers" are relevant to a court's consideration under the first prong, "**though the contract is**

not conclusive." (Emphasis added.) *O'Loughlin v. ServiceMaster Co. Ltd. Partnership*, 216 Ill. App. 3d 27, 34 (1991) citing *Emma v. Norris*, 130 Ill. App. 2d 653, 657 (1970). While the contract is one relevant factor under the first prong, the contract has "no bearing on plaintiffs' implied contract for hire with [defendant]." *Morales v. Herrera*, 2016 IL App (1st) 153540, ¶ 33. Based on the above case law, the contract is relevant (though not determinative) to the court's consideration under the first prong, but not a factor considered under the second.

¶ 26 Turning to the first prong of the borrowed employee analysis, our case law has set forth several factors for courts to consider when determining how much control the special employer was able to exercise over the loaned employee. Courts may consider: "the manner in which the performance of the employee's duties is directed, the mode of payment, the right to discharge, the terms of any written contract between the employers, and the general employer's ability to substitute among employees loaned to the borrowing employer." *Hastings v. Jefco Equipment Co., Inc.*, 2013 IL App (1st) 121568, ¶ 6. The fact the special employer does not pay the loaned employee directly does not defeat a finding that an individual is a borrowed employee. *Morales v. Herrera*, 2016 IL App (1st) 153540, ¶ 24.

¶ 27 After reviewing the evidence in a light most favorable to plaintiff, the pleadings, depositions, and other materials on file lead only to the conclusion that defendant had the right to direct and control plaintiff's manner of work. Plaintiff admits defendant had the right to terminate his employment at defendant's facility. He worked the same shift and hours as defendant's employees. He received his instructions from defendant's maintenance and production employees. They told him what machines to work on and provided the requisite equipment to help plaintiff complete the work. Rzewnicki, an Advantage employee, testified that Advantage did not supervise plaintiff's work, nor did it assign plaintiff's daily or weekly tasks. While Rzewnicki visited defendant's facility, it was not to give plaintiff work instruction but

merely to see how all Advantage employees were fairing. She stated that she never interrupted an Advantage placed individual's work. Based on the above, it is evident that after being placed with defendant, plaintiff "became wholly subject to the control and direction" of defendant and "was free from the control of the original employer [Advantage]." *Kristensen v. Gerhardt F. Meyne Co.*, 104 Ill. App. 3d 1075, 1079 (1982).

¶ 28 We are not convinced the contract between defendant and Advantage precludes a finding that defendant had the right to direct and control plaintiff's work. Initially, plaintiff ignores the fact that section 20 of the agreement states, "[t]his Agreement shall be governed by and construed in accordance with the laws of the **State of Georgia**, without reference to conflicts of laws principles." Plaintiff's brief does not make any reference to Georgia law. Equally important, the contractual language had no effect on defendant's ability to control plaintiff while working at defendant's facility. As stated above, plaintiff worked the same hours and shift as defendant's employees and took direction from them. Defendant's employees told plaintiff what machine to repair or work on, while also providing him with tools. Advantage did not have any control in how defendant managed plaintiff after the placement occurred. The undisputed facts demonstrate defendant had the right to direct and control plaintiff's work and the contractual language does not alter this outcome.

¶ 29 The record also demonstrates plaintiff had an implied contract for hire with defendant. For a contract for hire to exist, the employee must have at least implicitly acquiesced to the relationship. *A. J. Johnson Paving Co.*, 82 Ill. 2d at 350. Implied consent to an employment relationship exists "where the employee knows that the borrowing employer generally controls or is in charge of the employee's performance." *Prodanic v. Grossinger City Autocorp, Inc.*, 2012 IL App (1st) 110993, ¶ 17. "Furthermore, the employee's acceptance of the borrowing

employer's direction demonstrates the employee's acquiescence to the employment relationship." *Id.*

¶ 30 Here, acquiescence to the employment contract is established by the fact that plaintiff was aware the work he was doing was for the benefit of defendant and that he accepted defendant's control over his work. Defendant told plaintiff what shift and hours to work. Defendant told plaintiff what machine to repair and supplied the tools and materials to assist plaintiff in this task. Plaintiff admitted he agreed to follow defendant's policies and protocols while working at the facility. All of these facts demonstrate plaintiff acquiesced to an employment relationship with defendant. See *Chavez v. Transload Services, L.L.C*, 379 Ill. App. 3d 858, 863 (2008) (finding that the plaintiff implicitly consented to the borrowed employment relationship where he accepted his assignment with that entity and its control and direction of his work); see also *Crespo v. Weber Stephens Products Co.*, 275 Ill. App. 3d 641, 641–42 (1995) (finding the plaintiff's consent was demonstrated when he appeared at the defendant's facility and responded to instructions of the defendant's supervising employee).

¶ 31 The undisputed facts of this case demonstrate plaintiff is a borrowed employee of defendant. As a borrowed employee under the Act, his negligence claim against defendant is barred. 820 ILCS 305/5(a) (West 2016). Plaintiff's sole means of recovery lies with the Act. Accordingly, the circuit court did not err in granting summary judgment in favor of defendant.

¶ 32 CONCLUSION

¶ 33 For the reasons stated above, we affirm the circuit court order entering summary judgment in favor of defendant.

¶ 34 Affirmed.