

**L.G.S. HYDROSTATIC
TESTING, INC.**

VERSUS

BUD'S BOAT RENTAL, INC.

*** NO. 2001-CA-1904**

*** COURT OF APPEAL**

*** FOURTH CIRCUIT**

*** STATE OF LOUISIANA**

APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 46-587, DIVISION "A"
HONORABLE ANTHONY D. RAGUSA, JUDGE

JUDGE MICHAEL E. KIRBY

(Court composed of Chief Judge William H. Byrnes III, Judge Miriam G. Waltzer, Judge Michael E. Kirby)

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L.G.S. Hydrostatic Testing, Inc. (“L.G.S.”) filed a lawsuit against Bud’s Boat Rental, Inc., claiming that Bud’s lost an industrial water-filtering unit (“the filter”) entrusted to it. Bud’s filed a summary judgment motion, contending that it did not have custody, care and control of the filter at the time it was lost. Based upon the motion and its accompanying documentation and the opposition filed by L.G.S., the trial court granted the motion on June 20, 2001, finding no genuine issues of material fact and that Bud’s was entitled to judgment as a matter of law. L.G.S. appeals the judgment. We affirm.

L.G.S. contracted with Bud’s to care for, store, and safeguard the filter and other equipment while awaiting transport of the equipment to an offshore drilling barge. On October 14, 1998, L.G.S. loaded the filter and other equipment it owned onto a truck for delivery to Bud’s dock site, on which it was unloaded.

Bud’s maintains that on October 16, 1998, the filter was then taken from its dock and loaded onto the M/V SEARCHER, a vessel it neither

owned nor operated, along with the rest of the L.G.S. equipment. Bud's contends it is not responsible for the loss of the filter because the filter disappeared sometime after it was loaded aboard the vessel. On the other hand, L.G.S. claims that Bud's is responsible for the loss of the filter because on October 16, 1998, all of the equipment, except for the filter, was loaded on the vessel for transport to the barge.

Along with its summary judgment motion, Bud's submitted a loading receipt showing that "LGS equip" was loaded onto the M/V SEARCHER on October 16, 1999, a request for admission to L.G.S. that the filter was loaded by Bud's aboard the M/V SEARCHER on October 16 without incident, and documentation that L.G.S. did not timely respond to the request. As a supplement, Bud's submitted the affidavit of Mr. Kim Baril, the general manger of its Venice, Louisiana facility.

Mr. Baril's affidavit, executed on April 16, 2001, stated that he had personal knowledge of the matter set forth; that on October 14, 1998, the filter was delivered by truck to Bud's; that on October 16 he supervised the loading of the filter unit aboard the vessel M/V SEARCHER, and he contemporaneously completed a load receipt reflecting the loading of the filter at issue as "L.G.S. equipment"; that sometime thereafter the vessel M/V SEARCHER departed Bud's facility presumably to make an offshore

supply run; that on October 20, 1998, the M/V SEARCHER returned to Bud's, and Bud's had been employed to unload the vessel; and that during unloading, the filter at issue was not present aboard the M/V SEARCHER, as reflected in the discharge receipt he completed.

In opposition to the motion for summary judgment, L.G.S. submitted an invoice from Bud's showing that the filter unit and other equipment was offloaded from a truck to Bud's dock on October 14, 1999, another invoice from Bud's showing unspecified "LGS equipment" was loaded from the dock to HERCULES (presumably the barge to which the M/V SEARCHER was transporting the equipment) on October 16, 1999, its own response to an interrogatory that the filter was not loaded onto the vessel for transport to the barge, and its untimely denial of Bud's request for admission. Shortly before the hearing on the motion for summary judgment, L.G.S. submitted an affidavit from Mr. Jerry Lewis, its secretary/treasurer and a test engineer.

The Lewis affidavit stated that Mr. Lewis had personal knowledge of the matter at issue; that on October 14, 1998, the filter in question was loaded onto a Global truck, delivered to Bud's, and placed on the dock there; that on October 15, an L.G.S. crew arrived at Bud's and the filter was present there; that on October 16, L.G.S. equipment was loaded onto the M/V SEARCHER without, according to an invoice, the filter; and that on

October 20 the filter was not present when equipment was unloaded from the M/V SEARCHER onto another vessel at Bud's or when the other vessel returned to the barge.

In Reasons for Judgment issued on October 30, 2001, the trial court stated:

. . . [T]he Defendant, Bud's Boat Rental, Inc., has presented evidence including the "loading receipt", the Affidavit of Mr. Kim Basil [sic], General Manager of . . . its Venice, La. operations stating his personal observations and knowledge of relevant facts, and the presumed admission of the Requests for Admissions. The Petitioner has only presented a defective affidavit of its president, Mr. Jerry Lewis, an argument that perhaps the Request for Admissions should not be conclusively presumed, and a reference to other pleadings which might serve as a denial of the presumed admission. Petitioner offers no real evidence to support its position. It is curious and a bit baffling to the Court why no party introduced any statements from the crew of the M/V Searcher.

In short, the Defendant submitted evidence that the filter unit had left its care, custody and control, and thus it is not liable for damages under the "CARRIERS AND WATERMEN" law contained in Articles 2751 et seq. of the Civil Code. Petitioner has not offered any credible evidence to support its position.

. . . [I]t is the opinion of the Court that a Summary Judgment was appropriate in these proceedings as there is no genuine issue of material fact.

At issue in this appeal is whether the trial court erred in granting summary judgment to Bud's. We must conduct a *de novo* review of the summary judgment, using the same criteria applied by the trial court to determine whether summary judgment is appropriate. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226,230.

Summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966. Pursuant to amendments to article 966, summary judgments are favored, and the rules regarding summary judgments are to be liberally applied. La. Code Civ. P. art. 966(A)(2). The amendments leveled the playing field for the litigants, required equal scrutiny of documentation submitted by the parties, and removed the earlier overriding presumption in favor of trial on the merits. Marrogi v. Gerber, 2000-1091(La.App. 4 Cir. 5/16/01), 787 So.2d 1098, writ denied, 2001-1768 (La. 9/28/01), 798 So.2d 120.

In a summary judgment proceeding, the initial burden of proof is on the mover to show that no genuine issue of material fact exists. After the mover has met its initial burden of proof, the burden shifts to the non-

moving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. La. Code Civ. P. art. 966(C) (2). If the non-moving party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment.

La.Code Civ.P. art. 966; Schwarz v. Administrators of Tulane Educational Fund, 97-0222 (La.App. 4 Cir. 9/10/97), 699 So.2d 895, 897. When a motion for summary judgment is properly supported, the non-moving party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La.Code Civ.P. art. 967; Townley v. City of Iowa, 97-493 (La.App. 3 Cir. 10/29/97), 702 So.2d 323, 326.

In this appeal, L.G.S. argues that there was a genuine issue of material fact regarding the loading of the filter unit. L.G.S. discounts the Baril affidavit by claiming that Mr. Baril surely could not remember an incident with one particular filter two years later. Having reviewed the Baril affidavit, however, we find no reason to believe that Mr. Baril is being less than truthful in his recounting of the events that he witnessed and documented. L.G.S.'s argument is not persuasive.

L.G.S. further asserts that Mr. Lewis's affidavit stated that Mr. Baril

told Mr. Lewis shortly after the incident that the filter had been improperly loaded on a truck. Having reviewed the Lewis affidavit, however, we note that Mr. Lewis stated only that in February 1999 Mr. Baril told him that a Bud's employee thought the filter was loaded onto a truck. L.G.S., therefore, misconstrued the affidavit.

Next, L.G.S. contends that the loading receipts show that the filter was lost while in Bud's care and custody because the October 14 receipt specifically references the filter, whereas the October 16 receipt merely references "LGS equipment." Having reviewed the documentary evidence, we find that the discrepancy noted by L.G.S. is not significant enough to create a genuine issue of material fact. The listing as "LGS equipment" does not necessarily indicate, or even imply, that the filter was not included.

Finally, as its most important argument, L.G.S. claims that an illegible designation after Mr. Baril's signature indicates that Mr. Baril did not sign the affidavit and therefore the affidavit was not based on personal knowledge. We find no merit in this argument.

Overall, we find that Bud's sufficiently fulfilled its burden of proof by establishing through its summary judgment motion and accompanying documents, mainly the Baril affidavit, that the filter was loaded onto the M/V SEARCHER and was not lost while in Bud's care and custody. Hence,

Bud's established the absence of a genuine issue of material fact. Agreeing with the trial court's assessment of the inadequacy of the Lewis affidavit, we find that L.G.S. did not meet its proof burden once the burden shifted to it to set forth specific facts showing the existence of a genuine issue of material fact. The Lewis affidavit is not based upon personal knowledge of the facts stated therein primarily because Mr. Lewis was not present at the dock in question. Furthermore, the invoices and receipts upon which L.G.S. relies simply do not establish the facts that L.G.S. claims they do.

Accordingly, for the reasons given, the judgment of the trial court granting summary judgment in favor of Bud's is affirmed.

AFFIRMED