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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001454-MR

GLENDON BURGESS RICHARDSON AND
DODSON INSURANCE GROUP — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH J. BAMBERGER, JUDGE
ACTION NO. 95-CI-00277

SABATASSO FOODS — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Glendon Richardson, an employee of Industrial Security Service, Inc. (ISS), suffered serious injuries while performing security guard duties at the production facility of Sabatasso Foods, Inc., in Boone County Kentucky. Asserting that Sabatasso had breached its duty to provide a safe workplace, Richardson sued Sabatasso.[1] By summary judgment entered May 27, 1999, the Boone Circuit Court dismissed Richardson's complaint on

[1]The other party to this appeal, Dodson Insurance Group, provided workers' compensation benefits to Richardson on behalf of ISS. It intervened in Richardson's suit to protect its subrogation interest.

the ground that, under the exclusive-liability provisions of KRS Chapter 342, Sabatasso was immune from liability. Richardson appeals from that judgment and contends both that Sabatasso is not immune from liability and that a material factual dispute should have precluded summary judgment. Being unpersuaded by either of these contentions, we affirm.

The facts underlying this appeal are not disputed. Near the time of Richardson's injury, in April 1994, Sabatasso was a subsidiary of a large frozen-food manufacturer. It employed hundreds of workers over three shifts in the large scale production of frozen pizza. To protect its product, its equipment, and its facilities, Sabatasso required anyone entering the plant to pass through either of two guarded gates. No one was to enter without clearance from the security guard, who maintained a log, and shipping trucks needed clearance to exit. Since at least 1992, Sabatasso had contracted with ISS to provide these security services at the gates as well as to patrol the entire facility during the second and third shifts. While screening traffic at what was apparently the main gate, Richardson was struck by an exiting van and suffered injury to his back. He received workers' compensation benefits through ISS.

Richardson filed negligence-based claims against the driver of the van and against Sabatasso in April 1995.[2] In April 1996, Sabatasso moved for summary judgment on the ground that, as a contractor/statutory employer under the workers' compensation

[2]The driver of the van and Richardson have since settled.

laws, it was immune from tort liability. The trial court denied the motion, and nearly three years' of discovery ensued. In May 1999, on the eve of trial, Sabatasso renewed its motion for summary judgment, and this time the trial court agreed with it that KRS 342.610 and 342.690 operate to bar Richardson's claim. It is from that determination that Richardson has appealed.

KRS 342.610(2)(b) defines "contractor," in pertinent part, as

> [a] person who contracts with another . . . to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person.

Section 342.690(1) then provides, in part, as follows:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation.

In other words, if Sabatasso is a contractor, under KRS 342.610, then under KRS 342.690 it is immune from the tort liability Richardson asserts.[3] As noted, Sabatasso is to be

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[3]This assumes, of course, that Sabatasso "secure[d] payment of compensation as required by" the workers' compensation chapter. *See* KRS 342.340 *and* Davis v. Turner, Ky., 519 S.W.2d 820 (1975); Matthews v. G & B Trucking, Inc., 987 S.W.2d 328 (1998); Becht v. Owens Corning Fiberglass Corporation, 196 f.3d 650 (6th Cir. 1999) (citing Gordon v. NKC Hosps., Inc., 887 S.W.2d 360, 362 (Ky. 1994)). We have not been referred to Sabatasso's proffer of evidence on this basic element of its

(continued...)

deemed a contractor for the purposes of these statutes if its contract with ISS was for work that "is a regular or recurrent part" of Sabatasso's business. Richardson concedes that the security services ISS provided Sabatasso were regular. Indeed, they seem to have been continual. He denies, however, that they formed a part of Sabatasso's business. We disagree.

Richardson's contention is twofold. He argues first that Sabatasso's business is the marketing of food products, not security services, and thus that ISS can not be the sort of sub-contractor envisioned by the statute. Implicit in this argument is the contention that no sub-contractor supplying a product or service ancillary to what the contractor markets would come within the statute. Our appellate courts have already rejected this result. In Tom Ballard Co. v. Blevins, Ky., 614 S.W.2d 247 (1980), a sub-contractor providing delivery services to a coal mining company was held to be within the statute, and in Daniels v. Louisville Gas and Electric Co., Ky. App., 933 S.W.2d 821 (1996), LG&E was deemed a contractor/statutory employer of workers providing ancillary emissions-testing services.[4]

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[3](...continued)
defense, but, in as much as Richardson does not dispute the point and there is no apparent reason to doubt it, we may assume that the record supports the trial court's judgment. CR 59.06; Miller v. Commonwealth, Department of Highways, Ky., 487 S.W.2d 931(1972); Clay v. Clay, Ky., 424 S.W.2d 583 (1968).

[4]*See also* Thompson v. The Budd Company, 199 F.3d 799 (6th Cir. 1999) (ancillary maintenance services within the statute); 4 *Larson's Workers' Compensation Law* § 70.06D7 (2000) (criticizing, in the discussion of Wilson v. A-I Indus., Inc., 451 So. 2d 1251 (La. Ct. App. 1984), the result for which Richardson contends).

Richardson next contends that, even if ancillary services may sometimes be deemed "regular or recurring part[s]" of a contractor's business, the security services at issue here are too far removed from Sabatasso's main business--food production--to bring Richardson's claim within the workers' compensation act. Only "integral" services, he maintains, have that effect, and ISS's services are not integral.

While it may be true, as Richardson suggests, that "Kentucky cases have not mapped precisely the contours of section 342.610,"[5] the territory is broader than he would have it. The plain language of the statute, whatever its ultimate scope, clearly refers, we believe, to an on site aspect of the business's operation important enough to require around-the-clock manpower. Both Sabatasso's production facility, with its accumulation of costly tools and equipment, and its product, an item meant for human consumption, require the protection ISS provides. That protection is a "regular part" of Sabatasso's business, making Sabatasso a contractor with respect to ISS. *Cf.* United States Fidelity & Guaranty Company v. Technical Minerals, Inc., Ky., 934 S.W.2d 266 (1996); Thompson v. The Budd Company, 199 F.3d 799 (6th Cir. 1999); Sharp v. Ford Motor Company, 66 F. Supp. 2d 867 (1998); *and see* 4 *Larson's Workers' Compensation Law* §§ 70.06[7] and 70.06D[7] (annotating exclusive-liability cases in which a security service is the alleged sub-contractor).

[5]Thompson v. The Budd Company, 199 F.3d 799, 805 (6th Cir. 1999).

Finally, noting the familiar rule that summary judgment is inappropriate where material issues of fact are in dispute, Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378 (1992), Richardson contends that the ultimate question of fact as to whether ISS's services were a regular or recurrent part of Sabatasso's business should be submitted to a jury. Richardson is correct, of course, that, such ultimate decisions are often submitted to a jury, in conjunction with the court's instructions, to be decided in light of the jury's resolution of underlying factual disputes. When, as in this case, however, there is no genuine dispute concerning the underlying facts, such ultimate questions may properly be addressed by the court as matters of law. Steelvest v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991); Holladay v. Peabody Coal Company, Ky., 560 S.W.2d 550 (1977).

The trial court did not err, therefore, by deeming this matter ripe and appropriate for summary judgment, nor did it err, for the reasons discussed above, by concluding that Sabatasso is immune from Richardson's suit under the exclusive liability provisions of the workers' compensation laws. We affirm, accordingly, the May 27, 1999, judgment of the Boone Circuit Court.

DYCHE, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS WITH RESULT.

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