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Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000435-MR
AND
NO. 2017-CA-000483-MR

JOHN A. HOSKINS AND AMBER HOSKINS — APPELLANTS

v.

APPEALS FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 11-CI-01133

ZAPPOS FULFILLMENT CENTERS, INC.; TRAVIS ARNOLD; MICHAEL BREDENSTEINER; LEAH MORRIS; AND COMMERCE & INDUSTRY INSURANCE COMPANY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, LAMBERT, AND K. THOMPSON, JUDGES.

JONES, JUDGE: This consolidated appeal arises out of an order entered by the Bullitt Circuit Court dismissing the claims of the Appellants, John and Amber Hoskins ("the Hoskinses"), against Zappos Fulfillment Centers ("Zappos") and

three of its employees, Travis Arnold, Michael Bredensteiner, and Leah Morris. The Hoskinses contend Zappos and its employees are liable in whole or in part for the injuries John sustained when he fell several feet while working on Zappos's property in September of 2010. The circuit court concluded that the Hoskinses' claims were subject to dismissal based on the exclusivity provision of the Workers' Compensation Act, KRS[1] 342.690, and the doctrine of up-the-ladder immunity. The Hoskinses appealed the dismissal (appeal no. 2017-CA-000435-MR) as did Commerce & Industry Insurance Company (appeal no. 2017-CA-00483-MR), the compensation carrier for John's direct employer, US Trades LLC ("US Trades"), a temporary employment agency.[2] For the reasons set forth below, we reverse and remand.

I. BACKGROUND

In 2010, Zappos contracted to have work performed at its Shepherdsville, Kentucky, warehouse. The work included the construction and installation of a mezzanine as well as the assembly and installation of a new

[1] Kentucky Revised Statutes.

[2] US Trades LLC was permitted to join the action below as an intervening plaintiff. Following a prehearing conference, the Court ordered the two appeals to be consolidated for all purposes with Commerce & Industry Insurance Company designated as an "appellee." Despite its designation as an appellee, Commerce & Industry Insurance Company has maintained throughout this appeal that the circuit court incorrectly granted judgment as a matter of law to Zappos and its employees. Its arguments mirror those made by the Hoskinses.

conveyor system. The mezzanine was constructed and installed by Meyer GC, Inc. Zappos contracted with Dematic Corporation ("Dematic") to assemble and install the conveyor system on the mezzanine. Dematic had performed similar work at other Zappos locations and had entered into a "Master Design and Equipment Purchase Agreement" with Zappos on May 24, 2007. As related to the Shepherdsville project, the parties executed only a work order with an effective date of May 11, 2010.

Dematic did not use its own employees to perform the work. It relied on US Trades, a temporary employment agency, to provide laborers for the project. John, an electrician, was employed by US Trades, and it assigned him to work for Dematic on the Zappos project. While working at Zappos, John was supervised by Dematic employees.

The conveyor system that Dematic was hired to install ran across an elevated mezzanine at the Shepherdsville facility requiring the laborers, including John, to work at elevated heights of approximately twelve feet. When Dematic began its work on or about August 10, 2010, the mezzanine had guardrails around its perimeter. Dematic initially left the guardrails in place. However, one or two days before September 7, 2010, the date of John's fall, someone removed the guardrails. It is unknown who removed the guardrails and whether that person was an employee of US Trades, Dematic or Zappos.

On the day in question, September 7, 2010, John was working in the area where the guardrails had been removed. His work involved installing wire for the new conveyor. While performing his work, John tripped, lost his balance, and fell approximately eleven feet from the mezzanine to the ground below. John landed on his head and suffered serious injuries.

After the incident occurred, the Kentucky Department of Occupational Safety and Health ("KOSH") investigated. Following the investigation, Dematic was cited for two "serious" violations of OSHA: the failure to protect employees working on a surface with an unprotected edge or side which is six feet or more above a lower level from falling by providing guardrails systems, safety net systems or personal fall arrests systems in violation of 29 CFR[3] 1926.501(b)(1); and the failure to assure that each employee has been trained as necessary by a competent person in the use and operation of guardrail systems, personal fall arrest systems, safety net systems, warning line systems, safety monitoring systems, controlled access zones and other protection to be used in violation of 29 CFR 1926.503(a)(2)(iii). Dematic was fined $9,000. Zappos was neither cited nor fined.

On September 6, 2011, the Hoskinses filed a complaint against Zappos, and three of its employees; Dematic and one of its employees; John Doe;

[3] Code of Federal Regulations.

Meyer GC Inc.; and Allied Barton Security, a company that performed security for Zappos, seeking compensation for the injuries he suffered as a result of his fall. Amber sought damages for loss of consortium. Commerce & Industry Insurance Co. was granted permission to intervene as the workers' compensation carrier for John's employer, US Trades.

In June 2015, defendant Meyer GC moved to dismiss the Hoskinses' claims due to lack of prosecution pursuant to CR[4] 41.02. However, its counsel served the motion on an incorrect address. After counsel for Zappos informed the Hoskinses' counsel about the pending motion, the Hoskinses' counsel called Meyer GC's counsel. Meyer GC's counsel confirmed that the motion had been served on an incorrect address and represented to the Hoskinses' counsel that an amended motion would be forthcoming and served using the correct address.

Prior to any amended motion being filed, the circuit court held a brief hearing on the initial motion on June 29, 2015, at which the Hoskinses' counsel did not appear.[5] Hours after the hearing, Meyer GC filed an amended motion to dismiss and served counsel for the Hoskinses' at the correct address. The amended motion was noticed to be heard on July 13, 2015. However, the circuit court

[4] Kentucky Rules of Civil Procedure.

[5] The Hoskinses' counsel later represented that they did not think it was necessary to appear because opposing counsel had represented that he would be filing an amended motion.

entered a final order dismissing all claims with prejudice on July 10, 2015, which essentially mooted the amended motion.

On July 13, 2015, the circuit court held another hearing. At this time, the dismissal order was addressed. Local counsel for the Hoskinses stated she did not know the case had been dismissed until that day. Counsel for Meyer GC stated that he had told counsel of the entry of the dismissal order prior to that date. Finally, counsel for Zappos stated the case should remain dismissed for various reasons and that it had previously informed the Hoskinses' counsel about the motion to dismiss. The circuit court noted that no party had asked it to set aside the dismissal for lack of notice, other than verbally by local counsel for the Hoskinses during the hearing. The circuit court opted to set the motion to dismiss for a hearing in August and directed counsel for the Hoskinses to file a motion to set aside the dismissal order if she wished to do so, which could be considered at the same time.

On July 24, 2015, the Hoskinses' counsel filed a motion pursuant to CR 60.02 requesting the circuit court to set aside the motion. The circuit court considered the CR 60.02 motion at the August 3, 2015, hearing. Counsel for the Hoskinses stated that they had filed a motion to set aside pursuant to the circuit court's direction. Meyer GC and Zappos responded to the CR 60.02 motion, arguing that on procedural grounds, the court did not have the authority to set the

order aside because the Hoskinses had failed to seek relief via CR 59.05. Counsel for the Hoskinses stated they were not under the impression, after the discussion with local co-counsel and opposing counsel, that there was any need to file a CR 59.05 motion within ten days. At the conclusion of the hearing, the circuit court took the matter under advisement.

On August 20, 2015, the circuit court entered an order granting the Hoskinses' motion for CR 60.02 relief. In its ruling, the court stated:

> The Defendant Meyer GC, Inc. had filed a Motion to Dismiss for Lack of Prosecution on June 18, 2015. This Motion noticed the parties to appear at the Court's Motion Hour on June 29, 2015. The Motion however was noticed to an old address for the Plaintiffs' counsel and was never received by them. Through conversation with Zappos counsel, Plaintiffs' counsel became aware of the existence of a Motion to Dismiss.
>
> Plaintiffs' counsel contacted Meyer GC's counsel asking about why they had not received the Motion to Dismiss. Meyer GC's counsel's staff informed Plaintiffs that they had spotted the error in the address and would file an Amended Motion to Dismiss with the proper address noticing the Plaintiffs. This did not happen. Rather Meyer GC appeared before the Court on June 29, 2015 at 9:00 a.m. without Plaintiffs present. The Court granted the Motion to Dismiss and signed the Order. Hours later at 1:44 p.m. on June 29, 2015 Meyer GC filed an Amended Motion to Dismiss for lack of Prosecution which noticed the Motion for July 13, 2015 and included the correct address for the Plaintiffs. However this Motion was completely moot as the Court had already signed the Order Dismissing for lack of Prosecution.

> The Plaintiffs filed this Motion to Set Aside under CR 60.02. The Defendants argue that the Plaintiffs are [barred] as they should have filed the Motion under CR 59.05 within ten days to alter or amend and that the Order dismissing is now final. However CR 60.02 allows for a remedy beyond the ten day limit of CR 59.05.
>
> CR 60.02 has several grounds for relief including two that could be applicable in this case. CR 60.02(f) allows for relief for "any other reason of an extraordinary nature justifying relief." CR 60.02(d) allows for the setting aside of an order for fraud affecting the proceedings. "Fraud affecting the proceedings" relates to extrinsic fraud which covers "fraudulent conduct outside of the trial which is practiced upon the court, or upon the defeated party, in such a manner that he is prevented from appearing or presenting fully or fairly his side of the case." McMurry v. McMurry, 957 S.W.2d 731 (Ky. App. 1997).
>
> Meyer GC told the Plaintiffs they would re-notice the Motion to Dismiss and correct the Plaintiffs' address in the notice. But they did not. Plaintiffs relied on this statement in failing to appear for the Court's June 29, 2015 Motion Hour. The Court finds Defendant Meyer GC's conduct deprived the Plaintiffs of an opportunity to appear and present their side of the case to the Court. Such conduct justifies relief under CR 60.02(d).
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> Additionally, the Court finds failing to provide proper notice of the Motion to Dismiss would be appropriate grounds to set aside the Order under CR 60.02(f). Due process requires notice and a right to be heard. Boddie v. Connecticut, 401 U.S. 371 (1971). Filing an amended motion after the motion had already been granted did not provide the Plaintiffs with notice.

Accordingly, the circuit court set aside the July 10, 2015, order of dismissal.

Meyer GC and Hoskins sought clarification of the circuit court's order. Meyer GC's notice addressed the fraud element, while the Hoskinses' motion addressed whether the court ever intended: 1) to dismiss Zappos in the original order; and 2) for the entire case to proceed against all the defendants in its August 20th order. On November 2, 2015, the circuit court entered an order clarifying its prior order and confirming that the entire order of dismissal had been set aside.

Following this ruling, the case proceeded, with the Hoskinses filing a first amended complaint and the parties filing their respective motions for summary judgment or partial summary judgment. Eventually, the case came down to the Hoskinses' claims against Zappos and its employees. While Zappos had previously argued it was entitled to summary judgment based on up-the-ladder immunity, its new counsel represented to the circuit court that it was no longer relying on that argument. Nevertheless, by order entered February 22, 2017, the circuit court granted summary judgment to Zappos and its employees on the basis that they were immune from civil tort liability by virtue of the Workers' Compensation Act and the doctrine of up-the-ladder immunity. The circuit court explained as follows:

> The Plaintiffs concede [John] Hoskins received workers' compensation benefits from US Trade[s] for the injuries he incurred when he fell from the Zappos mezzanine on September 7, 2010. The Zappos Defendants submit

> satisfaction of [John] Hoskins' workers' compensation claim extinguished any an all tort liability on behalf of Zappos or Dematic Corp., or any individual employee thereof. The Court agrees.
>
> It is undisputed [John] Hoskins was present at [] Zappos as a temporary employee staffed by US Trades and hired by Dematic Corp. to [perform] electrical work essential to constructing a conveyor belt for Zappos. As a high-volume distribution center, the construction, maintenance, and replacement of conveyor belts is a "regular and recurrent" part of Zappos' business. Therefore, the Court finds Zappos was an 'employer' of Dematic Corp. employees, including temporary employees, for the purposes of the Workers' Compensation Act. Zappos is entitled to 'Up the Ladder Immunity' for any [and] all claims arising from the Plaintiff's September 7, 2010 fall. Hoskins having received worker's compensation benefits for the specific injuries claimed, the Court find the Zappos Defendants are entitled to Judgment as a matter of law.
>
> This consolidated appeal followed.

II. PROCEDURAL DEFAULT

Before we address the merits of the appeal, we must first consider Zappos's argument that the Hoskinses are barred from any appeal because they brought an improper CR 60.02 motion. Zappos maintains that the Hoskinses forfeited their right to CR 60.02 relief by failing to move to alter, amend or vacate under CR 59.05—despite having clear notice from the lower court (and the Civil Rules) that their time was running. The Hoskinses argue that their failure to seek relief via CR 59.05 did not foreclose their ability to seek relief under CR 60.02.

Zappos does not cite any civil authority to support its position. It relies on criminal cases applying the doctrine of procedural default to CR 60.02 motions when relief was sought or could have been sought under RCr[6] 11.42. For example, Zappos cites to the Kentucky Supreme Court's decision in in *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014), a criminal procedural default case. Foley was sentenced to death following his convictions for murder. His convictions and sentence were affirmed by the Kentucky Supreme Court on direct appeal in 1996. Thereafter, he sought post-conviction relief pursuant to RCr 11.42. His request was denied by the trial court. The Kentucky Supreme Court affirmed the denial in 2000. Foley again failed to obtain relief in his federal habeas corpus proceedings. He then proceeded to file a series of CR 60.02 motions with the trial court, the last of which was filed on February 21, 2013. Therein, Foley relied on a report recently prepared by John Nixon, a forensic expert on firearms and ballistics, concluding that the available evidence supported Foley's version of events and, correspondingly, contradicted the Commonwealth's theory. The Supreme Court cited the extraordinary delay between Foley's conviction and his most recent motion. It also noted that in criminal cases, post-conviction motions should not be used to litigate matters that could have been pursued on direct appeal

[6] Kentucky Rules of Criminal Procedure.

or by way of a RCr 11.42 motion. Nevertheless, the Court reviewed Foley's appeal on its merits.

While it is true that the Hoskinses could have moved for relief under CR 59.05 nothing in our case law suggests that the only avenue to seek relief from a CR 41.02 dismissal is by way of CR 59.05. If the time limit of CR 59.05 has expired, a litigant can seek relief through CR 60.02. However, as we have previously recognized, a litigant seeking relief under CR 60.02 is subject to a higher burden. The circuit court applied CR 60.02's specific, more rigid requirements and determined relief was appropriate in this instance. In doing so, it acted within the time periods contained within CR 60.02. Even though the circuit court may not have possessed particular jurisdiction to alter, vacate or amend under CR 59.05, nothing stripped the circuit court of jurisdiction to rule on a CR 60.02 motion, which has its own time limits. *See Arnett v. Kennard*, 580 S.W.2d 495, 497 (Ky. 1979). Clearly, the circuit court had both particular case and subject matter jurisdiction to rule on the Hoskinses' motion. Likewise, we have jurisdiction to consider the instant appeal.[7]

While Zappos may disagree with the circuit court's decision to grant relief under CR 60.02, it has not demonstrated the circuit court abused its

[7] The Court will issue a separate order denying Zappos's motion to dismiss this consolidated appeal for lack of jurisdiction.

discretion in doing so. The circuit court determined that opposing counsel's failure to properly serve its motion and its misrepresentation that an amended motion would be filed resulted in the entry of the original dismissal order. The record supports the circuit court's findings in this regard.

III. UP-THE-LADDER IMMUNITY

The Hoskinses' first argument is that the circuit court erred in basing its dismissal on up-the-ladder immunity because Zappos's new counsel stated before the circuit court that he did not believe up-the-ladder applied in this case based on the type of project John was working on at the time of his injury. Zappos's arguments before the circuit court were inconsistent at best. However, even though Zappos stated that its second motion for summary judgment was not based on up-the-ladder immunity, and its new counsel expressed doubt as to the viability of such an argument, the first motion for summary judgment, which had not been ruled on by the circuit court, relied on that argument and was pending before the circuit court. There was no formal filing with the circuit court withdrawing that motion. And, there was no factual admission made by Zappos that would have precluded the application of up-the-ladder immunity. As such, we cannot agree with the Hoskinses that Zappos conceded the issue in a way that would preclude the circuit court from taking it up.

We now turn to the circuit courts' conclusion that Zappos is entitled to up-the-ladder immunity based on the Workers' Compensation Act. The doctrine of up-the-ladder immunity derives from KRS 342.690(1) and KRS 342.610. By virtue of these two sections, "[a]n entity 'up-the-ladder' from the injured employee that meets all the requirements of KRS 342.610(2) is entitled to immunity under KRS 342.690 and has no liability to the injured employee of the subcontractor." *Pennington v. Jenkins-Essex Const., Inc.*, 238 S.W.3d 660, 663 (Ky. App. 2006).

KRS 342.690(a) provides in relevant part that:

> 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, his legal representative, husband or wife, parents, dependents, next of kin, 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. . . . The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier, provided the exemption from liability given an employee, officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.

(Emphasis added.) KRS 342.610(2) defines a "contractor" to include a person who contracts 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."

"[I]mmunity pursuant to the exclusivity provision of the Workers' Compensation Act is an affirmative defense[.]" *Pennington*, 238 S.W.3d at 663-64. The party claiming the defense bears the burden of proof. *Id.* "Even when the underlying facts are undisputed, a conclusion that a defendant is entitled to judgment as a matter of law must be supported with substantial evidence that a defendant was the injured worker's statutory employer under a correct interpretation of KRS 342.610(2)(b)." *General Electric Co. v. Cain*, 236 S.W.3d 579, 585 (Ky. 2007).

Whether Zappos is entitled to up-the-ladder immunity in this instance depends on whether Zappos presented sufficient proof that the work John was performing was a regular or recurrent part of Zappos's trade or business. Work is "regular or recurrent" if it is either: (1) performed with some frequency by the business, or (2) is the type that the business would "normally perform or be expected to perform with employees." *Id*. at 588. "Employees of contractors hired to perform major or specialized demolition, construction, or renovation projects generally are not a premises owner's statutory employees unless the owner or the

owners of similar businesses would normally expect or be expected to handle such projects with employees." *Id.*

In finding that Zappos was entitled to rely on the doctrine of up-the-ladder immunity, the circuit court determined that "construction, maintenance, and replacement of conveyor belts" is a regular or recurrent part of Zappos's business. The circuit court, however, did not indicate what portion of the record it based this conclusion on. In fact, the record is very limited regarding the nature of Zappos's business in relation to the work John was performing at the time he was injured.

John testified that the work he was doing at the time he was injured involved wiring a new conveyor system with electricity. This was in conjunction with the expansion of the facility and the construction of a new conveyor system. There was no testimony that he was merely servicing or maintaining an existing conveyor such as replacing a belt.

With respect to Zappos, the record contains only the testimony of one corporate representative for Zappos, Leah Crutcher. Ms. Crutcher testified that Zappos's Shepherdsville, Kentucky, location served as a merchandise warehouse. Personnel at the facility received customer orders and then shipped out the merchandise. When asked whether "construction" was part of Zappos's business, Ms. Crutcher indicated that "there was construction going on at that time, yes." She explained that the Zappos was expanding its Shepherdsville location into an

open area and adding conveyors and mezzanines. Ms. Crutcher also testified that even though Zappos has a maintenance department, it would not have used its own electricians to install a new conveyor system for this expansion. Aside from some testimony that Zappos and Amazon (an affiliate company) contracted for expansions at other locations, there was no testimony regarding the frequency or nature of the project at the Shepherdsville location.

Certainly, it would be reasonable to conclude that changing conveyor belts and maintaining a conveyor system were recurrent or regular parts of Zappos's business. However, this is not the work John was hired to do. John was hired to wire and assist in installing an entirely new system as part of an expansion project.[8] Zappos failed to adequately demonstrate that this type of work was a regular or recurrent part of its business. Accordingly, we hold that the circuit court erred in dismissing the Hoskinses' claims on the basis of qualified immunity.

IV. CONCLUSION

For the reasons set forth above, we reverse the Bullitt Circuit Court's dismissal of the Hoskinses' complaint on the basis of immunity and remand for further proceedings, including consideration of the arguments set forth by Zappos in its second motion for summary judgment, which the circuit court did not rule on.

[8] Large scale, costly and time-consuming expansion and installation projects are often not deemed to be regular or recurrent. *See Smith v. North American Stainless, L.P.*, 158 F. App'x 699, 707 (6th Cir. 2005); *Gesler v. Ford Motor Co.*, 185 F. Supp. 2d 724, 728 (W.D. Ky. 2001).

THOMPSON, K., JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS AND DOES NOT FILE SEPARATE OPINION.

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