

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1774

JOSE CANTU

VERSUS

THE SHAW GROUP, INC., PLAINS ALL AMERICAN PIPELINE, L.P.
AND ENTERGY LOUISIANA, LLC

DATE OF JUDGMENT: MAY - 3 2010

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 563483, DIV. E, SEC. 23, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILLIAM A. MORVANT, JUDGE

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Plains Marketing, L.P. and Shaw
Constructors, Inc.

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Disposition: AFFIRMED.

Parro, J., concurs.
McDonal, J., concurs.

KUHN, J.

Plaintiff-appellant, Jose Cantu, appeals the trial court's judgment, which grants summary judgment and dismisses his tort claims against defendants-appellees, Plains Marketing, L.P. (Plains) and Shaw Constructors, Inc. (Shaw)¹ based on a finding that these defendants are his statutory employers. We affirm.

PROCEDURAL BACKGROUND

According to Cantu's affidavit, he was working as an installer/helper at Plains' St. James Parish terminal facility. As Cantu installed cable dividers on a cable tray, the dividers came into contact with low-lying power lines causing him to suffer electrical injuries and burns to his entire body. He filed this lawsuit naming Plains and Shaw among the defendants.²

The record establishes that at the time of his employment Cantu was the direct employee of Ardent Services, LLC (Ardent), which had entered into a subcontract with Shaw for electrical and instrumentation work at the St. James Crude Oil Storage Facility owned by Plains. And Shaw was under contract with Plains to perform construction services at the facility.

Plains and Shaw filed a joint motion for summary judgment averring entitlement to statutory immunity in tort pursuant La. R.S. 23:1032 and 1061. After a hearing, the trial court granted their motion and dismissed Plains and Shaw from Cantu's lawsuit. This appeal followed.

¹ Although his original petition misidentifies these parties, Cantu's supplemental and amending petitions ultimately name Plains and Shaw as the correct defendants.

² In addition, Cantu sued Entergy Louisiana, LLC (identified as Entergy of Louisiana, Inc., in his petition and supplemental and amending petitions) for, among other things, allegedly allowing a high-voltage power line to sag dangerously low.

DISCUSSION

The doctrine of “statutory employer,” codified in La. R.S. 23:1061, was amended in 1997 to provide that, except in the two-contract situation set forth in La. R.S. 23:1061 A(2), a statutory employer relationship “shall not exist ... unless there is a written contract between the principal and a contractor ... which recognizes the principal as a statutory employer.” La. R.S. 23:1061 A(3). It further provides that when there is such a written contractual recognition of the relationship, there shall be a rebuttable presumption of a statutory employer relationship between the principal and the contractor's employees that may only be overcome by showing the work performed is not an integral part of or essential to the ability of the principal to generate that principal's goods, products, or services. La. R.S. 23:1061 A(3). An employer seeking to avail itself of tort immunity bears the burden of proving its entitlement to immunity. Furthermore, immunity statutes must be strictly construed against the party claiming the immunity. *Fleming v. JE Merit Constructors, Inc.*, 2007-0926, p. 8 (La. App. 1st Cir. 3/19/08), 985 So.2d 141, 145-46. The ultimate determination of whether a principal is a statutory employer entitled to immunity is a question of law. *See Jackson v. St. Paul Ins. Co.*, 2004-0026, p. 7 (La. App. 1st Cir. 12/17/04), 897 So.2d 684, 688, *writ denied*, 2005-0156 (La. 3/24/05), 896 So.2d 1042.

Insofar as Plains' status as a statutory employer, Cantu first challenges the written contractual relationship between Plains and Shaw. He claims the contractual provisions of the Plains-Shaw contract establish that “in effect ... Plains will not be liable for the payment of worker's compensation benefits” and that “[t]he fact that Plains is now attempting to hide under the statutory immunity

statute, while contracting not to pay worker's compensation benefits is clearly contrary to [La.] R.S. 23:1061."

Article 6.3 of the contract between Plains and Shaw states in relevant part:

FOR PURPOSES OF THE LOUISIANA WORKER'S COMPENSATION LAW ... OWNER [Plains] AND CONTRACTOR [Shaw] AGREE THAT THE WORK PERFORMED BY CONTRACTOR AND ITS EMPLOYEES PURSUANT TO THIS CONTRACT ARE AN INTEGRAL PART OF AND ARE ESSENTIAL TO THE ABILITY OF THE OWNER TO GENERATE OWNER'S GOODS, PRODUCTS, AND SERVICES, AND THAT CONTRACTOR'S WORK AND SERVICES SHALL BE CONSIDERED A PART OF OWNER'S TRADE, BUSINESS, AND OCCUPATION FOR PURPOSES OF La. R.S. 23:1061(A)(1). FURTHERMORE OWNER AND CONTRACTOR AGREE THAT THE OWNER IS THE PRINCIPAL OR STATUTORY EMPLOYER OF CONTRACTOR'S EMPLOYEES FOR PURPOSES OF La. R.S. 23:1061(A) ONLY. IRRESPECTIVE OF OWNER'S STATUS EITHER AS THE STATUTORY EMPLOYER OR THE SPECIAL EMPLOYER (AS DEFINED IN La. R.S. [23:]1031(C)) OF CONTRACTOR'S EMPLOYEES, AND REGARDLESS OF ANY OTHER RELATIONSHIP OR ALLEGED RELATIONSHIP BETWEEN THE OWNER AND CONTRACTOR'S EMPLOYEES, CONTRACTOR SHALL BE AND REMAIN AT ALL TIMES PRIMARILY RESPONSIBLE FOR THE PAYMENT OF LOUISIANA WORKER'S COMPENSATION BENEFITS TO ITS EMPLOYEES, AND NEITHER CONTRACTOR NOR ITS UNDERWRITER SHALL BE ENTITLED TO SEEK CONTRIBUTION FOR ANY SUCH PAYMENTS FROM OWNER.

According to H. Alston Johnson III, "workers' Compensation and Practice,"

13 Louisiana Civil Law Treatise § 129, at 261 (4th ed. 2002):

If the principal (or principal contractor) is subjected to liability he is entitled to indemnity from the contractor (or sub-contractor) who directly employed the claimant; and if there is more than one intermediary contractor in the chain of employment, he may have indemnity against them all on a solidary basis. Each intermediary contractor in turn is entitled to indemnity against the sub-contractor operating under him, with the objective of shifting the loss ultimately to the claimant's immediate payroll employer. All parties other than such employer merely lend their solvency to the employee's claim.

(Footnotes omitted.)

Thus, the Plains-Shaw contract simply iterated that which otherwise occurs by operation of law under La. R.S. 23:1061. Accordingly, we find no error in the trial court's conclusion that under the Plains-Shaw contract, Plains is Cantu's statutory employer and is entitled to tort immunity.³

Cantu next challenges the contract between Ardent and Shaw as insufficient to support a finding of statutory employer status in favor of Shaw or Plains. The subcontract between Ardent and Shaw states in relevant part:

Company [Shaw] and Subcontractor [Ardent] agree that Owner [Plains] and Company are designated as the statutory employer of Subcontractor's direct and statutory employees, pursuant to La. R.S. 23:1061 and acknowledge that the *services* required of Subcontractor and its direct and statutory employees pursuant to this Subcontract are an integral part of and essential to Owner's and Company's ability to execute the Project. (Emphasis added.)

Cantu notes that for statutory employer immunity from tort to apply, La. R.S. 23:1061 requires that the work undertaken must be considered part of the principal's trade, business, or occupation if it is an integral part of or essential to the ability of the principal to generate that principal's "*goods, products, or services.*" Thus, he asserts that because the Ardent-Shaw subcontract states only that the *services* are an integral part of and essential to Plains' and Shaw's ability to execute the project -- and not the goods and products as well -- it fails to strictly adhere to the statutory requirements and, therefore, does not support either defendant's entitlement to immunity. In making this assertion, Cantu does not suggest that the work undertaken was used to generate Plains' goods or products

³ Unlike the contractual provisions at issue in *Prejean v. Maintenance Enterprises, Inc.*, 2008-0364, pp. 13-14 (La. App. 4th Cir. 3/25/09), 8 So.3d 766, 774-75, *writ denied*, 2009-0892 (La. 6/26/09), 11 So.3d 496, the Plains-Shaw contract does not limit payment of workers' compensation benefits to the injured employee only if his employer is unable to pay but rather states that as between the owner and the employer ultimate liability for workers' compensation payments is borne by the employer and not the owner.

rather than its services; he merely contends that the language of the contract must exactly track that of the statute and, having failed to do so (by omitting the words “goods [and] products”), the contract must be construed to disallow statutory employer status in favor of Shaw.

Unless it is otherwise clearly indicated by the context, whenever the term “or” is used in the Revised Statutes, it is used in the disjunctive. La. R.S. 1:9. Thus, by employing one of the disjunctive types of generated works by the principal listed in La. R.S. 23:1061, the Ardent-Shaw subcontract conforms to the statutory requirements. The trial court correctly rejected this assertion as a basis for disallowing statutory employer status for Plains and Shaw.

Since the subcontract recognizes a statutory employer relationship of Plains and Shaw with Ardent’s direct and statutory employees, a rebuttable presumption of a statutory employer relationship between Plains and Shaw and Ardent’s employees attached. *See Fleming*, 2007-0926 at p. 12, 985 So.2d at 147-48. It was, therefore, incumbent on Cantu to show that the work he performed was not an integral part of or essential to the ability of Plains (via Shaw) to generate Plains’ goods, products, or services in order to rebut the presumption of statutory employer status in favor of Plains and Shaw.

In his attempt to overcome the presumption, Cantu offered his affidavit in which he attests the following.

On [the day of the accident], I was sent to assist other workers to help install screws to reposition drivers in cable trays which had not been installed properly. At the time of the accident I was working as an installer/helper.... The dividers had been positioned by either [Plains] or [Shaw]. One of the dividers in the cable trays was turned the wrong way and I was told to flip it over to reposition the driver and when I did it came into contact with an overhead power line supply resulting in electrical shock injury.... The work I was

performing at the time I was injured was not one of my job duties or a part of the work required under the contract between my employer, Ardent, and [Shaw]. I was hired by Ardent to pull cable for light fixtures. Ardent's contract with [Shaw] was for installation of electrical and instrumentation services at the facility. The work I was performing at the time of the accident and which caused my injury was not an integral part of or essential to the ability of either [Plains] or [Shaw] to generate goods, products or services.

Nothing in Cantu's rebuttal evidence shows that repositioning the cable divider was not essential to Plains' ability to generate its goods, products, or services. Thus, having failed to rebut the presumption that Plains and Shaw are his statutory employers, *see Jackson*, 2004-0026 at p. 8, 897 So.2d at 689, defendants are entitled to tort immunity. And the trial court correctly granted summary judgment in favor of Plains and Shaw, dismissing Cantu's claims against them.

DECREE

For these reasons, the trial court's judgment is affirmed by this memorandum opinion issued in compliance La. U.R.C.A. Rule 2-16.1.B. Appeal costs are assessed against plaintiff-appellee, Jose Cantu.

AFFIRMED.