

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1209

LOUISIANA WORKERS' COMPENSATION CORPORATION

VERSUS

LUCIEN J. GAUFF, JR.

Judgment Rendered: JUL 26 2011.

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 559,090

Honorable Timothy E. Kelley, Judge

* * * * *

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDonald, J. dissents and assigns reasons.
Jmm

McCLENDON, J.

This is an appeal from a summary judgment in favor of plaintiff, Louisiana Workers' Compensation Corporation (LWCC), and against the defendant, Lucien J. Gauff, Jr. (Gauff). For the following reasons, we affirm.

LWCC provided workers' compensation insurance to Gauff, a brick mason, through a continuous annual policy bearing number 106661, effective July 1, 2004. The policy was cancelled on July 1, 2006. Following audits of the account, an invoice indicating a final balance due of \$37,419.00 was issued by LWCC on September 11, 2006. On September 11, 2007, LWCC filed suit against Gauff for the \$37,419.00 amount, alleging that he had failed to pay the entire premium owed for the insurance coverage provided. It also claimed a contractual right to reasonable attorney fees and any costs incurred in the collection of any unpaid premium amounts. A motion for an extension of time within which to plead was filed by Gauff on October 15, 2007, and on October 25, 2007, the trial court granted an additional fifteen days within which to file responsive pleadings.

In January 2008, with no further pleadings filed, LWCC filed a motion for preliminary default, which was signed by the trial court on January 14, 2008. Thereafter, on May 29, 2008, Gauff filed an answer, as well as exceptions of no cause of action and of vagueness and ambiguity, but he did not set the exceptions for hearing. On August 12, 2008, LWCC filed a motion to set the exception of no cause of action for hearing, and on December 15, 2008, the exceptions were withdrawn.

On September 10, 2009, LWCC filed its motion for summary judgment, submitting therewith the insurance policy, the premium obligations endorsement, an invoice showing the final balance, a policy summary statement, three affidavits regarding the correctness of the account, one of which included audits of the account, and the application for workers' compensation. Gauff filed an opposition to the motion, contending that he paid all premiums that were due and, therefore, there were genuine issues of material fact, but he filed no countervailing affidavit or other evidence to oppose the motion.

The motion for summary judgment was set to be heard on Monday, November 16, 2009. On the afternoon of Friday, November 13, 2009, Gauff faxed an affidavit to opposing counsel and to the court. However, at the hearing, LWCC indicated that it had not seen the affidavit prior to appearing in court and objected to its admission as untimely, since opposing affidavits are required to be served at least eight days prior to the hearing. See LSA-C.C.P. art. 966B; Louisiana Rules for District Courts, Rule 9.9. The court inquired as to just cause for the failure to follow the procedural rule, and counsel for Gauff stated that he had difficulty in getting in touch with his client. Apparently not considering the response sufficient to constitute just cause, the trial court sustained the objection, and the affidavit was not admitted, although the court allowed it be proffered. Thereafter, a request for continuance was denied. Without a countervailing affidavit and with a determination by the trial court that there was sufficient evidence of its claim, summary judgment was granted. Judgment was signed on December 1, 2009, in favor of LWCC and against Gauff, in the amount of \$37,419.00, together with legal interest, attorney fees, and costs.

Gauff suspensively appealed, alleging two assignments of error: (1) the trial court erred in granting summary judgment in favor of the plaintiff; and (2) the trial court erred in refusing to grant a continuance in this matter.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full-scale trial where there is no genuine factual dispute. **Sanders v. Ashland Oil, Inc.**, 96-1751, p. 5 (La.App. 1 Cir. 6/20/97), 696 So.2d 1031, 1034, writ denied, 97-1911 (La. 10/31/97), 703 So.2d 29. It should only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966B; **Horn v. LaCoste**, 00-0965, p. 5 (La.App. 1 Cir. 6/22/01), 793 So.2d 319, 323, writ denied, 01-2615 (La. 12/14/01), 804 So.2d 633. Courts of appeal review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is

appropriate. **Anglin v. Anglin**, 05-1233, p. 5 (La.App. 1 Cir. 6/9/06), 938 So.2d 766, 769.

In the matter before us, the trial court, considering the evidence before it, found that LWCC was entitled to judgment as a matter of law. It did not consider the affidavit of Gauff, which, after questioning to determine whether good cause existed for the untimely filing, it found was inadmissible for failure to comply with the eight-day rule. The court actually questioned counsel regarding the delay:

The Court: It is supposed to be eight days. Why was it not submitted eight days ahead of time? Is there any good cause for not –

Counsel for Gauff: Judge, I had a difficult time getting in touch with my client. He's old, seventy-three. He does have a cellphone, but he doesn't check it. I actually went to his house and dropped a copy of their motion off about a week and a half, two weeks ago. I kept calling and finally got him to come –

The Court: I hope it was more than a week and a half ago, because eight days is almost a week and a half ago.

Counsel for Gauff: Well, one week and a day, yeah. I tried to get in touch with him before that. It was hard to get in touch with him, but I did.¹

We find that the trial court did not abuse its discretion in refusing to admit the affidavit into evidence. See **Guillory v. Chapman**, 10-1370 (La. 9/24/10), 44 So.3d 272 (per curiam). Accordingly, based on our *de novo* review and considering the properly submitted evidence, we find no error in the summary judgment in LWCC's favor.

However, Gauff also argues that the trial court erred in denying his request for a continuance. A trial court has discretion to grant a continuance if the mover shows good grounds therefor. See LSA-C.C.P. art. 1601. A trial court's ruling regarding a continuance will not be disturbed on appeal in the absence of a clear showing of abuse of discretion. Appellate courts interfere in matters such as control of a trial court's docket, case management, and determining whether a motion for continuance should be granted only with reluctance and in extreme cases. See **Bozarth v. State of Louisiana LSU Medical Center**, 09-1393, p. 6 (La.App. 1 Cir. 02/12/10), 35 So.3d

¹ The record reflects that this line of questioning by the court continued for some time.

316, 321; **Perkins v. Willie**, 01-0821, pp. 2-3 (La.App. 1 Cir. 2/27/02), 818 So.2d 167, 169.

In requesting the continuance, the following exchange took place:

Counsel for Gauff: And, Judge, maybe I can move for a continuance of the actual motion so we can get, you know, get an – I just – he’s very adamant that he paid what he was supposed to pay, and I wouldn’t want it not to be considered.

The Court: Well, I understand. I just – you know, the problem is we’ve received probably two or three first circuit and supreme court rulings just in the last year stressing that the eight-day rule is to be enforced. So while a couple years ago I would have said, you know, let’s put this on another day, let’s see what ya’ll figure out, what your discovery needs to be, **you’ve known for a while**. You didn’t have the affidavit into the court within the proper time. He is entitled to the benefit of a procedural law that’s afforded him. (Emphasis added.)

Thus, Gauff’s only stated reason for requesting the continuance was to avoid the eight-day rule and allow the re-filing of his affidavit. Despite some of the comments made by the trial court, the court clearly considered whether just cause existed for the late filing of the affidavit and considered counsel’s alleged difficulties in getting in touch with his client. The motion was pending for over two months, and a continuance would have been prejudicial to LWCC. We cannot say that the trial court abused its discretion.

For the above reasons, the December 1, 2009 judgment of the trial court is affirmed. Costs of this appeal are assessed against Lucien J. Gauff, Jr.

AFFIRMED.

LOUISIANA WORKERS'
COMPENSATION CORPORATION

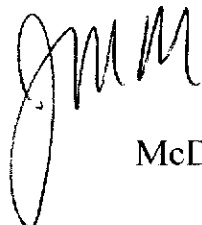
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McDONALD, J., DISSENTING.

The trial court found that LWCC was entitled to judgment as a matter of law. It did not consider the affidavit of Gauff, finding that it was not admitted in compliance with the eight-day rule. Gauff argues that the evidence was insufficient to grant the motion for summary judgment. It is important to note that he does not challenge or assign as error the failure of the trial judge to consider his affidavit that was filed on the afternoon of the last working day prior to the hearing, well out of compliance with the eight-day rule. Rather, he suggests that there are too many genuine issues of material fact such that the motion should have been denied. I agree with the majority that the trial court did not abuse its discretion in refusing to admit the affidavit into evidence. Considering there is no evidence in opposition to the motion to summary judgment I agree that there was no error in granting the motion for summary judgment.

Gauff's other assignment of error is that the trial court erred in denying his request for a continuance. Courts are given great latitude in controlling their docket and the decisions affecting their docket. The failure to grant a motion for a continuance is well within the vast discretion afforded the trial judge.¹ Ostensibly, Gauff sought the continuance so he could cure his failure to file his opposition at least eight days prior to the hearing. Even though he does not challenge the failure

¹ *Bozarth v. State of Louisiana LSU Medical Center*, 35 So.3d 316, 2009-1393 (La. App. 1 Cir. 02/12/10); *State v. Ford*, 24 So.3d 249, 2009-0392 (La. App. 4 Cir. 10/21/09).

to consider his offerings, Gauff's motion for a continuance is designed to remedy this situation.

While the trial court is granted great latitude in docket-control, including granting or not granting a continuance, it still must exercise this discretion in one way or the other. In this case, it appears that the trial court was of the opinion that it lacked any discretion, and was required to deny the filing of the defendant's affidavit and to deny a continuance. In its oral reasons, the court stated:

[T]he problem is we've received probably two or three first circuit and supreme court rulings just in the last year stressing that the eight-day rule is to be enforced. So while a couple years ago I would have said, you know, let's put this on another day, let's see what ya'll figure out, what your discovery needs to be...(emphasis added)

It is unclear whether the trial court would have granted a continuance in this matter if it thought it was within its discretion to do so. It is an erroneous understanding of the law for a trial court to believe that by requiring affidavits to be submitted timely, as required by the code of civil procedure rule, it was prohibited from granting a continuance. For these reasons I respectfully dissent and would remand the matter for further consideration by the trial court.