NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 0398

BRIAN REDMOND

VERSUS

SUPERIOR SHIPYARD AND FABRICATION, INC.
AND XYZ INSURANCE COMPANY

Judgment Rendered: November 1, 2013

Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche, Louisiana
Docket Number 119091

Honorable F. Hugh Larose, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH AND CRAIN, JJ.

WHIPPLE, C.J.

Plaintiff appeals the trial court's judgment granting defendant's motion for summary judgment and dismissing plaintiff's tort suit with prejudice on the basis that plaintiff was defendant's borrowed employee whose exclusive remedy is in workers' compensation. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Superior Shipyard and Fabrication, Inc. (Superior Shipyard), defendant herein, operates a shipyard in Golden Meadow, Louisiana. Periodically, Superior Shipyard needed additional personnel to perform its shipbuilding and ship-repairing operations, and contracted with Global Oilfield Contractors, LLC (Global) to provide needed personnel.

In an effort to supply laborers to its customers, Global utilized the Terrebonne Parish Work Release Program, a program whereby inmates are allowed to participate in specific outside employment while still legally incarcerated. Thus, when Superior Shipyard requested that Global provide it with additional labor in December 2010, Global arranged with the Terrebonne Parish Sheriff's Office to assign plaintiff, Brian Redmond, to Superior Shipyard to perform welding and other needed services. Accordingly, Global hired Redmond on December 4, 2010, and assigned him to Superior Shipyard, where he began working on approximately December 6, 2010. On December 16, 2010, only ten days after his employment began, Redmond was purportedly injured at Superior Shipyard's Golden Meadow facility when the scaffolding on which he was standing to perform his welding duties broke, causing him to fall.

Thereafter, Redmond filed the instant tort suit against Superior Shipyard, contending that the accident and his resulting injuries were caused

by the negligence of Superior Shipyard and its employees. Superior Shipyard answered the suit and asserted various affirmative defenses, including the defense that as a borrowed employee at the time of the injury, Redmond's remedies were limited to workers' compensation benefits.

Superior Shipyard later filed a motion for summary judgment, contending that it was entitled to judgment as a matter of law dismissing Redmond's claims on the basis that it was Redmond's borrowing employer and, thus, immune from tort liability. Following a hearing on the motion, the trial court found that Superior Shipyard had established that there was no issue of material fact, that Redmond was Superior Shipyard's borrowed employee and, thus, that Redmond's right of recovery was limited to workers' compensation or longshoremen benefits. From the trial court's December 5, 2012 judgment granting Superior Shipyard's motion for summary judgment and dismissing his suit with prejudice, Redmond now appeals, contending that the trial court erred in determining that there was no issue of fact as to whether he was a borrowed employee.

BURDEN OF PROOF AND STANDARD OF REVIEW FOR SUMMARY JUDGMENT

A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. LSA-C.C.P. art. 966(A)(2).

The mover bears the burden of proving that he is entitled to summary judgment. LSA-C.C.P. art. 966(C)(2). However, if the mover will not bear

the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. LSA-C.C.P. art. 966(C)(2). If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. LSA-C.C.P. art. 966(C)(2). Once the mover has put forth supporting proof through affidavits or otherwise, the adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. LSA-C.C.P. art. 967(B).

If, on the other hand, the mover will bear the burden of proof at trial, that party must support his motion with credible evidence that would entitle him to a directed verdict if not controverted at trial. Hines v. Garrett, 2004-0806 (La. 6/25/04), 876 So. 2d 764, 766. Such an affirmative showing will then shift the burden of production to the party opposing the motion, requiring the opposing party either to produce evidentiary materials that demonstrate the existence of a genuine issue for trial or to submit an affidavit requesting additional time for discovery. Hines, 876 So. 2d at 766-767.

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. Hines, 876 So. 2d at 765. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the

motion, and all doubt must be resolved in the opponent's favor. Willis v. Medders, 2000-2507 (La. 12/8/00), 775 So. 2d 1049, 1050 (per curiam).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. East Tangipahoa Development Company, LLC v. Bedico Junction, LLC, 2008-1262 (La. App. 1st Cir. 12/23/08), 5 So. 3d 238, 243-244, writ denied, 2009-0166 (La. 3/27/09), 5 So. 3d 146.

BORROWED EMPLOYEE DEFENSE

In the instant case, the issue on appeal is whether there is any genuine issue of material fact concerning Redmond's status as a borrowed servant of Superior Shipyard. If Redmond is a borrowed servant, then his remedy is exclusively in workers' compensation, under either the Longshore and Harbor Workers' Compensation Act (LHWCA) or Louisiana workers' compensation law. See 33 U.S.C.A. §905(A) and LSA-R.S. 23:1032(A)(1)(a); Griffin v. Wickes Lumber Company, 2002-0294 (La. App. 1st Cir. 12/20/02), 840 So. 2d 591, 594, 597, writ denied, 2003-1338 (La. 9/19/03), 853 So. 2d 640; Ledet v. Quality Shipyards, Inc., 615 So. 2d 990, 992; Hall v. Equitable Shipyard, Inc., 95-1754 (La. App. 4th Cir. 2/29/96), 670 So. 2d 543, 545.

The issue of whether a borrowed servant relationship existed is a matter of law for the court to determine. Griffin, 840 So. 2d at 596; Ledet, 615 So. 2d at 992. While there is no fixed test, the factors to be considered in determining the existence of a borrowed employee relationship include: right of control; selection of employees; payment of wages; power of dismissal; relinquishment of control by the general employer; which employer's work was being performed at the time in question; the existence

of an agreement, either implied or explicit, between the borrowing and lending employer; furnishing of instructions, tools and place for the performance of the work; the length of employment; and the employee's acquiescence in a new work situation. Mejia v. Boykin Brothers, Inc., 2010-0118 (La. App. 1st Cir. 9/10/10), 52 So. 3d 82, 84-85; Foreman v. Danos and Curole Marine Contractors, Inc., 97-2038 (La. App. 1st Cir. 9/25/98), 722 So. 2d 1, 4-5, writ denied, 98-2703 (La. 12/18/98), 734 So. 2d 637; Ledet, 615 So. 2d at 992.

Tort immunity under the borrowed servant doctrine is an affirmative defense within the context of a tort action. Billeaud v. Poledore, 603 So. 2d 754, 755 (La. App. 1st Cir.), writ denied, 608 So. 2d 176 (La. 1992); Brumbaugh v. Marathon Oil Company, 507 So. 2d 872, 874-875 (La. App. 5th Cir.), writ denied, 508 So. 2d 824 (La. 1987). Thus, as the party asserting the affirmative defense, Superior Shipyard bore the burden of proof in establishing tort immunity on the basis of Redmond's status as its borrowed employee. See Billeaud, 603 So. 2d at 755-756, and Brumbaugh, 507 So. 2d at 876; also see generally Barabay Property Holding Corporation v. Boh Brothers Construction Co., L.L.C., 2007-2005 (La. App. 1st Cir. 5/2/08), 991 So. 2d 74, 79, writ granted, 2008-1185 (La. 10/10/08), 993 So. 2d 1270, writ denied as improvidently granted, 2008-1185 (La. 3/17/09), 6 So. 3d 172 (tort immunity is an affirmative defense for which the one asserting the defense has the burden of proof). Accordingly, to establish its entitlement to summary judgment, Superior Shipyard was required to support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial. See Hines, 876 So. 2d at 766.

With regard to the right of control and the relinquishment of control by Global, the evidence of record demonstrates that each day, a Global

employee would transport Redmond from the prison to the Superior Shipyard's facility and back to prison again at the end of his work shift. However, once at the Superior Shipyard's facility, Redmond attended a daily work schedule meeting conducted by Superior Shipyard after which he would receive his work assignment for the day from the Superior Shipyard foreman.

Moreover, while a Global employee who may have been in a supervisory position was present at the Superior Shipyard facility, Redmond's work was in fact supervised by the Superior Shipyard foreman, not the Global employee.[1] At no time did any Global employee ever direct Redmond's activities at the Superior Shipyard's facility. Compare Mejia, 52 So. 3d at 85. Indeed, Redmond acknowledged that his contact with Global consisted of transporting him to and from the worksite and delivering his paycheck. Compare Hall, 670 So. 2d at 546.

The work Griffin performed was Superior Shipyard's work, and not Global's. Redmond worked only at Superior Shipyard's facility and never worked at any other place while employed with Global. Compare Ledet, 615 So. 2d at 993. Redmond never went to Global's office for any reason. All instructions given to Redmond were furnished by the Superior Shipyard foreman, who was also the individual Redmond sought out if he encountered a problem or needed anything while on the jobsite. Additionally, except for the personal equipment that Redmond himself supplied, such as a welding lead, chipping hammer, gloves, welding shield, jacket, wrench, and screwdriver, Superior Shipyard supplied all other equipment and machinery needed to perform the job. Global supplied no tools or equipment.

[1]With regard to the Global employee on site, Redmond testified that he thought the Global employee was a "supervisor or something." However, he was not sure of the Global employee's title because Redmond "hadn't seen too much of him."

Regarding power of selection and dismissal, although Redmond was hired by Global, he was selected for the purpose of working at the Superior Shipyard facility, and Superior Shipyard acquiesced in the assignment. Compare Griffin, 840 So. 2d at 597. And while Superior Shipyard did not have the power to terminate Redmond's employment with Global, Superior Shipyard did have the authority to terminate Redmond's employment with Global, Superior Shipyard did have the authority to have him removed from its jobsite. The power to terminate an employee's services at a job site is enough to satisfy the power of dismissal factor. Ledet, 615 So. 2d at 994.

In considering the payment of wages to the employee, the determinative consideration in addressing this factor is which company provided the funds to pay Redmond. Ledet, 615 So. 2d at 994; see also Hall, 670 So. 2d at 547. The evidence demonstrates that Redmond clocked in and out at the Superior Shipyard facility on a time card labeled "GOC," for Global Oilfield Contractors. His time card was maintained by Superior Shipyard and then submitted to Global. Global charged Superior Shipyard $24.00 per hour for Redmond's services and then paid Redmond $12.00 per hour out of that sum. Thus, Superior Shipyard provided the funds to pay Redmond. See Mejia, 52 So. 3d at 85, Ledet, 615 So. 2d at 994, and Hall, 670 So. 2d at 547.

Because Redmond was injured only two weeks after he began his employment, the borrowing arrangement had not been lengthy or extending over a considerable period of time. However, Redmond testified that he believed that Superior Shipyard was satisfied with his work and that his assignment there "was going to be permanent." Similarly, representatives of Superior Shipyard and Global attested that, had it not been for the accident, Redmond would have continued to be employed at the Superior Shipyard

facility for as long as his work continued to be satisfactory and his services were needed. Additionally, while he attested that he believed he was working for Global, Redmond acknowledged that he "was okay with" the job assignment to Superior Shipyard and readily agreed that he would have kept performing the job as assigned if he had not been hurt. Thus, he clearly acquiesced in the arrangement.

Finally, turning to the question of whether an agreement existed between the borrowing and lending employer, Global and Superior Shipyard did in fact have a contract for the furnishing of labor, and the contract specifically provided that Global's employees were not the employees of Superior Shipyard. However, the actions of Global and Superior Shipyard were clearly inconsistent with this written agreement. Redmond worked solely at the Superior Shipyard and was instructed and supervised by the Superior Shipyard foreman. Other than actions in transporting Redmond for medical treatment and preparing of the accident report with regard to the accident at issue, Global's contact with Redmond consisted of providing a ride to and from the prison and work and delivery of his paycheck. All elements of the work were directed and controlled by Superior Shipyard.

The parties to a contract cannot automatically prevent a legal status like "borrowed employee" from arising merely by stating in a provision of their contract that it cannot arise. Ledet, 615 So. 2d at 993. Rather, "the reality at the worksite and the parties' actions in carrying out a contract ... can impliedly modify, alter, or waive express contract provisions." Ledet, 615 So. 2d at 993, quoting Melancon v. Amoco Production Co., 834 F.2d 1238, 1245 (5th Cir. 1988). Thus, a summary judgment can be affirmed despite the existence of such a contract clause if all factors other than the

contract overwhelmingly establish the "borrowed employee" status. Ledet, 615 So. 2d at 993.

In the instant case, we find that the evidence presented in support of Superior Shipyard's motion for summary judgment overwhelmingly established that Redmond was its borrowed employee. Thereafter, the burden of production shifted to Redmond, which required him to produce evidentiary materials that demonstrate the existence of a genuine issue for trial as to his status as a borrowed employee. He did not do so. The evidence he submitted in opposition to the motion did not raise any disputed issue of material fact. Compare Ledet, 615 So. 2d at 994. Accordingly, we find no error in the trial court's determination that Superior Shipyard demonstrated its entitlement to judgment in its favor as a matter of law dismissing Redmond's claims against it.

CONCLUSION

For the above and foregoing reasons, the trial court's December 5, 2012 judgment granting Superior Shipyard's motion for summary judgment and dismissing Redmond's suit with prejudice, is hereby affirmed. Costs of this appeal are assessed against Brian Redmond.

AFFIRMED.