NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 0762

BENNY HERNANDEZ

VERSUS

EXCEL CONTRACTORS, INC.

Judgment Rendered: DEC 21 2017

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Docket Number 113,957

Honorable Jessie M. LeBlanc, Judge Presiding

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BEFORE: WHIPPLE, C.J., MCDONALD, AND CHUTZ, JJ.

WHIPPLE, C.J.

This matter is before us on appeal by plaintiff, Benny Hernandez, from a judgment of the trial court granting summary judgment in favor of defendants, SPX Cooling Technologies, Inc., Xcel Erectors, Inc., and James Meidl, dismissing plaintiff's claims with prejudice and maintaining an exception of no cause of action. For the reasons that follow, we dismiss the appeal.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff filed a petition for damages against Excel Contractors, Inc. and its insurer averring that on September 16, 2014, he was employed as a carpenter with ASAP Employment Services, Inc. ("ASAP"), and that while in the course and scope of his employment, he was injured working at CF Industries' plant. According to plaintiff, while working with his crew, an employee of Excel Contractors, who was operating a forklift, moved an object with the forklift, causing the object to collide into plaintiff. Plaintiff averred that as a result of this collision, he sustained injuries to various parts of his body, including his lumbar spine.

Excel Contractors filed a motion for summary judgment on the basis that on the day in question, none of its employees were operating any forklifts at the CF Industries plant. Following a hearing, the trial court granted the motion for summary judgment and dismissed plaintiff's claims against Excel Contractors with prejudice.

In the meantime, plaintiff filed an amending and supplemental petition naming SPX Cooling Technologies, Inc., Xcel Erectors, Inc., CF Industries Nitrogen, LLC, and James Meidl as defendants.[1] In his amending petition, plaintiff averred that an object being moved by the forklift operated by Meidl swung so

[1]The amended petition erroneously identified the forklift operator as "James Merrill" and CF Industries Nitrogen, LLC as "CF Industries, Inc."

close to plaintiff "as to necessitate his rapid movement to escape colliding with the load" and that the near impact caused plaintiff to fall, resulting in injuries to his body. Plaintiff contended that the accident was caused by the negligence of SPX Cooling Technologies, Xcel Erectors, and CF Industries Nitrogen. Plaintiff further averred that Meidl was employed by either SPX Cooling Technologies, Xcel Erectors, and/or CF Industries Nitrogen, and that SPX Cooling Technologies, Excel Erectors, and/or CF Industries Nitrogen, were vicariously liable under the doctrine of *respondeat superior* for the acts of their employee, Meidl. Plaintiff further contended that the defendants knew of the hazards presented by the intentional acts of Meidl and/or the substantial certainty that he would injure persons working at the CF Industries Nitrogen plant because of his "dangerous and reckless behavior" in operating a forklift, but did not prohibit, prevent, or warn of Meidl's actions, and accordingly, the defendants were liable for his intentional acts pursuant to LSA-R.S. 23:1032(B).

CF Industries Nitrogen answered, asserting among other things, the affirmative defense of tort immunity under the Louisiana Workers' Compensation Act ("LWCA"). CF Industries Nitrogen contended that plaintiff's exclusive remedy for any injury occurring while in the course and scope of his employment was under the LWCA, which bars any tort claims, and alternatively, that plaintiff was a statutory employee of CF Industries Nitrogen, which, under the LWCA, renders CF Industries Nitrogen immune from tort liability.

Defendants SPX Cooling Technologies, Xcel Erectors, and Meidl ("defendants") filed a peremptory exception of no cause of action, and in the alternative, a motion for summary judgment, seeking dismissal of plaintiff's claims on the basis that: (1) plaintiff was the statutory employee of SPX Cooling Technologies and co-employee of all Xcel Erectors employees, including Meidl, and thus, the defendants were immune from his negligence claims under the

LWCA; (2) plaintiff was the borrowed employee or special employee of SPX Cooling Technologies and Xcel Erectors and was therefore barred from pursuing negligence claims against those defendants and their employees, including Meidl; and (3) the remedies available to plaintiff were those allowed pursuant to the LWCA as the law does not afford plaintiff a remedy for his allegations of intentional tort.

Following a hearing, the trial court issued reasons for judgment, finding that Xcel Erectors was a wholly owned subsidiary of SPX Cooling Technologies, and that SPX Cooling Technologies was plaintiff's borrowed employer, and was entitled to the exclusive remedy provisions of the LWCA. The trial court further determined that Xcel Erectors's employees were plaintiff's co-employees, who were also immune from negligence claims pursuant to LSA-R.S. 23:1031. In accord with its reasons, on February 22, 2017, the trial court rendered a "FINAL JUDGMENT," granting the motion for summary judgment filed by SPX Cooling Technologies, Xcel Erectors, and Meidl, and dismissing plaintiff's negligence claims against these defendants with prejudice.[2] The judgment further provided that the peremptory exception of no cause of action was moot as to the "statutory employee issue," but the peremptory exception of no cause of action as to plaintiff's intentional tort claims was maintained, and plaintiff was granted thirty days to "amend his pleadings" to "sufficiently plead any intentional torts if he so chooses."

Plaintiff now appeals, contending that the trial court erred in: (1) finding that the service agreement between ASAP and SPX Cooling Technologies was a "contract" within the meaning of LSA-R.S. 23:1032; (2) finding that plaintiff was

[2]Although the pleadings and transcript identified the defendant as "**Xcel** Erectors, Inc.," the judgment referred to Xcel Erectors, Inc. as "**Excel** Erectors, Inc."

a "statutory employee" within the meaning of LSA-R.S. 23:1032; and (3) not allowing plaintiff to conduct "adequate" discovery in this matter.

Appellate Jurisdiction

At the outset, the defendants contend that because plaintiff's the intentional tort claims were not disposed of by the judgment, the summary judgment was granted pursuant to LSA-C.C.P. art. 966(E),[3] and as such, the partial summary judgment required a designation as a final judgment by the trial court pursuant to LSA-C.C.P. art. 1915(B)(1).[4] Defendants also contend that in the absence of such designation, the judgment does not constitute a final judgment for purposes of an immediate appeal. See LSA-C.C.P. arts. 1915(A)(3)[5] and 1915(B)(2).[6]

Although actually raised by the defendants herein, appellate courts have the duty to examine subject matter jurisdiction *sua sponte,* even when the parties do not raise the issue. Malus v. Adair Asset Management, LLC, 2016-0610 (La. App. 1st Cir. 12/22/16), 209 So. 3d 1055, 1059. Pursuant to LSA-C.C.P. art. 2083(A), a final judgment of the district court may be appealed. A judgment that determines

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[3]Louisiana Code of Civil Procedure article 966(E) provides as follows:

> A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case as to that party or parties.

[4]Louisiana Code of Civil Procedure article 1915(B)(1) provides as follows:

> When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories against a party, whether in an original demand, reconventional demand, cross-claim, third-party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

[5]Louisiana Code of Civil Procedure article 1915(A)(3) allows an immediate appeal from a partial summary judgment, without the need for a determination and designation of finality, unless the summary judgment was granted under LSA-C.C.P. art. 966(E).

[6]Louisiana Code of Civil Procedure article 1915(B)(2) provides as follows:

> In the absence of such a determination and designation, any such order or decision shall not constitute a final judgment for the purpose of an immediate appeal and may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

the merits in whole or in part is a final judgment. LSA-C.C.P. art. 1841. However, whether a partial final judgment is immediately appealable is determined by examining the requirements of LSA-C.C.P. art. 1915. See LSA-C.C.P. art. 1911. Accordingly, we must first consider and determine whether this matter is properly before us on appeal.

The February 22, 2017 judgment grants the defendants' motion for summary judgment and dismisses plaintiff's negligence claims against the defendants with prejudice. The judgment then states that the defendants' peremptory exception of no cause of action as to the statutory employee issue is moot. The judgment also maintains the exception of no cause of action as to plaintiff's intentional tort claims, but orders plaintiff to amend his pleadings within thirty days to "sufficiently plead any intentional torts if he so chooses."

A judgment that dismisses a suit as to less than all of the parties is a final judgment for purposes of appeal. LSA-C.C.P. art. 1915(A)(1). However, a summary judgment that is only dispositive of a particular issue, theory of recovery, cause of action, or defense shall not constitute a final judgment unless it is designated as a final judgment after an express determination that there is no just reason for delay. See LSA-C.C.P. arts. 1915(A)(3), 966(E), and 1915(B)(1). In the absence of such a determination and designation, any such order or decision shall not constitute a final judgment for the purpose of an immediate appeal and may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties. LSA-C.C.P. art. 1915(B)(2).

While the judgment herein dismisses plaintiff's **negligence** claims against defendants, it further orders plaintiff to amend his pleadings to sufficiently plead any **intentional tort** claims against these defendants, which precludes the disposition of plaintiff's entire case against defendants, thereby rendering it a partial summary judgment granted under the provisions of LSA-C.C.P. art. 966(E).

Thus, to the extent that the defendants contend that the judgment's failure to dispose of the intentional tort claims against them renders it a partial summary judgment, which requires a designation as a final judgment after an express determination that there is no just reason for delay, the defendants' arguments have merit. See LSA-C.C.P. arts. 1915(A)(3) and 1915(B)(1).

Although the judgment is captioned, "FINAL JUDGMENT," the judgment does not contain a designation that it is a final judgment and designated as such after an express determination that there is no just reason for delay. Given the absence of such a determination and designation in the judgment before us, the judgment does not constitute a final judgment for purposes of an immediate appeal. As such, this court lacks appellate jurisdiction to review the partial summary judgment. See LSA-C.C.P. art. 1915(B)(2); Bosley v. Louisiana Department of Public Safety and Corrections, 2016-1112 (La. App. 1st Cir. 4/20/17)(unpublished opinion).

Moreover, a judgment that grants an exception of no cause of action and allows a period of time for amendment of the petition is not an appealable judgment, because it is not a final judgment nor an interlocutory judgment made expressly appealable by law. See LSA-C.C.P. art. 2083; Barfield v. Tammany Holding Company, 2016-1420 (La. App. 1st Cir. 6/2/17)(unpublished opinion); Schroeder v. Board of Supervisors of Louisiana State University, 540 So. 2d 380, 382 (La. App. 1st Cir. 1989); see also B.G. Mart, Inc. v. Jacobsen Specialty Services, Inc., 2016-675 (La. App. 5th Cir. 2/8/17), 213 So. 3d 1238, 1239; Hughes v. Energy & Marine Underwriters, Inc., 2007-490 (La. App. 5th Cir. 3/11/08), 978 So. 2d 566, 567-568, writ denied, 2008-0957 (La. 8/29/08), 989 So. 2d 100.

Thus, to the extent that the February 22, 2017 judgment maintains defendants' exception of no cause of action and allows a period of time for the plaintiff to amend his petition to sufficiently assert intentional tort claims, it is

neither a final judgment nor an interlocutory judgment that may cause irreparable harm. See Schroeder v. Board of Supervisors of Louisiana State University, 540 So. 2d at 382 (where this court found that a judgment maintaining an exception of no cause of action and allowing a period of time for the plaintiff to amend is neither a final judgment nor an interlocutory judgment where such an order merely permits an amendment within the delay allowed by the court as provided in LSA-C.C.P. art. 934[7] and does not dismiss the plaintiff's suit nor a party to the suit, even if the time period within which to amend has passed, because the plaintiff may still amend unless the defendant has moved for dismissal). See also Coulon v. Gaylord Broadcasting, 408 So. 2d 16, 17 (La. App. 4th Cir. 1981). Accordingly, the portion of the trial court's judgment maintaining defendants' peremptory exception of no cause of action is not a final ruling over which this court has appellate jurisdiction. See Schroeder v. Board of Supervisors of Louisiana State University, 540 So. 2d at 382.

CONCLUSION

Based on the above and foregoing reasons, plaintiff's appeal of the February 22, 2017 judgment of the trial court is hereby dismissed. Costs of this appeal are assessed to the plaintiff/appellant, Benny Hernandez.

APPEAL DISMISSED.

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[7]Louisiana Code of Civil Procedure article 934 provides as follows:

> When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection raised through the exception cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed.