STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 0774

BOBBIE J. SANDERS, JR.

VERSUS

SWIFTSHIPS, INC.

Judgment Rendered: SEP 20 2018

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On appeal from the
Sixteenth Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Docket Number 117,628

Honorable Paul J. deMahy, Judge Presiding

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* * * * * *

BEFORE: GUIDRY, PETTIGREW, McDONALD, HIGGINBOTHAM,
AND CRAIN, JJ.

Higginbotham, J. dissents for reasons assigned by J. Crain.
Crain, J. dissents and assigns reasons

GUIDRY, J.

This is an appeal of judgments rendered on an incidental claim in a personal injury suit. For the reasons expressed herein, we reverse the first judgment, vacate the second judgment, dismiss the cross appeal, and remand this matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

In early September 1997, Mark A. Robicheaux, Inc. ("Robicheaux, Inc.") and Swiftships, Inc. executed a "Basic Ordering Agreement" ("BOA"), wherein for a recited amount of compensation, Robicheaux, Inc. agreed to provide shipbuilding craft labor on Swiftships vessels. According to the BOA, its term was from August 27, 1997 to November 27, 1997. Around a year later, on November 11, 1998, Bobbie J. Sanders, a Robicheaux, Inc. employee, was working aboard a Swiftships vessel,[1] when he fell through a floor hatch, allegedly left open by a Swiftships employee, and sustained injury. As a result of that accident, Sanders filed a petition for damages against Swiftships.

Swiftships, in turn, filed a third-party demand against United Fire & Casualty Company ("United Fire"), claiming that pursuant to the BOA executed with Robicheaux, Inc., the insurance Robicheaux, Inc. obtained from United Fire provided coverage for Swiftships as well. Pursuant to such coverage, Swiftships demanded that United Fire defend, indemnify, and insure it against the claims of Sanders. However, as United Fire refused to defend, indemnify, or insure Swiftships against Sanders' claims, Swiftships sought a judgment compelling United Fire to do so and penalties and attorney fees for United Fire's failure to do so.

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[1] The record reveals that the vessel, identified as Hull No. 507 and named "Kristin Grace," was owned by Diamond Services Corporation, but was constructed by Swiftships.

Swiftships subsequently filed a motion for summary judgment on its third-party demand on August 19, 2011, seeking a ruling that it was an additional insured under the policy United Fire issued to Robicheaux, Inc. The trial court granted summary judgment in favor of Swiftships in a judgment signed January 6, 2012. United Fire sought an immediate appeal of the January 6, 2012 summary judgment, but this court dismissed the appeal because the judgment was a partial final judgment rendered pursuant to La. C.C.P. art. 966(E) that had not been certified as final pursuant to La. C.C.P. art. 1915(B). See Sanders v. Swiftships, Inc., 12-1195 (La. App. 1st Cir. 7/25/13), 2013 WL 3875327, at *2 (unpublished opinion).

Thus, proceeding forward in the trial court, Swiftships filed motions to tax costs, for penalties pursuant to La. R.S. 22:1973, to assess attorney fees, and for a summary judgment awarding litigation expenses. A hearing on the various motions was held on July 20, 2016, following which the trial court signed a judgment on October 10, 2016, ordering United Fire to pay $49,079.50 as the defense costs and expenses associated with Swiftships' defense in the Sanders suit. The trial court later granted United Fire a suspensive appeal of that judgment. Swiftships filed a cross motion for a devolutive appeal of the judgment seeking review of the trial court's denial of its request for penalties and attorney fees, which is also before us.

DISCUSSION

On appeal, United Fire raises two assignments of error challenging the trial court's judgments signed on January 6, 2012[2] and October 10, 2016. The first assignment of error challenges the trial court's decree in the January 6, 2012

[2] When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory rulings prejudicial to him, in addition to the review of the final judgment from which he appeals. La. C.C.P. arts. 1841 and 2083; Guidry v. USAgencies Casualty Insurance Company, Inc., 16-0562, p. 17 (La. App. 1st Cir. 2/16/17), 213 So. 3d 406, 420, writ denied, 17-0601 (La. 5/26/17), 221 So. 3d 81.

judgment that United Fire "is required to defend, indemnify, and insure Swiftships, Inc. against all claims asserted against Swiftships, Inc. in the lawsuit filed by Bobbie J. Sanders, Jr." It is United Fire's contention that genuine issues of material fact exist as to whether Swiftships was an additional insured under the commercial general liability policy it issued to Robicheaux, Inc. We find merit in this assignment of error.

The United Fire policy issued to Robicheaux, Inc. that was in effect at the time of Sanders' accident provided, in pertinent part, under the section labeled "SUPPLEMENTARY PAYMENTS – COVERAGES A AND B"[3]:

> If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit," we will defend that indemnitee if all the following conditions are met:
>
> a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
>
> ....
>
> c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";
>
> ....
>
> So long as the above conditions are met, attorneys fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments.

The policy goes on to define "insured contract" to mean, in pertinent part:

> That part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

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[3] Under the Commercial General Liability Coverage of the policy, "Coverage A" is for bodily injury and property damage liability and "Coverage B" is for personal and advertising injury liability.

The BOA executed by Robicheaux, Inc. and Swiftships required Robicheaux, Inc. to procure and maintain comprehensive general liability insurance and to "name SWIFTSHIPS, INC. as an additional insured for comprehensive general liability" in that policy. Robicheaux, Inc. was also required to endorse the policy to "waive subrogation" against Swiftships. The agreement further recites that "[t]he term of this BOA shall commence on August 27, 1997 and continue until November 27, 1997, or until unilaterally canceled by SWIFTSHIPS, whichever occurs first."

In rendering summary judgment in favor of Swiftships, the trial court expressly relied on the affidavit of Jeffery P. Leleux, which Swiftships submitted in support of its motion for summary judgment. According to his affidavit, Leleux was the vice president/operations manager of Swiftships, but at the time of Sanders' accident in November 1998, he was employed as the program manager for Swiftships' commercial crew-boat construction program. In his affidavit, Leleux acknowledged that the term of the BOA was until November 27, 1997, but he stated that Swiftships and Robicheaux, Inc.'s "business relationship continued pursuant to the terms and conditions of the BOA." He also stated that during the existence of that business relationship, Robicheaux, Inc. was required to maintain comprehensive general liability insurance coverage naming Swiftships as an additional insured and waiving subrogation in favor of Swiftships for all work performed for Swiftships. He further stated:

> Irrespective whether the BOA remained in effect on 11/11/98, all third-party contractors providing labor for Swiftships shipyard work such as [Robicheaux, Inc.] are required to maintain comprehensive general liability insurance which names Swiftships as an additional insured and which waives subrogation in favor of Swiftships for all work done for Swiftships. More specifically, on November 11, 1998 [Robicheaux, Inc.] was required to maintain comprehensive general liability insurance which names Swiftships as an additional insured and which waives subrogation in favor of Swiftships for all work done on behalf of Swiftships by [Robicheaux, Inc.]. The aforesaid insurance requirements of Swiftships would

definitely have applied to the interior finish work being done on crewboat Hull #507.

Among the documents attached to Leleux's affidavit is a "Certificate of Liability Insurance" showing Robicheaux, Inc. as the insured, listing the effective dates of coverage for commercial general liability insurance as October 10, 1998 to October 10, 1999, and displaying the name of Swiftships as the certificate holder. Also attached is a document titled "Daily Log," dated November 11, 1998, indicating that a person associated with Robicheaux, Inc. had signed in with Swiftships as "entering" on November 11, 1998.[4]

In opposition to Swiftships' motion for summary judgment, United Fire submitted the affidavits of Melissa and Mark Robicheaux. Other than the statements as to identity and capacity -- Melissa identified herself as the chief financial officer and Mark identified himself as the chief executive officer of Robicheaux, Inc. -- all of the remaining statements in their affidavits are identical. Pertinent to the matter before us are the following statements from their affidavits:

> 7. The only contract on file between Mark A. Robicheaux, Inc., and Swiftships, Inc., is the Basic Ordering Agreement (BOA97.8.3) signed on September 2 and 3, 1997;
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> 8. After searching through the Swiftships, Inc. account files, there are no other contracts or agreements found between Mark A. Robicheaux, Inc., and Swiftships, Inc., after the September 3, 1997 Basic Ordering Agreement; and
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> 9. The Basic Ordering Agreement between Mark A. Robicheaux, Inc., and Swiftships, Inc., expired upon its own terms on November 27, 1997, and ***no further agreements were made to extend the Basic Ordering Agreement*** (BOA97.8.3) by Swiftships, Inc. or Mark A. Robicheaux, Inc. [Emphasis added.]

A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

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[4] Two copies of the same page 2 of the "Daily Log" appear in the record, displaying sections labeled "date," "time in/out," "name," "badge number," and "company name & reasons for entering."

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. La. C.C.P. art. 966(B).[5] When the issue before the court on the motion for summary judgment is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing there is no genuine issue of material fact remains with the party bringing the motion. See La. C.C.P. art. 966(C)(2); Sova v. Cove Homeowner's Association, Inc., 11-2220, p. 3 (La. App. 1st Cir. 9/7/12), 102 So. 3d 863, 866.

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. Boudreaux v. Vankerkhove, 07-2555, p. 5 (La. App. 1st Cir. 8/11/08), 993 So. 2d 725, 729-30. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. Janney v. Pearce, 09-2103, p. 5 (La. App. 1st Cir. 5/7/10), 40 So. 3d 285, 289, writ denied, 10-1356 (La. 9/24/10), 45 So. 3d 1078.

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. A trial court cannot make credibility decisions on a motion for summary judgment. In deciding a motion for summary judgment, the trial court must assume that all of the witnesses are credible. 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. Janney, 09-2103 at pp. 5-6, 40 So. 3d at 289.

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[5] The citations to La. C.C.P. art. 966 are all to the version of the statute as it read prior to amendments by 2012 La. Acts, Nos. 257, § 1 and 741, § 1; 2013 La. Acts, No. 391, § 1; 2014 La. Acts, No. 187, § 1; and 2015 La. Acts, No. 422, § 1.

A fact is material when its existence or nonexistence may be essential to a litigant's cause of action under the applicable theory of recovery. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Fouquet v. Daiquiris & Creams of Mandeville, L.L.C., 10-0233, p. 3 (La. App. 1st Cir. 9/13/10), 49 So. 3d 44, 46.

The party demanding performance of an obligation must prove the existence of the obligation. La. C.C. art. 1831. Likewise, the party asserting a modification of an obligation must prove by a preponderance of the evidence facts or acts giving rise to the modification. Amitech U.S.A., Ltd. v. Nottingham Construction Company, 09-2048, p. 27 (La. App. 1st Cir. 10/29/10), 57 So. 3d 1043, 1063, writs denied, 11-0866, 11-0953 (La. 6/17/11), 63 So. 3d 1036, 1043; see also La. C.C. art. 1831. In this case, Swiftships has asserted that the term of the BOA was extended by an oral agreement and the conduct of the parties.

A contract may be modified only by mutual consent. L & A Contracting Company, Inc. v. Ram Industrial Coatings, Inc., 99-0354, p. 15 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1223, 1232, writ denied, 00-2232 (La. 11/13/00), 775 So. 2d 438. Written contracts may be modified by oral contracts or by the conduct of the parties. Fleming v. JE Merit Constructors, Inc., 07-0926, p. 9 (La. App. 1st Cir. 3/19/08), 985 So. 2d 141, 146. Whether an oral agreement modifies a written contract is a question of fact. While modification can be presumed by silence, inaction, or implication, one party may not change the terms unilaterally. L & A Contracting Company, Inc., 99-0354 at p. 15, 762 So. 2d at 1232.

Reviewing the record before us, the evidence presented by Swiftships clearly establishes, and it is not disputed, that a business relationship between Robicheaux,

Inc. and Swiftships continued beyond the term recited in the BOA. However, what is disputed is whether there was an agreement, oral or otherwise, whereby the parties agreed to extend the term, and more importantly, the provisions of the BOA. Leleux, in his affidavit, expressly stated that the business relationship between the two parties "continued pursuant to the terms and conditions of the BOA," but the Robicheauxs contrarily stated in their affidavits that "no further agreements were made to extend" the BOA.

Any doubt as to a dispute regarding a material issue of fact must be resolved against granting a motion for summary judgment and in favor of a trial on the merits. Moreover, in deciding a motion for summary judgment, the trial court cannot make credibility determinations, evaluate testimony, or weigh evidence. Janney, 09-2103 at p. 11, 40 So. 3d at 293. The fact that a party is unlikely to prevail at a trial on the merits is an insufficient basis for rendering a summary judgment against that party. Downtown Parking Service, Inc. v. Hyman, 93-1803, p. 4 (La. App. 4th Cir. 3/15/94), 635 So. 2d 282, 285, writ denied, 94-1519 (La. 9/23/94), 642 So. 2d 1298. This is because the function of the court on summary judgment is not to determine the merits of the issues involved, but only whether or not there is a genuine and material factual issue. West ex rel. West v. Watson, 35,278, p. 4 (La. App. 2nd Cir. 10/31/01), 799 So. 2d 1189, 1192, writ denied, 01-3179 (La. 2/8/02), 809 So. 2d 140.

The evidence before the trial court sufficiently raised genuine issues of material fact. As such, the trial court erred in granting summary judgment in favor of Swiftships, because doing so required the trial court to decide disputed genuine issues of material fact, which should have been reserved for a trial on the merits. Hence, summary judgment was inappropriate. In so concluding, we likewise find

that the trial court's October 10, 2016 judgment was improperly rendered.[6] We pretermit consideration of Swiftships' cross appeal as being moot at this time.

CONCLUSION

For the foregoing reasons, we reverse the January 6, 2012 summary judgment in favor of Swiftships, and accordingly, vacate the October 10, 2016 judgment awarding Swiftships defense costs and expenses in the amount of $49,079.50. We further dismiss the cross appeal of Swiftships, as consideration of the relief requested in that appeal is moot at this time. This matter is thus remanded to the trial court for further proceedings consistent with the rulings herein. All costs associated with this appeal are assessed against Swiftships, Inc.

SUMMARY JUDGMENT SIGNED JANUARY 6, 2012 REVERSED; JUDGMENT SIGNED OCTOBER 10, 2016 VACATED; AND CROSS-APPEAL DISMISSED.

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[6] United Fire challenged the propriety of the October 10, 2016 judgment in its second assignment of error.

BOBBIE J. SANDERS, JR.

VERSUS

SWIFTSHIPS, INC.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0774

CRAIN, J., dissents.

I disagree that the October 10, 2016 judgment is a final, appealable judgment, such that this court has appellate jurisdiction to review it and the January 6, 2012 interlocutory judgment. The October 10, 2016 judgment merely awards litigation costs and expenses incurred to date. It does not represent a final resolution of the issue between the parties and was not certified as final pursuant to Louisiana Code of Civil Procedure article 1915. I would dismiss the appeal for lack of jurisdiction.