NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2019 CA 1469

ROGER D. ANDERSON, TERRI T. ANDERSON &
THERESA LEUSCHNER

VERSUS

LABORDE CONSTRUCTION INDUSTRIES, L.L.C., CATAMOUNT CONSTRUCTORS, INC., LMK BATON ROUGE CONSTRUCTION, L.L.C., AND THE STANDARD OF BATON ROUGE, L.L.C.

Judgment Rendered: DEC 30 2020

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On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 638,369

Honorable Janice Clark, Judge Presiding

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* * * * * * *

BEFORE: McDONALD, HOLDRIDGE, AND PENZATO, JJ.

HoldridgeJ. concurs

PENZATO, J.

Roger D. Anderson, Terri T. Anderson, Theresa Leuschner, and Robin Toler appeal a summary judgment granted in favor of Catamount Constructors, Inc. ("Catamount").

FACTS AND PROCEDURAL HISTORY

This case involves the construction of a student housing apartment complex known as The Standard at Baton Rouge (the "Project"). The Andersons, Ms. Leuschner, and Ms. Toler own homes located immediately adjacent to the construction site. On April 6, 2015, Mr. and Mrs. Anderson and Ms. Leuschner (collectively "plaintiffs") filed a joint petition (district court docket number 638,369) against The Standard at Baton Rouge, L.L.C. ("Standard"), the owner of the Project; LMK Baton Rouge Construction, L.L.C. ("LMK"), and Catamount, both alleged to be general contractors; and Laborde Construction Industries, L.L.C. ("Laborde"), a subcontractor alleged to have responsibility for acquisition and driving of the piles on the Project. According to plaintiffs' petition, they suffered property damage as well as mental and emotional distress as a result of the pile driving operation and construction work on the Project. Recovery was sought under the provisions of La. C.C. arts. 2315 and 667.[1]

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[1] Louisiana Civil Code article 2315 provides in pertinent part that:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

Louisiana Civil Code article 667 provides as follows:

> Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.

On April 30, 2015, plaintiffs' suit (district court docket number 638,369) was consolidated with a similar suit filed by Ms. Toler (district court docket number 614,428) alleging similar damages against the same defendants.[2] Thereafter, on August 27, 2018, an "Order of Deconsolidation" was signed, ordering the Clerk of Court to "deconsolidate, separate and divide" district court docket number 614,428 from district court docket number 638,369, and to thereafter "file and maintain all pleadings, memoranda, exhibits, notices and the like, separately and independently."

On February 14, 2019, Catamount filed a motion for summary judgment "on all claims asserted against it by Roger D. Anderson, Terri T. Anderson, Theresa Leuschner and Robin Toler" in district court docket number 638,369. In its motion for summary judgment, Catamount asserted that it did not self-perform any work on the Project, but sub-contracted out its entire scope of work to second-tier subcontractors, all of whom were independent contractors. Catamount argued that there was no evidence that any independent act or omission of Catamount caused or contributed to any of plaintiffs' alleged damages, and that Catamount was not vicariously liable for tort damage allegedly caused by an independent contractor. Thus, plaintiffs' could not carry their burden of proof that Catamount was liable for any of their alleged damages. Catamount's motion for summary judgment was set for hearing on August 1, 2019.

On July 3, 2019, plaintiffs and Ms. Toler filed a motion to continue the motion for summary judgment, based upon the unavailability of Louis R. Koerner, Jr., counsel for Ms. Toler.[3] The motion was denied "on showing made" by order signed July 8, 2019. On July 18, 2019, plaintiffs and Ms. Toler filed a request for written

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[2] Ms. Toler originally filed suit against Cable Lock Foundation Repair a/k/a Olshan Foundation Repair. By amended petition filed April 2, 2015, she added as defendants Standard, LMK, Catamount, and Laborde.

[3] While the motion to continue asserts that Mr. Koerner was Ms. Toler's "lead counsel," Mr. Koerner was not enrolled as counsel of record. Ms. Toler was represented by Richard J. Brazan, Jr.

reasons for the order denying their motion to continue, as well as a notice of intention to apply for supervisory writs. On August 1, 2019, this court denied the writ. *Roger D. Anderson, Terri T. Anderson, and Theresa Leuschner v. Laborde Construction Industries, L.L.C., Catamount Constructors, Inc., LMK Baton Rouge Construction, L.L.C., and The Standard of Baton Rouge, L.L.C.*, 2019 CW 1014 (La. App. 1 Cir. 8/1/19).

Following a hearing on August 1, 2019, the trial court granted Catamount's motion for summary judgment. A judgment was signed August 1, 2019 that dismissed "[A]ll plaintiffs' claims against Catamount." The Andersons, Ms. Leuschner, and Ms. Toler appealed the August 1, 2019 judgment as well as the denial of the motion to continue and the failure to hold a hearing on the motion to continue.

RULE TO SHOW CAUSE

On August 13, 2020, this court, *ex proprio motu*, issued a rule to show cause order noting that the August 1, 2019 judgment of the district court appeared to be non-appealable as it involves a non-party to the underlying district court suit docketed as number 638,369, namely Robin Toler. The parties were directed to show cause why this appeal should or should not be dismissed for this reason.

On August 31, 2020, the parties filed a joint brief in support of the appeal. The parties acknowledge that at no time was Ms. Toler a plaintiff in district court docket number 638,369, and to the extent that she is not a plaintiff in this lawsuit, the August 1, 2019 judgment is not applicable to her. They further argue that the judgment is final and appealable as to the Andersons and Ms. Leuschner, plaintiffs in district court docket number 638,369. The parties indicate that they consent to the dismissal of Ms. Toler's appeal on the grounds that she has no right to appeal as a non-party to district court docket number 638,369, and the August 1, 2019 judgment does not dismiss or effect any of her claims pending in a separate suit (district court docket number 614,426).

Louisiana Code of Civil Procedure Article 2082 provides that an "[a]ppeal is the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court." As Ms. Toler is not a party in district court docket number 638,369, she has no right to appeal the August 1, 2019 judgment rendered in that suit. Accordingly, we dismiss Ms. Toler's appeal, and address only the appeal by the Andersons and Ms. Leuschner.

ASSIGNMENTS OF ERROR

Plaintiffs contend that the trial court erred in the following respects:

1. The trial court erred in setting the Catamount motion for summary judgment for hearing on August 1, 2019, without prior consultation with counsel, by denying a timely, meritorious, and unopposed motion to continue "on the showing made," by failing and refusing to sign an order setting a date for the filing of supervisory writs, by failing to provide written reasons, and by holding an unnecessarily rushed hearing on the motion for summary judgment in the absence of plaintiffs' lead counsel and without taking the matter under advisement despite accepting plaintiffs' opposition on the day prior to the hearing;

2. The trial court erred in not finding numerous issues of fact that should have prevented a summary disposition of the case given the extensive opposition filed by plaintiffs;

3. The trial court misapplied the applicable law by granting summary judgment in favor of Catamount, which acted in the capacity of general contractor, despite its own negligent and unlawful actions and despite those of the subcontractors that it was mandated by contract to supervise, did not properly supervise, and permitted to violate applicable law even after numerous complaints by plaintiffs.

LAW AND DISCUSSION

Motion to Continue (Assignment of Error Number 1)

When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. *Judson v. Davis*, 2004-1699 (La. App. 1 Cir. 6/29/05), 916 So. 2d 1106, 1112, writ denied, 2005-1998 (La. 2/10/06), 924 So. 2d 167. Plaintiffs raise both substantive and procedural issues in connection with the July 8, 2019 judgment denying their motion to continue "on showing made." We first address the substantive issues raised, i.e. the denial of the motion

to continue without a hearing.

A continuance rests within the sound discretion of the trial court, and may be granted in any case "if there is good ground therefor." La. C.C.P. art. 1601. A continuance shall be granted if the party applying for the continuance shows that he has been unable, with the exercise of due diligence, to obtain evidence material to his case; or that a material witness has absented himself without the contrivance of the party applying for the continuance. La. C.C.P. art. 1602. The trial court must consider the particular facts of a case when deciding whether to grant or deny a continuance. Absent a clear abuse of discretion in granting or denying a continuance, the ruling of the trial court should not be disturbed on appeal. *Cole v. Baton Rouge General Medical Center*, 2017-1016 (La. App. 1 Cir. 2/16/18), 2018 WL 914229 *2 (unpublished).

Louisiana Code of Civil Procedure article 1605 provides that "Every contested motion for a continuance shall be tried summarily and contradictorily with the opposite party." A hearing is not required by La. C.C.P. art. 1605 when the motion for continuance is not "contested." *James v. Our Lady of Lourdes, Inc.*, 2018-368 (La. App. 3 Cir. 12/12/18), 261 So. 3d 921, 924.

Catamount's motion for summary judgment was filed on February 14, 2019, and set for hearing on August 1, 2019. Plaintiffs filed a motion to continue on July 3, 2019, based upon the unavailability of Mr. Koerner, which is not a peremptory ground for the granting of a continuance. See La. C.C.P. art. 1602. At the time the motion to continue was filed, Mr. Koerner was not enrolled as counsel of record for any party in district court docket number 638,369, the case in which the summary judgment was set. All parties were represented by other counsel. Catamount did not oppose the motion, and therefore a hearing was not required. See La. C.C.P. art. 1605; *James*, 261 So. 3d at 924. The trial court is authorized to rule on a motion for continuance without a hearing if the non-moving party does not oppose the motion.

Even though all parties agree to a continuance, it is within the trial court's discretion to grant or deny the continuance. See La. C.C.P. art. 191; La. C.C.P. art. 1601.

Based upon the above, we find no abuse of the trial court's discretion in denying plaintiffs' motion to continue without a hearing. We now address the procedural issues raised in plaintiffs' first assignment of error.

First, plaintiffs contend the trial court erred in setting the motion for summary judgment for hearing without prior consultation with counsel. The district courts shall prescribe the procedure for assigning cases for trial. La. C.C.P. art. 1571A. According to Louisiana District Court Rules, Rule 9.14(a), the method of setting a date for trial shall be determined by each district court as set forth in Appendix 9.14. Appendix 9.14 for the Nineteenth Judicial District Court does not require the court to consult with counsel prior to setting a matter for hearing.

Next, plaintiffs assert the trial court erred in refusing to sign an order setting a date for the filing of supervisory writs. This assertion appears moot as this court did address plaintiffs' writ application. See *Anderson,* 2019 CW 1014.

Plaintiffs further contend the trial court erred by failing to provide written reasons in connection with the denial of their motion to continue. Other than raising the issue, plaintiffs sought no remedy in this case. See *First Nat. Bank v. Kellick's Catch Pen and Western Wear, LLC*, 50,196 (La. App. 2 Cir. 11/18/15), 182 So. 3d 227, 231-232 n.1.[4]

Finally, plaintiffs assert the trial court erred by holding an unnecessarily rushed hearing on the motion for summary judgment in the absence of plaintiffs' lead counsel and without taking the matter under advisement. Catamount's motion for summary judgment was filed on February 14, 2019, and set for hearing on August

[4] A judge shall give written reasons when requested "[i]n all appealable contested cases[.]" La. C.C.P. art. 1917A. A denial of a motion for continuance is not an appealable contested case and therefore the trial court was correct in not providing any written reasons even though they were requested.

1, 2019 – more than five months after it was filed. As noted above, Mr. Koerner was not enrolled as counsel of record for any party in district court docket number 638,369, the suit in which the motion for summary judgment was set for hearing. Plaintiffs elected to delay the filing of their opposition to the motion for summary judgment until July 31, 2019.[5] At the hearing on the motion for summary judgment, the trial court indicated that "although the brief was untimely filed, the court has considered the brief." Louisiana Code of Civil Procedure article 1637 provides that the trial court may immediately pronounce judgment or take the case under advisement. In this case, the trial court indicated it had an opportunity to review plaintiffs' opposition to the motion for summary judgment and make a reasonable conclusion. See *Hughes v. Bailey*, 29,314 (La. App. 2 Cir. 4/2/97), 691 So. 2d 359, 365. Moreover, this court will consider the evidence submitted in opposition to Catamount's motion for summary judgment *de novo* in determining whether summary judgment is appropriate.

Based upon the above, we find plaintiffs' first assignment of error is without merit.

Motion for Summary Judgment (Assignments of Error Numbers 2 and 3)

We now address plaintiffs' second and third assignments of error regarding the granting of Catamount's motion for summary judgment.

After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents 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. 966A(3). The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of

[5] Louisiana Code of Civil Procedure article 966B(2) requires an opposition to a motion for summary judgment and all documents in support of the opposition be filed not less than fifteen days prior to the hearing on the motion. Catamount did not object to the untimely filing and did not answer and raise this issue on appeal.

and (5) actual damages. *Christy v. McCalla*, 2011-0366 (La. 12/6/11), 79 So. 3d 293, 299.

A principal is not liable for the negligence of an independent contractor. See *Smith v. Zellerbach*, 486 So. 2d 798, 801 (La. App. 1 Cir.), writ denied, 489 So. 2d 246 (La. 1986). However, an exception arises when the principal reserves the right to supervise or control the work of the independent contractor. *Cenac v. Evangeline Business Park, LLC*, 2015-0198 (La. App. 1 Cir. 5/27/16), 2016 WL 3032662, *6 (unpublished), writ not considered, 2016-1227 (La. 10/17/16), 207 So. 3d 1062.

Plaintiffs also seek recovery pursuant to La. C.C. art. 667 for the ultrahazardous activity of pile driving. With regard to liability pursuant to La. C.C. art. 667, as a matter of law, a contractor who complies with the project's plans and specifications is not liable for damages to the property of third parties. *Holzenthal v. Sewerage & Water Bd. of New Orleans*, 2006-0796 (La. App. 4 Cir. 1/10/07), 950 So. 2d 55, 80-81, writ denied, 2007-0294 (La. 3/30/07), 953 So. 2d 71.

In support of its motion for summary judgment, Catamount filed the "Subcontract Agreement" that it entered into on April 8, 2014, with LMK, the general contractor of the Project. Catamount agreed to perform a defined and limited scope of work that included site work, pile driving, and concrete work. Also filed were subcontract agreements Catamount entered into with Laborde for pile driving; HCI Construction Group for grading and site work; and Associated Concrete Contractors, Inc. of Nevada ("ACC") for concrete work. Catamount's contracts with Laborde, HCI, and ACC each provided that the subcontractor was an independent contractor in all respects. Catamount also attached a "Termination Agreement," terminating the April 8, 2014 "Subcontract Agreement" with LMK, effective July 1, 2014.

In addition to the relevant contracts, Catamount submitted the affidavit of Chris Yancey, who was employed by Catamount and was personally involved with

Catamount's performance of work on the Project. According to Mr. Yancey, Catamount did not self-perform any of the construction work or other construction activities on the Project; rather, all of the actual construction work and activities were performed by independent contractors, i.e., Laborde, HCI, and ACC. Mr. Yancey further attested that at no time was Catamount the owner of the immovable property upon which the Project is located or the general contractor for the Project. Mr. Yancey attested that Catamount did not participate in the design of the Project, and did not prepare any of the plans, specification, or designs governing the work. In addition, to Mr. Yancey's knowledge, all of the work on the Project that was within Catamount's scope was performed in accordance with the plans and specifications prepared by others and provided by The Standard.

Catamount further filed with its motion for summary judgment excerpts from the deposition of Jacques Lasseigne, a professional engineer who prepared a structural engineering report in connection with the litigation. The report was attached to his deposition and filed in connection with Catamount's motion for summary judgment. Mr. Lasseigne indicated in his report that during the pile driving operation, the ground vibration never reached the threshold set by Southern Earth Sciences, Inc., in connection with the Project. Mr. Lasseigne opined that there was no evidence to support the claim that pile driving or any other construction activity caused damage to plaintiffs' residences.

In opposition to Catamount's motion for summary judgment, plaintiffs argued that the evidence they filed in opposition was "relevant and convincing...that the work performed adjacent to plaintiffs' property between April 8, 2014 and July 1, 2014 caused damage." This evidence included the pleadings, the Catamount contracts, selected pages from the depositions of Ms. Toler and Ms. Leuschner, selected pages from Ms. Toler's diary, and Ms. Toler's affidavit. In her deposition, Ms. Leuschner testified that "a week after they tore those houses down, I was cutting

my grass and I realized my yard dropped at the fence line where they had been grading the property and demolishing." Ms. Leuschner further testified that sometime in February, she had six inches of water in her yard, and over time, the water stayed in her yard, and just got worse. Ms. Leuschner testified that she was "no engineer" but she felt that "all the vibrations of the ground – it's just gotten worse and now my backyard stays wet all the time." According to Ms. Leuschner, prior to the construction, water did not sit in her backyard. Ms. Leuschner indicated that she advised the Catamount supervisor of the flooding issues.

Plaintiffs also rely on Ms. Toler's affidavit wherein she "concluded that Catamount's actions in causing and permitting them was in accordance with the directions issued by LMK and the Standard and all appear consistent with the contractual provisions that I have been provided that obligated Catamount not to let the subcontractors take these actions, which caused me and the other plaintiffs so much damage." In support of this conclusion, Ms. Toler proceeded to list a number of events that occurred from April 8, 2014 through July 1, 2014, while Catamount was on site. Relevant hereto, she attested that she observed building material "leaned up against the [Anderson's pecan] tree." According to Ms. Toler, Catamount, "as general contractor," knew about this practice, which damaged the pecan tree. The remainder of Ms. Toler's observations pertain to damages she claims to have suffered, which are not the subject of this lawsuit or pending appeal.

Plaintiffs also point out provisions contained in Catamount's contracts with its subcontractors that required the subcontractors to notify Catamount of any discrepancies or error in the drawings or specifications provided by LMK/Standard. Plaintiffs further rely on a provision in the contract between LMK and Catamount whereby Catamount was required to maintain a competent and experienced superintendent or supervisor on the job at all times.

After a thorough *de novo* review of the record in this appeal, we find that

Catamount met its initial burden of pointing to an absence of factual support for one of the essential elements of plaintiffs' negligence claim, *i.e.,* that any conduct by Catamount was a legal cause of plaintiffs' injuries. Catamount introduced evidence that it did not perform any of the work on the Project, but sub-contracted out the entire scope of work for which it was contractually obligated. It further introduced evidence that the subcontractors who performed the work were independent contractors. With regard to the pile driving, Catamount introduced evidence that the work was done in accordance with the plans and specifications provided by Standard. Catamount further introduced evidence that the pile driving did not cause damage to plaintiffs' residences.

Once Catamount demonstrated this lack of evidence, the burden shifted to plaintiffs to specifically show evidence that any conduct by Catamount caused them damage. While Ms. Leuschner testified that her yard began to hold water after construction began, she failed to identify any action by Catamount that caused this to occur. Similarly, Ms. Toler failed to identify that a Catamount employee placed building materials near the Anderson's pecan tree.

Plaintiffs argue that the evidence shows they complained to Catamount employees about flooding, noise, and vibration, but despite these complaints, Catamount took no precautions and initiated no corrective actions to minimize the damage caused to them and their properties. In support of this argument, plaintiffs cite *Holzenthal*, 950 So. 2d at 70, and *Ewell v. Petro Processors of Louisiana, Inc.*, 364 So. 2d 604, 607 (La. App. 1 Cir. 1978), writ denied, 366 So. 2d 575 (La. 1979). However, in both of those cases, the complaints established that defendants with an established duty to plaintiffs had knowledge that their actions were causing damage. In this case, plaintiffs have failed to establish that Catamount had a duty to respond to any such complaints.

Ms. Toler's affidavit is insufficient to establish that plaintiffs will be able to

carry their burden of proof, as it simply contains a conclusory allegation that Catamount was obligated not to allow its subcontractors to take certain actions. Affidavits with conclusory allegations of fact are not sufficient to defeat summary judgment. *Christakis v. Clipper Const., L.L.C.*, 2012-1638 (La. App. 1 Cir. 4/26/13), 117 So. 3d 168, 170-71, writ denied, 2013-1913 (La. 11/8/13), 125 So. 3d 454. Furthermore, plaintiffs were not parties to the various contracts between LMK and Catamount and Catamount and its subcontractors.

Thus, plaintiffs did not come forward with any evidence to show that they would be able to carry their burden of proving that any conduct by Catamount was a legal cause of their injuries; therefore, there is no genuine issue of material fact and summary judgment is appropriate.

CONCLUSION

For the above and foregoing reasons, the August 1, 2019 judgment dismissing plaintiffs' claims against Catamount is affirmed. Costs of this appeal are assessed to plaintiffs, Roger D. Anderson, Terri T. Anderson, and Theresa Leuschner.

AFFIRMED.