NOT DESIGNATED FOR PUBLICATION

WILBERT JOHNSON	*	**NO. 2007-CA-0238**
VERSUS	*	**COURT OF APPEAL**
U-HAUL COMPANY OF ARIZONA, CHARLES WARNELL, US AGENCIES INSURANCE, AND UNKNOWN DEFENDANT JOHN DOE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2005-12103, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

ARMSTRONG, C.J., CONCURS IN THE RESULT REACHED BY THE MAJORITY.

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AFFIRMED

Wilbert Johnson appeals a summary judgment granted in favor of defendant, U-Haul Co. of Arizona (U-Haul). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY:

Mr. Bijou[1] leased the vehicle in question on September 14, 2004, for a one-day, one-way rental, but did not return the vehicle the next day as provided for in the contract between him and U-Haul. On October 9, 2004, Mr. Johnson's parked vehicle in which he was sitting was struck from the rear by the U-Haul truck allegedly being driven by Mr. Bijou. After the collision, Mr. Bijou allegedly fled the scene on foot.

Mr. Johnson filed suit alleging that Mr. Bijou was an employee, agent or lessee of U-Haul. Thus, U-Haul was responsible for the accident because of gross negligence, fault, carelessness and recklessness. U-Haul filed a motion for summary judgment, which plaintiff opposed. After hearing, the trial court granted

[1] The original petition named Charles Warnell as defendant. Plaintiff amended to correctly name defendant as Warnell Charles Bijou.

summary judgment, dismissing all claims against U-Haul. This appeal followed.[2]

DISCUSSION:

Appellate courts review grants of summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate, i.e., whether there is a genuine issue of material fact and whether the mover is entitled to summary judgment as a matter of law. *Champagne v. Ward*, 03-2311, p. 4 (La. 1/19/05), 893 So.2d 773, 776. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. La. Code Civ. Proc. art. 966B. The movant bears the burden of proof to demonstrate that there is an absence of material factual support for one or more elements of the adverse party's claim. La. Code Civ. Proc. art. 966C(2). If the adverse party fails to produce factual support sufficient to establish that he will be able to support his evidentiary burden of proof at trial, there is no genuine issue of material fact. *Id.*

In its motion, U-Haul argued that Mr. Bijou was not an employee or agent of U-Haul. Further, he was not a permissive driver due to the fact that he was allegedly driving the vehicle beyond the term for the rental. The rental agreement specifically provided: "Any operation of EQUIPMENT outside the time agreed

[2] There is no transcript of the hearing in the record.

and allowed mileage is without Company consent." Consequently, at the time of the accident, Mr. Bijou did not have U-Haul's permission to operate the vehicle.

Mr. Johnson argues on appeal that he met his burden by establishing that a genuine issue of material fact existed sufficient to preclude summary judgment, that is, whether or not Mr. Bijou was a permissive driver of the U-Haul vehicle thereby creating liability on the part of U-Haul.

First, Mr. Johnson questions the veracity of the affidavit of U-Haul of Louisiana's president, who attested that Hurricane Katrina destroyed the original contract between Mr. Bijou and U-Haul. However, a computer generated document attached to the affidavit, indicated that the rental contract was for a one-day, one-way rental from September 14 to September 15, 2004, but that the rental was not returned per the contract. The affiant further attested that U-Haul did not recover the vehicle until after the accident, and that any records of attempts to recover the vehicle prior to the accident were also destroyed during the hurricane. Mr. Johnson claims that if U-Haul could produce one computer generated document after the hurricane, then all records relative to this rental should likewise be available.

Mr. Johnson argues that he should have had the opportunity to depose U-Haul's president relative to its policies regarding recovery of vehicles, and to attempt discovery of other documents. He contends that this discovery is needed because if U-Haul was negligent in recovering the vehicle, then it cannot hide

behind the shield of the contract. In other words, U-Haul is liable for permitting Mr. Bijou to continue driving the vehicle thereby endangering the public.

Louisiana Code of Civil Proc. art. 967B provides that "an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above [depositions, answers to interrogatories, or by further affidavits], must set forth specific facts showing that there is a genuine issue for trial." "If it appears from the affidavits of a party opposing the motion that for reasons stated he cannot present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had …." La. Code Civ. Proc. art. 967C.

The record indicates that the only discovery undertaken in this case was by U-Haul. Further, Mr. Johnson did not attach any affidavits to his opposition indicating that he had been unsuccessful in discovery attempts or that he required discovery to oppose the motion. As such, he is precluded from now arguing that further discovery would have bolstered his position.

Mr. Johnson next cites *Collette v. Ledet*, 93-1581 (La.App. 3 Cir. 6/1/94), 640 So.2d 757, in an attempt to establish a jurisprudential rule that a time period exists during which a lessor must attempt to recover a vehicle, or be held liable for any damages occurring outside of that period. He points to the fact that U-Haul did not produce any evidence that it attempted to recover the vehicle.

Once again, after U-Haul filed its motion for summary judgment supported by the affidavit of the U-Haul representative, the burden shifted to Mr. Johnson to produce **factual** support sufficient to establish that he would be able to satisfy his evidentiary burden of proof at trial. Citing to case law is not **factual** support.

Last, Mr. Johnson argues that the rental contract may be ignored in its entirety because dismissing U-Haul from the case based on the contract is against public policy. Mr. Johnson's argument again evolves from his position that U-Haul had a duty to recover the vehicle within a certain time frame. Argument is not **factual** support.

Accordingly, we find that Mr. Johnson failed to carry his burden of proof pursuant to La. Code Civ. Proc. art. 966C(2). The trial court did not err in granting summary judgment in favor of U-Haul.

AFFIRMED