NOT DESIGNATED FOR PUBLICATION

LETHA H. DUNCAN, WIFE OF/AND LAWRENCE E. DUNCAN	*	**NO. 2008-CA-0728**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
JADE SERVICES LIMITED	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-15103, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge
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Judge Dennis R. Bagneris, Sr.
* * * * * *
(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love, and Judge Roland L. Belsome)
BELSOME, J. DISSENTS WITH REASONS

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AFFIRMED

FEBRUARY 18, 2009

The Appellants, Letha H. Duncan and Lawrence Duncan, appeal the granting of summary judgment in favor of the Appellee, Jade Services Ltd.. For the reasons that follow, we affirm.

Facts

Jade Services leased two 40-foot shipping containers to U. S. Gypsum ("USG"). Jade rents out large storage containers to mostly businesses. The intended use of the containers is to serve as portable warehouse space. USG rented a container from Jade Services to store parcels of lime weighing between 1500 and 2000 pounds. The parcels of lime were to be brought in and out of the container by a forklift.

On August 10, 2003, Lawrence Duncan, a USG employee, was injured when he was operating a forklift in one of the containers. According to Mr. Duncan, the bottom of the container gave way and he fell through the container, hitting the ground, causing serious back injury.

Procedural History

Mr. Duncan, and his wife, Letha H. Duncan, filed a personal injury suit against Jade Services alleging various theories of liability each stemming from an

alleged pre-delivery container defect. Jade Services filed a Motion for Summary Judgment that was granted on March 28, 2008, five years after the suit was filed. It is from this judgment that the instant appeal was taken.

Issues Presented for Review

The Duncans offer four issues for this Court to review. However, we find that the sole issue on appeal is whether the district court erred in granting the summary judgment in favor of Jade Services in light of La. Code of Civil Procedure Art. 966.[1]

The Law

> Appellate courts review the granting of summary judgment *de novo* under the same criteria governing the trial court's consideration of whether summary judgment is appropriate. *Reynolds v. Select Props., Ltd.*, 93-1480 (La.4/11/94), 634 So.2d 1180, 1183. *See also Indep. Fire*

[1] A. (1) The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time. (2) The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969. The procedure is favored and shall be construed to accomplish these ends.

B. The motion for summary judgment and supporting affidavits shall be served at least fifteen days before the time specified for the hearing. For good cause, the court shall give the adverse party additional time to file a response, including opposing affidavits or depositions. The adverse party may serve opposing affidavits, and if such opposing affidavits are served, the opposing affidavits and any memorandum in support thereof shall be served pursuant to Article 1313 at least eight days prior to the date of the hearing unless the Rules for Louisiana District Courts provide to the contrary. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.

C. (1) After adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted. (2) The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

D. The court shall hear and render judgment on the motion for summary judgment within a reasonable time, but in any event judgment on the motion shall be rendered at least ten days prior to trial.

E. 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.

> *Ins. Co. v. Sunbeam Corp.,* 99-2181, 99-2257, p. 7 (La.2/29/00), 755 So.2d 226, 230.
>
> A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). If the court finds that a genuine issue of material fact exists, then summary judgment must be rejected. *Oakley v. Thebault,* 96-0937, p. 4 (La.App. 4 Cir. 11/13/96), 684 So.2d 488, 490. The burden of proof does not shift to the party opposing the summary judgment until the moving party first presents a *prima facie* case that no genuine issues of material fact exist. *Id.* At that point, if the party opposing the motion "fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact." La. C.C.P. art. 966(C)(2). Summary judgment should then be granted.

Lomax v. Ernest Morial Convention Center 963 So.2d 463, 464-465, 2007-0092 (La.App. 4 Cir. 7/11/07), (La.App. 4 Cir.,2007)

Argument and Analysis

The Duncans maintain that Jade Services was always aware of the use of the rental container and knew that USG planned to use a forklift within the container. They argue that Jade Services failed to adequately warn USG that the floor of the container was only 1 1/8" thick. The Duncans rely on the testimonies of USG's plant manager, Donald Browing and Jade's owner, Howard Rose, in support of their opposition to the Jade Service's summary judgment. The Duncans maintain that contradictory testimony exists between Mr. Rose and the USG plant manager as to whether USG informed Jade Services of its intent to use forklifts and that this is a genuine issue of material fact.

Further, the Duncans argue that Jade Services erroneously relies on La. R.S. 9:3221 (*discussed infra*) as to whether its "notice of defect" requirement applies, and then "shifted gears" to incorporate La. Civ. Code Art. 2695 in support of its arguments in an effort to escape liability. La. Civ. Code Art. 2695 reads as follows:

> Attachments, additions, or other improvements to leased thing
>
> In the absence of contrary agreement, upon termination of the lease, the rights and obligations of the parties with regard to attachments, additions, or other improvements made to the leased thing by the lessee are as follows: (1) The lessee may remove all improvements that he made to the leased thing, provided that he restore the thing to its former condition. (2) If the lessee does not remove the improvements, the lessor may: (a) Appropriate ownership of the improvements by reimbursing the lessee for their costs or for the enhanced value of the leased thing whichever is less; or (b) Demand that the lessee remove the improvements within a reasonable time and restore the leased thing to its former condition. If the lessee fails to do so, the lessor may remove the improvements and restore the leased thing to its former condition at the expense of the lessee or appropriate ownership of the improvements without any obligation of reimbursement to the lessee. Appropriation of the improvement by the lessor may only be accomplished by providing additional notice by certified mail to the lessee after expiration of the time given the lessee to remove the improvements. (c) Until such time as the lessor appropriates the improvement, the improvements shall remain the property of the lessee and the lessee shall be solely responsible for any harm caused by the improvements.

The Duncans argue that Jade Services concedes to the fact that the floor of the container was defective and that the district court erred in finding that the USG misused the container and that it is not the role of the district court to make a finding of fact in a summary judgment proceeding.

Jade Services contradicts the Duncans by arguing that the Duncans failed to meet their burden of proof under La. Civ. Code Art. 966(C)(2) and that Jade Services had no duty, imposed by law, to warn. Jade Services argues that the mere testimony of Mr. Rose explaining that he would not have rented out the container had he known a forklift would have been used does not imply that he knew the container posed a dangerous risk to Mr. Duncan

The Duncans allege that there was a pre-delivery defect of the container; however, they failed to introduce evidence to support their allegation. The testimony, which they rely upon only suggests that the parties knew of the use of the container, not that the container was defective upon delivery and that Jade failed to warn of the defect. LSA-R.S. 9:3221 reads:

> Assumption of responsibility by lessee; liability of owner
>
> Notwithstanding the provisions of Louisiana Civil Code Article 2699, the owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.

La Civ. Code Art. 2699 reads:

> Waiver of warranty for vices or defects
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> The warranty provided in the preceding Articles may be waived, but only by clear and unambiguous language that is brought to the attention of the lessee. Nevertheless, a waiver of warranty is ineffective: (1) To the extent it pertains to vices or defects of which the lessee did not know and the lessor knew or should have known; (2) To the extent it is contrary to the provisions of Article 2004; or (3) In a residential or consumer lease, to the extent it purports to waive the warranty for vices or defects that seriously affect health or safety.

The Duncans continue to argue that the floor "buckled" and that there was a problem with the waviness of the floor when operating a forklift, which is definitely a defect. However, when the district court inquired as to whether the Duncans had an expert to testify about the defect, the Duncans replied in the negative. Further, the container was subjected to four months of heavy use causing USG to use a blow torch on the threshold of the door in order to cause entry into the container with a forklift, thus altering the container significantly.

Conflicting testimony regarding the duty to warn does not create a genuine issue of material fact in that Jade Services proved an absence of factual support for an essential element of the Duncans' claim; i.e., a pre-existing defect.

A *de novo* review reveals that the record does not contain any evidence to contradict summary judgment in favor of Jade Services after almost five years of discovery, the Duncans failed to prove that the container, which they rented, was defective upon delivery.

Decree

For the reasons set forth, we find that the district court did not err in granting summary judgment in favor of Jade Services.

AFFIRMED