RAYMOND SCHULTZ	*	**NO. 2017-CA-0165**
VERSUS	*	**COURT OF APPEAL**
COX OPERATING, LLC AND TERRY VINCENT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2013-05305, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

* * * * * *

JUDGE SANDRA CABRINA JENKINS

* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Daniel L. Dysart, Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins, Judge Paula A. Brown)

LOBRANO, J., DISSENTS AND ASSIGNS REASONS.

James M. Williams
Erin B. Rigsby
CHEHARDY, SHERMAN, ELLIS, MURRAY, RECILE, GRIFFITH, STAKELUM & HAYES, LLP
One Galleria Blvd., Suite 1100
Metairie, LA 70001

Danial C. Vidrine
12445 Parkvilla Avenue
Baton Rouge, LA 70816

COUNSEL FOR PLAINTIFF/APPELLANT

Salvador J. Pusateri
Kyle A. Khoury
PUSATERI BARRIOS GUILLOT & GREENBAUM, LLC
1100 Poydras Street, Suite 2250
New Orleans, LA 70163

COUNSEL FOR DEFENDANTS/APPELLEES

REVERSED; REMANDED

JANUARY 31, 2018

In this personal injury case, plaintiff Raymond Schultz appeals the trial court's October 11, 2016 judgment granting a motion to re-urge a motion for summary judgment filed by defendants/appellees Cox Operating, L.L.C. ("Cox") and Terry Vincent[1] (collectively, "Defendants"), and dismissing all of Schultz's claims against Defendants. Mr. Schultz also appeals the trial court's October 26, 2016 judgment denying his motion for a new trial. For the reasons that follow, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On June 5, 2012, Mr. Schultz was injured in a work-related accident. At the time of the accident, Mr. Schultz was the payroll employee of Blanchard Contractors ("Blanchard"), and Mr. Vincent was the payroll employee of Greene's Energy Group, LLC ("Greene's").

On June 4, 2013, Mr. Schultz filed an Original Petition for Damages ("Petition") asserting negligence claims against Cox and Mr. Vincent. Mr. Schultz alleged that in June 2012, he was installing a header to which a pipeline was tied. Mr. Schultz averred that after he left work on the day before the accident, Cox, or someone acting on Cox's behalf, brought a well online without a lockout or tagging to warn that the system was pressurized. Mr. Schultz contended that, when he returned to work the next day, he inadvertently touched the lever of a valve

[1] The October 11, 2016 judgment refers to this defendant/appellee as "Terry Vinson." The record contains conflicting information on whether his last name is Vinson or Vincent. For the purposes of this opinion, we refer to this defendant/appellee as "Vincent," which is the name used in the appellee brief.

connected to the pressurized system. According to Mr. Schultz, rust and slag shot out under pressure, striking him in the abdomen and knocking him into the water, from where he had to be rescued. Mr. Schultz asserted that Cox knew or should have known that the equipment was defectively maintained, and that, had Cox and Mr. Vincent instituted proper safety precautions, Mr. Schultz would not have been injured.

On December 18, 2013, Cox and Mr. Vincent, through their attorney of record, jointly filed an Answer to the Petition, asserting as an affirmative defense that Mr. Schultz was a statutory employee of Cox.

On August 27, 2015, Cox and Mr. Vincent filed a Motion for Summary Judgment, contending that because Mr. Schultz was Cox's statutory employee and Mr. Vincent's statutory co-employee, Mr. Schultz's exclusive remedy was under the Louisiana Workers' Compensation Act, and that Mr. Schultz's tort claims against Defendants were barred. In support of their Motion for Summary Judgment, Defendants introduced exhibits, including two contracts: (1) a Master Services Agreement between Cox and Blanchard providing that Blanchard's employees were Cox's statutory employees; and (2) a Master Services Agreement between Cox and Greene's providing that Greene's employees were Cox's statutory employees (collectively, the "MSAs"). Other exhibits to the motion included the Petition, Mr. Schultz's deposition, and the affidavit of Cox employee Jeffrey Wallace attesting that Mr. Schultz and Mr. Vincent were performing work for Cox at the time of Mr. Schultz's accident pursuant to the MSAs.

On October 27, 2015, Mr. Schultz moved for leave to file a First Supplemental and Amending Petition (the "Amending Petition"), in which he named Greene's as an additional defendant. The Amending Petition alleged that "[a]n additional cause of the accident and resulting injuries" to Mr. Schultz was the Defendants' "intentional acts within the meaning of La. R.S. Rev. Stat. 23:1302(B)," which is an exception to the exclusivity of the Louisiana Workers' Compensation Act.[2] Specifically, Mr. Schultz alleged that Cox and Mr. Vincent: (1) knew of the hazards presented by allowing the line on which Mr. Schultz worked to be pressurized after he ceased his work on the line the day before the accident; (2) knew that the line was pressurized and knew of the substantial certainty that serious bodily injury would occur if the crew was allowed to work on a pressurized line; (3) knew that a rapid, suddenly dangerous release of pressurized material would be released from the pressured line which would result in serious bodily injury; and (4) did not prohibit, prevent, or warn of the substantial certainty that serious bodily injury would occur if the contents inside the highly pressurized line were intentionally allowed to be released.

On October 28, 2015, Mr. Schultz also filed an opposition to summary judgment, contending that there was a genuine issue of material fact as to "whether

[2] The Louisiana Workers' Compensation Act provides that "[e]xcept for intentional acts provided for in Subsection B, the rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights, remedies, and claims for damages…" La. R.S. 23:1032(A)(1). "Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act." La. R.S. 23:1032(B).

any of the members of the Blanchard crew were aware that the pipe was pressurized when they began work on June 5, 2012."

On November 16, 2015, Cox and Mr. Vincent filed a reply memorandum, arguing that Mr. Schultz could not prevail on his intentional acts claims because he testified in his deposition that he could not say whether Mr. Vincent knew that the line was pressurized on the day of the accident.

On December 9, 2015, the trial court granted leave for Mr. Schultz to file the Amending Petition. On December 28, 2015, the trial court denied the Defendants' Motion for Summary Judgment "without prejudice" to allow Mr. Schultz "six months in which to conduct discovery at which time the defense counsel may re-file this Motion."

On May 31, 2016, one month before the six-month discovery deadline, counsel for Mr. Schultz sent an e-mail to all defense counsel asking for available dates in June to depose Mr. Vincent. He received no response. On June 8, 2016, counsel for Mr. Schultz made a second request for available dates in June, and also asked defense counsel "which defendant/attorney will be responsible for Mr. Vincent to be present at the deposition?" On the same date, counsel for Cox and Mr. Vincent responded that Mr. Vincent was a direct employee of Greene's, but did not work for Greene's any longer. He also said that counsel for Mr. Schultz would need to subpoena Mr. Vincent to secure his attendance at a deposition. Counsel for Mr. Schultz responded, asking for the last known address for Mr. Vincent in order to set a deposition for June 28 or June 29. On June 9, 2016,

counsel for Cox and Mr. Vincent stated that "[t]hat question would probably be better directed to Tim Hassinger, counsel for Greene's." The six-month deadline for Mr. Schultz to conduct additional discovery expired on June 28, 2016 without Mr. Vincent's deposition being taken.

On July 29, 2016, Cox and Mr. Vincent filed a Motion to Re-Urge Motion for Summary Judgment, arguing that Mr. Schultz had conducted no additional discovery and that summary judgment was now appropriate. In support of their motion, Cox and Mr. Vincent introduced as exhibits the series of e-mails between the attorneys regarding scheduling Mr. Vincent's deposition, along with Defendants' 2015 Motion for Summary Judgment, Mr. Schultz's opposition, and Defendants' reply memorandum.

On August 29, 2016, Mr. Schultz filed a Motion to Compel Cox and Greene's to produce Mr. Vincent for a deposition. Mr. Schultz also filed a Motion to Continue the hearing on the Motion to Re-urge Motion for Summary Judgment. Mr. Schultz argued that he could not respond to the Motion for Summary Judgment without taking Mr. Vincent's deposition, and that all defense counsel had refused to produce Mr. Vincent for deposition. Exhibits to these motions included the same series of e-mails between the attorneys documenting Mr. Schultz's counsel's attempts to schedule Mr. Vincent's deposition prior to the expiration of the six-month discovery deadline.

On September 21, 2016, Cox and Mr. Vincent filed an opposition to Mr. Schultz's motions, arguing that Mr. Schultz had an adequate opportunity to

conduct discovery but delayed in undertaking the discovery he sought. In the opposition, counsel for Cox and Mr. Vincent stated that he was unaware of Mr. Vincent's whereabouts, and that his representation of Mr. Vincent was only pursuant to a defense and indemnity provision in the MSA between Blanchard and Cox. Counsel for Cox and Mr. Vincent also stated that he had never spoken to Mr. Vincent.

On October 11, 2016, the trial court rendered judgment denying Mr. Schultz's Motion to Compel, denying his Motion to Continue, granting the Defendants' Motion to Re-urge Motion for Summary Judgment, and dismissing Mr. Schultz's claims against Cox and Mr. Vincent, with prejudice. On October 24, 2016, Mr. Schultz filed a Motion for New Trial, arguing that summary judgment was premature because further discovery would establish the existence of genuine issues of material fact, and that counsel for Cox and Mr. Vincent had repeatedly refused to produce Mr. Vincent for deposition. The trial court denied a new trial on October 26, 2016. This appeal followed.

DISCUSSION

In this appeal, Mr. Schultz sets forth a single assignment of error, contending that the trial court erred in granting summary judgment and denying a new trial. Mr. Schultz argues that summary judgment was premature because he was unable to conduct adequate discovery due to Defendants' failure to produce Mr. Vincent for a deposition, and that this discovery was necessary because it pertained directly

to an unresolved factual issue in Mr. Schultz's intentional acts claims, i.e., whether Defendants knew that Mr. Schultz's injuries were substantially certain to occur because they did not warn the Blanchard work crew about the pressurized pipe.

Standard of Review

Mr. Schultz filed a Motion to Continue, which is the proper method to challenge a motion for summary judgment on the basis of prematurity due to inadequate discovery. *See* La. C.C.P. art. 966(C)(2). "When discovery is alleged to be incomplete, a trial court has the discretion either to hear the summary judgment motion or to grant a continuance to allow further discovery." *Roadrunner Transp. Sys. v. Brown*, 17-0040, p. 11 (La. App. 4 Cir. 5/10/17), 219 So.3d 1265, 1272. The trial court denied Mr. Schultz's Motion to Continue. We thus review the trial court's decision under an abuse of discretion standard. *Id*.

Inadequate Discovery

A defendant may file a summary judgment motion at any time. La. C.C.P. art. 966(A). Generally, a motion for summary judgment may only be granted "[a]fter an opportunity for adequate discovery." *Serpas v. Univ. Healthcare Syst.*, 16-0948, p. 2 (La. App. 4 Cir. 3/18/17), 213 So.3d 427, 428-29; La. C.C.P art. 966(A)(3). "Although the language of article 966 does not grant a party the absolute right to delay a decision on a motion for summary judgment until all discovery is complete, the law does require that the parties be given a fair opportunity to present their case." *Leake & Andersson, LLP v. SIA Ins. Co. (Risk Retention Grp.)*, 03-1600, pp. 3-4 (La. App. 4 Cir. 3/3/04), 868 So.2d 967, 969

(citing *Doe v. ABC Corp.*, 00-1905, pp. 10-11 (La. App. 4 Cir. 6/27/01), 790 So.2d 136, 143). This court has found summary judgment premature where the party opposing summary judgment was not afforded a reasonable opportunity to take relevant depositions prior to being required to defend against a motion for summary judgment. *See Doe*, 00-1905, p. 11, 790 So.2d at 143; *Serpas,* 16-0948, p. 2, 213 So.3d at 429.

With respect to an inadequate discovery claim, this court has identified the following four relevant factors to be considered:

> (i) whether the party was ready to go to trial,
>
> (ii) whether the party indicated what additional discovery was needed,
>
> (iii) whether the party took any steps to conduct additional discovery during the period between the filing of the motion and the hearing on it, and
>
> (iv) whether the discovery issue was raised in the trial court before the entry of the summary judgment.

Roadrunner, 17-0040, pp. 11-12, 219 So.3d at 1273 (citing *Bass P'ship v. Fortmayer*, 04-1438, p. 10 (La. App. 4 Cir. 3/9/05), 899 So.2d 68, 75 (citing *Greenhouse v. C.F. Kenner Associates Ltd. P'ship*, 98-0496, p. 3 (La. App. 4 Cir. 11/10/98), 723 So.2d 1004, 1006)).

As to the first factor, this case has not been set for trial, which suggests that discovery has not been completed, and that Mr. Schultz is not ready to go to trial.[3]

[3] Under Louisiana District Court Rule 9.14, Appendix 9.14, cases in Civil District Court may be set for trial upon a written motion by a party certifying, among other things, that all depositions and discovery have been completed, and that the matter is ready to be set for trial.

Under the second factor, Mr. Schultz sought to depose Mr. Vincent in order to elicit testimony regarding Mr. Vincent's knowledge that the line was pressurized and his failure to inform Mr. Schultz and his crew of the pressurized condition.

Under the third factor, between the time the Motion to Re-urge was filed and the hearing, Mr. Schultz filed a Motion to Compel Mr. Vincent's deposition.

As to the fourth factor, on both occasions when Cox and Mr. Vincent moved for summary judgment, Mr. Schultz filed a Motion to Continue the hearing, arguing that further discovery was needed regarding Mr. Schultz's claim under the intentional act exception to the workers compensation statute.

Taken together, these four factors support Mr. Schultz's contention that the trial court abused its discretion in ruling on Defendants' Motion for Summary Judgment before Mr. Schultz was able to depose Mr. Vincent. *See Crawford v. City of New Orleans*, 01-0802, pp. 7-8 (La. App. 4 Cir. 1/23/02), 807 So.2d 1054, 1058 (trial court abused its discretion in granting summary judgment without further discovery where there was no trial set, the plaintiff had identified the deposition testimony sought and the defendant agreed to participate, the plaintiff documented his efforts to set the deposition, and the plaintiff filed a motion to continue the summary judgment motion due to the need for the earlier requested discovery).

Mr. Schultz argues that he was unable to complete discovery because defense counsel "refused" to produce Mr. Vincent for deposition. He also contends that Cox and/or the attorney representing Defendants were required to ensure that Mr. Vincent appeared for deposition because counsel filed an Answer to Mr. Schultz's Petition on behalf of both Cox and Mr. Vincent.

This court has recognized another factor that may be considered is "whether discovery has been hindered by a circumstance beyond an opponent's control." *Roadrunner*, 17-0040, p. 13, 219 So.3d at 1274. "[T]he need for additional time to conduct discovery based on such a hindering circumstance should be documented in the record; the need should be 'expressed in a motion to continue, motion to compel, or other pleading.'" *Id.*

Additionally, "'[t]he trial court may take into consideration such factors as diligence, good faith, reasonable grounds, fairness to both parties and the need for the orderly administration of justice' in addressing the adequate discovery issue." *Id*. (quoting *Rogers v. Hilltop Retirement & Rehabilitation Ctr.*, 13-867, p. 4 (La. App. 3 Cir. 2/12/14), 153 So.3d 1053, 1058).

The record shows that, prior to the expiration of the six-month period for conducting additional discovery, counsel for Mr. Schultz asked all defense counsel for available dates to take Mr. Vincent's deposition in the month of June. When defense counsel did not respond, counsel for Mr. Schultz repeated his request, and asked "which defendant/attorney will be responsible for Mr. Vincent to be present at the deposition?" Counsel for Mr. Vincent responded that Mr. Vincent was a direct employee of Greene's, and that counsel for Mr. Schultz would need to subpoena Mr. Vincent to secure his attendance at a deposition. When counsel for Mr. Schultz asked for the last known address for Mr. Vincent, counsel for Mr. Vincent stated that "[t]hat question would probably be better directed to Tim Hassinger, counsel for Greene's." The record does not show that counsel for Mr. Vincent ever took any affirmative steps to produce his client, Mr. Vincent, for deposition. He readily admitted that he had no knowledge of his client's whereabouts, and had never even had contact with his client. Counsel for

Greene's, Mr. Vincent's payroll employer, failed to cooperate at all in timely setting Mr. Vincent's deposition.[4]

Under these circumstances, we find that Mr. Schultz's inability to locate Mr. Vincent was due to a circumstance beyond his control that hindered his attempts to discover information he needed to defend against Defendants' Motion for Summary Judgment. Mr. Schultz's inability to find Mr. Vincent was documented in the record – in the e-mails with defense counsel and in Mr. Schultz's Motion to Compel defendants Cox and Greene's to produce Mr. Vincent for a deposition. *See Roadrunner*, 17-0040, pp. 13-14, 219 So.3d at 1274 (finding that plaintiff's inability to locate and obtain discovery from an unserved, absent defendant was a hindering circumstance beyond its control). We also find that counsel for Mr. Schultz made a good faith, reasonable effort to take Mr. Vincent's deposition within the time frame set by the trial court.

Finally, we find that the information sought by Mr. Schultz through additional discovery pertains directly to unresolved factual issues necessary to determine whether the Louisiana Worker's Compensation Act provides the exclusive remedy to plaintiff. Thus, we find the granting of summary judgment was premature due to a lack of adequate discovery. *See* La. C.C.P. art. 966(A)(3); *Leake & Andersson,* 03-1600, pp. 3-4, 868 So.2d at 969.

CONCLUSION

[4] The Louisiana Rules of Professional Conduct mandate that counsel for Mr. Vincent reasonably consult with his client regarding the means by which his client's objectives are to be accomplished, and to keep his client reasonably informed about the status of this matter. *See* La. R. Prof. Conduct 1.4(a)(2), (3). Counsel for Mr. Schultz, on the other hand, is not permitted to communicate with Mr. Vincent unless his lawyer has consented, or Mr. Schultz's lawyer is authorized to do so by law or a court order. *See* La. R. Prof. Conduct 4.2(a). Counsel are also required to abide by the Louisiana Code of Professionalism, which states that an attorney "will consult with other counsel whenever the scheduling procedures are required and will be cooperative in scheduling discovery, hearings, the testimony of witnesses and in the handling of the entire course of any legal matter." La. Dist. Ct. R. 6.2.

For the foregoing reasons, we reverse the judgment of the trial court granting Defendants' Motion for Summary Judgment filed by Defendants, and remand the matter for further proceedings.

REVERSED; REMANDED