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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001350-MR

DUDLEY J. VAN METER, JR.
AND KEMI — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 09-CI-006308

WEBER GROUP, INC.; CB RICHARD
ELLIS, INC.; BA MERCHANTS SERVICES,
LLC; AND BANK OF AMERICA, N.A., D/B/A
BA MERCHANTS SERVICES, LLC — APPELLEES

AND NO. 2011-CA-001372-MR

KEMI — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 09-CI-006308

WEBER GROUP, INC.; CB RICHARD
ELLIS, INC.; BA MERCHANTS SERVICES,
LLC; AND BANK OF AMERICA, N.A., D/B/A
BA MERCHANTS SERVICES, LLC APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Dudley J. Van Meter, Jr. appeals from two summary judgments of the Jefferson Circuit Court. The first was entered in favor of Weber Group, Inc. on the basis that Weber was entitled to up-the-ladder immunity under the Kentucky Workers' Compensation Act. The second summary judgment was entered in favor of CB Richard Ellis, Inc., BA Merchants Services, LLC and Bank of America, N.A. d/b/a BA Merchants Services, LLC, (we refer to the Bank of America entities collectively as BOA) on the basis that Van Meter was an employee of an independent contractor and, therefore, CB Richard Ellis and BOA cannot be liable for his injuries. The issues presented are: (1) whether an adequate opportunity to conduct discovery was granted; (2) whether Weber is entitled to up-the-ladder immunity provided in Kentucky Revised Statute (KRS) 342.690(1) and KRS 342.610(2); and (3) whether CB Richard Ellis and BOA owed a duty to provide a safe workplace to Van Meter. We affirm.

On June 26, 2008, Van Meter was working as a temporary employee at a BOA facility when he fell from a steel canopy roof and sustained permanent

injuries. At the time of his accident, Van Meter was employed by A Better Industrial Temporary, Inc. (ABIT), which had contracted with Weber to provide temporary maintenance workers. Weber is a design and construction company and a full service provider for facility maintenance and renovation for corporate campuses. It contracted with CB Richard Ellis to provide its services at the BOA facility.

Weber and ABIT had workers' compensation insurance as required by the Kentucky Workers' Compensation Act. Van Meter filed a workers' compensation claim against ABIT that was ultimately settled. On June 24, 2009, Van Meter filed a complaint against Weber, CB Richard Ellis, and BOA alleging that their negligence and failure to provide proper safety equipment caused his injuries. The circuit court issued summary judgment in favor of Weber on October 22, 2010, and, on June 22, 2011, issued summary judgment in favor of CB Richard Ellis and BOA. Further facts will be developed as required to address the specific issues presented.

Summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. "The party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence v. Chipman,* 38 S.W.3d 387, 390 (Ky. 2001).

When a summary judgment is granted, our review is *de novo.* *Burton v. Kentucky Farm Bureau Mut. Ins. Co.,* 326 S.W.3d 474, 475 (Ky.App. 2010).

Van Meter contends that the circuit court granted its summary judgments prematurely. As a part of our review, this Court must "consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling." *Blankenship v. Collier,* 302 S.W.3d 665, 668 (Ky. 2010). However, the trial court's determination that a sufficient time was given will not be disturbed absent an abuse of discretion. *Id.*

Almost fifteen months had elapsed since the complaint was filed when the first summary judgment was entered and almost two years when the second summary judgment was entered. The circuit court had an extensive record before it including depositions, affidavits, and other information produced in the workers' compensation proceeding. Additionally, written discovery was propounded and answered prior to the motions for summary judgment. We conclude that the summary judgments were not prematurely granted and, for the following reasons, affirm.

It is well established that "the workers' compensation system is the exclusive remedy for any injuries falling within its purview, except for intentional injuries caused by the employer." *Edwards v. Louisville Ladder*, 957 S.W.2d 290, 294 (Ky.App. 1997). When read in conjunction, KRS 342.690(1) and KRS 342.610(2) provide up-the-ladder immunity to a contractor for injuries incurred by an employee of a subcontractor. KRS 342.690(1) states:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation.

KRS 342.610(2)(b) defines contractor as a person who contracts with another "[t]o have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person[.]"

Despite the statutory language, Van Meter contends that because he was provided as a temporary worker by ABIT, the circuit court erred when it concluded Weber was entitled to up-the-ladder immunity. In *United States Fidelity & Guarantee Company v. Technical Minerals*, *Inc*., 934 S.W.2d 266 (Ky. 1996), the Court considered and rejected the same argument.

The Court addressed whether a company that contracted with a temporary labor service for temporary employees was a contractor for the purposes of Kentucky's Workers' Compensation Act. The Court held that because the company contracted to have work performed by a temporary employee that was a regular and recurring part of the company's business, the company was a contractor as defined in the Act and the contract labor company was a subcontractor. *Id*. at 267. Therefore, the Court held, the temporary employee's

tort claim was barred because workers' compensation was his exclusive remedy. *Id*.

Van Meter attempts to distinguish *Technical Minerals* by pointing out that in the Court's recitation of the facts it referred to the injured employee as a "leased" employee, which he argues is distinguishable from a temporary employee working for a temporary employment agency. *Id*. He cites to the post-*Technical Minerals* enactment of KRS 342.615 setting forth various definitions of terms used in the Act when referring to employment relationships, including leased employees and temporary workers. The distinction was explained in *Labor Ready, Inc. v. Johnston*, 289 S.W.3d 200, 207 (Ky. 2009):

> Employee leasing arrangements are arrangements in which two or more entities allocate employment responsibilities. KRS 342.615(4) requires the lessee to secure workers' compensation coverage for all leased employees or contract with the employee leasing company to do so, and it requires the premium to be based on the lessee's exposure and experience. A temporary help service hires its own employees and assigns them to clients for finite periods to supplement the client's workforce during special situations such as employee absences, temporary skill shortages, and seasonal workloads. KRS 342.615(5) states explicitly that the temporary help service "shall be deemed" a temporary worker's employer and "shall be subject" to Chapter 342.

(footnotes omitted). Although the statute distinguishes a leased employee and a temporary employee, there is no language in the statute that overrules the Supreme Court's holding in *Technical Minerals*.

A close reading of *Technical Minerals* reveals that the injured employee was employed by a temporary employment service and the Court's reference to a "leased" employee an inconsequential difference in semantics. *Technical Minerals*, 934 S.W.2d at 267. Likewise, the distinction made by Van Meter has no consequence to the exclusiveness of his remedy. If he was a leased employee, he would be entitled to receive workers' compensation benefits from Weber as his exclusive remedy. If he was a temporary worker, he would be entitled to benefits from ABIT and Weber would be entitled to up-the-ladder immunity because it is a contractor that secured workers' compensation coverage.

Van Meter criticizes the holding in *Technical Minerals* on public policy grounds. He points out that companies who hire temporary workers can avoid all responsibility under the Workers' Compensation Act and civilly. In *Technical Minerals*, our Supreme Court made clear that its decision rested on different public policy considerations when it stated:

> As a practical matter, if the statute here were construed to allow a common law civil action against an employer who obtains a temporary employee through a temporary services company, no employer in his right mind would hire such an employee. The effect of this would be to destroy the temporary services industry.
>
> Historically, a major reason employers were willing to provide Workers' Compensation benefits was to be free of common law civil liability. By the argument of plaintiffs in this case, such would be totally frustrated and the plaintiff would have the best of both worlds, Workers' Compensation benefits and a common law right of action. By contrast, the defendant/employer

> would have the worst of both worlds and this could not have been legislative intent.

Id. at 269. Although we believe there is some merit to Van Meter's public policy arguments, particularly as the temporary service business continues to expand, we are not at liberty to enforce a public policy at variance with our Supreme Court and Legislature. Our inquiry turns to whether Weber was a contractor under the Act.

Van Meter contends that Weber contracted with ABIT to provide temporary employees and not to maintain the property. He misstates the issue. The issue for purposes of up-the-ladder immunity is whether Van Meter was engaged in a kind of work which was "a regular and recurrent part" of Weber's business. KRS 342.610(2). In *General Electric Co. v. Cain*, 236 S.W.3d 579, 588 (Ky. 2007), the Court defined "regular and recurrent" as work that is "customary, usual, or normal to the particular business (including work assumed by contract or required by law) or work that the business repeats with some degree of regularity, and it is of a kind that the business or similar businesses would normally perform or be expected to perform with employees."

Weber was a construction and maintenance company retained by CB Richard Ellis to provide ongoing construction and maintenance work at the BOA facility, and Weber contracted with ABIT for Van Meter's services to assist with maintenance. Based on the undisputed facts, the circuit court properly concluded that Weber was a contractor for purposes of KRS 342.610(2).

Van Meter seeks to impose liability on CB Richard Ellis and BOA on the basis of KRS 338.160. Because that statute was repealed in 1972, his argument is without merit. We address his contention that CB Richard Ellis and BOA owed common law duties to provide a safe workplace.

"As a general rule, an employer is not liable for the torts of an independent contractor in the performance of his job." *Miles Farm Supply v. Ellis*, 878 S.W.2d 803, 804 (Ky.App. 1994). An exception to the general rule exists if the independent contractors work is inherently dangerous or creates a nuisance. *Id*. at 804.

The contracts establish that there was no employment relationship between CB Richard Ellis, BOA, and Van Meter. Van Meter was employed by ABIT and received directions regarding the relocation of the steel canopy from a Weber employee. The relocation of the steel canopy was not common to the normal business operations of CB Richard Ellis or BOA and no evidence was produced that they retained any supervision or control over the project. Additionally, there is no evidence that the relocation of the steel canopy was an inherently dangerous activity or a nuisance.

The circuit court did not abuse its discretion when it concluded that Van Meter had ample opportunity to conduct discovery and refute the undisputed facts in the record but simply failed to do so. Summary judgment was properly granted.

Based on the forgoing, the summary judgments of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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