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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001380-MR

JAMES CARPENTER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 13-CI-005220

GEIGER & PETERS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: James Carpenter appeals from a summary judgment by the Jefferson Circuit Court dismissing his civil claim against Geiger & Peters, Inc. (Geiger & Peters) based upon the exclusive remedy provisions of the Workers' Compensation Act. Carpenter argues that the trial court erred in finding that Geiger & Peters was entitled to immunity under the Act because he was not

performing work which is a regular and recurrent part of Geiger & Peters's business. In the alternative, Carpenter argues that genuine issues of material fact remained to be resolved, and consequently summary judgment was not yet appropriate. But based upon the express terms of the contract and other evidence of record, we agree with the trial court that Carpenter was clearly performing work which was a regular and recurrent part of Geiger & Peters's business. Hence, we affirm the trial court's entry of summary judgment.

For purposes of this appeal, the facts of this action are not in dispute. In the fall of 2012, Carpenter was employed by Millennium Steel, Inc. (Millennium) to perform steel erection work for an addition that was being built onto Central Baptist Hospital in Lexington, Kentucky. The general contractor for this construction was Congleton-Hacker. Congleton-Hacker subcontracted with Geiger & Peters to provide structural steel beams for the project. In turn, Geiger & Peters contracted the steel erection work to Millennium.

On November 5, 2012, Carpenter was injured when a steel beam which he was unloading from a truck rolled onto his foot. Carpenter received workers' compensation benefits from Millennium based upon this accident. Thereafter, on October 15, 2013, Carpenter filed this civil action, alleging that Geiger & Peters negligently loaded the truck, causing the beam to be unstable and prone to roll.

In response to the complaint, Geiger & Peters asserted several defenses, including that Carpenter's claim was barred by the exclusive remedy provision of the Workers' Compensation Act. Thereafter, in its answer to interrogatories, Geiger & Peters admitted that it supplied the steel. Geiger & Peters also admitted that its employees were responsible for loading the beams onto the delivery trucks. However, Geiger & Peters stated that unloading the steel at the job site is always the responsibility of a subcontractor such as Millennium.

Based upon these responses, Geiger & Peters moved for summary judgment, arguing that it was entitled to immunity as an "up-the-ladder" contractor under the provisions of KRS 342.610. Carpenter argued that summary judgment was premature because discovery had just begun. He also argued that there was a factual issue whether Geiger & Peters would qualify as a contractor within the definition of KRS 342.610(1)(b).

After considering the record and arguments of counsel, the trial court granted summary judgment for Geiger & Peters on August 13, 2015. The trial court concluded that Carpenter was engaged in a regular and recurrent portion of Geiger & Peters's work. Consequently, the court found that Geiger & Peters was entitled to immunity as an "up-the-ladder" contractor. This appeal followed.

The sole question on appeal is whether Geiger & Peters qualifies as an "up-the-ladder" contractor and thus is entitled to immunity from tort liability under

the provisions of the Workers' Compensation Act. KRS 342.690(1) provides, in pertinent part, as follows:

> 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. . . . 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. (Emphasis added.)

KRS 342.610 identifies those employers who are liable for payment of workers' compensation benefits to employees who suffer work-related injuries or occupational diseases. Specifically, subsection (2) provides,

> A contractor who subcontracts all or any part of a contract and his or her carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his or her carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another:
>
> . . . .
>
> (b) To 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 shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.

The purpose of KRS 342.610(2) is to discourage owners and contractors from hiring fiscally irresponsible subcontractors and thus eliminate workers' compensation liability. It accomplishes this purpose by imposing liability upon the "up-the-ladder" contractor for compensation to the employees of a subcontractor unless the subcontractor has provided for the payment. *Matthews v. G & B Trucking, Inc.*, 987 S.W.2d 328, 330 (Ky. App. 1998). But conversely, an "up-the-ladder" contractor is entitled to immunity from tort liability where its subcontractor has secured workers' compensation coverage. *Gen. Elec. Co. v. Cain*, 236 S.W.3d 579, 584-85 (Ky. 2007). However, if "some other person than the employer" may be legally responsible for the worker's on-the-job injuries, the worker may assert a tort claim against that other person and attempt to recover damages. *Beaver v. Oakley*, 279 S.W.3d 527, 530 (Ky. 2009), *citing* KRS 342.700.

The parties in this case agree that Geiger & Peters contracted with Carpenter's employer, Millennium, to provide the steel for the construction project. The parties also agree that Millennium secured payment of workers' compensation benefits. The only issue is whether the work being performed by Carpenter was a "regular and recurrent part of the trade, occupation, or profession" of Geiger & Peters.

In *Gen. Elec. Co. v. Cain*, *supra*, the Kentucky Supreme Court addressed the standards under which a premises owner may be found to be an up-

the-ladder contractor. The Court first noted that a party who asserts exclusive-remedy immunity must both plead and prove the affirmative defense. *Id.* at 585. Even when the underlying facts are undisputed, a conclusion that a defendant is entitled to judgment as a matter of law must be supported with substantial evidence that a defendant was the injured worker's statutory employer under a correct interpretation of KRS 342.610(2)(b). *Id., citing Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

The Court went on to discuss the circumstances under which the work being performed is a "regular and recurrent" part of the premises owner's business. The Court noted that "recurrent" means occurring again or repeatedly, and "regular" generally means customary or normal, or happening at fixed intervals. *Id.* at 586, *citing Daniels v. Louisville Gas & Elec. Co.*, 933 S.W.2d 821 (Ky. App. 1996). However, the Court went on to note that neither term requires regularity or recurrence with the preciseness of a clock or calendar. *Id.* at 587. Rather, the term "regular" applies not only to the nature of the owner's business, but also to the frequency of the occurrence of a need to perform the work in question. *Id.*

The Supreme Court also found guidance for determining the work of a business in Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 70.06[3] (2006), which states:

> [T]he test must be relative, not absolute, since a job of construction or repair that would be a nonrecurring and extraordinary undertaking for a small business might well

> for a large plant be routine activity which it normally expects to cope with through its own employed staff. Ordinarily construction work, such as building a factory structure, installing a conveyor system, moving laboratory equipment, putting in new partitions, making electrical installations, road widening, excavating, replacing a heating system, inspecting elevators, changing the pipes, putting in a septic tank, bricking up the windows, replacing the floor, building a fence, building a canopy for a small grocery store, or replacing shoe racks, would be considered outside the trade or business of a manufacturing or mercantile establishment. But if the defendant is a business which by its size and nature is accustomed to carrying on a more or less ongoing program of construction, replacement, and maintenance, perhaps even having a "construction division," or which can be shown to have handled its own construction in the past, a job of construction delegated to a contractor will be brought within the statute. (footnotes omitted.)

Id. at 587-88.

The Court in *Cain* concluded that work of a kind which is a "regular or recurrent part of the work of the trade, business, occupation, or profession" of an owner does not mean work that is beneficial or incidental to the owner's business or that is necessary to enable the owner to continue in business, improve or expand its business, or remain or become more competitive in the market. Rather, it is 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. *Id.* at 588.

While the Court in *Cain* was specifically addressing the liability of a premises owner for workers' compensation benefits, the same standards apply to a party such as Geiger & Peters.

As the trial court correctly pointed out, the question centers on whether Carpenter was injured while performing a job that is part of Geiger & Peters's regular or recurrent work. Geiger & Peters is in the business of manufacturing and supplying steel beams for the construction process. The President of Geiger & Peters, Stephen H. Knitter, provided an affidavit stating:

> As a regular and recurrent part of its business as a structural steel manufacturer and supplier, Geiger & Peters hires subcontractors such as Millennium Steel to provide services for unloading the steel beams on projects such as the project at Central Baptist Hospital.

Geiger & Peters further notes that a person who engages another to perform a part of the work which is a recurrent part of his business, trade, or occupation is a contractor, even though he may never perform that particular job with his own employees. *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459, 462 (Ky. 1986). Even though it never uses its own employees to unload trucks, Geiger & Peters argues that unloading the truck was a regular and recurrent part of its business because it consistently employs subcontractors to perform this duty. Geiger & Peters argues that Knitter's affidavit clearly establishes that Carpenter's work in unloading the truck was a regular and recurrent part of its business.

Carpenter responds that Geiger & Peters is merely a manufacturer and supplier of structural steel. He also alleges that the unloading of the truck was directly supervised only by Millennium and Congleton-Hacker, and he saw no evidence on the job site that Geiger & Peters had any role other than the delivery of the steel. Consequently he argues that Geiger & Peters is not in the business of providing services such as unloading of steel beams upon delivery to a job site.

Knitter's affidavit is relevant to the question of whether unloading the truck was a regular and recurrent part of Geiger & Peters's business, but it is not determinative. Indeed, statements that amount to legal conclusions are not substantial evidence. *Cain*, 236 S.W.3d at 585. However, we find that the contract between Geiger & Peters and Millennium clearly resolves the question.

The terms of that contract indicate that Geiger & Peters was not acting merely as a supplier of steel, but as an up-the-ladder contractor to Millennium. The contract specified Millennium's duties as a subcontractor to Geiger & Peters. These duties included the submission of periodic reports to Geiger & Peters, as well as the scope of Geiger & Peters's supervision of the work performed by Millennium. Millennium also agreed to maintain insurance coverage, including workers' compensation coverage for any liability arising out of the performance of the subcontract with Geiger & Peters.

And most significantly, Attachment "A" to the subcontract sets out Millennium's specific duties with respect to performance:

> UNLESS OTHERWISE SPECIFICALLY ADDESSED IN THE CONTRACT DOCUMENTS, THE FOLLOWING WILL BE REQUIRED UNDER THIS SUBCONTRACT AGREEMENT;
> You [Millennium] will be expected to perform all field work necessary to complete structural steel, decking and miscellaneous steel work within Geiger & Peter, Inc., scope, which may include but is not limited to:
> ….
> G. Unloading of trucks within 2 hours of arrival at jobsite.

The determination of immunity is a mixed question of fact and law for the court to decide. *Cain*, 236 S.W.3d at 589. On the factual issue, summary judgment is not appropriate unless no genuine issues of material fact are raised. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. *Id.* The conclusions to be drawn from those findings of jurisdictional facts are questions of law for the trial court to decide, subject to *de novo* review by this Court. *Cain*, 236 S.W.3d at 589.

We agree with Carpenter that, generally, a business which merely supplies goods will not be a contractor within the meaning of KRS 342.610(2)(b). But based upon Knitter's affidavit and particularly upon the contract between Geiger & Peters and Millennium, Millennium was clearly functioning as a subcontractor under Geiger & Peters. The unloading of the truck was part of the duties which Geiger & Peters delegated to Millennium. Given these undisputed

facts, the trial court properly found that Carpenter was injured while performing duties that were within the regular and recurrent part of Geiger & Peters's business. Thus, as a matter of law, we agree with the trial court that Geiger & Peters was entitled to immunity under the provisions of KRS 342.690. Consequently, the trial court properly granted summary judgment to Geiger & Peters and dismissed Carpenter's claim.

Accordingly, the summary judgment by the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Timothy R. McCarthy Louisville, Kentucky	Lisa Jayne Fauth Lexington, Kentucky