

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0726

DAMON M. DEVILLE

VERSUS

**ADVANCED MASONRY, L.L.C., THE ALTERNATIVE IS
ADVANCED MASONRY SERVICES, L.L.C.**

Judgment rendered: February 9, 2007

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Suit Number 512,297; Division H Sec 23
The Honorable William A. Morvant, Judge Presiding**

**Joseph H. Jolissaint
Baton Rouge, LA**

**Counsel for Plaintiff/Appellant
Damon M. Deville**

**Justin A. Day
Baton Rouge, LA**

**Jonathan D. Mayeux
Baton Rouge, LA**

**Counsel for Defendant/Appellee
Advanced Masonry, L.L.C. and
Republic Vanguard Insurance Co.**

**Daniel A. Reed
Baton Rouge, LA**

**John A. London, III
Baton Rouge, LA**

**Counsel for Intervenor/Appellee
Bridgefield Casualty Insurance
Company, Inc.**

BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

270 Pettigrew, J. Concur

TRD

DOWNING, J.

Plaintiff, an electrician working at a construction site, filed a tort action against Advanced Masonry, LLC, (Advanced Masonry) and its insurer, for injuries he sustained by the negligence of another subcontractor's employee who was also working at the jobsite. The trial court rendered summary judgment in favor of defendants, and from that judgment, plaintiff appeals. For the following reasons, we affirm.

BACKGROUND

Damon M. Deville was working as an electrician at a Walgreen's Pharmacy building site when he was struck on the head by a falling cinder block. The blocks were being installed pursuant to a sub-contract agreement between Alfonse Castro Arrietos (Castro) and Advanced Masonry.¹ Sergio Barrera and Jose Lopez, employees of Castro, were installing the blocks when one fell and injured Deville. Deville brought suit against Advanced Masonry and its insurer, Republic Vanguard Insurance Company, alleging that Advanced Masonry was vicariously liable for the negligence of Castro's employees' negligence. Castro was added as a defendant at a later date.

Defendants filed a motion for summary judgment asserting that Castro was an independent contractor and not an employee of Advanced Masonry. Deville requested a continuance alleging that it needed to conduct additional discovery to defeat Advanced Masonry's motion. Particularly, Deville wanted to depose the person who signed the contracts on behalf of Advanced Masonry. The trial court denied the continuance and granted Advanced Masonry's motion.

¹ Deville was not an employee of or hired by Advanced Masonry or Castro.

STANDARD OF REVIEW

A motion for summary judgment is a procedural device used to avoid a full-scale trial where there is no genuine factual dispute. *Sanders v. Ashland Oil, Inc.*, 96-1751, p. 5 (La.App. 1 Cir. 6/20/97), 696 So.2d 1031, 1034. It should only be granted if the pleadings, deposition, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966.

DISCUSSION

Deville contends that Advanced Masonry is liable as a principal for his injuries on two grounds. The first being that by operation of law Advanced Masonry's operational control over Castro made it vicariously liable for Castro's employees negligence. Deville's second argument is that Advanced Masonry is liable for Castro's negligence on a contractual basis.

OPERATIONAL CONTROL *Assignment of Error Number Two*

Under Louisiana law, a principal generally is not liable for the offenses an independent contractor commits in the course of performing its contractual duties. *Smith v. Zellerbach*, 486 So.2d 798,801 (La.App. 1 Cir. 1986). There are two exceptions to this rule. One is when the injuries result from an ultra-hazardous activity. The other is when the principal reserves the right to supervise or control the work. *Davis v. State Farm Ins. Co.*, 558 So.2d 636, 639 (La.App. 1 Cir. 1990). Since building a cinder block wall is not an ultra-hazardous activity,² Advanced Masonry can only be held liable if it had the right to exercise control of Castro's work.

Here, no evidence was presented indicating that Advanced Masonry had the right to control Castro employees' work. In fact, the record indicates

² See *Davis v. Ins. Co. of North America*, 94-0698, p. 5, (La.App. 1 Cir. 3/3/95) 652 So.2d 531, 536.

that Castro was paid a flat rate per block installed. There is no evidence that Advanced Masonry supervised the cinder block installation at the jobsite or had any right to do so.

Deville cites *Ledet v. Moran Bros. Drilling Co.*, 590 So.2d 631 (La.App. 3 Cir. 1991), in support of his argument that supplying equipment including scaffolding creates the existence of a material fact that Advanced Masonry exhibited operational control over Castro. The agreement between Advanced Masonry and Castro provides for Advanced Masonry to provide “all major equipment, including scaffolding, necessary for the performance of the work.”

We disagree. *Ledet* is not on point with the facts of this case. In *Ledet* the court found that the contractor provided equipment and then gave direct instruction to the sub-contractor’s employee on how to utilize the equipment in performing his duties. *Ledet*, 590 So.2d at 633. In the case before us there is no evidence that Advanced Masonry instructed Castro on utilizing the provided equipment. Therefore, even if Castro did utilize some of Advanced Masonry’s equipment at the jobsite, this in itself, is not enough to establish that Advanced Masonry had the right to control or did in any way control Castro’s work. The lacking evidence of Advanced Masonry’s supervision or control is essential to support the claim. *Davis*, 558 So.2d at 639.

Here, Advanced Masonry introduced an affidavit signed by Keith R. Merchant, the agent who signed the sub-contract agreement on behalf of Advanced Masonry, stating that Castro was on the jobsite pursuant to a sub-contract agreement, that Advanced Masonry had no employees at the jobsite at the time of the accident, and that Advanced Masonry did not give any

directions concerning the proper method of installing the cinder block wall. Deville presented no pertinent evidence to counter this affidavit.

Summary judgments are favored, and the documents submitted by both parties are to be equally scrutinized. The initial burden is on the mover to show that no genuine issue of material fact exists. LSA-C.C.P. art. 966.

If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the non-moving party must produce factual support sufficient to satisfy his evidentiary burden at trial. LSA-C.C.P. art. 967 B.

Here, Advanced Masonry, the moving party, has presented evidence with its affidavit and other evidence attesting that Castro was an independent contractor not subject to its supervision and control. Thus, this evidence shows that there is a lack of factual support for Deville's claim.

Deville has failed to counter with evidence sufficient to satisfy his burden of proof to establish that Advanced Masonry had the right or did exercise supervision or control over Castro or his employees.

CONTRACTUAL LIABILITY

Deville next infers that the contractual agreement between Lanco Construction, Inc.³ (Lanco) and Advanced Masonry, and the sub-contract agreement between Advanced Masonry and Castro, creates a genuine issue of material fact as to whether Castro was under the supervision of Advanced Masonry. Specifically, Castro points out that in paragraph 9.4 of the Lanco agreement, Advanced Masonry obligated itself to become liable for its sub-contract employees. We disagree with this characterization.

The relevant term states in pertinent part, that pursuant to La.R.S. 23:1061(A), the Contractor and the Subcontractor agree that the Contractor

³ The contract between these parties provides that Lanco hired Advanced Masonry to install the masonry for the Walgreen Pharmacy.

shall be the statutory employer of any and all of Subcontractor's employees. Lanco is the "Contractor," not Advanced Masonry. Furthermore, the agreement between Castro and Advanced Masonry clearly states that Castro is to be responsible for any problems resulting from the workmanship of his employees. It also provides that Castro will adhere to all safety regulations as required by OSHA, and is responsible for all penalties imposed if such safety guidelines are violated. We therefore conclude that these agreements do not obligate Advanced Masonry to become liable for Castro or his employee's negligence. Thus, the trial court did not err in ruling that no genuine material issue of fact exists in this litigation.

MOTION TO CONTINUE
Assignment of Error Number One

Deville next argues that the motion for summary judgment was premature as outstanding discovery in this case, the deposition of Keith Merchant, was essential to controverting the motion.

Here, the motion to continue the summary judgment hearing was filed on November 11, 2005; the trial court gave notice to all that the motion to continue would be heard at the same time as the motion for summary judgment on December 12, 2005. The original petition was filed on September 29, 2003. Deville was aware of the contract between Advanced Masonry and Castro. Deville was aware that Merchant signed the agreement on behalf of Advanced Masonry. Under these circumstances, we agree with the trial court that Deville had ample opportunity to explore these issues. Further, the affidavit of Keith Merchant was already in the record. He stated that Castro was not his employee and that he did not in anyway control or supervise Castro's employees. A trial court has great discretion when ruling on a motion to continue and the ruling will not be disturbed absent a clear

abuse of discretion. *St. Tammany Parish Hosp. v. Burris*, 00-2639, p. 4 (La.App. 1 Cir. 2/28/01), 804 So.2d 960, 963. Where Deville was on notice of the facts giving rise to these defenses and had ample opportunity to address its concerns prior to the motion for summary judgment being filed, we conclude that the trial court did not abuse its vast discretion in denying the motion to continue.

Accordingly, the assignments of error are without merit and the judgment of the trial court is affirmed.

DECREE

For the above reasons, the judgment of the trial court is affirmed. Damon M. Deville is cast with the costs of this appeal.

AFFIRMED