NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

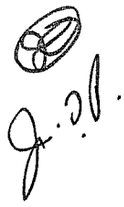
FIRST CIRCUIT

2006 CA 2145

EDWARD J. TRIMM, SR. AND TINA TRIMM, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, NOEL TRIMM AND ARIEL TRIMM

VERSUS

DOMINO ESTATE, LLC, COLONY INSURANCE COMPANY AND PRODUCTION MANAGEMENT INDUSTRIES, LLC



Judgment Rendered: June 8, 2007

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On Appeal from the 16th Judicial District Court
In and For the Parish of St. Mary
Trial Court No. 113,891, Division "F"

Honorable Edward M. Leonard, Jr., Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Downing, J. dissents

HUGHES, J.

This is an appeal from a summary judgment dismissing a building owner, who had leased a commercial building to an employer/lessee whose employee was injured because of a defect in the premises, on the basis that liability for the condition of the premises had been assumed by the employer/lessee pursuant to LSA-R.S. 9:3221. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On May 11, 2004, plaintiff, Edward J. Trimm, Sr., was employed by defendant Production Management Industries, L.L.C. (PMI) as a offshore operations supervisor, when he was called to a meeting a PMI's Morgan City office. During the meeting, Mr. Trimm was asked to step out onto a second floor deck with his boss, Ronald Carville, and as they were talking, Mr. Trimm leaned against the deck railing, which gave way causing him to fall onto the concrete surface below and resulting in serious injury to him.

Mr. Trimm and his family filed suit against his employer, PMI, alleging that they had actual or constructive knowledge of the defect for a substantial period of time but failed to remedy it. He also sued Domino Estate, L.L.C. (Domino), the owner of the building where PMI had its office. PMI filed a peremptory exception of no cause of action, which was granted on July 22, 2005, dismissing PMI as a tort defendant on the basis of the employer immunity under workers' compensation laws; the record does not reflect that this judgment has been appealed.

In September of 2005, Domino filed a motion for summary judgment on the issue of LSA-R.S. 9:3221 immunity, but the motion was denied by the trial court to allow plaintiffs addition time to conduct discovery. The motion for summary judgment was re-urged by Domino in March of 2006,

asserting that it had no actual and/or constructive knowledge of any defect in the premises. The motion was granted and a judgment dismissing Domino was signed by the trial court on May 9, 2006.

From this judgment plaintiffs appeal and assert that the trial court erred in granting defendants' motion for summary judgment because: (1) defendants did not meet their initial burden of proof under LSA-C.C.P. art. 966; and (2) plaintiffs produced factual support for their contention that defendants had actual and/or constructive knowledge of the defect giving rise to plaintiffs' damages.

LAW AND ANALYSIS

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the mover 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. LSA-C.C.P. art. 966(B).

Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. **Allen v. State ex rel. Ernest N. Morial--New Orleans Exhibition Hall Authority**, 2002-1072, p. 5 (La. 4/9/03), 842 So.2d 373, 377; **Schroeder v. Board of Supervisors of Louisiana State University**, 591 So.2d 342, 345 (La. 1991). In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine

whether there is a genuine issue of triable fact. All doubts should be resolved in the non-moving party's favor. **Hines v. Garrett**, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765.

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Id.** at 765-66.

Pursuant to LSA-C.C.P. art. 966(C)(2), the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof on the issue at trial and 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 establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. Moreover, as consistently noted in LSA-C.C.P. art. 967, the opposing party cannot rest on the mere allegations or denials of his pleadings, but must present evidence that will establish that material facts are still at issue. **Cressionnie v. Intrepid, Inc.**, 2003-1714, p. 3 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 738.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Richard v. Hall**, 2003-1488, p. 5 (La. 4/23/04), 874 So.2d 131, 137; **Dyess v. American National Property and Casualty Company**, 2003-1971, p. 4 (La. App. 1 Cir. 6/25/04), 886 So.2d 448, 451, writ denied, 2004-1858 (La. 10/29/04), 885

So.2d 592; **Cressionnie v. Intrepid, Inc.**, 2003-1714 at p. 3, 879 So.2d at 738-39.

The resolution of this case turns on the application of LSA-R.S. 9:3221, which at the time of the accident provided:[1]

> 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.

This statute was designed to relieve an owner/lessor of some of the burdens imposed on him by law in cases where he has given dominion and control of his premises to a tenant under lease. **Wallace v. Helmer Directional Drilling, Inc.**, 93-901, p. 6 (La. App. 3 Cir. 7/13/94), 641 So.2d 624, 628, citing **Gilliam v. Lumbermens Mutual Casualty Co.**, 240 La. 697, 124 So.2d 913 (1960).

In the case of **Pellegrin v. Ditto**, 625 So.2d 1356 (La. App. 1 Cir. 1993), a very similar factual scenario to that currently before the court was presented. In **Pellegrin v. Ditto**, the plaintiff fell through a defective railing on a porch on premises leased by his employer from the defendants. In upholding the dismissal of the defendant/owner/lessor on the basis of an LSA-R.S. 9:3221 contractual assumption of liability by the employee/lessee in that case, this court reasoned as follows:

> Petitioners contend that the trial court erred in finding that LSA-R.S. 9:3221 prohibited the imposition of liability on the defendants in the instant case.
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> LSA-R.S. 9:3221 permits a building owner to contract out of responsibility imposed by LSA-C.C. arts. 2317 and 2322 and to allow the lessee to assume responsibility. ...

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[1] This statute was amended by 2004 La. Acts, No. 821, § 3, effective January 1, 2005, to substitute "Notwithstanding the provisions of Louisiana Civil Code Article 2699, the" for "The" at the beginning of the section.

* * *

> In the instant case, it is undisputed that the lease between the [owner/lessor] and [the employer/lessee] contained a clause in which the lessee assumed responsibility for the condition of the leased premises during the term of the lease and agreed to exonerate the [owner/lessor] from all responsibility because of any defect or vice in the leased premises and buildings. In fact, the lease provision made specific reference to LSA-R.S. 9:3221. Therefore, because [the employer/lessee] assumed responsibility for the condition of the leased premises, pursuant to LSA-R.S. 9:3221, the [owner/lessor is] not liable for petitioner's injuries unless it knew or should have known of the defect and failed to remedy it within a reasonable time.
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> Therefore, in order to recover from the owner of the property ... petitioners must prove: that they sustained damages; that there was a defect in the defendant's property; that the defendant knew or should have known of this defect; and that defendant thereafter failed to remedy the defect within a reasonable time. **Robert v. Espinosa**, 576 So.2d 555, 557 (La. App. 4th Cir.), writ denied, 578 So.2d 139 (La. 1991).
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> * * *
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> Petitioners argue that LSA-R.S. 9:3221 should not be applied in the instant case because the lessee, who assumed liability for the defective condition of the leased premises, was petitioner's ... employer. However, there is no limitation in LSA-R.S. 9:3221 which makes it inapplicable to those situations in which the lessee who assumed responsibility for the condition of the leased premises is the employer of the injured tort victim. If the legislature had intended the statute to be inapplicable, such an exception would have been set forth in the statute.

Pellegrin v. Ditto, 625 So.2d at 1362-63 (footnote omitted).

In accordance with LSA-C.C.P. art. 966, to survive a motion for summary judgment in this type case, a plaintiff must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, i.e., that there was a defect in the property and that the property owner who had contractually transferred to the lessee pursuant to LSA-R.S. 9:3221 knew or should have known of the defect. See **Smith v. French Market Corp.**, 2003-1412, p. 7 (La. App. 4 Cir. 10/6/04), 886 So.2d 527, 531, writ denied, 2004-2741 (La. 1/14/05), 889 So.2d 272. In the instant

case, there was no dispute concerning the presence of a defect in the deck railing; nor did the parties contest whether the lease between Domino and PMI contained provisions shifting liability for the condition of the premises to PMI. The only issue on motion for summary judgment was whether Domino had actual or constructive knowledge of a defect such that it remained liable for the defective railing under the provisions of LSA-R.S. 9:3221.

In conjunction with the motion for summary judgment filed in the trial court, the deposition of Frank J. Domino, Sr., a manager for Domino, was introduced. In his deposition, Mr. Domino stated that Domino built the building where the accident occurred approximately twenty years ago, but that the deck at issue had been built by one of the lessees who occupied the building before PMI. Mr. Domino had no knowledge of who built the deck railing. Mr. Domino indicated that prior lessees/occupants of the building included: Rock Specialty Services, Olivier Diesel, Oil Waste, and Phillips Environmental (sic). Mr. Domino indicated that he and another manager, Leroy Domino, were responsible for leasing the building and handling repair issues. When PMI leased the building from Domino, Mr. Domino did not recall that either he or Leroy Domino had inspected the building before PMI took occupancy, although he admits that "we probably did a walk-through." Mr. Domino did pay a "social call" to the building approximately four to six weeks after PMI had moved in to view some improvements PMI had made to the building, which included painting and installing new flooring. Since that time, Mr. Domino's visits to the building have been limited to occasional social calls. Mr. Domino testified that his company has never received a single call from PMI complaining that any repair was needed and he stated that the lessee was responsible for maintenance of the building.

Mr. Domino further testified that he had never been on the deck in question. Mr. Domino denied that his company had any knowledge of a defect in the railing at issue.

The deposition of Donald Mehrtens, Jr. was also introduced into the record. Mr. Mehrtens testified that he was the Chief Financial Officer for PMI. Mr. Mehrtens stated that he signed the lease with Domino, a copy of which was produced and identified by Mr. Mehrtens. Mr. Mehrtens was not aware of any alterations having been made to the deck area until after the accident in question. Mr. Mehrtens also could not recall whether Frank Domino was present during their inspection of the building prior to leasing it. Mr. Mehrtens further testified that he had only seen Frank Domino in the building once since PMI leased it. Mr. Mehrtens confirmed the fact that PMI had never called Domino with regard to any repair issue. Mr. Mehrtens stated that he had never noticed any defect in the railing of the deck prior to the accident, and that if he had he would have brought it to someone's attention; he was unaware of any complaint having been made about the railing.

In answers to interrogatories filed into the record, plaintiffs identified the names of twenty-nine persons who allegedly were "familiar with, worked on and/or complained about the condition of the [deck railing] prior to and/or subsequent to Mr. Trimm's accident." The affidavit of one of those persons,[2] Stanley L. Jones, a former PMI employee, was filed into the record and stated that he had personal knowledge of the condition of the railing in question, that it was unstable, and that the instability was "apparent to anyone who regularly visited the second floor deck." The affidavits of

[2] No additional statement appears in the record giving any further detail concerning the knowledge and/or actions of the other twenty-eight persons named by plaintiffs.

two other former PMI employees was also filed into the record, that of Walter Kelly, Jr. and Kevin B. Jones. Both Mr. Kelly and Mr. Jones stated in their affidavits that they had previously worked for Phillips Services Corporation ("Phillips") at the building in which Mr. Trimm was later injured, that the second floor deck railing was unstable when they worked for Phillips, that this fact was widely known among Phillips employees, that Phillips employees were cautioned not to lean against the railing, and that when they subsequently went to work for PMI the railing was in the same condition.

After a thorough review of the record presented to this court on appeal, we must conclude that plaintiffs have failed to meet their burden to show that they will be able to satisfy their evidentiary burden of proof at trial against Domino, i.e., that Domino, who had contractually transferred liability for the condition of the premises at issue to PMI pursuant to LSA-R.S. 9:3221, knew or should have known of the defective railing. At most, plaintiffs established that former employees of PMI knew of the defect; however, there was no evidence whatsoever in the record tending to show that Domino had ever received any notice, actual or constructive, of the defective railing. Therefore, we are unable to say the trial court erred in granting summary judgment in favor of Domino.

CONCLUSION

For the reasons assigned herein, the judgment dismissing Domino Estate, L.L.C. is affirmed. All costs of this appeal are to be borne by appellants.

AFFIRMED.