NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0196

WILLIE F. WALTON

VERSUS

DUSTIN GUIDRY, CLINT EDWARD GIVENS,
AND A-PORT, L.L.C.

Judgment Rendered: SEP 1 8 2015

* * * * *

On Appeal from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
No. 2013-3330, Div. C

The Honorable Robert H. Morrison III, Judge Presiding

* * * * *

J. Quentin Simon
Lafayette, Louisiana

Attorney for Appellant,
Willie F. Walton

S. Brian Perry
Lafayette, Louisiana

Attorney for Appellees,
Duston Guidry, Clint Edward Givens, and A-Port, L.L.C.

* * * * *

BEFORE: WHIPPLE, C.J., WELCH, AND DRAKE, JJ.

DRAKE, J.

Plaintiff, Willie F. Walton, appeals a judgment of the trial court granting the motion for summary judgment of defendants, Duston Guidry,[1] Clint Givens, and A-Port, LLC, (A-Port) and dismissing plaintiff's tort suit with prejudice on the basis that he was the borrowed employee of A-Port whose exclusive remedy is in worker's compensation. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

A-Port is a shorebase facility located in Grand Isle, Louisiana, that provides crane, forklift, storage, and other services to its customers transporting inbound and outbound equipment and materials. Occasionally, A-Port requires additional personnel when its permanent employees are on leave or there is an increased demand for services by customers. On June 20, 2012, A-Port entered into a letter agreement with Original USA General Labor, LLC, (USA General) pursuant to which USA General agreed to provide riggers to A-Port for a fixed rate of $23.00 an hour. Periodically, after June 20, 2012, A-Port contacted USA General regarding supplying of riggers. Mr. Walton was hired by USA General beginning May 23, 2011, and was assigned to provide labor services to businesses in the Lafourche/Terrebonne Parish areas. He was assigned by USA General to the A-Port facility in the fall of 2012 to work as a rigger to meet the seasonal or short-term workload of A-Port. Plaintiff worked at the A-Port facility from October 20, 2012, until October 31, 2012, the day he was injured.[2] Mr. Walton was injured while assisting the crane operator, Mr. Guidry, in the loading of an industrial mud tank onto a flatbed trailer. During this process, Mr. Walton's left foot and ankle

[1] Although the caption of the case spells Mr. Guidry's first name as "Dustin," in his answer and the motion for summary judgment he refers to himself as "Duston."

[2] Although Mr. Walton claims in his amended petition that he was assigned to A-Port from July 30, 2012, until October 31, 2012, the records of his time worked demonstrate that he worked from October 20, 2012, until October 31, 2012, at A-Port.

were injured which required two open reductions with the implementation of stabilizing hardware and screws.

Mr. Walton filed the instant tort suit against Mr. Guidry, Mr. Givens, who was also assisting with loading the mud tank, and A-Port, contending that the accident and his resulting injuries were caused by the negligence of the defendants.[3] The defendants answered the lawsuit and asserted various affirmative defenses, including the defense that as a borrowed employee at the time of the injury, plaintiff's remedies were limited to workers' compensation benefits.

Defendants filed a motion for summary judgment, contending that they were entitled to judgment as a matter of law dismissing plaintiff's claims on the basis that A-Port was the borrowing employer and, thus, immune from tort liability. Furthermore, defendants assert because plaintiff was the borrowed employee of A-Port, Mr. Guidry and Mr. Givens were also immune from tort liability. Following a hearing on the motion, the trial court found that the defendants had established that there was no issue of material fact, that plaintiff was the borrowed employee of A-Port and, thus, that plaintiff's right of recovery was limited to workers' compensation. The trial court signed a judgment on August 12, 2014, which was later amended on September 8, 2014, to correct the spelling of the names of Mr. Guidry and Mr. Givens. It is from this judgment that plaintiff appeals.

ERRORS

Plaintiff claims that the trial court erred in giving undue weight to the right of control factor in determining that he was a borrowed employee and in not giving the appropriate weight to the contract between USA General and A-Port.

---

[3] Plaintiff later amended his petition to include as defendants, Magnum Mud Equipment Co., Inc. and Nick Thibodaux, an employee of Magnum Mud. However, neither of these parties are the subject of the present motion for summary judgment.

BURDEN OF PROOF AND STANDARD OF REVIEW FOR SUMMARY JUDGMENT

A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. La. C.C.P. art. 966(A)(2).

The mover bears the burden of proving that he is entitled to summary judgment. La. C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. La. C.C.P. art. 966(C)(2). 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 nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. La. C.C.P. art. 966(C)(2). Once the mover has put forth supporting proof through affidavits or otherwise, the adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. La. C.C.P. art. 967(B).

If, on the other hand, the mover will bear the burden of proof at trial, that party must support his motion with credible evidence that would entitle him to a directed verdict if not controverted at trial. *Hines v. Garrett,* 2004-0806 (La. 6/25/04), 876 So. 2d 764, 766. Such an affirmative showing will then shift the burden of production to the party opposing the motion, requiring the opposing

party either to produce evidentiary materials that demonstrate the existence of a genuine issue for trial or to submit an affidavit requesting additional time for discovery. *Hines,* 876 So. 2d at 766-767.

In ruling on a motion for summary judgment, the trial court'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. *Hines,* 876 So. 2d at 765. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. *Willis v. Medders,* 2000-2507 (La. 12/8/00), 775 So. 2d 1049, 1050 (per curiam).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *East Tangipahoa Development Company, LLC v. Bedico Junction, LLC,* 2008-1262 (La. App. 1 Cir. 12/23/08), 5 So. 3d 238, 243-244, *writ denied,* 2009-0166 (La. 3/27/09), 5 So. 3d 146.

BORROWED EMPLOYEE DEFENSE

In the instant case, the issue on appeal is whether there is a genuine issue of material fact concerning Mr. Walton's status as a borrowed employee of A-Port. If plaintiff is a borrowed employee, then his remedy is exclusively in workers' compensation, under Louisiana workers' compensation law. La. R.S. 23:1032(A)(1)(a); *Griffin v. Wickes Lumber Company,* 2002-0294 (La. App. 1 Cir. 12/20/02), 840 So. 2d 591, 594, 597, *writ denied,* 2003-1338 (La. 9/19/03), 853 So. 2d 640; *Ledet v. Quality Shipyards, Inc.,* 615 So. 2d 990, 992 (La. App. 1 Cir. 1993).

The issue of whether a borrowed employee relationship existed is a matter of law for the court to determine. *Griffin,* 840 So. 2d at 596; *Ledet,* 615 So. 2d at 992. While there is no fixed test, the factors to be considered in determining the existence of a borrowed employee relationship include: right of control; selection of employees; payment of wages; power of dismissal; relinquishment of control by the general employer; which employer's work was being performed at the time in question; the existence of an agreement, either implied or explicit, between the borrowing and lending employer; furnishing of instructions, tools and place for the performance of the work; the length of employment; and the employee's acquiescence in a new work situation. *Mejia v. Boykin Brothers, Inc.,* 2010-0118 (La. App. 1 Cir. 9/10/10), 52 So. 3d 82, 84-85; *Foreman v. Danos and Curole Marine Contractors, Inc.,* 97-2038 (La. App. 1 Cir. 9/25/98), 722 So. 2d 1, 4-5, *writ denied,* 98-2703 (La. 12/18/98), 734 So. 2d 637; *Ledet,* 615 So. 2d at 992.

Tort immunity under the borrowed employee doctrine is an affirmative defense within the context of a tort action. *Billeaud v. Poledore,* 603 So. 2d 754, 755 (La. App. 1 Cir.), *writ denied,* 608 So. 2d 176 (La. 1992); *Brumbaugh v. Marathon Oil Company,* 507 So. 2d 872, 874-875 (La. App. 5 Cir.), *writ denied,* 508 So.2d 824 (La. 1987). Thus, as the party asserting the affirmative defense, A-Port bore the burden of proof in establishing tort immunity on the basis of Mr. Walton's status as its borrowed employee. *See Arabie Bros. Trucking Co. v. Gautreaux,* 2003-0120 (La. App. 1 Cir. 8/4/04), 880 So. 2d 932, 940, *writ denied,* 2004-2481 (La. 12/10/04), 888 So. 2d 846; *Billeaud,* 603 So. 2d at 755-756; *Brumbaugh,* 507 So. 2d at 876; *also see generally Barabay Property Holding Corporation v. Boh Brothers Construction Co., L.L.C,* 2007-2005 (La. App. 1 Cir. 5/2/08), 991 So. 2d 74, 79, *writ granted,* 2008-1185 (La. 10/10/08), 993 So. 2d 1270, *writ denied as improvidently granted,* 2008-1185 (La. 3/17/09), 6 So. 3d 172 (tort immunity is an affirmative defense for which the one asserting the defense

has the burden of proof). Accordingly, to establish its entitlement to summary judgment, A-Port was required to support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial. *See Hines,* 876 So. 2d at 766.

With regard to the right of control, the evidence of record demonstrates that during the time Mr. Walton was assigned to A-Port, USA General provided him daily transportation to and from the USA General facility in Golden Meadow, Louisiana, to the A-Port facility in Grand Isle, Louisiana. During this time, Mr. Walton was typically provided housing by USA General, which was provided only to its employees. However, the work schedule of Mr. Walton, including the dates, times, and locations of work to be performed, was determined exclusively by A-Port. Any instructions regarding work responsibilities and performance of duties was provided to Mr. Walton by A-Port supervisors. No USA General employees directed, instructed, or supervised Mr. Walton's work while he was working at the A-Port facility. *See Mejia,* 52 So. 3d at 85. Furthermore, the letter agreement between USA General and A-Port specifically stated that Mr. Walton would be performing his work under the direction and control of A-Port. Besides being transported to and from the A-Port facility by and receiving his paycheck from USA General, the only other contact Mr. Walton had with USA General was that it housed Mr. Walton and provided a daily lunch sack for his lunch break. *See Hall v. Equitable Shipyard, Inc.,* 95-1754 (La. App. 4 Cir. 2/29/96), 670 So. 2d 543, 546.

The work Mr. Walton performed was A-Port's work, not USA General's. Although USA General provided the personal protection equipment, such as safety goggles, hard hat, gloves, and steel toe boots to Mr. Walton, A-Port provided all the equipment and machinery necessary for Mr. Walton to perform his work at A-

Port. No equipment or tools were provided by USA General other than the personal protection equipment.

Regarding power of selection and dismissal, although Mr. Walton was hired by USA General, he was assigned to the A-Port facility, and A-Port acquiesced in the assignment. The record shows that, but for the accident, Mr. Walton would have continued to be employed at the A-Port facility for as long as his services were needed and his work remained satisfactory. *See Griffin,* 840 So. 2d at 597. Mr. Walton argues that according to the affidavit of the sales manager of USA General, A-Port could not fire Mr. Walton. While A-Port did not have the power to terminate Mr. Walton's employment with USA General, A-Port did have the authority to remove Mr. Walton from its facility at any time. The power to terminate an employee's services at a job site is enough to satisfy the power of dismissal factor. *See Arabie,* 880 So. 2d at 941; *Ledet,* 615 So. 2d at 994.

In considering the payment of wages to the employee, the determinative consideration in addressing this factor is which company provided the funds to pay Mr. Walton. *Ledet,* 615 So. 2d at 994; *see also Hall,* 670 So. 2d at 547. The evidence demonstrates that Mr. Walton signed in and out in A-Port's dispatch office every day he worked at A-Port. He would check in with the A-Port supervisor when he arrived each morning. Mr. Walton then reported his hours worked at A-Port to USA General. A-Port also kept up with the hours Mr. Walton worked and reported them to USA General. An A-Port employee reviewed USA General's weekly time reports containing Mr. Walton's hours and compared them to the A-Port daily sign-in sheets. The agreement provided that A-Port was required to keep a record of the hours/time worked for the personnel supplied by USA General and that A-Port would report these hours/time on a weekly basis. A-Port paid USA General $23.00 per hour for the work of Mr. Walton. USA General paid Mr. Walton $11.00 per hour for regular time and $16.50 per hour for

overtime. Therefore, A-Port provided the funds to pay Mr. Walton. *See Mejia,* 52 So. 3d at 85; *Ledet,* 615 So. 2d at 994; *Hall,* 670 So. 2d at 547.

Mr. Walton worked a total of 108 hours at the A-Port facility between October 20, 2012, and October 31, 2012, the day he was injured. Mr. Walton relies on *Dyer v. Serv. Marine Indus., Inc.,* 97-2622 (La. App. 1 Cir. 12/28/98), 723 So. 2d 1135, 1139, for the proposition that the 108 hours he worked was not enough to acquiesce to the work situation. However, this court has found that being on the job even three hours was enough to acquiesce in the job situation for the purpose of determining that a person was a borrowed employee. *Osborne v. JAG Const. Services, Inc.,* 2004-0437 (La. App. 1 Cir. 2/16/05), 906 So. 2d 601, 603, *writ denied,* 2005-0739 (La. 5/6/05), 901 So. 2d 1101. Although 108 hours was not a lengthy period of time, the general manager of A-Port testified that A-Port was satisfied with the work of Mr. Walton and expected his employment to have continued at the A-Port facility as long as his services were needed and his work continued to be satisfactory, had it not been for the accident. Mr. Walton testified that he had no problems working at A-Port, that he liked working there, and that A-Port treated him pretty well. Therefore, Mr. Walton acquiesced in the arrangement.

Finally, with regard to whether an agreement existed between the borrowing and lending employer, USA General and A-Port did enter into a letter agreement for the furnishing of labor. The agreement specifically provided that USA General "is the employer of all personnel supplied by them for the purpose of this agreement." Mr. Walton argues that the trial court did not place the proper emphasis on the agreement between USA General and A-Port, which stated that USA General was his employer. However, the actions of USA General and A-Port were clearly inconsistent with the written agreement. Mr. Walton worked solely at the A-Port facility once he began working there and was instructed and supervised

by the A-Port employees. The only contact that USA General had with Mr. Walton was transporting him to and from the A-Port facility providing him a sack lunch, and issuing his paycheck. All elements of the work were directed and controlled by A-Port. Mr. Walton relies on *West v. Kerr-McGee Corp.,* 765 F.2d 526, 531 (5th Cir. 1985) and *Alday v. Patterson Truck Line, Inc.,* 750 F.2d 375 (5th Cir. 1985) for the proposition that a contractual provision denying that an employee relationship exits with the borrowing employer precludes summary judgment. However, this court cited both these cases in finding that the parties to a contract cannot automatically prevent a legal status like "borrowed employee" from arising merely by stating in a provision of their contract that it cannot arise. *Ledet,* 615 So. 2d at 993. Rather, "the reality at the worksite and the parties' actions in carrying out a contract ... can impliedly modify, alter, or waive express contract provisions." *Ledet,* 615 So. 2d at 993, *quoting, Melancon v. Amoco Production Co.,* 834 F.2d 1238, 1245 (5th Cir. 1988). Thus, a summary judgment can be affirmed despite the existence of such a contract clause if all factors, other than the contract, overwhelmingly establish the "borrowed employee" status. *Ledet,* 615 So. 2d at 993.

In the instant case, we find that the evidence presented in support of A-Port's motion for summary judgment overwhelmingly established that Mr. Walton was its borrowed employee. Thereafter, the burden of production shifted to Mr. Walton, which required him to produce evidentiary materials that demonstrate the existence of a genuine issue for trial as to his status as a borrowed employee. He did not do so. The evidence he submitted in opposition to the motion did not raise any disputed issue of material fact. *See Ledet,* 615 So. 2d at 994. Accordingly, we find no error in the trial court's determination that A-Port demonstrated its entitlement to judgment in its favor as a matter of law dismissing Mr. Walton's claims against it.

CONCLUSION

For the above and foregoing reasons, the trial court's September 8, 2014 judgment granting A-Port, LLC, Duston Guidry, and Clint Givens' motion for summary judgment and dismissing Willie F. Walton's with prejudice, is hereby affirmed. Costs of this appeal are assessed against Willie F. Walton.

AFFRIMED.