IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1015

Filed: 15 March 2016

Johnston County, No. 13 CVS 3601

AARON FREEMAN, Plaintiff,

v.

SONA BLW PRECISION FORGE, INC., Defendant.

Appeal by Plaintiff from order entered 18 May 2015 by Judge R. Frank Floyd in Johnston County Superior Court. Heard in the Court of Appeals 28 January 2016.

Hardison & Cochran, PLLC, by Benjamin T. Cochran, for Plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Jeffery A. Doyle and M. Duane Jones, for Defendant.

STEPHENS, Judge.

This appeal is brought by an injured temporary/contract employee from a grant of summary judgment in favor of the business to whom the employee was assigned by his temporary employment agency. In determining whether the trial court erred in ruling that the injured employee could not sue the business in tort, we consider the applicability of the "special employment doctrine" of our State's workers' compensation jurisprudence. Because we conclude that the appellant was an

employee of the business to which he was assigned, as well as the temporary employment agency, we affirm the trial court's summary judgment order.

Factual and Procedural Background

Defendant SONA BLW Precision Forge ("SONA") designs and manufactures transmission and axle components for cars and trucks at its facility in Selma. To staff the facility, SONA contracted with Mega Force Staffing Services ("MFSS") to place temporary hourly or "contract employees" in particular positions. SONA would provide MFSS with a description of the positions to be filled, as well as the requirements to be used in screening potential employees, and MFSS would then send resumes of qualified applicants to SONA for selection. Temporary employees were paid the same hourly rate as permanent employees, but at the end of each pay period, SONA would pay each contract employee's wages plus 27% to MFSS. MFSS would then pay the contract employee for his time worked and use the extra funds for administrative costs, including the purchase of workers' compensation insurance to cover contract employees. The contract with MFSS also provided that SONA could offer a contract employee a permanent position following 400 hours of employment with SONA.

Plaintiff Aaron Freeman applied for contract employment at MFSS with the hope of being assigned to a temporary position with SONA which might eventually lead to a permanent job. Freeman specifically asked MFSS to assign him to SONA.

MFSS submitted Freeman's resume to SONA, and after a supervisor at SONA, Greg Joyner, reviewed the resume, SONA selected Freeman for temporary employment. As a result, MFSS directed Freeman to report to SONA's Selma facility for an assignment operating a cold coining press used to stamp metal parts. Following completion of an orientation program conducted by SONA, SONA employees instructed Freeman in the operation and use of three cold coining machines. Each day, Freeman would report to Joyner, who would then give Freeman his assignments for work that day. Freeman was directly supervised in those assignments by his shift supervisor, another SONA employee. On 10 July 2012, as Freeman was operating a cold coining press at SONA's plant, his right hand was crushed between two press portions of the machine, resulting in amputation and other serious injuries.

On 21 November 2013, Freeman filed a complaint seeking damages as a result of SONA's alleged negligence. SONA answered and moved to dismiss Freeman's complaint in February 2014. On 24 July 2014, the trial court denied the motion to dismiss. On 10 April 2015, SONA filed a motion for summary judgment, alleging that Freeman's claims were barred by the exclusivity provisions of the North Carolina Workers' Compensation Act ("the Act"). Following a hearing on SONA's motion in Johnston County Superior Court before the Honorable R. Frank Floyd, Judge presiding, the court entered an order granting summary judgment in favor of SONA

on 18 May 2015. Freeman filed his notice of appeal from the summary judgment order on 16 June 2015.

Discussion

On appeal, Freeman argues that the trial court erred in granting summary judgment in favor of SONA on the basis that his claims were "barred by the exclusivity provisions of the . . . Act, and that the [c]ourt therefore lack[ed] subject matter jurisdiction . . . ." We agree that Freeman's sole recourse for the injuries he sustained is under the Act, and, accordingly, we affirm the order of the trial court.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted; italics added). "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Taft v. Brinley's Grading Servs.*, 225 N.C. App. 502, 505, 738 S.E.2d 741, 744 (2013) (citation omitted).

"The issue of whether [a] plaintiff's [tort] claim is barred by the Workers' Compensation Act is a question of subject matter jurisdiction." *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988) (citation omitted). With regard to claims based on the alleged negligence of the employer, "[a]n employee

cannot elect to pursue an alternate avenue of recovery, but is required to proceed under the Act with respect to compensable injuries." *Id.* at 580, 364 S.E.2d at 188 (citations omitted); *see also* N.C. Gen. Stat. § 97-10.1 (2015) ("If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of such injury or death."). In turn, the Act defines the term "employee" to include "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . ." N.C. Gen. Stat. § 97-2(2) (2015).

Here, it is undisputed that Freeman was an employee who sustained his injuries on the job, which he contends resulted from the negligence of SONA. Thus, the central question we must resolve is whether Freeman was an employee of SONA, as well as of MFSS. If so, Freeman may only seek compensation for his injuries under the Act. If not, Freeman's negligence claims against SONA may proceed. To address the rights of a worker injured in the course of temporary or contract employment,

> our courts have adopted the special employment doctrine, which provides that, for purposes of the Workers' Compensation Act, under certain circumstances a person can be an employee of two different employers at the same time. When the special employment doctrine applies, the joint liability under the Act of the company that directly employs the employee (the general employer) and a second company (the special employer) provides the plaintiff-

> employee with two separate potential sources of workers' compensation benefits. However, under the special employment doctrine, the employee's receipt of workers' compensation benefits from either employer bars the employee from proceeding at common law against either of the employers.

Taft, 225 N.C. App. at 506, 738 S.E.2d at 744 (citations and internal quotation marks omitted). "When a general employer lends an employee to a special employer, the special employer becomes liable for [workers'] compensation only if" the following three conditions are satisfied:

> (a) the employee has made a contract of hire, express or implied, with the special employer;
>
> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.

Anderson v. Demolition Dynamics, Inc., 136 N.C. App. 603, 606, 525 S.E.2d 471, 473 (citations and internal quotation marks omitted), *disc. review denied*, 352 N.C. 356, 544 S.E.2d 546 (2000). Our review of the pertinent case law and the record on appeal indicate that all three conditions required for application of the special employment doctrine are satisfied here.

On appeal, Freeman makes no argument disputing the existence of the second and third criteria of the special employment doctrine, to wit, that when injured, he was performing the work of SONA and that SONA exercised control over the details

of his work. *See id.* We agree that the evidence is undisputed that Freeman was injured while operating a cold coining press to stamp metal parts for SONA and that he had been specially selected, trained, supervised, and evaluated in the performance of his work details by SONA and its employees. Accordingly, we turn to a consideration of the first prong of the special employment doctrine test: whether an implied contract existed between Freeman and SONA.[1]

An implied contract exists between the employee and the special employer where the employee "accept[s] the assignment from [the temporary employment agency] and perform[s] the work at the direction and under the supervision of [the special employer]." *Brown v. Friday Servs., Inc.*, 119 N.C. App. 753, 759-60, 460 S.E.2d 356, 360, *disc. review denied*, 342 N.C. 191, 463 S.E.2d 234 (1995). In *Brown*, the existence of an implied contract was also demonstrated by an *express contract* between the temporary employment agency and the special employer under which the special employer paid the temporary employment agency which in turn paid the employee for his work. *Id.* at 760, 460 S.E.2d at 360-61. *See also Henderson v. Manpower of Guilford Cty., Inc.*, 70 N.C. App. 408, 414, 319 S.E.2d 690, 694 (1984) ("Although no express contract existed between [the employee] and [the special employer], an implied contract manifestly did, since they accepted [the employee's]

[1] Neither party suggests that an express contract existed between Freeman and SONA.

work and were obligated to pay [the temporary employment agency] for it, and [the temporary employment agency] was obligated in turn to pay [the employee]. . . .").

Likewise, here, Freeman accepted the assignment to do work at and under the direction of SONA; indeed, Freeman only applied for work with MFSS in order to obtain an assignment at SONA in furtherance of his plan to obtain permanent employment there. In addition, the contract between MFSS and SONA provided that SONA would pay MFSS for Freeman's work and obligated MFSS to compensate Freeman. Thus, we conclude that, just as in *Brown* and *Henderson*, an implied contract existed between Freeman and SONA. In so holding, we reject Freeman's reliance on *Taft* and *Gregory v. Pearson*, 224 N.C. App. 580, 736 S.E.2d 577 (2012), *affirmed per curiam without precedential value*, 367 N.C. 315, 754 S.E.2d 416 (2014).

In *Gregory*, this Court noted that in determining the existence of an implied contract between an employee and a special employer, a court "may examine the contract between a temporary employment agency and the business hiring temporary workers." 224 N.C. App. at 585, 736 S.E.2d at 581. We then distinguished *Brown* and *Henderson* based on a provision in the *Gregory* contract at issue that "expressly stated temporary employees are not employees of the [special employer]." 224 N.C. App. at 586, 736 S.E.2d at 581. On further review by our Supreme Court, that Court was "equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals . . . ." *Gregory*, 367 N.C. at 316, 754

S.E.2d at 416. Thus, the decision of the Court of Appeals was "left undisturbed and stands *without precedential value*." *Id.* (emphasis added). More importantly, however, *Gregory* is inapposite because the contract between MFSS and SONA for the supply of temporary workers by MFSS to SONA contains no express language stating that temporary employees supplied by MFSS were not employees of SONA nor any language stating that temporary workers were employees of MFSS but not of the companies to which they were assigned.[2]

Likewise, in *Taft*, this Court concluded that the injured employee was not an employee of the would-be special employer because the contract ("the Agreement") between the temporary employment agency (Pro-Tech) and the business accepting workers therefrom (Brinley) provided:

> "The parties understand that Pro-Tech is an independent contractor, and that all of the personnel assigned by Pro-Tech to Brinley's business in order to fill the relevant job positions are employees of Pro-Tech and only Pro-Tech." Further, under the Agreement, "Pro-Tech acknowledges that it is responsible for all matters related to the payment of federal, state and local payroll taxes, workers' compensation insurance, salaries and fringe benefits for its employees." Additionally, Pro-Tech was required by the Agreement to maintain its own general liability, professional malpractice, and automobile liability insurance for actions and omissions of leased Pro-Tech

[2] This Court in *Gregory* also relied on *Shelton v. Steelcase, Inc.*, in which "we concluded [the employee] was not a special employee of Steelcase because the contract between [the temporary employment agency] and Steelcase expressly stated [the temporary employment agency's] staff 'will be employees of [the temporary employment agency],' not Steelcase." *Gregory*, 224 N.C. App. at 386, 736 S.E.2d at 581 (citing *Shelton*, 197 N.C. App. 404, 412, 677 S.E.2d 485, 492, *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009)).

> employees. Finally, in a Rule 30(b)(6) deposition for Brinley's Grading given by its president, Mr. Brinley, Brinley's Grading conceded that, pursuant to the Agreement, [the employee] was solely an employee of Pro-Tech.

225 N.C. App. at 508, 738 S.E.2d at 745-46. As previously stated, the contract here does not contain any such language. We conclude that the three criteria of the special employment doctrine are satisfied in this case, and, accordingly, we affirm the trial court's summary judgment order. *See, e.g.*, *Poe v. Atlas-Soundelier/American Trading & Prod. Corp.*, 132 N.C. App. 472, 473, 512 S.E.2d 760, 761 (finding that the special employment doctrine applied where the injured employee was "one of approximately 100 temporary employees supplied to [the special employer] by [temporary employment agency] Mega Force Temporary Services, Inc. . . . [and who] was operating a mechanical die press at Atlas-Soundelier's Laurinburg plant when his left hand was crushed in the press"), *disc. review denied and cert. denied*, 350 N.C. 835, 538 S.E.2d 199 (1999).

AFFIRMED.

Judges HUNTER, JR., and INMAN concur.

Report per Rule 30(e).