2013 IL App (4th) 120282-U

NO. 4-12-0282

FILED
February 13, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ROBERT T. SMITH,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	McLean County
NORFOLK SOUTHERN RAILWAY COMPANY, a Railroad Corporation,	)	No. 09L97
Defendant-Appellee.	)	Honorable
	)	Paul G. Lawrence,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court correctly granted summary judgment for defendant because no genuine issue of fact existed as to whether plaintiff was an employee of defendant at the time of his injury for purposes of an action under the Federal Employers' Liability Act.

¶ 2 Plaintiff, Robert Smith, brought an action under the Federal Employers' Liability Act (FELA) (45 U.S.C. §§ 51 to 59 (2006)), against defendant, Norfolk Southern Railway Company, for damages for injuries allegedly incurred in the course of his employment. The trial court granted defendant's motion for summary judgment, finding no issue of material fact existed and defendant did not exercise sufficient control over the details of plaintiff's work to be considered his employer. Plaintiff appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In March 2007, plaintiff was employed by Road & Rail Services, Inc. (Road &

Rail), as a maintenance associate, inspecting, maintaining, preparing, repairing, and placing railcars at defendant's railroad yard in Normal. He alleged while working he raised the deck of an autorack railcar, which transports automobiles, and injured his neck, back, and right shoulder. Plaintiff filed and settled a claim against Road & Rail under the Illinois Workers' Compensation Act (820 ILCS 305/1 *et seq*. (West 2006)) for his injuries.

¶ 5 On January 12, 2009, plaintiff filed a two-count complaint against defendant seeking to recover damages from an alleged incident on March 15, 2007, even though he was a direct employee of Road & Rail. He alleged claims under FELA under theories of "master/servant" and "joint employment." Each count alleged plaintiff was an "employee" or "joint employee" of defendant because Road & Rail was a servant of defendant and, therefore, plaintiff was a subservant of defendant and/or employee of defendant and defendant exercised direct control or had the right to exercise control over plaintiff in his work.

¶ 6 The trial court ordered all discovery in this case be completed by May 2, 2011, and all summary judgment motions be filed by June 2, 2011. After discovery had closed and all witnesses except plaintiff's fellow worker, Travice Cobb, were deposed, plaintiff's counsel withdrew, effective May 26, 2011. In support of his withdrawal, plaintiff's counsel submitted to the court a copy of his letter addressed to plaintiff, which stated "I spoke with Travis [*sic*] Cobb this afternoon who advised that [defendant's] employees did not, in fact, exercise control over you or any other Road and Rail employees. In light of Eugene Davis' similar testimony recently, I do not believe your case against [defendant] has any merit. Therefore, I cannot ethically represent you any further in this matter and will file my motion for leave to withdraw immediately." Plaintiff's counsel earlier produced affidavits of Cobb and Davis (a fellow worker with

plaintiff) regarding defendant's control over their work. Plaintiff then proceeded *pro se*.

¶ 7 On June 1, 2011, defendant filed its motion for summary judgment and memorandum of law in support of the motion. After multiple delays to give plaintiff time to find new counsel, the trial court eventually entered a briefing schedule on all pending motions requiring plaintiff to file any responses by February 1, 2012. On February 1, 2012, plaintiff filed excerpts from the deposition of Aaron Anderson and excerpts from safety guideline books provided by defendant. He also filed an untimely response on February 24, 2012, just before the hearing on February 28, 2012, which was accepted by the court upon agreement of defense counsel.

¶ 8 In its summary judgment motion, defendant moved for summary judgment on both counts of the complaint because it was not plaintiff's employer for FELA purposes. In support of that motion, defendant filed a memorandum of law and 266 pages of exhibits. The trial court ruled only on the issue of whether plaintiff was defendant's employee. Plaintiff's allegations of negligence are not at issue. Ths following facts are supported by defendant's memorandum and exhibits. Plaintiff's brief does not challenge the accuracy of these facts and does not set forth anything establishing a question of material fact.

¶ 9 Road & Rail is a company that provides for the prepping of railroad cars for railroads. They contracted with defendant in June 2004 to provide multilevel railcar prepping "for loading of the automobile manufacturer" at defendant's Normal rail yard, taking over for Rescar, the previous prepping company, after they lost their contract. Plaintiff worked for Rescar and was kept on in his job by Road & Rail. The contract between Road & Rail and defendant included the "Road & Rail Services Prepper Multi-Level Railcar Job Description," which provided preppers "assist in raising (lifting) railcar decks," which is what plaintiff was doing at

the time of the alleged incident.

¶ 10 In his work for Road & Rail, plaintiff's "lead man" was Greg Britt, an employee of Road & Rail who occupied a supervisory position over plaintiff. Britt reported to Aaron Anderson, manager for Road & Rail at the Normal railyard since June 2004. Anderson was plaintiff's manager from June 2004 until plaintiff left Road & Rail's employ. Both Britt and Anderson had, like plaintiff, previously been employed by Rescar and had stayed on with Road & Rail. Anderson reported to Dave Lawshe, Area Manager for Road & Rail. Anderson's duties included training new employees, doing daily paperwork of the track lists, preparing the payroll, ordering parts, keeping up with safety training, and approving vacation time. Neither Britt nor Anderson ever reported to defendant's employees, nor was defendant involved in any of Anderson's duties.

¶ 11 Lawshe visited the Normal location to inspect the prepped railcars and oversee production, safety, cleanliness, and everything else going on at the site. He also inspected Anderson's paperwork to make sure it was done properly and in compliance with Road & Rail's requirements. He had "complete oversight of the facility." Lawshe reported to Greg Miller, General Manager of Road & Rail at the Louisville, Kentucky, corporate office. Robert Ellison was the Safety and Quality Manager at Road & Rail in 2004. When Road & Rail began operations at the Normal facility in 2004, Ellison was there on the first day and assisted in the new hire process. He processed payroll information and provided training on hazardous chemicals. He never reported to or was supervised by any of defendant's personnel. The chain of authority over plaintiff did not include any employees of defendant.

¶ 12 In addition to the chain-of-command above plaintiff were the provisions of the

contract between Road & Rail and defendant. Under the contract, Road & Rail was required to provide "a properly prepared multi-level railcar for loading of the automobile manufacturer" and the job description for prepping the railcar provided preppers "assist in raising (lifting) railcar decks," exactly what plaintiff was doing at the time of the alleged incident. The job description was a Road & Rail document. Defendant did not provide a job description for preppers or give a job description to them. Plaintiff admitted he did not receive a job description for his position from defendant.

¶ 13 Under the contract, Road & Rail "is and shall remain an independent Contractor. Contractor shall be solely responsible for, and Company [defendant] shall not participate in, the employing or supervising of each person engaged in discharging Contractor's responsibilities under this Agreement; all such persons shall be the sole agents, servants and employees of Contractor." Further, the contract stated "[n]othing contained in this Agreement is intended to create a joint venture or to constitute either party as agent (for any purpose) of the other."

¶ 14 Plaintiff admitted Anderson was his direct supervisor and Lawshe was also when he came to the jobsite about once a month. Anderson was the "manager" and Britt was the supervisor below Anderson. Plaintiff also admitted no one from defendant ever trained him on how to prep a railcar. Lawshe showed him a video on the procedures for the job regarding "how Road & Rail does it." Britt testified he was trained by Anderson and other Road & Rail personnel. Anderson testified Road & Rail conducted training on prepping the multilevel railcars and also "extensive" safety training. Defendant was not involved in the training. Anderson was given a safety and procedure handbook prepared by Road & Rail.

¶ 15 Lawshe confirmed required training for preppers included receiving copies of the

safety manual and the manual was kept in the office for workers to look at and for training. Both Davis and plaintiff admitted they received a copy of the handbook on how to do their job from a Road & Rail employee and not from defendant.

¶ 16 Ellison testified he was the one who compiled the safety handbook and manual given to preppers at the Normal facility when they were hired by Road & Rail. Defendant did not provide any of the documents Ellison gave to the preppers. Further, defendant did not provide any rule books, training manuals, or safety guidelines at any Road & Rail location.

¶ 17 Anderson testified the Guidelines for Contractors of defendant provided "Contractors have the sole responsibility of controlling the means and manner of work done by their employees ***." Plaintiff admitted no one from defendant ever told him how to prep a railcar. The policy regarding how to raise railcar decks was a Road & Rail policy, not a policy of defendant.

¶ 18 Other than his own testimony, the only evidence plaintiff produced were affidavits from two former Road & Rail employees, Eugene Davis and Travice Cobb, who had worked in the same capacity as plaintiff. Both affidavits contained statements regarding how defendant's employees "routinely exercised directive control over the details of [their] job." However, when both Davis and Cobb were later deposed, they provided testimony abandoning the assertions made in their affidavits about defendant's control of them at their jobs.

¶ 19 Plaintiff testified Britt showed him an agreement between defendant and Rescar (Road & Rail's predecessor) which plaintiff characterized as a written document setting forth procedures for the job after Road & Rail took over because "[defendant]" was directing what we did on the racks through that contractual agreement." He later testified no one at Road & Rail

actually showed him the contract. Lawshe "verbalized" the contract to him. Plaintiff stated defendant "had requirements as to how we were supposed to deal with the decks, but could only refer to the contractual agreement which he never saw. However, the contract does not contain any provision regarding the methods of work. Plaintiff's only argument as to control is "the inspection work that we had to do [was] required by [defendant]."

¶ 20 Anderson told plaintiff what to do each day and how to do his work. Plaintiff testified Anderson received some type of track list which told him which railcars to prepare. Plaintiff believed one of defendant's employees gave the list to Anderson each day. However, Anderson stated he knew how many prepared railcars were needed each day because he had contact with "Auto Warehouse Company, which are the rail loaders, and they [sent him] a daily report on what they've had shipped for each day." On a day-to-day basis, the work done by Road & Rail was based on a report received from Auto Warehouse Company.

¶ 21 Plaintiff testified a conductor, Steve Anderson, employed by defendant would directly tell him "what track to do or what track not to do." This included telling him which cars were "hold cars" which were not to be prepared. Plaintiff also testified a switchman from defendant would sometimes tell him which railcars to prepare. He spoke with this switchman "five, ten, fifteen" times during his three years at Road & Rail. This was partly confirmed by Britt, who testified defendant's employees would sometimes tell Road & Rail what tracks they wanted but not which cars to work on and when. Britt stated defendant's employees have told Road & Rail employees to stop their work because they wanted to use the track to move something around. However, those employees never told Britt specific cars needed to be prepared in a specific time frame. Defendant's employees never told Britt which cars he should

prep and which ones he should not prep or which cars were "hold cars." Britt testified he had only spoken to Steve Anderson in the break room. Davis testified he did not know any of defendant's conductors, including Steve Anderson.

¶ 22 Cobb did not remember anyone besides Aaron Anderson and Britt ever telling him a track was "on hold." Steve Anderson never told him which railcars to work on. He never talked to Steve Anderson. It was only Aaron Anderson and Britt who told him what to do.

¶ 23 Defendant neither performs any autorack prepping, nor is any of its personnel used for such purpose. All autorack prepping is done by contractors, including Road & Rail. Aaron Anderson and Britt testified defendant did not do any prepping work or work alongside the preppers. Anderson testified the only activities of defendant affecting the preppers' work was when defendant brought in railcars and performed switching in the rail yard next to where Road & Rail employees were working. Defendant's rail crews moved the railcars around, pulled the loaded cars out of the Mitsubishi plant and respotted the plant with empty auto racks. Anderson did not have direct contact with defendant's employees. Defendant's employees had no reason to talk to the preppers about the work they were doing and defendant's employees did not give Road & Rail employees instruction on how to do their jobs.

¶ 24 Britt testified his conversations with defendant's employees were just general "chitchat." They did not tell him how to do his job. Davis testified his only contact with defendant's employees was brief. He vaguely stated one employee came out and talked to the group generally about how to make the job go better. His only other contact was "just hi and bye."

¶ 25 It is uncontested defendant owned the railyard in Normal. However, according to

the contract between defendant and Road & Rail, Road & Rail had the responsibility, "at its sole cost," to "keep and maintain all of the Premises (including, but not limited to, all structural and non-structural components thereof and all systems) in good order and repair ***."

¶ 26 Plaintiff brought a workers' compensation claim regarding his injury. Ellison coordinated the information between the Workers' Compensation Commission and Road & Rail. The claim was settled with Road & Rail's insurer and defendant did not contribute to the settlement. Road & Rail had paid the workers' compensation insurance premiums, not defendant.

¶ 27 After the workers' compensation claim was settled, plaintiff did not return to work and did not contact Road & Rail. Ellison testified it was assumed plaintiff resigned and a letter was sent to him in this regard. Defendant was not involved in the decision to terminate plaintiff's employment.

¶ 28 On February 28, 2012, after a hearing on defendant's summary judgment motion, at which both parties were heard, the trial court granted the motion, finding no issue of material fact and defendant did not exercise sufficient control over the details of plaintiff's work to support a claim under FELA. No transcript of the hearing has been provided on appeal. This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 Plaintiff argues the case presents a triable issue of fact both as to defendant's negligence and concerning defendant's control over plaintiff's employment which would qualify him for relief under FELA. Therefore, the trial court erred in granting summary judgment for defendant.

¶ 31 A trial court's grant of summary judgment is reviewed *de novo*. *Allegis Realty*

Investors v. Novak, 223 Ill. 2d 318, 330, 860 N.E.2d 246, 252 (2006). A triable issue exists where the material facts are disputed or where reasonable persons might draw different conclusions from undisputed facts. *Doe v. Brouillette*, 389 Ill. App. 3d 595, 604, 906 N.E.2d 105, 114 (2009).

¶ 32 Absent any transcript of the hearing on defendant's motion for summary judgment, we must presume the trial court followed the law and the motion had a sufficient factual basis. *Cutler v. Northwest Suburban Community Hospital, Inc.*, 405 Ill. App. 3d 1052, 1062, 939 N.E.2d 1032, 1040 (2010). Appellant has the burden to present this court with an adequate record regarding claimed errors and any doubts arising from incompleteness of the record will be resolved against the appellant. See *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 546-47, 662 N.E.2d 1248, 1258 (1996).

¶ 33 FELA is the exclusive remedy for railroad employees for compensation for injuries occurring on the job while state workers' compensation statutes are the exclusive remedy for other employees in the workforce. FELA provides in relevant part:

> "Every *** railroad while engaging in commerce *** shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, *** for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier ***." 45 U.S.C. § 51 (2006).

Thus, liability for plaintiff's injury may not be imposed on defendant unless he was employed by defendant at the time of the accident. The burden of proving employee status in cases brought

under FELA is on the plaintiff. See *Turpin v. Chicago, Burlington & Quincy R.R. Co.*, 403 S.W.2d 233, 237 (Mo. 1966).

¶ 34 Plaintiff concedes he was nominally employed by Road & Rail, which is not a common carrier for FELA purposes. However, plaintiffs nominally employed by non-FELA entities may recover from railroad defendants under the statute under three circumstances: (1) plaintiff is a borrowed servant of the railroad; (2) plaintiff works for two employers simultaneously; or (3) plaintiff's employer is a servant of the railroad and plaintiff is, thus, a "subservant" of the railroad. (Internal quotation marks omitted.) *Larson v. CSX Transportation, Inc.*, 359 Ill. App. 3d 830, 835, 835 N.E.2d 138, 142 (2005).

¶ 35 Under the borrowed servant theory, one master enters into an agreement with a second under which the second borrows the servants of the first. The dual servant theory arises when two employers share the direct supervision and control of one servant. At the center of both theories is the issue of control. The control necessary to establish plaintiff's status as defendant's servant is defendant's significant supervisory role over the means and manner of the plaintiff's performance; global oversight is insufficient as is cooperation and consultation in coordinated operations. *Larson*, 359 Ill. App. 3d at 835, 835 N.E.2d at 142.

¶ 36 Nothing in the evidence outlined above points to defendant having a significant supervisory role over plaintiff's work. On the contrary, the opposite was true. Road & Rail supervised and directed plaintiff's work. This is what defendant contracted with Road & Rail to do. The contract language went to great pains to ensure defendant was not assuming any liability for plaintiff and his work as a prepper.

¶ 37 As for a subservant relationship between Road & Rail and defendant, plaintiff

must demonstrate Road & Rail, his nominal employer, was a servant of the railroad. Again, the focus is on the issue of control and the requisite measure of control has been described as the right to control " 'the physical conduct in the performance of the services.' " *Dominics v. Illinois Central R.R. Co.*, 934 F. Supp. 223, 226 (S.D. Miss. 1996) (quoting Restatement (Second) of Agency § 220(1), at 485 (1958)). No evidence suggests defendant had control of plaintiff's physical conduct in performing his job. As in the case of the borrowed or dual servant theory, the evidence fails to create a question of fact regarding plaintiff's status. No evidence suggests Road & Rail is a servant of defendant and he a subservant.

¶ 38 III. CONCLUSION

¶ 39 We find the record does not show any genuine issue of material fact on whether plaintiff is either a borrowed or dual servant of defendant or Road & Rail is a subservant of defendant. We affirm the trial court's judgment granting summary judgment for defendant.

¶ 40 Affirmed.