NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 2049

GARY JACKSON

VERSUS

DYNAMIC INDUSTRIES, INC.

Judgment Rendered: May 2, 2012

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APPEALED FROM THE SIXTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. MARY
STATE OF LOUISIANA
DOCKET NUMBER 120,548, DIVISION "A"

THE HONORABLE GERARD B. WATTIGNY, JUDGE

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDONALD, J.

Plaintiff, Gary Jackson, appeals the trial court's judgment granting summary judgment in favor of defendant, Dynamic Industries, Inc. The trial court determined Mr. Jackson's personal injury suit against Dynamic was barred under the "borrowed servant" doctrine based on its conclusion that Dynamic's payroll employee, Tom Gaddy, the alleged negligent actor in this suit, was the borrowed employee of Total E&P USA, Inc. at the time Mr. Jackson was injured.

After a *de novo* review of the record, and of applicable statutes and jurisprudence, we agree with the trial court's conclusion that there is no genuine issue of material fact that Tom Gaddy was Total's borrowed employee. Therefore, Mr. Jackson's suit against Dynamic is barred, and Dynamic is entitled to summary judgment in its favor. Accord **Jackson v. Total E&P USA, Inc.**, H-08-385 (S.D. Tex. 11/28/08) (unpub'd), affirmed, 09-20826, 2009 WL 2474070 (5th Cir. 2009) (unpub'd).

The trial court's February 7, 2011 reasons for judgment, which we adopt and have attached, thoroughly and adequately analyze the borrowed servant doctrine and its applicability to this case. For this reason, we affirm the trial court's April 20, 2011 judgment by summary disposition in accordance with Rule 2-16.2A(5) of the Uniform Rules of Louisiana Courts of Appeal. Costs of this appeal are assessed to Gary Jackson.

AFFIRMED.

GARY JACKSON	**16TH JUDICIAL DISTRICT COURT**
VS. NO. 120,548-A	**PARISH OF ST. MARY**
DYNAMIC INDUSTRIES, INC.	**STATE OF LOUISIANA**

REASONS FOR JUDGMENT

This litigation arises from personal injuries suffered by Gary Jackson ("Jackson") allegedly sustained while working as a mechanic on Total's Virgo Platform located on the Outer Continental Shelf ("Total"). The Virgo is a production platform engaged in the production of oil and gas. On September 14, 2007, Jackson and several other Total employees were instructed to lift a pipe connected to a sea water pump used to cool the production equipment. Jackson assisted the other Total workers by collecting the pump's power cable as the pump rose. The engine assembly broke away from the pipe, allowing the pump to fall through the casing, dragging the power cable with it. Jackson was standing on the power cable at the time and he fell to the deck. Jackson claims to have sustained serious injury.

Jackson was employed by Producers Assistance Corporation ("PAC"), a Total man-power contractor. Pursuant to the Master Service Contract existing between the parties, PAC assigned Jackson to work for Total on its Virgo platform in January of 2007. At the time of the accident, Jackson was a payroll employee of PAC assigned to work as a mechanic on the Virgo.

From the time of his employment with PAC, Jackson worked exclusively on the Virgo platform owned by Total. Jackson worked exclusively within a hierarchy overseen by Total's RSES, Doug Sumpter. On each and every fourteen (14) day hitch aboard the Virgo platform, Jackson received delineated work responsibilities by and through his Total supervisors and Total's internal computerized CHAMPS system. There were no other PAC employees working on the Virgo platform or supervising Jackson on the Virgo platform.

Originally, Jackson sued Total, not Dynamic, for injuries he allegedly sustained on September 14, 2007. The law suit was filed in the United States District Court for the Southern District of Texas claiming that Total was negligent by failing to install a safety cable before lifting the pump. On November 28, 2008, the District Court dismissed Total, with prejudice, on the basis that Jackson was a borrowed servant of Total. Jackson appealed the decision and the

United States Court of Appeal for the 5th Circuit affirmed the District Court's ruling on August 13, 2009.

On August 12, 2009, Jackson filed the present litigation against Dynamic Industries, Inc. ("Dynamic"). In the present litigation, Jackson alleges that Dynamic, another manpower contractor for Total is vicariously liable for his injuries due to the negligence of Tom Gaddy ("Gaddy"). At the time of Jackson's accident, Gaddy was assigned by Dynamic to work for Total as a safety consultant on the Virgo platform. Jackson claims that Dynamic is vicariously liable for Gaddy's negligence because it failed to supervise its crew, properly train its employees, provide adequate safety equipment, operate the Virgo in a safe manner, and other acts deemed negligent or grossly negligent. Dynamic counters that Gaddy is in fact a borrowed employee of Total, and as such, Jackson should be barred from maintaining a cause of action against Dynamic because Dynamic cannot be held liable for the alleged negligence of a borrowed employee of Total. Dynamic has filed a Motion for Summary Judgment making this claim and asking for a dismissal.

When injuries occur on the Outer Continental Shelf, the LHWCA precludes tort actions based on the fault of other workers in the same employ in favor of the certitude of compensation payments to the injured person without regard to fault. Dynamic claims, therefore, that as a matter of law, Dynamic is immune from tort liability as to any alleged negligence on the part of Gaddy, Jackson's co-employee.

Under the borrowed employee doctrine, an employee of one company may become the servant of another company if he is transferred by the former with his consent and acquiescence to the employ of the latter. A borrowed servant becomes the employee of the borrowing employer, and is to be dealt with as a servant of the borrowing employer and not of the nominal employer. The United States Court of Appeal for the 5th Circuit, in the case of *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312 (5th Cir. 1969), established nine (9) factors to be considered in analyzing whether a borrowed employee status is applicable.

The evidence in this case establishes that Gaddy worked alternating hitches as a safety consultant exclusively for Total for the extended time period from February 3, 2005, through March 28, 2008, with Dynamic as his payroll employer. In 2003, prior to his employment with Dynamic, Gaddy worked as a safety consultant for Acadian Industrial Solutions ("AIS"), and was assigned to the Virgo and Matterhorn platforms owned by Total. In February of 2005,

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Gaddy became dissatisfied with AIS and after telling his supervisors at Total of his plan to seek new employment, the Total supervisor suggested that Gaddy seek employment with one of Total's other manpower contractors, either Dynamic or PAC. Gaddy then made the switch from AIS to Dynamic, thereby bringing his employment with Total to Dynamic. After he became an employee of Dynamic, Gaddy continued under the direct control and supervision of Total. He received instructions from Total supervisors. He utilized tools provided by Total and wore a Total uniform. His sleeping quarters were provided by Total, as were his meals and transportation to and from the platform. Gaddy was supervised by Total's RSES, Doug Sumpter, who gave him direct orders, as well as outranked and had control over Gaddy. Total had day-to-day exclusive supervision over Gaddy.

With these considerations, the Court will now go through the factors to be examined as required by the U. S. 5th Circuit Court of Appeals in the *Ruiz* case.

1. **Who has control over the employee and the work he is performing, beyond a mere suggestion of details or cooperation?**

The testimony before the Court unequivocally establishes that Dynamic did not control Gaddy's day-to-day work activities on the Virgo. For five (5) years, Gaddy worked exclusively for Total, originally through AIS and later through Dynamic. Total trained Gaddy and paid for Gaddy to attend training throughout the three (3) years he worked on Total platforms. During the three (3) years that Gaddy worked through Dynamic, Dynamic never trained Gaddy (other than his new employee orientation) and never sent Gaddy to any training courses.

Gaddy's work schedule on the Total platforms was set and exclusively supervised by Total personnel. Gaddy referred to Total's RSES, Doug Sumpter, as the "head guy" on the Virgo platform, and said that he would receive instruction from the RSES and other Total personnel regarding his work responsibilities. The RSES and other Total personnel gave Gaddy all of his work instructions concerning the performance of his daily duties, and Gaddy was required to, and did follow the instructions the Total personnel gave him. Gaddy admitted that the Total RSES aboard the Virgo outranked him in all respects, including safety.

When on the Virgo platform, Gaddy reported to the Total RSES, Doug Sumpter, the supervisor on sight everyday. All of the written reports Gaddy drafted in connection with his work were submitted to the RSES and other Total personnel. No other Dynamic employees were on the Virgo platform and Gaddy did not report to or receive instruction from Dynamic. Gaddy

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had minimal contact with Dynamic while aboard the Total platform. Gaddy estimated that he only contacted Dynamic four (4) times during the three (3) years he worked through Dynamic. Gaddy had to have his time sheets verified and approved by Total before Dynamic would pay him.

It is obvious that Dynamic did not retain any supervision over Gaddy while he worked aboard Total platform. The only contact Gaddy had with Dynamic basically was to report his hours with his Total worksheet and receive a paycheck.

2. Whose work was being performed?

The evidence before the Court establishes that Gaddy was performing Total's work as a safety consultant on its Virgo platform. There was no one from Dynamic directing, instructing, or supervising Gaddy on the Virgo platform and all of the work performed by Gaddy was being performed for Total's benefit exclusively. Gaddy himself testified that Dynamic had no interest in any of the work being performed by him on the Virgo.

3. Was there an agreement, understanding, or meeting of the minds between the original and borrowing employer?

The Master Service Agreement ("MSA") between Total and Dynamic states that Dynamic is understood to be an "independent contractor" of Total. Jackson asserts that the MSA establishes that Gaddy was to be deemed "solely the employee of Dynamic", that Dynamic alone was to have control and management over Gaddy's work activities, Dynamic was solely responsible for training Gaddy, supervising Gaddy, paying Gaddy, supplying Gaddy with all necessary and proper safety equipment, and removing Gaddy from the worksite if necessary. Jackson argues that the provisions of the MSA between Dynamic and Total was controlling and governed any and all working relationships between Dynamic and Total.

Dynamic's corporate representatives testified that the MSA between Dynamic and Total did not account for Gaddy's special circumstances. It was the representative's permission that the MSA was not applicable to Gaddy. He testified that the circumstances for Gaddy were different.

The facts also establish that Gaddy was the only Dynamic employee assigned to the Total platforms. There were no Dynamic supervisors on the platform to supervise, control or direct

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Gaddy. It was Total and not Dynamic that trained Gaddy and paid for Gaddy to attend training sessions. Gaddy testified that all of the safety equipment he used while on the platform belonged to Total.

Notwithstanding such language in an MSA, Courts have found that provisions similar to the ones at issue here do not prohibit a finding of borrowed employee status where the work place realities are otherwise. The 5th Circuit has held that the terms of a contract between the borrowing employee and payroll employer do not ordinarily provide a sufficient basis to deny summary judgment when the remaining *Ruiz* factors point toward borrowed-employee status. *Alexander v. Chevron, USA,* 806 F.2d 526, 529 (5th Cir. 1986). The Courts have also found that the parties' actions in carrying out the contract can impliedly modify or waive the express provision. *Brown v. Union Oil Co. of California,* 984 F.2d 674, 678 (5th Cir. 1993). See also *Lemaire Danos & Curole Marine Contractors, Inc.,* 256 F.3d 1059, 2001 WL 872840 (5th Cir. 7/10/2001). See also the decision of the United States District Court for the Southern District of Texas, which held in Jackson's initial suit that the MSA between PAC and Total defined the "larger relationship between Total and Producers, not the actual working relationship between Total and Jackson on Virgo."

The resolution of this factor seems simple to this Court because of the obvious intentions of Dynamic and Total. The testimony in the case unequivocally establishes that Dynamic did not direct or control Gaddy's day-to-day activities aboard the Virgo Platform. Dynamic did not train Gaddy for any work on the platform. Gaddy's day to day activities were directed by his Total supervisors. Dynamic did not instruct him how to perform his job duties, nor control his job duties as safety consultant, but Dynamic merely directed him to go to Total's platform and perform activities pursuant to instructions received from his Total supervisors. He was the only Dynamic employee on the platform and had no Dynamic supervisors offshore pertaining to his work for Total.

4. Did the employee acquiesce in the new work situation?

Gaddy had worked for Total for two (2) years at the time of Jackson's alleged accident. As stated in *Melancon v. Amoco Prod. Co.*, 834 F.2d 1238 (5th Cir. 1988), a worker who makes no complaint regarding his work conditions clearly acquiesces in his work situation. Gaddy testified that he had no complaints regarding his work conditions or the conditions of any of the

facilities and, in fact, was comfortable with his job with the Total employees and platform. Gaddy further testified that he felt as though he was a Total company employee and that Total was one of the best companies he has ever worked for. Gaddy remained on Total platforms for five (5) years without objection, for both AIS and Dynamic, and felt as though he was part of the Total team. This clearly establishes that Gaddy accepted the work situation with Total.

Jackson worked for PAC less than three (3) years, yet the U. S. District Court for the Southern District of Texas found that he was a borrowed employee of Total.

5. Did the original employer terminate his relationship with employee?

The 5th Circuit has established that a finding of a borrowed employee status does not require that the lending employer completely sever its relationship with the employee. Such a requirement would effectively eliminate the borrowed employee doctrine. The focus rather is on the lending employer's relationship with the employee while the borrowing occurs.

The facts alluded to hereinabove already establish that Gaddy had minimal contact with Dynamic, maybe having four (4) contacts in a period of three (3) years. He was merely the payroll employee of Dynamic. He was assigned to Total on the Virgo platform at the time of Jackson's accident. Activities, requirements and supplies all came from Total, together with supervision and training.

6. Who furnished tools and place of performance?

The tools and place of performance for Gaddy's work were furnished by Total. Total provided the transportation for Gaddy to get from shore to the platform and back again. Total provided all of the food Gaddy ate and all the accommodations in which he slept while working on the Total platforms. Total provided Gaddy with all of the equipment and tools, including a computer, which Gaddy used while on the platform. Total provided Gaddy with a Total uniform while he worked on the Total platforms. Total provided all of these things for the performance of Gaddy's work over the extended period of time of exclusive service.

7. Was the new employment over a considerable length of time?

Where the length of employment is considerable, this factor supports a finding that the employee is a borrowed employee. *Capps v. N. L. Baroid-NL Indus., Inc.*, 784 F.2d 615, 618 (5th

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Cir. 1986). The testimony establishes that the relationship between Gaddy, Dynamic, and Total lasted for three (3) years. Gaddy had worked exclusively for Total for a period of three (3) years at the time of Jackson accident. At that time, Jackson had worked under similar conditions for a month. The District Court in Texas and the 5th Circuit Court of Appeal found that the eight (8) months Jackson was employed with Total was a considerable length of time. Therefore, Gaddy's work relationship, which continued for three (3) years prior to Jackson's accident, is obviously a considerable length of time.

8. Who had the right to discharge the employee?

Total did not have the right to terminate Gaddy's employment. Gaddy was an employee of Dynamic. Though only Dynamic had the right to terminate Gaddy's employment, Total did have the right to terminate Gaddy's working relationship or presence on any Total property and could remove him from the Virgo platform. This arrangement is sufficient to support a finding of borrowed employee status. The Court also notes that Jackson's working relationship with Total was comparable except that it was for a much shorter period.

9. Who had the obligation to pay the employee?

Dynamic paid Gaddy in actuality. Gaddy reported his hours to Dynamic and provided his time sheets from Total to Dynamic. The procedure by which Total approved and signed-off on Gaddy's time sheets further demonstrates his status as a borrowed employee. Similarly, Jackson's check was actually given to him by PAC, although he was actually doing all of his work and working on a Total platform.

In the 5th Circuit cases of *Billizon, Melancon,* and *Capps*, the 5th Circuit Court of Appeals found that this procedure of payment supported a borrowed employee status. *Billizon v. Conoco, Inc.*, 993 F.2d 104 (5th Cir. 1993); *Melancon*, supra; *Capps*, supra.

The situation of Jackson, who was employed by PAC, but who actually worked for and performed Total's work on its platform Virgo, is parallel and almost one hundred (100%) percent similar to Gaddy's situation with Dynamic. This Court finds that the only distinction between the two situations of Jackson and Gaddy is that Gaddy was a safety person. Therefore, he was responsible for the safety of the operation of the Total platform Virgo. On the other hand, Jackson was a mechanic working on the Total platform Virgo.

This Court finds that there are no issues of material fact to warrant a denial of the Motion for Summary Judgment. The overwhelming weight of the factors weighs in favor of Gaddy being a borrowed employee of Total.

This Court concludes that reasonable minds could not differ in the conclusion that the overwhelming weight of the *Ruiz* factors supports Total's borrowed employee conclusions. Plaintiff argues that Gaddy was a safety consultant and exercised his own judgment regarding the details of his job. Plaintiff asserts that such is further support that Total did not retain the requisite control over Gaddy. The jurisprudence supports a finding of control by the borrowing employer even when the plaintiff uses his own discretion in performing tasks. In *Allen v. Texaco*, 2001 WL 61139 *1 (E.D. La. 2001), the plaintiff was an employee of Danos and Curole, working as a roustabout/operator for Texaco on a Texaco platform. Allen was injured when a wrench he was using slipped while he worked on a pump during a storm. Texaco argued that the facts favored a determination that Allen was a borrowed employee of Texaco. Allen argued that Danos and Curole retained control over him because Danos and Curole gave certain instructions to Allen regarding safety on the job and the authority to refuse work if he felt unsafe or to contact his employer if anything endangered him. The Court found that historically, Allen did not have anyone from Danos and Curole assisting or supervising his work, that Allen received his daily assignments from Texaco personnel, that Allen's direct supervisor was a Texaco employee, that Texaco determined whether or not to discharge Allen from Texaco assignments and that the Danos and Curole personnel coordinator had no knowledge of how Allen performed his job on Texaco's platforms. The Court concluded that even though plaintiff used his own discretion in evaluating the safety of tasks without direction from Texaco, it did not preclude a finding of borrowed employee status because Texaco personnel told him what work to do and when and where to do it. The control factor does not require that the borrowed employer direct each and every action taken by the borrowed employee.

Plaintiff also asserts that if Gaddy is determined to be the borrowed employee of Total, Jackson may still bring a negligence action directly against Dynamic. However, if Gaddy is determined to be the borrowed employee of Total, the duties to train and supervise Gaddy and the other duties associated with being Gaddy's employer, shift to Total. In this case, Total did in fact both train and supervise Gaddy. Therefore, the plaintiff would have a direct action against Total, but not Dynamic.

This Court finds that Dynamic has satisfied its initial burden of proof that no genuine issue of material fact exists and that plaintiff cannot rely upon argument and conclusive allegations alone.

The Court finds that plaintiff has failed to submit specific facts showing there is a genuine issue for trial.

For the above and foregoing reasons, this Court finds that Dynamic is entitled to a summary judgment dismissing Dynamic as a defendant in these proceedings because of the borrowed servant doctrine.

Costs shall be paid by plaintiff.

GRANTED at New Iberia, Louisiana, this 7 day of February, 2011.

GERARD B. WATTIGNY
District Judge

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