

No. 38,944-CA

ON REHEARING

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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FLETTER C. TAYLOR

Plaintiff-Appellant

Versus

LSU MEDICAL CENTER

Defendant-Appellee

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Originally Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 460,572

Honorable Charles Rex Scott II, Judge

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THE SINGLETON LAW FIRM
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Appellant

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Appellee

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Before BROWN, STEWART, CARAWAY, DREW and MOORE, JJ.

DREW, J., dissents with written reasons.

MOORE, J., dissents for the reasons assigned by Judge Drew.

CARAWAY, J.

We granted rehearing to further review the procedural process of La.

R.S. 13:5107, which provides in pertinent part as follows:

(A) In all suits filed against the state of Louisiana or a state agency, citation and service may be obtained by citation and service on the attorney general of Louisiana, or on any employee in his office above the age of sixteen years, or any other proper officer or person, depending upon the identity of the named defendant and in accordance with the laws of this state, and on the department, board, commission, or agency head or person, depending upon the identity of the named defendant and in accordance with the laws of this state, and on the department, board, commission, or agency head or person, depending upon the identity of the named defendant and the identity of the named board, commission, department, agency, or officer through which or through whom suit is to be filed against.

* * *

(D) (1) In all suits in which the state, a state agency, or political subdivision, or any officer or employee thereof is named as a party, service of citation shall be requested within ninety days of the commencement of the action or the filing of a supplemental or amended petition which initially names the state, a state agency, or political subdivision or any officer or employee thereof as a party. This requirement may be expressly waived by the defendant in such action by any written waiver.

(2) If service is not requested by the party filing the action within that period, the action shall be dismissed without prejudice, after contradictory motion as provided in Code of Civil Procedure Article 1672(C), as to the state, state agency, or political subdivision, or any officer or employee thereof, who has not been served.

(3) When the state, a state agency, or a political subdivision, or any officer or employee thereof, is dismissed as a party pursuant to this Section, the filing of the action, even as against other defendants, shall not interrupt or suspend the running of prescription as to the state, state agency, or political subdivision, or any officer or employee thereof; however, the effect of interruption of prescription as to other persons shall continue.

We now reverse the trial court's judgment of dismissal of the suit.

The unique procedure of this case was thoroughly reviewed in the initial opinion of this court. We reiterate the following procedural facts which demonstrate that the untimeliness of citation and service was never challenged by the defendant, LSU Health Sciences Center (“LSUHSC”), under La. C.C.P. art. 1672(C) and La. R.S. 13:5107(D)(2) and was waived by its actions in seeking relief by a peremptory exception.

The original petition was filed against a misnamed non-entity, LSU Medical Center, and service for the action was made on CT Corporation System, which is not LSUHSC's agent for service of process. The initial petition and service of process were therefore completely insufficient to support any action of the court or judgment against LSUHSC, which was not named in the suit. Nevertheless, LSUHSC apparently received informal notice of the action and filed pleadings in its name challenging service of the suit and seeking dismissal under La. R.S. 13:5107(D) and La. C.C.P. art. 1672(C) for failure to serve citation within ninety days after the filing of the suit. This procedural objection was raised by declinatory exceptions regarding citation and service of process and by a separate motion to dismiss under the authority of La. R.S. 13:5107(D).

While we will base our ruling upon LSUHSC's further actions in the case as discussed below, it is significant to note that at the time LSUHSC filed its motion to dismiss, Taylor was not in violation of the procedural rule embodied in La. R.S. 13:5107(D). Suit had never been filed against LSUHSC, and service of citation upon LSUHSC had never been withheld.

In the language of the statute, Taylor “requested” service, service was made within ninety days, but not on LSUHSC.

Through an amended petition filed on April 23, 2002, Taylor, for the first time, named LSUHSC and expressly “requested” at the end of the pleading that service be made on LSUHSC through the Louisiana Attorney General, whose address was listed in Baton Rouge. Such service of the state agency through the attorney general is sanctioned under La. R.S. 13:5107(A). The record reveals the clerk of court's file copy of a citation addressed to the attorney general, indicating the attachment of the original petition and the first supplemental and amended petition as requested by Taylor. However, there is no showing in the record through a sheriff's return that service of citation was ever attempted upon LSUHSC.

On April 30, 2002, LSUHSC received a judgment in its favor sustaining its declinatory exceptions regarding the insufficiency of citation and service of process of the original petition. The judgment, however, did not comply with La. C.C.P. art. 932(A) by ordering Taylor to properly serve LSUHSC within a delay fixed by the court. Instead, the judgment contained a footnote reflecting that the First Supplemental and Amending Petition had been filed “naming the proper defendant and requesting service on the appropriate agent.” The notice of judgment for this ruling on the exceptions was mailed by the clerk to the counsel of record for LSUHSC.

After the filing of the amending petition and the April 30, 2002 judgment, no service of the petition, amended petition and citation was ever made on LSUHSC. Nevertheless, on May 19, 2003, LSUHSC filed the

peremptory exception of prescription. Notably, in the allegations for the exception, LSUHSC asserted:

Therefore, despite the filing of the amending petition on April 23, 2002, attempting to correct the deficiencies of the original petition, plaintiff's action has prescribed.

Discussion

The trial court's dismissal of this suit apparently resulted because Taylor never made a follow-up on the service of the citation and the amended petition which she requested to be made upon LSUHSC. "The requirement that service upon defendant be requested within the 90-day period should reasonably be read to require an accurate request of service upon the proper agent for defendant." *Barnett v. Louisiana State University Medical Center-Shreveport*, 02-2576 (La. 2/7/03), 841 So.2d 725, 726. Yet, when service and citation is accurately requested by a party, the parish clerk of court must issue the citation and must deliver it to the sheriff for service. La. C.C.P. arts. 252 and 321; *Nguyen v. Fok*, 03-744 (La. App. 5th Cir. 2/23/04), 867 So.2d 844.

Significantly, it is unclear from the record why Taylor's request for service of the amended petition was not honored by the clerk of court. Thus, whether Taylor could establish "good cause" for the lack of service under La. C.C.P. art. 1672(C) because of the clerk's inaction remains a question. Because of this ambiguity, we find that it was incumbent upon LSUHSC to file a contradictory motion pursuant to La. C.C.P. art. 1672(C) alleging Taylor's neglect in obtaining service of the amended petition for over ninety days. Such contradictory proceeding would allow Taylor to defend

his “request” of service and attempt to show that “good cause” existed and that La. R.S. 13:5107(D) was not violated.

LSUHSC’s earlier motion to dismiss, filed prior to the filing of the amended petition, was inappropriate, as noted above, and could not allege Taylor’s later actions or inactions in requesting and obtaining service. Following the filing of the amended petition, LSUHSC was therefore required to file a new motion for dismissal and afford Taylor a contradictory hearing. Instead of seeking such dismissal under La. R.S. 13:5107 and La. C.C.P. art.1672(C), however, LSUHSC filed the peremptory exception of prescription. Consequently, the hearing by which the present judgment of dismissal was rendered was actually set as a hearing on LSUHSC's exception of prescription instead of the contradictory hearing required by La. C.C.P. art. 1672(C). This procedural flaw in the process by which LSUHSC obtained the dismissal judgment alone requires its reversal. However, we additionally find a waiver by LSUHSC of the alleged deficiencies in service of process.

LSUHSC's attempt to assert dismissal under La. R.S. 13:5107 following its filing of the peremptory exception presents the question of waiver of service of process. La. R.S. 13:5107(D)(1) expressly allows for a waiver of service of citation by the state agency. In the closely related and analogous setting involving insufficiency of citation and service of process upon a defendant, La. C.C.P. art. 925(C) indicates that the objections available to the defendant through the declinatory exceptions for such deficiencies “are waived unless pleaded” by the declinatory exceptions. In *Little v. Little*, 513 So.2d 464 (La. App. 2d Cir. 1987), this court held that

the filing of a declinatory exception after the consideration of a peremptory exception was inappropriate because the seeking of peremptory relief amounted to a waiver of the declinatory objection. This concept of waiver as it relates to the sufficiency of service of process is still in our law despite the repeal of Article 7 of the Code of Civil Procedure and the notion of a defendant's general appearance in a suit.

In this case, the record gives ample evidence that LSUHSC had notice of plaintiff's claim not only within the ninety days following the amended petition but before that amended pleading was ever filed. Timely notice for the preparation of the defense is the concern and purpose of La. R.S. 13:5107(D), and a lack of notice is not present in this case. LSUHSC nevertheless could have challenged the lack of formal service of citation and the amended petition after the 90-day period had passed. Instead, it chose to seek the peremptory relief regarding its defense of prescription. This shows that despite the lapse of the 90-day period, LSUHSC waived the right to seek a dismissal without prejudice under La. R.S. 13:5107(D)(2) and proceeded to a substantive issue in the case.

Accordingly, finding that the dismissal of plaintiff's claims under La. R.S. 13:5107(D)(2) was in error, we reverse the judgment of the trial court and remand the case for further proceedings. The assessment of costs is precluded in these proceedings, because LSUHSC is not required to pay court costs in any judicial proceeding instituted or prosecuted by or against it under La. R.S. 13:4521.

REVERSED AND RENDERED.

DREW, J., dissenting.

I reiterate the points raised in the original opinion by this court and add these additional observations. First, the majority essentially disregards the original petition upon which the amended petition is based. The majority brushes aside the impact of the La. C.C.P. art. 1672 motion on the original petition by finding it significant that at the time LSUHSC first filed the motion, LSUHSC had not been named as a defendant and thus, service upon LSUHSC had not been withheld. The majority adds that Taylor had requested service within 90 days, but not on LSUHSC. Using the majority's reasoning, failure to request service within 90 days upon the incorrect agent for the properly named defendant would subject a petition to dismissal, but requesting service within 90 days upon the incorrect agent for an improperly named defendant would not run afoul of La. R.S. 13:5107(D)(2).

Second, the majority takes the position that LSUHSC somehow waived its defense by filing the exception of prescription to the amended petition without reurging the motion to dismiss. The majority states:

. . . Following the filing of the amended petition, LSUHSC was therefore required to file a new motion for dismissal and afford Taylor a contradictory hearing. Instead of seeking such dismissal under La. R.S. 13:5107 and La. C.C.P. art.1672(C), however, LSUHSC filed the peremptory exception of prescription. Consequently, the hearing by which the present judgment of dismissal was rendered was actually set as a hearing on LSUHSC's exception of prescription instead of the contradictory hearing required by La. C.C.P. art. 1672(C). This procedural flaw in the process by which LSUHSC obtained the dismissal judgment alone requires its reversal. However, we additionally find a waiver by LSUHSC of the alleged deficiencies in service of process.

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In doing this, the majority improperly likens the art. 1672 motion to a declinatory exception, as well as ignores the plain language of paragraph C of the article that “[a] judgment dismissing an action without prejudice shall be rendered as to a person named as a defendant for whom service has not been requested within the time prescribed by Article 1201(C), upon contradictory motion of that person or any party or *upon the court’s own motion . . .*”

Our emphasis. Moreover, as recognized by the majority, La. R.S.

13:5107(D)(1) allows for a waiver of service of citation by the state agency.

However, it should be noted that 13:5107(D)(1) states that this “requirement may be *expressly* waived by the defendant in such action by any *written*

waiver.” Emphasis added. The filing of the exception of prescription in this instance would not serve as the express waiver contemplated by the statute.

Third, the majority states that:

In this case, the record gives ample evidence that LSUHSC had notice of plaintiff’s claim not only within the ninety days following the amended petition but before that amended pleading was ever filed. Timely notice for the preparation of the defense is the concern and purpose of La. R.S. 13:5107(D), and a lack of notice is not present in this case. LSUHSC nevertheless could have challenged the lack of formal service of citation and the amended petition after the 90-day period had passed.

The issue of notice is irrelevant at this juncture in the case because the issue of prescription is not before the court at this time. We are cognizant of

our supreme court's statement in *Naquin v. Titan Indemnity Co.*, 2000-1585

(La. 2/21/01), 779 So. 2d 704:

Plaintiff's initial claim is that defendants' knowledge of the pending suit obviated the need for service of citation. Plaintiff argues that adjusters for Titan and the Sheriff knew about the suit and had received courtesy copies of the petition, and that a request for service within ninety days was thus unnecessary. However, it is well-accepted that *even a defendant's actual knowledge of a legal action cannot supply the want of citation because proper citation is the foundation of all actions*. See, e.g., *Peschier v. Peschier*, 419 So.2d 923 (La.1982); *Strong's Plumbing, Inc. v. All Seasons Roofing & Sheet Metal, Inc.*, 32-783 (La.App. 2 Cir. 3/1/00), 754 So.2d 336, 338; *Kimball v. Kimball*, 93-1364 (La.App. 1 Cir. 5/20/94), 637 So.2d 779; *Scullin v. Prudential Ins. Co. of America*, 421 So.2d 470 (La.App. 4 Cir.1982). The argument that the defendants' knowledge of Naquin's suit can somehow fill the role of service of citation lacks merit.

Id., 779 So. 2d at 704. Our emphasis.

Finally, the majority fails to afford credence to the rationale recently expressed by our supreme court in *Barnett v. Louisiana State University Medical Center-Shreveport*, 2002-2576 (La. 2/7/03), 841 So. 2d 725.

I respectfully dissent.