

Judgment rendered October 14, 2004.
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 38,944-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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FLETTER C. TAYLOR

Plaintiff-Appellant

Versus

LSU MEDICAL CENTER

Defendant-Appellee

* * * * *

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

Honorable Charles Rex Scott II, Judge

* * * * *

THE SINGLETON LAW FIRM
By: W. James Singleton
Reshonda Leshay Bradford

Counsel for
Appellant

MARK E. POSEY
Assistant Attorney General

Counsel for
Appellee

* * * * *

Before CARAWAY, DREW and MOORE, JJ.

CARAWAY, J., dissents with written reasons.

DREW, J.:

In this employment discrimination suit, Fletter Taylor appeals a judgment dismissing her claim without prejudice because of her failure to timely request service. We affirm.

FACTS

Taylor filed suit on August 9, 2001, against LSU Medical Center (“LSUMC”). Taylor alleged that she had been wrongfully terminated in May 2000 because of her race and comments she had made regarding the proposed removal of another minority nurse.¹ Service of process was made as requested on LSUMC through its agent, CT Corporation System in Baton Rouge, on August 23.

On April 3, 2002, the LSU Board of Supervisors, appearing through the LSU Health Sciences Center-Shreveport (“LSUHSC”), filed the declinatory exception of insufficiency of citation and insufficiency of service of process, as well as a separate motion to dismiss. LSUHSC argued that the citation was defective in that there was no entity named LSUMC that was subject to suit. LSUHSC further argued that service was defective in that it was not made upon the Attorney General’s office and upon the head of the Board of Supervisors, as required by La. R.S. 13:5107(A). LSUHSC prayed that the action be dismissed without prejudice pursuant to La. R.S. 13:5107(D) as the result of Taylor’s failure to request proper service within 90 days of commencing the action. The exceptions and the motion to dismiss were set for hearing on April 29, 2002.

¹ On June 11, 2001, the U.S. Equal Employment Opportunity Commission sent a “Dismissal and Notice of Rights” to Taylor regarding her charges against the hospital. The notice stated that Taylor had 90 days from receipt of the notice to file a Title VII claim.

On April 23, 2002, Taylor amended her petition to substitute LSUHSC and the Board of Supervisors as defendants. Service was requested and apparently effected on LSUHSC through the Attorney General and on the Board of Supervisors through its Chairman on April 30 and May 2, 2002, respectively.

On April 30, 2002, the trial court rendered judgment sustaining the exceptions of insufficiency of citation and service of process. The court noted in a footnote in the judgment that Taylor had amended the petition to name the proper defendant and request service on the appropriate agent. Although there was no mention of the motion to dismiss in the judgment, the court minutes show that the exception of insufficiency of service and the motion to dismiss were granted on April 29, 2002.

In April 2003, Taylor attempted to get a default judgment against LSUHSC. On May 19, 2003, LSUHSC filed the peremptory exception of prescription. LSUHSC argued that the suit was dismissed by the April 30 judgment, or in the alternative, it re-urged the arguments in support of its motion to dismiss. A hearing was held on September 8, 2003.² The trial court rendered judgment dismissing the action without prejudice pursuant to La. C.C.P. art. 1672(C). Taylor appealed.

DISCUSSION

The Confederate Memorial Medical Center was merged with the LSU Medical School at Shreveport in 1976. *See* La. R.S. 17:1517. We note that §8 of Act 802 of 1999 directed the Law Institute to change all references in

² The trial judge who ruled on April 30, 2002, had since retired.

law from the “Louisiana State University Medical Center” to the “Louisiana State University Health Sciences Center.” At the time Taylor was fired, La. R.S. 17:1519(5) provided in part, “‘Hospitals’ shall not include the health care institution, formerly known as the Confederate Memorial Medical Center at Shreveport, merged with the Louisiana State University Health Sciences Center at Shreveport by R.S. 17:1517.”³ LSUHSC is part of the LSU System and is under the supervision and management of the Board of Supervisors. La. R.S. 17:3215.

Citation and service thereof are essential in all civil actions except for summary and executory proceedings, Article 102 divorce actions, and proceedings under the Children’s Code; without them all proceedings are absolutely null. La. C.C.P. art. 1201(A). Proper citation is the foundation of all actions. *Richardson v. O’Neal*, 30,599 (La. App. 2d Cir. 5/13/98), 716 So. 2d 26.

The requirements of service of process and citation upon LSUHSC are found in La. R.S. 13:5107(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,

³ Subpart C-2, “LSU Health Sciences Center-Health Care Services Division”, of Part II of Chapter 4 of Title 17, consisting of La. R.S. 17:1519 to 17:1519.9, was amended and reenacted by § 1 of Act. 906 of 2003.

or officer through which or through whom suit is to be filed against.

The requisite period in which service is to be made upon LSUHSC, as well as the penalty for the failure to do so, are provided in La. R.S.

13:5107(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.

A dismissal premised upon La. R.S. 13:5107(D)(2) should not be reversed in the absence of manifest error. *Patterson v. Jefferson Davis Parish School Bd.*, 2000-00580 (La. App. 3d Cir. 12/6/00), 773 So. 2d 297.

La. C.C.P. art. 1672(C) requires dismissal without prejudice when “service has not been requested within the time prescribed by Article 1201(C) . . . unless good cause is shown why service could not be requested, in which case the court may order that service be effected within a

specified time.” The motion for an art. 1672(C) dismissal may be made by any party or the court.

“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*, 2002-2576 (La. 2/7/03), 841 So. 2d 725, 726. A request for service of process satisfies the 90-day requirement of La. R.S. 13:5107(D) when it names the proper party or agent for service of process. *Thomas v. Louisiana Dept. of Public Safety and Corrections*, 2002-0897 (La. App. 1st Cir. 3/28/03), 848 So. 2d 635, *writ denied*, 2003-2397 (La. 11/21/03), 860 So. 2d 552.

Taylor failed to request service upon the proper agent within 90 days of the filing of her original petition as CT Corporation was not the proper agent for service. On August 29, 2001, Leon Reymond, representing the Foundation for The LSU Health Sciences Center, wrote to Taylor’s counsel that CT, which was the Foundation’s agent for service of process, had forwarded the petition to the Foundation. Reymond advised that because Taylor was suing LSU Medical Center and not the Foundation, she should serve the appropriate agent for the defendant. Taylor’s attorney received this letter on September 4, 2001. Despite the receipt of this information, Taylor did not act with haste to serve the proper defendant or agent. Instead, she waited until April of 2002 to amend her petition and request service on the proper defendant, which was more than eight months after the filing of her original petition.

The facts of this case are similar to those in *Barnett v. Louisiana State University Medical Center-Shreveport*, *supra*. Barnett filed suit on January 24, 2002, requesting service of process on CT Corporation System, the incorrect agent for service of process. CT alerted Barnett of this mistake on February 4, 2002. Nevertheless, Barnett waited more than 90 days after receiving this information to serve the correct agent. Dismissing Barnett's petition against defendant without prejudice, the supreme court stated:

Louisiana Code of Civil Procedure article 1672 requires dismissal without prejudice as to a named defendant for whom service of process has not been requested within the 90-day time period prescribed by article 1201(C), unless good cause is shown why service could not be requested. If the plaintiff successfully demonstrates good cause, "the court may order that service be effected within a specified time." La. Code Civ. Proc. art. 1672(C).

Louisiana courts strictly construe the good cause requirement of article 1672(C). *See Norbert v. Loucks*, 01-1229 (La. 6/29/01), 791 So. 2d 1283. Consequently, plaintiffs are strictly held to the obligation of serving the correct agent for service of process. *See Conner v. Continental Southern Lines*, 294 So. 2d 485 (La. 1974) (holding that service of process on incorrect agent is illegal and without effect); *Brooks v. Terry*, 608 So. 2d 1047 (La. App. 1st Cir. 1992) (annulling judgment against defendant who had been improperly served).

Relevant to this case, La. Rev. Stat. 13:5107 explicitly governs service on a state agency, such as the defendant medical center. Thus, plaintiff could have discerned the proper agent with minimal effort and cannot show good cause for the delay in proper service. 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. Because correct service was not accomplished in this case, and because plaintiff did not attempt service within 90 days on the proper agent, even after being notified by C.T. Corporations Systems that it was not the correct agent for defendant, article 1672 is applicable, and dismissal without prejudice is required.

Id., 841 So. 2d at 726.

In an attempt to avoid the penalty of La. R.S. 13:5107 by showing good cause why service upon the proper agent could not be requested, Taylor argues that she was essentially lulled into inaction by two letters received by her attorney. The first letter is dated August 31, 2001, and is from Penny Buchanan, a State Risk Claims Adjuster. Buchanan wrote that she had recently received the pleadings filed against the state, and although she was not waiving any procedural and legal defenses, she requested an informal 30-day extension of time to review the file and prepare appropriate pleadings. The second letter, dated September 5, 2001, is from attorney William Norfolk. Norfolk wrote to confirm his telephone conversation of the preceding day with Taylor's attorney, and that he appreciated the agreement of Taylor's counsel to take no adverse action against LSUMC without advance notice to him. Norfolk added that until the case was assigned to an attorney in the Attorney General's office, he would answer any questions regarding the suit.

Norfolk had represented LSU in the civil service appeal process initiated by Taylor in June of 2000 and which was resolved on April 12, 2002. In additional support for her "good cause" argument, Taylor asserts that she relied on her working relationship with Norfolk and his failure to complain about lack of service.

Taylor's attorney stated at the September 8, 2003, hearing that it was not until the filing of the declinatory exceptions on April 3, 2002, that they knew the wrong entity had been named in the suit. The amended petition was filed shortly thereafter.

Although “good cause” is not defined in La. C.C.P. art. 1672(C), courts have concluded that mere confusion regarding a party’s correct name or inadvertence on the part of plaintiff’s counsel to request service is not a sufficient basis for good cause. *Norbert v. Loucks*, 2001-1229 (La. 6/29/01), 791 So. 2d 1283. Confusion regarding the proper agent for service of process does not constitute good cause for the failure to request proper service. *Thomas v. Louisiana Department of Public Safety and Corrections, supra*.

Taylor’s counsel could have learned the proper party or agent to request service upon by referring to La. R.S. 13:5107. It is of no significance in this instance that the state was aware of the action. 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. *Naquin v. Titan Indemnity Co.*, 2000-1585 (La. 2/21/01), 779 So. 2d 704. *See also Richardson v. O’Neal, supra*, where service of the citation upon the appellees’ attorney was not sufficient service upon the appellees. Nor is it significant that Taylor’s attorneys engaged in communications with representatives of the state regarding this case. *See Naquin, supra*, where ongoing settlement negotiations did not absolve the plaintiff of his responsibility to comply with the service requirements.

Reliance on the mistakes of others is not “good cause.” In *Thomas v. Louisiana Department of Public Safety and Corrections, supra*, service was requested on the Secretary of State instead of on the Secretary of the Department of Public Safety and Corrections (“DPSC”). Although the

Secretary of State refused service, Thomas received a post card from the Clerk of Court indicating that service had been effected.⁴ A request for service on the Secretary of DPSC was made 18 months after the filing of the petition. The appellate court rejected Thomas's reliance on the post card as good cause, stating that "this notice to plaintiff that the sheriff had made the **requested** service upon the **wrong** agent did not relieve plaintiff of his duty to request service upon the **proper** party." *Id.*, 848 So. 2d at 640.

Taylor's apparent later service on the proper agent through the amended petition does not change the result in this matter as it did not cure the earlier defective service. The petition in *Barnett, supra*, was dismissed even though the correct agent was served outside the 90-day period. *See also Thomas, supra*.

For the foregoing reasons, we find no error in the trial court granting the dismissal in this matter.

Finally, Taylor contends that La. R.S. 13:5107(D)(3) is unconstitutional. Before the constitutionality of a statute can be considered, the issue must first be raised in the trial court and the statute's unconstitutionality must be specially pleaded. *Howard v. Howard*, 499 So. 2d 222 (La. App. 2d Cir. 1986). *See Vallo v. Gayle Oil Co., Inc.*, 94-1238 (La. 11/30/94), 646 So. 2d 859. That was not done in this matter.

Moreover, it is a long-standing judicial principle that courts will not consider constitutional challenges unless necessary to the resolution of a dispute.

Brinker v. Junction City Wood Co., Inc., 96-2896 (La. 1/20/99), 728 So. 2d

⁴ The post card did not contain any specific information regarding the date or type of service.

1252. Such a situation is not present in this case. Accordingly, we do not reach the constitutional issue at this point in this case.

DECREE

At appellant's costs, the judgment is **AFFIRMED**.

CARAWAY, J., dissenting.

I respectfully dissent from the majority's ruling affirming the judgment of dismissal without prejudice in this case.

The first judgment in this case was the April 30, 2002 ruling on the declinatory exceptions of insufficient citation and service of process. The judgment granting the exceptions did not comply with the mandatory rule of La. C.C.P. art. 932(A) and order the plaintiff to properly serve LSUHSC within a delay fixed by the court. As reflected in the footnote to the judgment, the trial court apparently believed that plaintiff's previously filed amended petition, which properly named LSUHSC and requested appropriate service, would cure the problem posed by the exceptions. *Significantly, the April 30, 2002 judgment on the exceptions did not dismiss the suit.*

The second point to be noted from the April 30, 2002 judgment is that it did not rule on LSUHSC's pending "Motion to Dismiss Pursuant to LSA-C.C.P. Article 1672.C" which had been filed on April 3. Arguably, that motion was inappropriate because, pursuant to La. R.S. 13:5107(D), the suit had not been previously filed naming LSUHSC so that service of citation upon LSUHSC had not been withheld for over ninety days within the strict context of that law. *In any event, the trial court again did not render a written judgment dismissing the suit.* Yet, by April 30, 2002, LSUHSC had made a limited appearance in the suit and, by virtue of the footnoted judgment, had notice advising that plaintiff's First Supplemental and

Amending Petition of April 23, 2002 had recently named LSUHSC as the proper defendant.

It is that same “Motion to Dismiss Pursuant to LSA-C.C.P. Article 1672.C” which resulted one year and a half later in the judgment of dismissal without prejudice that is the subject of this appeal. Nevertheless, because of LSUHSC’s actions throughout the mangled course of the proceedings, it has already appeared as a party defendant in this suit, and the “dismissal without prejudice” was improper.

Without re-urging the trial court to rule on its Motion to Dismiss, LSUHSC filed a peremptory exception of prescription on May 19, 2003. With this peremptory exception, LSUHSC made a general appearance in the suit and waived the lack of formal service of the First Supplemental and Amending Petition, which it acknowledged as having received in the allegations in the peremptory exception. *Dumas v. Angus Chemical Co.*, 31,399 (La. App. 2d Cir. 1/13/99), 729 So. 2d 624. The hearing, which resulted in the present judgment of dismissal without prejudice, was actually set as a hearing on LSUHSC’s exception on prescription.

This case should not now be dismissed without prejudice for lack of timely service (a La. C.C.P. art. 1672.C dismissal), because LSUHSC already appeared in the suit and had moved on to the more important issue of prescription. Nevertheless, at the hearing on the exception of prescription, LSUHSC misdirected the trial court back to its abandoned “Motion to Dismiss Pursuant to LSA-C.C.P. Article 1672.C.” LSUHSC apparently did this because of the harsh benefit it will receive under La. R.S.

13:5107(D)(3), which is dependent upon a prior dismissal under La. C.C.P. art. 1672(C). Considered, *Bordelon v. Medical Center of Baton Rouge*, 03-0202 (La. 10/21/03), 871 So. 2d 1075. Yet, La. R.S. 13:5107(D)(1) contemplates a waiver of service which arguably had initially occurred through the correspondence plaintiff received from Ms. Buchanan and Mr. Norfolk. More importantly, that correspondence reveals significant notice to LSUHSC within the prescriptive period, which under *Ray v. Alexandria Mall*, 434 So. 2d 1083 (La. 1983), may prevent the prescription bar which it is now urging. While these are the important issues for review of LSUHSC's claim for prescription, its backtracking in this case to its abandoned motion for an Article 1672(C) dismissal was inappropriate. I respectfully submit that the judgment of dismissal without prejudice should be reversed and the case remanded for consideration of the pending exception of prescription.