STATE OF LOUISIANA

COURT OF APPEAL

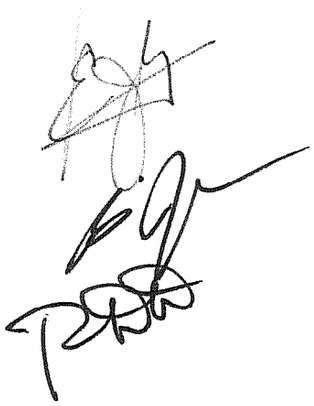
FIRST CIRCUIT

NO. 2004 CA 2189

ANGELA SPIERS, d/b/a ACT DEALER SERVICES

VERSUS

LORRAINE ROYE AND INTERSTATE MOTORS, INC.



Judgment Rendered: February 10, 2006

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Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Case No. 2003-001581

The Honorable Bruce C. Bennett, Judge Presiding

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Leonard E. Yokum, Jr. **Hammond, Louisiana**	**Counsel for Plaintiff/Appellee** **Angela Spiers, d/b/a ACT Dealer Services**
E. Wade Shows **Jo Ann Lea** **Baton Rouge, Louisiana**	**Counsel for Defendants/Appellants** **Lorraine Roye and Interstate Motors, Inc.**

* * * * * * * *

BEFORE: CARTER, C.J., DOWNING, AND GAIDRY, JJ.

GAIDRY, J.

This is an appeal of a money judgment and prior sequestration orders in a dispute arising from an alleged business agreement between the adverse parties. We dismiss the appeal in part, but remand this matter to the trial court for further proceedings before determining the remaining issues on appeal.

FACTS AND PRIOR PROCEEDINGS

The plaintiff-appellee, Angela Spiers, instituted this litigation on April 25, 2003, by filing a verified petition seeking damages for defamation, injunctive relief, and sequestration of property. She alleged that the defendant-appellant, Lorraine Roye, defamed her on April 15, 2003 at a used car auction by publicly accusing her of stealing that defendant's automobile dealer "tag." She also alleged the existence of a prior business arrangement with Ms. Roye and the other defendant-appellant, Interstate Motors, Inc., of which Ms. Roye was the sole stockholder. According to plaintiff's petition, the parties were engaged in a joint venture, the terms of which provided that plaintiff would purchase automobiles on behalf of the defendant corporation using her own funds, and those automobiles would then be sold by the corporation. Upon each sale, plaintiff would be repaid the funds expended in its purchase and additionally receive one-half of all monthly installment payments made to the corporation by the purchaser. Plaintiff further alleged that Ms. Roye unilaterally terminated the joint venture shortly prior to April 15, 2003. Plaintiff sought an injunction prohibiting defendants from disposing of any funds received from monthly payments and as sequestration of "at least three" vehicles purchased with her funds and still on the business premises.

On April 30, 2003, the trial court signed an order issuing a writ of sequestration of the three vehicles described in the petition and ordered a hearing on the request for an injunction. That hearing, set for June 23, 2003, was continued due to the incomplete status of discovery.

On May 22, 2003, defendants filed an answer in proper person, consisting of a one-page general denial. On the same date, plaintiff filed a request for a trial date, and a telephone conference was scheduled pursuant to the trial court's local rules. No trial date was assigned as the result of that conference. Defendants' original attorney moved to enroll as their counsel of record by motion filed July 15, 2003, and the order granting that motion was signed July 18, 2003.

On September 10, 2003, defendants filed another detailed answer and reconventional demand. In their reconventional demand, defendants alleged that no business arrangement existed between the parties and that plaintiff, as an employee, misappropriated approximately $41,000.00 in cash payments made by business customers. No answer to the reconventional demand was ever filed by plaintiff.[1]

On December 19, 2003, plaintiff filed a verified petition for sequestration in the same proceeding, referencing her original petition and seeking a second sequestration order directing the seizure of all movables, records, and funds of the defendant corporation. On the same date, the trial court ordered the issuance of the requested writ of sequestration.

On January 26, 2004, defendants filed a motion to dissolve the sequestration orders and alleged that the orders were wrongfully issued,

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[1] In her brief to this court, plaintiff claims that "either a short answer was filed or a denial or verbal answer was entered of record." The record contains no evidence of either. Additionally, we would point out that our civil procedure does not recognize a "verbal answer." *See* La. C.C.P. art. 1003.

entitling them to recovery of damages and attorney's fees. Defendants' motion was heard on February 25, 2004, and denied by the trial court in an oral ruling.

On February 27, 2004, defendants filed a motion requesting a status conference to set discovery deadlines and a trial date.

On March 1, 2004, the trial court signed its judgment denying defendants' motion to dissolve the sequestration orders and dismissing their claims for damages and attorney's fees. Defendants moved for a new trial on March 10, 2004.

On March 25, 2004, the telephone status conference requested by defendants was held. The case was set for trial during the week of June 21, 2004.[2] The trial order was signed and filed the same date, bearing the directive to "[p]lease send notice to all counsel of record[.].

On May 13, 2004, a petition of intervention was filed by the Louisiana Used Motor Vehicle and Parts Commission on behalf of consumers who had initiated complaints concerning their inability to receive the certificates of title to vehicles purchased from the defendant corporation. The record does not contain any answer to the petition of intervention by either plaintiff or defendants.

The hearing on defendants' motion for a new trial was held on May 17, 2004. At the conclusion of the hearing, the trial court denied defendants' motion. Its judgment in that regard was signed on May 26, 2004, and notice of that judgment was mailed the following day.

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[2] Although the order assigning the trial date stated that the trial was set for Monday, June 21, 2004, the district court's local rules provide that [a]ll civil matters set for trial shall be set for 'the week of' [*sic*] settings unless specifically set by the Trial judge." Rules for Louisiana District Courts, Rule 9.14(a), Appendix 8 (Rule 9.14), 21st Judicial District Court, par. 2.

The day after the hearing on defendants' motion for new trial, May 18, 2004, defendants' prior counsel filed an *ex parte mo*tion to withdraw from their representation. The order accompanying the motion was signed by the trial court on May 26, 2004.

The trial on the merits was held on June 24, 2004.[3] Defendants did not appear for trial. Prior to the taking of testimony and evidence, the trial court ordered the severance of the trial on the intervention.

On August 19, 2004, defendants filed a motion for a devolutive appeal from the judgment on the merits.

ASSIGNMENT OF ERRORS

Defendants have specified seven errors on the part of the trial court, which we summarize as follows:

(1) The trial court erred in granting a sequestration of property since plaintiff failed to prove an ownership interest, right to possession, security interest, or privilege relating to the property.

(2) The trial court erred in proceeding to trial prior to issue being joined on all demands asserted by all parties.

(3) The trial court erred in allowing the *ex parte* withdrawal of defendants' prior counsel after the case had been assigned for trial, as his motion to withdraw did not comply with Rule 9.13 of the Louisiana Rules for District Courts.

(4) The trial court erred in proceeding to trial and rendering judgment, since defendants had no notice of trial.

(5) The trial court erred in rendering judgment in the nature of a confirmation of a default judgment, since defendants filed an answer.

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[3] See n.2, *supra*.

(6) The trial court erred in signing a written judgment which was materially inconsistent with its oral ruling at the conclusion of the trial.

(7) The trial court's judgment was manifestly erroneous since it was based upon insufficient evidence.

DISCUSSION

Because our determination of some assigned errors is dependent upon the determination of others, we address these issues in a sequence different from that presented above.

Sequestration

Sequestration is a provisional remedy available for the seizure of property as to which the seizing party claims a property, possessory, or security interest, to prevent the disposal or concealment of the property by another party. La. C.C.P. arts. 3571, *et seq.* The writ of sequestration is conservatory in nature, used to preserve a creditor's right to execute on a judgment against a debtor on the merits of a principal demand. *Sarpy Properties, Inc. v. Diamond Shoe Stores of Louisiana, Inc.*, 99-1304, p. 6 (La. App. 5th Cir. 5/17/00), 761 So.2d 769, 774, *writ denied*, 00-1760 (La. 9/22/00), 768 So.2d 604. It is thus ancillary to the principal demand for a money judgment. *Carrier Leasing Corporation v. Ready-Mix Companies, Inc.*, 372 So.2d 601, 605 n.6 (La. App. 4th Cir.), *writ denied*, 375 So.2d 943 (La. 1979).

An order or writ of sequestration is an interlocutory judgment, and therefore not appealable in the absence of a showing of irreparable injury. *See* La. C.C.P. art. 2083 and *Big Four Crane Service, Inc. v. Owl Construction Co., Inc.*, 471 So.2d 992 (La. App. 1st Cir.), *writ denied*, 476 So.2d 350, 351 (La. 1985). However, when a motion to dissolve an interlocutory sequestration order also seeks damages and attorney's fees for

wrongful sequestration under La. C.C.P. art. 3506, the demand for damages is the equivalent of an incidental demand. *Sarpy Properties*, 99-1304 at p. 7, 761 So.2d at 774. Thus, the trial court's judgment of March 1, 2004, denying defendants' motion to dissolve the sequestration orders, was a final and appealable judgment. *Id. See also Carrier Leasing Corporation*, 372 So.2d at 603 n.3.

The record shows that notice of the judgment of May 26, 2004 denying defendants' motion for new trial was mailed on May 27, 2004, and the names of plaintiff's counsel and defendants' former counsel appear on the notice. The clerk's signed certificate expressly states that the notice was also sent to "such of the litigants, if any, who are not represented by counsel," although defendants' names do not appear on the notice. Defendants have not raised any issue of failure to receive notice of that judgment.

Because defendants' devolutive appeal was taken over sixty days from the date of mailing of the notice, defendants cannot appeal the judgment denying their motion to dissolve the sequestration orders. They likewise cannot appeal the interlocutory sequestration orders as part of their appeal of the judgment on the merits, as the judgment denying their motion to dissolve the sequestration orders determined the identical issues.[4] *See* La. R.S. 13:4231(3). Accordingly, this court lacks jurisdiction to consider the issues determined by the trial court's judgment of March 1, 2004. We therefore dismiss defendants' appeal in part insofar as it seeks relief from the

[4] When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. *Judson v. Davis*, 04-1699, p. 8 (La. App. 1st Cir. 6/29/05), 916 So.2d 1106, 1112. Here, however, the final judgment relating to the interlocutory sequestration orders was the unappealed judgment of March 1, 2004, denying defendants' motion to dissolve the sequestration orders.

sequestration orders and the judgment denying their motion to dissolve those orders. *See* La. C.C.P. art. 2162.

Setting of Trial Before All Issues Joined; Improper Use of Default Judgment Procedure; Conflict Between Written Judgment and Oral Reasons; Insufficient Evidence and Manifest Error

Because of our action taken relating to the issue of adequate prior notice of trial, discussed below, we defer final resolution of these issues pending further proceedings in the trial court.[5]

Ex Parte Withdrawal of Original Attorney

Defendants contend that the trial court erred in permitting their original attorney to withdraw on a motion that did not comply with Rule 9.13 of the Rules for Louisiana District Courts. The rule reads as follows, in pertinent part:

> **Rule 9.13 Withdrawal as Counsel of Record**
>
> Enrolled attorneys have, apart from their own interests, continuing legal and ethical duties to their clients, all adverse parties, and the court. Accordingly, the following requirements govern any motion to withdraw as counsel of record:
>
> (a) The withdrawing attorney who does not have written consent from the client must make a good-faith attempt to notify the client in writing of the withdrawal and of the status of the case on the court's docket. The attorney must deliver or mail this notice to the client before filing any motion to withdraw.
>
> . . . .
>
> (c) Any motion to withdraw must include the following information:

[5] As to the first issue, the premature setting of trial contrary to La. C.C.P. art. 1571, we observe that as defendants were the parties who requested the conference to set the case for trial, they may not have standing to object to any procedural irregularity in setting the case for trial prior to issue being joined on their reconventional demand. *See Northshore Insurance Agency, Inc. v. Farris*, 634 So.2d 867, 870 n.1 (La. App. 1st Cir. 1993). As to the issue of conflict between the judgment and the oral reasons, the jurisprudence holds that a trial court's written reasons for judgment form no part of the judgment itself. Where there is a conflict between the judgment and the written reasons, the judgment controls. *Delahoussaye v. Board of Supervisors of Community and Technical Colleges*, 04-0515, p. 13 (La. App. 1st Cir. 3/24/05), 906 So.2d 646, 654. The same reasoning obviously applies in the case of a conflict between a judgment and oral reasons for judgment. However, defendants also raise a substantive issue as to the propriety of the judgment's disposition of the sequestered property and any credit to which defendants may be entitled against the money judgment rendered against them.

(1) The motion must state current or last-known street address and mailing address of the withdrawing attorney's client. The withdrawing attorney must also furnish this information to the clerk of court.

(2) If a scheduling order is in effect, a copy of it must be attached to the motion.

(3) The motion must state whether any conference, hearing, or trial is scheduled, and, if so, its date.

(4) The motion must include a certificate that the withdrawing attorney has complied with paragraph (a) and with Rule 1.16 of the Rules of Professional Conduct, Louisiana State Bar Association, Articles of Incorporation, Art. 16. A copy of the written communication required by paragraph (a) must be attached to the motion.

(d) The court may allow an attorney to withdraw on *ex parte* motion if:

(1) The attorney has been terminated by the client; or

(2) The attorney has secured the written consent of the client and of all parties or their respective counsel; or

(3) No hearing or trial is scheduled, or the case has been concluded.

(e) If paragraph (d) does not apply, then an attorney may withdraw as counsel of record only after a contradictory hearing and for good cause. All parties and the withdrawing attorney's client must be served with a copy of the motion and rule to show cause why it should not be granted.

(f) If counsel's withdrawal would delay a scheduled hearing or trial, the court will not allow the withdrawal, unless exceptional circumstances exist.

. . . .

The motion to withdraw filed by defendants' original attorney stated only that he "desire[d] to withdraw as counsel of record"; it does not state whether he was discharged by defendants or whether he had defendants' and plaintiff's written consent to withdraw from defendants' representation. It

likewise did not state that a trial had been scheduled and the date of trial. Accordingly, under Rule 9.13(d), it was patently improper for the trial court to grant that motion on an *ex parte* rather than on a contradictory basis.

Both attorneys and the courts are charged with the duty of familiarity with court rules promulgated by our supreme court. Because of the relationship of this assigned error with that relating to notice of trial, we will address the consequences of this legal error in connection with our determination of the latter issue.

Notice of Trial

In the case of *Davis v. Dunn & Bush Construction*, 01-2472 (La. App. 1st Cir. 4/9/03), 858 So.2d 451, this court was confronted with a factual situation of withdrawal of counsel similar to that before us now. A workers' compensation claimant's claim was dismissed for his failure to appear at trial after his attorney was permitted to withdraw following the claimant's incarceration. The claimant appealed, arguing that the Office of Workers' Compensation (OWC) never notified him of the trial date. Because the record was unclear as to whether the claimant received any notice of trial, we remanded the case to the OWC for a hearing on that issue. In doing so, we observed:

> When a trial court provides written notice of a trial date to the attorney of record, but the attorney thereafter moves to withdraw as attorney of record, the trial court bears the responsibility of ensuring that the litigant receives notice of the pending trial in writing. [Footnote omitted.] The court can satisfy this notice requirement by reissuing the notice of trial to the unrepresented litigant directly. Otherwise, the court must receive reasonable proof that the withdrawing attorney has notified the client in writing of the trial date. This can be accomplished by attaching to the motion to withdraw a certified letter to the client or other evidence indicating the client has received unequivocal written notice of trial. If the record demonstrates that a litigant did not receive notice of trial, then he was denied procedural due process and fundamental fairness. [Footnote omitted.]

Id., 01-2472 at pp. 3-4, 858 So.2d at 453.

Judge Whipple dissented in part and concurred in part. In her partial concurrence, she summarized prior jurisprudence as holding that "the 'reasonable proof' that will satisfy a court's notice-of-trial obligation is established by attaching to a motion to withdraw a certified letter to **the client** or other evidence indicating the client has received **unequivocal written** notice of trial." *Id.*, 01-2472 at p. 2, 858 So.2d at 454 (concurring and dissenting opinion). Under this reasoning, any evidence short of actual documentation of mailing or issuance of formal notice or written communication by counsel would seem to fall short of "unequivocal" proof.[6] Ultimately, following the OWC hearing, which determined that the claimant did not receive prior written notice of the hearing, this court annulled the OWC's judgment dismissing the claim. In doing so, we observed that "[a]dequate notice is one of the most elementary requirements of procedural due process; it is fundamental to our system of laws that there be notice prior to trial, except in extraordinary cases, such as executory process." *Davis v. Dunn & Bush Construction*, 01-2472, p. 4 (La. App. 1st Cir. 8/20/03), 859 So.2d 155, 158.

The *Davis* cases related to proceedings before the OWC, rather than a district court, and arose prior to the adoption and promulgation of the uniform Rules for Louisiana District Courts in 2002. Rule 9.13 adopts the strict view taken in Judge Whipple's partial dissent and concurrence in *Davis*, and goes even further by requiring the withdrawing attorney to (1) state the client's current or last-known street *and* mailing addresses in the motion, and to also provide them to the clerk of court; (2) attach a copy of any scheduling order in effect to the motion; (3) state the date of any

[6] Under this interpretation, sworn testimony of the withdrawing attorney, without supporting documentation, would be insufficient proof of notice.

scheduled conference, hearing, or trial in the motion; and (4) attach a copy of the written notice to the client of the trial date *and* certify in the motion that he has complied with the rule and Rule 1.16 of the Louisiana State Bar Association's Rules of Professional Conduct. In setting out the foregoing requirements, Rule 9.13(c) makes no distinction between *ex parte* and contradictory motions, expressly making them applicable to "*any* motion to withdraw."

These mandatory duties placed upon counsel, however, do not relieve trial courts of their affirmative duty of ensuring and verifying that unrepresented parties receive adequate prior notice of trial.[7] The record before us does not reflect whether separate written notice of the trial date was sent to defendants by the trial court upon the withdrawal of their original counsel. In her brief to this court, plaintiff contends that defendants' former counsel did in fact properly notify them by letter of his withdrawal and the trial date, documented in a complaint filed with the Office of Disciplinary Counsel of the Louisiana State Bar Association. No such documentation appears in the record. An appellate court may not consider evidence which is outside the record. Further, appellate briefs are not part of the appeal record, and an appellate court has no authority to consider on appeal facts referred to in appellate briefs, if those facts are not in the record. *Tranum v. Hebert*, 581 So.2d 1023, 1026-27 (La. App. 1st Cir.), *writ denied*, 584 So.2d 1169 (La. 1991).

[7] A party appearing in proper person before a court is required to advise the court of his current address and any change of address. La. C.C.P. art. 1571(B). But a party's failure to do so does not affect the validity of any judgment rendered if notice of trial was sent to the party's last known address of record. *Id.*

In light of the relatively uncommon nature of civil trial assignments in this trial court, the adequacy of notice of trial to defendants is particularly crucial.[8] Additionally, if Rule 9.13 is to have any practical force and effect, justice dictates that any judgment rendered at a trial held after its violation is subject to review for possible constitutional invalidity, if actual prejudice results to the client.

CONCLUSION

As to the issue of improper sequestration, we dismiss defendants' appeal in part as untimely. We find merit in defendants' assigned error relating to the *ex parte* withdrawal of their original attorney. From the record before us, we cannot determine whether defendants received the adequate notice of trial required by Rule 9.13 of the Rules for Louisiana District Courts and procedural due process. Given this combination of circumstances, we hereby remand this matter to the trial court for an evidentiary hearing within thirty days of the issuance of this opinion on the issue of whether defendants received proper and adequate notice of trial. The record shall be supplemented with written documentation of any correspondence between defendants' original counsel and defendants relating to his withdrawal from representation on May 26, 2004, and any written notice of trial issued by the trial court to defendants in proper person from May 26, 2004 through June 24, 2004. The record and transcript of the hearing and the trial court's minutes shall be filed with this court within twenty-one days following the hearing in order that this appeal may proceed

[8] See n.2, *supra*. The practice of "weekly" trial assignments, with an indeterminate date for the actual opening of trial within the week, is obviously designed to accommodate multiple trial assignments within the same week. Ordinarily, the practice does not unduly inconvenience parties represented by attorneys. However, in order for *unrepresented* parties to receive proper notice of trial under this practice, they must be adequately notified of the necessity of attending the final pretrial conference and being prepared for trial at any time that week the trial may commence after the conference.

to final disposition. Assessment of costs of appeal is pretermitted pending such final disposition.

APPEAL DISMISSED IN PART; CASE REMANDED FOR EVIDENTIARY HEARING.