

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1497

DANIEL BERNE, SR.

VERSUS

CANADIAN NATIONAL/ILLINOIS CENTRAL RAILROAD, THE  
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF  
TRANSPORTATION DEVELOPMENT

***DATE OF JUDGMENT: May 4, 2007***

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT  
(NUMBER 2004-003337 "DIV. C"), PARISH OF TANGIPAHOA  
STATE OF LOUISIANA

HONORABLE ROBERT H. MORRISON, III, JUDGE

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**BEFORE: KUHN, GAIDRY, AND WELCH, JJ.**

**Disposition: AFFIRMED.**

**Kuhn, J.**

This tort suit, which was filed on October 1, 2004, arises from a June 29, 2004 train/truck collision at a railroad crossing in Independence, Louisiana. Plaintiff-appellant, Daniel Berne, Sr., appeals the trial court's judgment that denied his motion for a continuance and for an extension of time to produce an expert report; denied his motion to compel depositions of train crew members Roger Holder and Jeff A. Sturdivant; granted the motion for summary judgment filed by defendant, Illinois Central Railroad Company, d/b/a Canadian National Railroad ("the Railroad"); and dismissed Berne's demands against the Railroad. We affirm the trial court's judgment, finding that Berne was not entitled to his third request for a continuance of the hearing on the motion for summary judgment, that the trial court did not abuse its discretion in denying Berne's motions, and that the Railroad established it was entitled to summary judgment as a matter of law.

Berne argues on appeal that the trial court abused its discretion when it denied his motion for continuance and that the trial court erred in granting the Railroad's motion for summary judgment.

The trial court may grant a continuance on peremptory or discretionary grounds. La. C.C.P. arts. 1601 and 1602. There are only two peremptory grounds: 1) the party seeking the continuance, despite due diligence, has been unable to obtain material evidence; or 2) a material witness is absent without the contrivance of the party applying for the continuance. La. C.C.P. art. 1602. Absent peremptory grounds, a continuance rests within the sound discretion of the trial court. *St. Tammany Parish Hosp. v. Burris*, 00-2639, p. 4 (La. App. 1st Cir. 12/28/01), 804 So.2d 960, 963. The party seeking the continuance bears the burden of

establishing that his motion falls within the peremptory grounds. *Armand v. Delgado*, 99-2274, p. 5 (La. App. 1st 11/3/00), 770 So.2d 896, 898.

Otherwise, a trial court may grant a continuance "if there is good ground therefor." La. C.C.P. art. 1601. The trial judge must consider the particular facts of a case when deciding whether to grant or deny a continuance. *St. Tammany Parish Hosp.*, 00-2639 at p. 4, 804 So.2d at 963. The trial court should consider the diligence and good faith of the party seeking the continuance and other reasonable grounds. The trial court may also weigh the condition of the court docket, fairness to the parties and other litigants before the court, and the need for orderly and prompt administration of justice. *Id.* The trial court has great discretion in granting or denying a continuance under La. C.C.P. art. 1601, and its ruling should not be disturbed on appeal in the absence of a clear abuse of discretion. *Id.*

In this appeal, Berne's counsel argue that the expert they hired was unable to provide a written report as to the cause of the subject accident prior to the court-imposed, March 1, 2006 deadline, in part because the expert did not have access to the deposition testimony of Holder and Sturdivant. Berne's counsel submit that despite their best efforts, they were unable to obtain these depositions. They complain that the Railroad refused to voluntarily produce the train crew members as well as their residential addresses for subpoena purposes. The record before us, however, fails to demonstrate due diligence on the part of Berne's counsel. The record does not establish that Berne's counsel propounded timely interrogatories seeking the residential addresses of the train crew. Further, their attempts to subpoena these non-party witnesses at the Railroad's business address occurred after

the March 1, 2006 deadline for producing the expert report. If Berne's counsel expected their expert to use the testimony of these witnesses in rendering his opinion, they should have been more diligent in obtaining these depositions. Moreover, as the trial court pointed out, Berne did not specify why the expert needed the testimony of Holder and Sturdivant to render his opinion. Thus, Berne has not established that these witnesses were material to the expert report or to the allegations set forth in Berne's petition.

The trial court's deadline for producing the expert report was reasonable, particularly since Berne's counsel had previously informed the court in September 2005, that the matter was "ready for trial" on the merits. After the initial setting of the hearing on the motion for summary judgment, the trial court continued the matter twice upon Berne's motion. Upon Berne's second motion for a continuance, which was granted on January 17, 2006,<sup>1</sup> his counsel represented that they had hired an expert and they needed more time within which to obtain this expert's report. Berne's counsel did not represent, however, that the expert also needed the depositions of Holder and Sturdivant in order to render his opinion. During the March 27, 2006 hearing addressing Berne's motions to compel the depositions of Holder and Sturdivant and to continue the summary judgment hearing for a third time, Berne's counsel failed to establish their due diligence in obtaining these depositions or that the testimony of Holder and Sturdivant was material to the issues

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<sup>1</sup> The trial court's January 17, 2006 order continued the hearing on the Railroad's motion for summary judgment until March 27, 2006, and further decreed in pertinent part that Berne was to "produce to [the Railroad] any report from any expert witness engaged by Plaintiff for the purpose of proving liability, no later than the 1<sup>st</sup> day of March, 2006, or be precluded thereafter from utilizing such expert testimony in opposition to the motion for summary judgment ...."

under consideration.<sup>2</sup> Thus, we conclude Berne has failed to establish peremptory grounds for a continuance pursuant to La. C.C.P. art. 1602.

Further, we conclude the trial court did not abuse its discretion in denying a continuance under La. C.C.P. art. 1601. We believe the Railroad's interest in having this litigation judicially resolved within a reasonable time and the trial court's interest in controlling the docket far outweigh any possibilities of prejudice which may have resulted from a denial of the continuance. We do not believe these facts present an extreme situation that justifies interference by this court with the trial court's decision to deny the continuance. *Willey v. Roberts*, 95-1037, p. 4 (La. App. 1st Cir. 12/15/95), 664 So.2d 1371, 1374-75, *writ denied*, 96-0164 (La. 3/15/96), 669 So.2d 422.

Louisiana Code of Civil Procedure article 966(C)(1) expressly predicates the granting of a motion for summary judgment upon "adequate discovery" being accomplished, or a party being at least afforded the opportunity to undertake adequate discovery. But there is no absolute right to delay action on a motion for summary judgment until discovery is completed. *Vanderbrook v. Coachmen Industries, Inc.*, 01-809, p. 8 (La. App. 1st Cir. 5/10/02), 818 So.2d 906, 911. Unless plaintiff shows a probable injustice, a suit should not be delayed pending

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<sup>2</sup> In his oral reasons for denying Berne's third continuance request, the trial court stated in pertinent part:

The entire focus of the objection or argument in opposition to the Summary Judgment in January [2006] had to do with the condition of the grade crossing and I still have not heard anything ... that indicates to me that the train crew can do anything as far as an expert witness to shed any additional light [on the issues presented].... I tend to be pretty easy going about these things and ... try to get all the pieces put together and on the table. But in this case, ... it would help me if I had something like an affidavit from your expert saying I need these two guys testimony so I can do 'x', 'y' or 'z' as far as processing a report. I don't see that anywhere.

discovery when it appears at an early stage that there is no genuine issue of fact. *Simoneaux v. E.I. du Pont de Nemours and Company, Inc.*, 483 So.2d 908, 913 (La. 1986). The only requirement regarding discovery is that the parties be given a fair opportunity to present their claim. The mere claim by an opponent to a motion for summary judgment that he does not have in his possession the facts and information necessary to counter such a motion will not defeat a summary judgment motion. *Vanderbrook*, 01-809, p. 8, 818 So.2d at 911. Under the facts of this particular case, Berne had the opportunity for “adequate discovery.” La. C.C.P. art. 966(C)(1). Further, Berne has failed to show he was prejudiced in any way from proving his opposition. *Vanderbrook*, 01-809, p. 8, 818 So.2d at 912.

Additionally, notwithstanding Berne’s opinion on the completeness of discovery, once the Railroad supported its motion for summary judgment with its expert’s affidavit and other supporting documentation, Berne could not rely on the mere allegations or denials of his petition to rebut the motion. La. C.C.P. art. 967(B). Berne was required to set forth specific facts showing a genuine issue of material fact for trial. *Id.* Herein, Berne has argued that there are genuine issues of material fact concerning whether his view was obstructed and whether the railroad crossing constitutes a dangerous trap, but he has provided no evidence to support the allegations raised in his petition. Berne has relied on “mere allegations,” and failed to set forth specific fact showing that there is a genuine issue for trial. *Id.* Berne’s case hinged on establishing that the collision was caused by obstructions that blocked his view of the approaching train, the train’s excessive rate of speed, or inadequate protective devices or signage at the crossing. We find that the trial court’s March 28, 2006 written reasons for

judgment more than adequately explains that: 1) the evidence presented by the Railroad pointed out the absence of factual support for Berne's claims, and 2) Berne failed to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. La. C.C.P. art. 966(C)(2). Thus, because there was no genuine issue of material fact, and the Railroad was entitled to judgment as a matter of law, the trial court properly granted the motion for summary judgment.

For these reasons, we affirm the trial court's judgment. We issue this summary opinion in accordance with Uniform Rules-Courts of Appeal, Rule 2-16.2(A)(5),(6), and (7). Appeal costs are assessed against Berne.

**AFFIRMED.**