

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1920

**SOUTHEAST WIRELESS NETWORK, INC., SLAYDON INVESTMENT,
INC., AND CELIA KATZ, INDIVIDUALLY AND IN HER
CAPACITY AS INDEPENDENT EXECUTRIX FOR THE
SUCCESSION OF SAMUAL B. KATZ**

VERSUS

**U.S. TELEMETRY CORPORATION, U.S. TELEMETRY NETWORK,
INC., K. STEVEN ROBERTS, THOMAS L. SIEBERT,
DONALD M. CLARKE, S. ANDREW BANKS, CHARLES M. BRUCE,
AND JAMES K. GABLE**

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 505,430, Division "E"
Honorable William A. Morvant, Judge Presiding**

JUDGE DAVID S. GORBATY

**Charles R. Moore
J. E. Cullens, Jr.
S. Layne Lee
Patrick N. Broyles
Moore, Walters, Thompson,
Thomas, Papillion & Cullens, APLC
Baton Rouge, LA**

**Attorneys for
Plaintiffs-Appellants
Southeast Wireless Network, Inc.,
Slayton Investment, Inc., and
Celia Katz, individually and in her capacity
as Independent Executrix for the
Succession of Samuel B. Katz**

**Michael D. Hunt
Jane A. Robert
Phelps Dunbar LLP
Baton Rouge, LA**

**Attorneys for
Defendants-Appellees
Texaco Development Corporation
and Texaco Group, LLC**

BEFORE: MCKAY, GORBATY, AND CANNIZZARO, JJ.¹

Judgment rendered **JUL 6 2007**

¹ The Honorable James F. McKay, III, Judge, the Honorable David S. Gorbaty, Judge, and the Honorable Leon A. Cannizzaro, Jr., Judge, all members of the Fourth Circuit Court of Appeal, are serving as judges *ad hoc* by special appointment of the Louisiana Supreme Court.

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Plaintiffs appeal the granting of an exception of no cause of action filed by defendants Texaco Development Corporation and Texaco Group, LLC. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY:

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Plaintiffs/appellants are Southeast Wireless Network, Inc., Slaydon Investment, Inc., and Celia Katz, individually and in her capacity as independent executrix for the succession of Samuel B. Katz (appellants). The defendants involved in this appeal are Texaco Development Corporation (TDC) and Texaco Group, LLC (TG) (hereinafter sometimes referred to collectively as Texaco).²

Appellants filed suit against defendants pursuant to the Louisiana Securities Law, La. R.S. 51:701, *et seq.*, also known as the "Blue Sky Law," alleging that defendants made material misrepresentations to appellants in connection with the sale of securities, resulting in damages in excess of \$6 million.

Defendant U.S. Telemetry Corporation (USTC) began its business in 1999, intending to develop telemetry equipment that could use a certain spectrum of radio frequencies. This equipment would be of particular interest to industrial companies wishing to monitor remote facilities such as oil wells. Appellants were early investors in USTC. According to defendants, appellants had experience bidding and buying spectrum licenses auctioned by the Federal Communications Commission (FCC), having done so since 1994. To the contrary, defendants contend that they

² The other defendants not involved in this appeal are: U.S. Telemetry Corporation, U.S. Telemetry Network, Inc., Thomas L. Seibert, K. Steven Roberts, Donald M. Clarke, Charles M. Bruce, S. Andrew Banks, James K. Gable, Sentinel Telemetry, Inc., and Lee Lovett.

had no particular expertise or experience in buying and selling FCC licenses or telemetry.

In June of 2001, TDC purchased \$5 million worth of preferred stock in U.S. Telemetry. In exchange for its investment, TDC was granted the power to appoint a member to USTC's board of directors. James Gable, an employee of TG was selected. Appellants alleged that during Mr. Gable's six-months of service on the board, USTC made a variety of misrepresentations and omissions of material fact to appellants, which resulted in huge financial losses. Because Mr. Gable was an employee of TG and TDC appointed him as its representative to USTC's board, both Texaco entities are liable to appellants.

Appellants allege a cause of action against Texaco based on two distinct theories: (1) Texaco's liability as direct and/or indirect controlling parties of USTC under Louisiana's Blue Sky Law, specifically La. R.S. 51:714(B); and, (2) TG's vicarious liability as principal for the actions of its employee, Mr. Gable.

The original petition named Mr. Gable and all other USTC directors as defendants. Appellants filed a First Amended and Restated Petition for Damages adding TDC in December of 2003, and filed a Second Amended and Supplemental Petition for Damages in April of 2004, dismissing previously named Texaco defendants. Defendants TDC and TG filed an exception of no cause of action, which appellants opposed. In January 2005, the trial court granted the exception, but granted appellants leave to amend its petition.

In June of 2005, appellants filed their Third Amended and Restated Petition adding Sentinel Telemetry, Inc., and Lee Lovett as defendants.

Both Texaco entities again filed an exception of no cause of action, which was granted by the trial court in October of 2005. The trial court ruled that appellants had not adequately alleged that Texaco controlled USTC or that TG was liable under principles of *respondeat superior*. However, the trial court again granted leave for appellants to amend.

Appellants filed its Fourth Amended Petition in November of 2005, and Texaco again filed an exception of no cause of action. In March of 2006, the trial court concluded that appellants still had not alleged sufficient facts to support its conclusions, dismissing appellants' claims against Texaco, with prejudice.

A partial final judgment was entered on April 12, 2006, and this appeal followed.

LAW AND ANALYSIS:

The peremptory exception of no cause of action tests the legal sufficiency of a petition by examining whether, based upon the facts alleged in the pleading, the law affords the plaintiff a remedy. La. Code Civ. Proc. art. 927(4); *Montalvo v. Sondes*, 93-2813 (La. 5/23/94), 637 So.2d 127, 131. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause action. La. Code Civ. Proc. art. 931. The court reviews the petition and accepts all well pleaded allegations of fact as true, and the issue at the trial of the exception is whether, on the face of the petition, the plaintiff is entitled to the relief sought. *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So.2d 1234, 1235-36 (La. 1993); *Kuebler v. Martin*, 578 So.2d 113 (La. 1991); *Hero Lands Co. v. Texaco, Inc.*, 310 So.2d 93 (La. 1975). Because Louisiana is a fact-pleading jurisdiction, mere legal conclusions,

unsupported by facts, are not sufficient to set forth a cause of action. *State ex rel. Ieyoub v. Racetrac Petroleum, Inc.*, 01-0458 (La.App. 3 Cir. 6/20/01), 790 So.2d 673, 678. The reviewing court should conduct a *de novo* review because the exception raises a question of law and the trial court's decision is based solely on the sufficiency of the petition. *Fink v. Bryant*, 01-0987, p. 4 (La. 11/28/01), 801 So.2d 346, 349; *Wright v. Louisiana Power & Light*, 06-1181, p. 8 (La. 3/9/07), 951 So.2d 1058, 1069.

Appellants make two assignments of error: (1) the trial court committed legal error by granting Texaco's exception of no cause of action regarding control party liability under Louisiana's Blue Sky Law; and (2) the trial court committed legal error by granting TG's (Mr. Gable's employer) exception of no cause of action regarding appellants' *respondeat superior* claims.

Appellants' first assignment of error addresses the trial court's ruling that TDC and TG did not control the board of directors of USTC. Appellants base their allegations of control on La. R.S. 51:714(B), which provides:

B. Every person who directly or indirectly controls a person liable under Subsection A of this Section [Subsection A imposes liability on sellers of securities and their controlling parties], every general partner, executive officer, or director of such person liable under Subsection A of this Section, every person occupying a similar status or performing similar functions, and every dealer or salesman who participates in any material way in the sale is liable jointly and severally with and to the same extent as the person liable under Subsection A of this Section unless the person whose liability arises under this Subsection sustains the burden of proof that he did not know and in the exercise of reasonable care could not have known of the existence of the facts by reason of which liability is alleged to exist. There is contribution as

in the case of contract among several persons so liable.

Louisiana Revised Statute 51:702(4) defines control as:

“Control”, including “controlling”, “controlled by”, and “under common control with”, means the possession direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

Appellants argue that they have clearly alleged sufficient facts to advance a *prima facie* case of “control party” against TDC and TG pursuant to these statutes. Specifically, they argue that TDC and TG had the direct contractual and voting power to guide the management and policies of USTC, and also had the power through the influence of TG’s employee/agent, Mr. Gable, to guide the management and policies of USTC.

Specifically, in the subject petition (and some previous), appellants allege that Texaco Group was Mr. Gable’s employer, and that Texaco Group is therefore liable for Mr. Gable’s actions undertaken in the course and scope of his employment for Texaco Group. Appellants also allege that Texaco Group was a controlling party of USTC.

The trial court found that the pleading did not support appellants’ allegations. Specifically, the trial court stated “... I think the pleadings bear out, they (TG) own no stock whatsoever in USTC. They are not a party to any of the subscription agreements or stock agreements. They were, for the purposes of the exception, the employer of Mr. Gable; however, based on the allegations of the petition, they did not appoint Mr. Gable to the board.”

After our own review of the pleading and attached documents, we find that the trial court was correct in maintaining the exception of no cause of action in favor of TG.

As to appellants' allegations of control concerning TDC, in paragraph 77 of the Fourth Amended and Restated Petition, appellants state:

From June 1, 2001, through the present, Texaco Development "controlled" USTC as defined in La. R.S. 51:702(4), and is therefore liable jointly and severally and to the same extent as USTC under La. R.S. 51:714(B), for SEW's losses arising out of the September 30, 2001 sale of USTC securities to SEW as described in this Petition. Much of Texaco Development's "power to direct or cause the direction of the management and policies of" USTC "though [sic] the ownership of voting securities, by contract or otherwise," came as a consequence of the Texaco Contracts with USTC ... which gave Texaco Development Corporation supervisory authority and ultimate control over USTC's budget, operations, marketing, public relations, acquisitions, expenditures, stock issuances, and selection and hiring of key personnel such as a Chief Financial Officer and Vice-President of Marketing.

Appellants proceed to delineate specific allegations of Texaco Development's acts of control of the USTC board through the actions of Mr. Gable.

The trial court in oral reasons stated that it had carefully reviewed the subject petition and the documents attached thereto, along with the prior petitions. The trial court determined that another shareholder, Sentinel Telemetry, Inc., held the largest share of USTC common shares, and had two directors on the board. Thus, Sentinel was in a better position to control than TDC. The trial court stated:

... [a]nd I read over these things again and again. I can't remember the number of pages of

notes I made going through it. And the inescapable conclusion that I kept coming to after reviewing these documents is that these agreements clearly, and it can't be argued any way, shape or form to the contrary by Texaco, protect the value of Texaco Development Corporation's investment as a preferred stockholder in USTC. As a Series A preferred stockholder, the value of that \$5 million investment is protected by these documents. **However, when I go through and I read the allegations, especially in paragraph 77, and I look at these documents, I don't see where these documents vest Texaco Development Corporation with that element of direction or control sufficient to make them liable as a control person under the Blue Sky law. ...** And as I look at the pleadings and I went back and looked at some of my notes from the earlier ones, it seems that based on the pleadings, Sentinel defendants, they own the largest block of USTC common shares, they seem – and I realize there can be more than one controlling person, and by no means am I limiting that, because it depends on the facts, depends on what is given to that particular investor as to whether or not they are going to be a controlling person – but Sentinel seems to be, based on these with requiring two-thirds vote of outstanding shares of common stock, they are in a better position since they have got two directors on the board, they control probably more common stock than Texaco to override some of the things that Texaco can do. **And despite the additional language and the volume, I still think that the petition as amended falls short.** (emphasis added.)

Our *de novo* review of the record confirms the trial court's findings.

Appellants' second assignment of error is that the trial judge committed legal error by granting Texaco Group's exception of no cause of action regarding appellant's *respondeat superior* claims.

The trial court specifically found that the petition was void of any sufficient allegations to support these claims. Other than the fact that Mr. Gable was an employee of TG, the court stated "there were **no facts alleged** to show that Texaco Group had control over Gable under the

principles of *respondeat superior*.” (emphasis added.) Again, our careful review of the pleadings leads to the same conclusion as the trial court. Thus, we find that the trial court was correct in maintaining TG’s exception regarding the issue of *respondeat superior*.

Accordingly, for the reasons set forth above, we affirm the ruling of the trial court in its entirety.

AFFIRMED