STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2003 CA 2237 AND 2003 CW 1761

BARABAY PROPERTY HOLDING CORPORATION AND LION INVESTBANC

VERSUS

RONALD J. KENNEDY, CHRISTINE D. CLARK, AND MIRAGE VENTURES, INC.

Judgment Rendered: December 17, 2004

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Appealed from the
Nineteenth Judicial District Court in and for the
Parish of East Baton Rouge, Louisiana
Trial Court Number 464,554 "H"

Honorable William Morvant, Judge Presiding

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P. Albert Bienvenu New Orleans, LA	Counsel for Plaintiffs/Appellants, Barabay Property Holding Corporation, et al.
Lloyd Hertz Lafitte, LA	Counsel for Defendant/Appellee, In Proper Person
Randal J. Robert Baton Rouge, LA	Counsel for Defendant/Appellee, Michael Teague
Harry Rosenberg New Orleans, LA	Counsel for Defendant/Appellee, Windsor Financial Group, Inc.
Thomas C. Damico Baton Rouge, LA	Counsel for Defendants/Appellees, Ronald J. Kennedy and Christine Kennedy

BEFORE: WHIPPLE, FITZSIMMONS, AND DOWNING, JJ.

Fitzsimmons, J. concurs and assigns reasons.

WHIPPLE, J.

Plaintiffs, Barabay Property Holding Corporation ("Barabay") and Lion Investbanc Corporation ("Lion"), appeal from a judgment of the trial court granting a motion to dismiss filed by defendant, Windsor Financial Group, Inc. ("Windsor"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiffs filed a petition for damages and writs of attachment on property belonging to original defendants, Ronald J. Kennedy and Christine D. Clark (hereinafter referred to as "the Kennedys") on September 14, 1999. Plaintiffs alleged that the Kennedys, as officers of the plaintiff corporation, misappropriated large amounts of plaintiffs' assets.[1]

On December 12, 2000, the trial court permitted Lion Capital Corporation ("Lion Capital") to intervene in the action as an additional plaintiff, and granted the plaintiffs' motion to file an amending and supplemental petition. In addition to the Kennedys, Mirage Ventures, L.L.C., a limited liability company owned by Kennedy and Dr. Michael A. Teague, M.D., Lloyd Hertz, A. Edison Sexton, and Windsor, were also named as defendants in the amending and supplemental petition. In the amending and supplemental petition, plaintiffs alleged additional misappropriation causes of action against some of the newly named defendants, as well as allegations of unlawful conversion of Lion's property, mismanagement, malfeasance, and wrongful conduct, including breach of trust and breach of fiduciary duty.

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[1]According to the petition, Barabay is a wholly-owned subsidiary of Lion. Kennedy was employed by Lion and served as a director of Lion and as its managing officer. Through his position with Lion, Kennedy served as manager of Barabay and other entities owned by Lion or in which Lion held an ownership interest.

Clark was employed by Lion and served as a director of Lion and as its duly-elected corporate secretary. Clark was also entrusted with other administrative and supervisory functions for Lion, Barabay and other entities owned by Lion or in which Lion held an ownership interest.

Although Windsor was served with plaintiffs' "Amending and Supplemental Petition" on January 3, 2001, it was not served with the original petition. In response, Windsor filed numerous exceptions, including a declinatory exception raising the objection of insufficiency of service of process. The trial court denied this exception. Windsor subsequently sought writs of certiorari and review of the trial court's failure to sustain its objection of insufficient service based on plaintiffs' failure to serve the original petition. On September 24, 2001, this court issued the following ruling on Windsor's writ application:

> **WRIT GRANTED IN PART, DENIED IN PART.** As to relator's exception of insufficiency of service of process, we grant the writ and reverse the trial court's judgment denying the exception. Plaintiffs were required to serve relator with the original petition. See **Dickinson v. National Soc. of Health**, 589 So. 2d 632 (La.App. 5 Cir. 1991), **Williams v. New York Fire and Marine Ins. Co.**, 427 So. 2d 938 (La.App. 4 Cir. 1983), **Gant v. McGee**, 411 So. 2d 1191 (La.App. 4 Cir. 1982). Actual knowledge of the original petition does not remedy the lack of proper citation. See **Naquin v. Titan Indem. Co.**, 2000-1585 (La. 2/21/01), 779 So. 2d 704. Therefore, the ruling of the trial court of March 5, 2001 denying the exception of insufficient service is reversed. Based on this court's reversal of the trial court's denial of the exception of insufficient service, the issue of lack of subject matter jurisdiction is pretermitted.

Approximately fifteen months later, on December 2, 2002, plaintiffs requested that Windsor be served with the original petition and the amending and supplemental petition. On December 12, 2002, service upon Windsor was finally accomplished. In response, on December 30, 2002, Windsor filed a "Motion to Dismiss for Plaintiffs' Repeated Failures to Comply With La. Code of Civil Procedure Article 1201" in failing to serve Windsor as required

"within ninety days of commencement of the action."[2] Windsor additionally filed numerous exceptions on January 6, 2003, including an exception of "improper service and citation" and "repeated failures to comply with the mandate of Louisiana Code of Civil Procedure article 1201." The matters were consolidated for hearing before the trial court on February 10, 2003, after which the trial court rendered oral reasons granting Windsor's motion to dismiss, and pretermitted ruling on Windsor's exceptions. A written judgment dismissing Windsor without prejudice was signed by the trial court on June 3, 2003.

In its oral reasons for judgment, the trial court found that this court's September 24, 2001 ruling on the prior writ application had placed plaintiffs on notice that no service had been made, as set forth by LSA-C.C.P. art. 1201(C). The trial court further found that, "[s]ervice of process with the original and supplemental and amending petition was made on defendant December 12, 2002, some 15 months after the decision by the first circuit. Therefore, under the provisions of Code of Civil Procedure article 1672(C), the court is going to grant defendant's motion to dismiss."[3] The trial court

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[2]Louisiana Code of Civil Procedure article 1201 provides, as follows:

> A. Citation and service thereof are essential in all civil actions except summary and executory proceedings, divorce actions under Civil Code Article 102, and proceedings under the Children's Code. Without them all proceedings are absolutely null.
> B. The defendant may expressly waive citation and service thereof by any written waiver made part of the record.
> **C. Service of the citation shall be requested on all named defendants within ninety days of commencement of the action. When a supplemental or amended petition is filed naming any additional defendant, service of citation shall be requested within ninety days of its filing. The defendant may expressly waive the requirements of this Paragraph by any written waiver.** (Emphasis added.)

[3]Louisiana Code of Civil Procedure article 1672(C) provides, as follows:

> 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

explained that dismissal was warranted due to the plaintiffs' failure to make any showing of "good cause," as required by LSA-C.C.P. 1672(C), as to their failure to timely confect service of process on Windsor.

On June 12, 2003, plaintiffs filed a motion for new trial arguing that the trial court's written judgment of June 3, 2003 did not dispose of the issue of "bad faith" (in failing to serve Windsor with the original petition within ninety days pursuant to this court's action of September 24, 2001), and that plaintiffs thus were unable to determine the ultimate effect of the June 3, 2003 judgment and their rights there under. On June 16, 2003, the trial court denied plaintiffs' motion for new trial. Plaintiffs now appeal the judgment of the trial court dismissing its claims without prejudice, as against defendant Windsor.

On appeal, plaintiffs contend:

1. The district court erred when it granted Windsor's Motion to Dismiss, dismissing Windsor from this suit without prejudice, based on its erroneous finding that plaintiffs' December 12, 2000 request for citation on Windsor, made on the day plaintiffs' Supplemental and Amending Petition naming Windsor was filed and the January 3, 2001 service of citation on Windsor, did not satisfy the requirements of C.C.P. Article 1201(C).

2. The trial court erred in granting Windsor's Motion to Dismiss because Windsor failed to include with its February 1, 2002[4] exceptions, an exception to the sufficiency of the citation with which it was in fact served, and which exception was thus waived.

3. The trial court erred when it stated in granting Windsor's Motion to Dismiss that, "... the First Circuit did not state in its ruling that you now have to go ahead and serve them, they put plaintiff on notice that there was no service," and therefore held that plaintiffs were required to serve defendant within some unknown time period.

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contradictory motion of that person or any party or upon the court's own motion, **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. (Emphasis added.)

[4]The date of the filing of Windsor's exceptions was actually February 1, 2001, as shown in the record and as reflected in plaintiffs' brief.

In addition to the assignments of error asserted by plaintiffs on appeal, a pending application for writs is before us. Plaintiffs filed a writ application seeking review of a decision by the trial court denying plaintiffs leave to file a second amending petition. Specifically, on March 17, 2003, plaintiffs filed a "Motion to Substitute Parties Plaintiff and for Leave to File Amending Petition," requesting that the trial court order that Barabay Property Holding Company, LLC, Lion Investbanc, LLC, and Lion Capital, LLC be substituted for Barabay Property Holding Corporation, Lion Investbanc Corporation, and Lion Capital Corporation as parties plaintiff. The motion further requested that the trial court grant plaintiffs leave to file a second amending petition, seeking to rename Windsor as a defendant in the ongoing proceedings. On June 16, 2003, the trial court denied the motion for leave, and on July 7, 2003, plaintiffs filed a notice of intent to file supervisory and remedial writs to this court seeking review of the trial court's decision. On January 9, 2004, another panel of this court referred the writ application to the merits of this pending appeal.[5] Thus, in addition to the assignments of error raised by plaintiffs in their appeal, we will consider the merits of the pending writ application in our disposition of the instant appeal.

DISCUSSION

The Writ Application

In the application for writs, plaintiffs challenge the trial court's denial of their motion for leave as being contrary to law and an abuse of the trial court's discretion. As a general rule, the trial court has much discretion regarding amendments to pleadings after an answer is filed. In such matters, the trial court's ruling will not be disturbed unless a manifest abuse of discretion has

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[5] See Barabay Property Holding Corporation v. Ronald J. Kennedy, 2003-CW-1761 (La. App. 1st Cir. 1/09/04).

occurred, which indicates a possibility of resulting injustice. Heritage Worldwide, Inc. v. Jimmy Swaggert Ministries, 95-0484 (La. App. 1st Cir. 11/16/95), 665 So. 2d 523, 527, writ denied, 96-0415 (La. 3/29/96), 670 So. 2d 1233.

Thus, the first issue for consideration is whether the trial court abused its discretion in refusing to allow the filing of a supplemental and amending petition against Windsor in the ongoing proceedings after a judgment of dismissal without prejudice had been signed dismissing the plaintiffs' suit against this defendant.

Although a judgment of dismissal without prejudice shall not constitute a bar to another suit on the same cause of action, it does terminate the instant suit. LSA-C.C.P. art. 1673; Batson v. Cherokee Beach and Campgrounds, 470 So. 2d 478, 480 (La. App. 1st Cir. 1985).

In Meadows v. Cross Gates, Inc., 2003-1408 (La. App. 1st Cir. 4/2/04), 878 So. 2d 674, writ denied, 2004-1060 (La. 6/18/04), 876 So. 2d 813, a case similar in some respects to the instant case, this court recently addressed the issue of amendments in ongoing proceedings. In Meadows, one of the named defendants, the Parish of St. Tammany, filed a declinatory exception of insufficiency of citation and service of process and a motion to dismiss the suit, asserting that plaintiff therein had failed to perfect service within ninety days as required by the statutory authority governing suits against parishes as governmental entities. Meadows, 2003-1408 at p. 3, 878 So. 2d at 675. On October 10, 2002, the trial court rendered judgment maintaining the exception and dismissed the Parish from the litigation without prejudice. On October 12, 2002, the plaintiff filed a second supplemental and amending petition against the Parish alleging that the original suit had been filed timely, constituting an interruption of prescription. The Parish responded by filing a peremptory

exception raising the objection of prescription. On January 30, 2003, the plaintiff filed a third supplemental and amending petition, wherein the Parish was again named as a defendant, which was also opposed by the Parish on the basis that the appeal delays from the October 10, 2002 judgment dismissing the Parish as a defendant in the litigation had expired, and that the judgment therefore was final. The Parish contended that at the time the request to file the third supplemental and amending petition was made, there was no action pending against the Parish that could be amended. Meadows, 2003-1408 at pp. 3-4, 878 So. 2d at 675-676. The trial court agreed, and denied plaintiff's request to amend the petition. On appeal, this court affirmed, stating as follows:

> The October 10, 2002 judgment, dismissing the action against the Parish without prejudice, based on the failure to serve as required by La. R.S. 13:5107, was a final, appealable judgment. *Batson v. Cherokee Beach and Campgrounds*, 470 So. 2d 478, 480 (La.App. 1 Cir. 1985). Although a judgment of dismissal without prejudice does not bar the filing of another suit on the same cause of action, it does terminate the instant suit. *Id.* Plaintiff failed to appeal the judgment of dismissal. Instead, plaintiff sought to file a second and third supplemental petition in the ongoing litigation in an attempt to bring the Parish back into the litigation. However, at that stage of the proceeding, the pleadings could not be amended with respect to the Parish, as the trial judge was without authority to allow an amended petition after the suit was terminated by a judgment of dismissal. *Batson v. Cherokee Campgrounds,* 470 So. 2d at 480. Furthermore, the October 10, 2002 judgment dismissing the Parish from the litigation is now a final and definitive judgment. Plaintiff may no longer attack the dismissal of the petition against the Parish for defective service. Thus, the arguments underlying this appeal are moot, and the trial court's second judgment, dismissing the Parish from the lawsuit with prejudice, was correct.

Meadows, 2003-1408 at pp. 4-5, 878 So. 2d at 676.

We recognize that Meadows is distinguishable from the case at hand on at least one basis, i.e., the judgment of dismissal rendered herein was timely appealed by plaintiffs, whereas in Meadows, the plaintiff failed to appeal from the judgment of dismissal. Nonetheless, a similar result is warranted herein.

In the instant case, the judgment dismissing Windsor without prejudice as a defendant in the proceedings below was signed on June 3, 2003. On June 16, 2003, the trial court denied plaintiffs' motion for leave to file an amending and supplemental petition against Windsor. As of June 3, 2003, the trial court was without authority to allow the filing of the amended petition, as the suit, at least as to this defendant, had been terminated by judgment of dismissal. See Batson, 470 So. 2d at 480. As such, the trial court correctly denied plaintiffs' motion for leave to file a supplemental and amending petition to rename Windsor in the ongoing proceedings. See Templet v. Johns, 417 So. 2d 433, 435 (La. App. 1st Cir. 1982), writ denied, 420 So. 2d 981 and Meadows. For these reasons, plaintiffs' writ application is denied at plaintiffs' costs.

The Appeal

Assignments of Error Nos. 1 and 2

In these first two assignments, plaintiffs contend that the trial court erred in granting Windsor's motion to dismiss and dismissing Windsor from this suit without prejudice on the finding that plaintiffs' December 12, 2000 request for citation on Windsor did not satisfy the requirements of LSA-C.C.P. article 1201(C), and that the trial court erred in granting Windsor's motion to dismiss where Windsor failed to include with its February 1, 2001 exceptions, an exception to the sufficiency of the citation, thereby waiving any challenges to the sufficiency of the citation.

Plaintiffs contend that they requested citation and service on Windsor December 12, 2000, and that service was properly confected on Windsor on January 3, 2001, within the ninety-day time frame set forth in LSA-C.C.P. art. 1201(C). Plaintiffs admit, however, that the citation was insufficient because it did not mention the original petition. See Dickinson v. National Society of Health, 589 So. 2d 632, 633 (La. App. 5th Cir. 1991), Williams v. New York

Fire and Marine Insurance Company, 427 So. 2d 938, 940 (La. App. 4th Cir. 1983), Gant v. McGee, 411 So. 2d 1191, 1192 (La. App. 4th Cir. 1982).

Nonetheless, plaintiffs argue that because Windsor allegedly did not object to the sufficiency of the citation, any such defect is cured. Plaintiffs assert in brief that "the citation was insufficient ... even though there are no claims against Windsor in the original petition."

In these assignments, plaintiffs present essentially the same issue and argument previously rejected by this court in our action on the earlier writ application. Despite plaintiffs' arguments concerning the correctness of their position, we note that Windsor did, in fact, object to the propriety of plaintiffs' attempted service by filing numerous exceptions, including a declinatory exception raising the objection of insufficiency of service of process.[6] This court maintained Windsor's exceptions, specifically determining therein that "[p]laintiffs were required to serve [Windsor] with the original petition." Barabay Property, et al. v. Windsor Financial Group, Inc., 2001-CW-1406 (La. App. 1st Cir. 9/24/01). Moreover, if Windsor were to waive citation and service, LSA-C.C.P. art. 1201(B) requires that such waiver be in writing and be made part of the record. No such waiver appears of record herein.

Citing no authority, plaintiffs now argue that "that ruling did not void the citation which had already been served particularly for the purposes of plaintiffs' compliance with the requirements of C.C.P. Article 1201(C)." We disagree, and again find no merit to the plaintiffs' argument.

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[6]We find no merit to plaintiffs' contention in assignment of error number two that Windsor's exception of "insufficiency of service of process ... did not seek to have the citation with which it was served voided, recalled, or declared invalid." It is well-settled that the nature of a pleading must be determined by its substance and not by its caption or title. Vicedomini v. Pelts & Skins, 2001-2268, p. 2 (La. App. 1st Cir. 2/15/02), 808 So. 2d 867, 869, writ denied, 2002-0813 (La. App. 1st Cir. 5/24/02), 816 So. 2d 850. See also Scullin v. Prudential Insurance Company of America, 421 So. 2d 470, 472 (La. App. 4th Cir. 1982), holding that "[t]he characterization of a pleading by its' author is not controlling. Pleadings are governed by their substance and not by their caption."

A plain reading of LSA-C.C.P. art. 1201(C) provides that "[s]ervice of the citation shall be requested on all named defendants within ninety days of commencement of the action. When a supplemental or amended petition is filed naming any additional defendant, service of citation shall be requested within ninety days of its filing." Moreover, service of a supplemental and amending petition without the original petition is defective service of process, which **renders all subsequent proceedings absolutely null.** Dickinson v. National Society of Health, 589 So. 2d at 633. Service of a supplemental and amended petition as a substitute for citation and service of process of the original petition is not permitted under our laws. Gant v. McGee, 411 So. 2d at 1192. Undisputedly, plaintiffs' service request on December 12, 2000 was defective.

We find no merit to these assignments.

Assignment of Error No. 3

In this assignment, plaintiffs claim that this court's ruling of September 24, 2001 did not "order" them to take action or to "cite" Windsor again. Plaintiffs contend that the trial court thus erred in finding that the ruling of September 24, 2001 on the writ application served as notice, and commenced the ninety-day time frame within which to perfect service on Windsor of the original and amended and supplemental petitions. In support, plaintiffs cite LSA-C.C.P. art. 932, which provides in part:

> A. When the grounds of the objection pleaded in the declinatory exception may be removed by amendment of the petition or other action of plaintiff, the judgment sustaining the exception shall order the plaintiff to remove them within the delay allowed by the court.

In the instant case, plaintiffs were instructed as to the grounds upon which this court granted the writ and maintained the exception. Nontheless, plaintiffs still failed to act within the time allowed. See Spears v. Parish of

Jefferson, 2000-332 (La. App. 5th Cir. 10/18/00), 772 So. 2d 747, 749. The decision on the writ application was rendered by this court on September 24, 2001. However, the request for service of the original and supplemental and amending petition upon Windsor was not made until December 2, 2002. Moreover, service of the original and amending and supplemental petition was not confected upon Windsor until December 12, 2002, some fifteen months later.

We also reject plaintiffs' argument that they were relieved of the ninety-day service requirement of LSA-C.C.P. art. 1201(C) on the asserted basis that neither this court, the trial court, nor defendant Windsor provided plaintiffs with an order "granting a period within which to cure the defect." Instead, we find no error in the trial court's conclusion that once this court's decision put plaintiffs on notice as to the insufficient/absent service, plaintiffs were required to perfect service on defendant Windsor within ninety days thereafter, pursuant to LSA-C.C.P. art. 1201(C). Plaintiffs failed to do so.

Again, this court's decision on the writ application, reversing the trial court's denial of Windsor's exception of insufficiency of service of process stated, in part, as follows:

> As to relator's exception of insufficiency of service of process, we grant the writ and reversing the trial court's judgment denying the exception. Plaintiffs were required to serve relator with the original petition. See **Dickinson v. National Soc. of Health**, 589 So. 2d 632 (La.App. 5 Cir. 1991), **Williams v. New York Fire and Marine Ins. Co.**, 427 So. 2d 938 (La.App. 4 Cir. 1983), **Gant v. McGee**, 411 So. 2d 1191 (La.App. 4 Cir. 1982). Actual knowledge of the original petition does not remedy the lack of proper citation. See **Naquin v. Titan Indem. Co.**, 2000-1585 (La. 2/21/01), 779 So. 2d 704.

The ruling on the earlier writ application clearly states that plaintiffs were required to serve Windsor with the original petition, something that they undisputedly failed to do. While plaintiffs are correct in their contention that

this court did not specifically "order" them to take any action, the burden was upon the plaintiffs to take the necessary steps to ensure they were allowed to proceed with the pursuit of their claims. After pointing out these deficiencies in service, this court assumed no duty or responsibility to instruct plaintiffs as to how they should proceed, contrary to plaintiffs' implication in brief. The failure to properly serve Windsor within the applicable statutory time frame served only to retard the progress of their case.

We find no merit to this assignment.

CONCLUSION

For the above and foregoing reasons, the plaintiffs' pending writ application and appeal are denied. The June 3, 2003 judgment of the trial court, dismissing defendant Windsor Financial Group, Inc. without prejudice, is affirmed.

Costs of this appeal are assessed against the plaintiffs/appellants, Barabay Property Holding Corporation and Lion Investbanc Corporation.

WRIT APPLICATION DENIED; JUDGMENT OF JUNE 3, 2003 AFFIRMED.

BARABAY PROPERTY HOLDING CORPORATION AND LION INVESTBANC

VERSUS

RONALD J. KENNEDY, CHRISTINE D. CLARK AND MIRAGE VENTURES, INC.

STATE OF LOUISIANA

COURT OF APPEAL

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2003 CA 2237

FITZSIMMONS, J., concurs and assigns reasons.

FITZSIMMONS, Judge, concurring, with reasons.

I respectfully concur in the result. While I disagree that a party, dismissed without prejudice, can never be brought back into an ongoing or continuing suit through an amendment of the pleadings, I agree with the result in this particular case. See La. C.C.P. art. 1151; see also **Meadows v. Cross Gates, Inc.**, 2003-1408, p. 5 (La. App. 1 Cir. 4/2/04), 878 So.2d 674, 676-677 (concurrence by Fitzsimmons, J.) Pursuant to the facts presented in the case at hand, the trial court denial of plaintiffs' amending and supplemental petitions is properly affirmed on the basis of La. C.C.P. arts. 1201C and 1672C.