NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 0192

R. L. HALL AND ASSOCIATES, INC.

VERSUS

BRUNT CONSTRUCTION, INC.
AND RACETRAC PETROLEUM, INC.

Judgment Rendered: NOV 09 2015

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On Appeal from the
21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Trial Court No. 92,874

Honorable Wayne Ray Chutz, Judge Presiding

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BEFORE: PETTIGREW, HIGGINBOTHAM, AND CRAIN, JJ.

HIGGINBOTHAM, J.

This appeal concerns whether plaintiff's suit is abandoned pursuant to La. Code Civ. P. art. 561.

FACTS AND PROCEDURAL HISTORY

Fourteen years ago, on July 13, 2001, plaintiff, R. L. Hall and Associates, Inc., filed suit against defendants, Brunt Construction, Inc. (Brunt), and its surety, Fidelity Deposit Company of Maryland (Fidelity).[1] The lawsuit concerned a materialman's lien arising out of a contract for a construction project. Defendants answered the lawsuit and discovery ensued.[2]

On March 21, 2005, plaintiff filed a motion and order to compel discovery. The next action in the record is on November 19, 2007, when plaintiff filed a motion to set a scheduling/status conference. A telephone status conference was set for December 19, 2007. Nothing else appears in the record until plaintiff filed another motion to set a scheduling/status conference on October 15, 2010, which resulted in another telephone status conference on December 14, 2010. Thereafter, the trial court signed a scheduling order on December 21, 2010, establishing discovery deadlines and setting the next telephone status conference for April 12, 2011. On December 28, 2010, the record reflects that an order was signed allowing new counsel to enroll on behalf of defendants. Nothing else appears in the record until plaintiff filed a third motion to set a scheduling/status conference on June 4, 2014, causing the trial court to schedule yet another telephone status conference for June 25, 2014. However, before the status conference took place, defendants filed an *ex parte* motion for dismissal on June 9, 2014, maintaining that plaintiff had not taken any step in the prosecution of the action in over three years.

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[1] Fidelity was substituted as defendant in place of the originally named defendant, RaceTrac Petroleum, Inc., in an amended and supplemental petition filed by plaintiff on October 5, 2001.

[2] Brunt answered the lawsuit on July 25, 2001, and Fidelity filed an answer on July 23, 2004.

In connection with their motion for dismissal, defendants alleged, and their counsel verified by affidavit, that "according to his file, no step has been taken for a period in excess of three years in the prosecution or defense of this action, said action having been abandoned on May 17, 2011." On June 10, 2014, plaintiff filed an objection to defendants' motion, asserting that after discovery requests were served on plaintiff on May 17, 2011, plaintiff's counsel received correspondence from defendants' counsel on June 30, 2011, inquiring about dates for the taking of depositions.[3] According to plaintiff, counsel for defendants sent another letter to plaintiff on August 1, 2011, advising that August 25, 2011 was no longer an available date for any depositions, but offering more dates for consideration. Copies of the letters were attached to plaintiff's objection to defendants' motion for dismissal. Plaintiff acknowledged that no depositions ever took place. However, plaintiff asserted that the letters showed an attempt to set depositions, and as such, they constituted an active step in the prosecution of the case or a waiver of defendants' right to claim abandonment. Despite plaintiff's objection, the trial court signed an order on June 16, 2014, dismissing the matter as abandoned, in accordance with the provisions of La. Code Civ. P. art. 561.

On July 18, 2014, plaintiff filed a motion to set aside the dismissal, reiterating the same arguments and attaching the correspondence between counsel regarding the attempted setting of depositions. Defendants filed a memorandum in opposition, wherein they did not dispute the exchange of correspondence between counsel during June and August of 2011, but maintained that such informal correspondence discussing scheduling of depositions, without formal notices of deposition being filed into the record or depositions actually taking place, do not constitute a step for

[3] We note that the record does not contain a copy of the discovery requests that were served on plaintiff on May 17, 2011; however, the trial court obviously accepted the affidavit of defendants' counsel verifying that date as the last date an action took place, and the parties do not dispute that the action actually took place on that date.

purposes of interrupting the running of the three-year abandonment period. The trial court set the matter for a contradictory hearing, which was held on September 22, 2014. The hearing consisted solely of argument of counsel; no evidence was introduced. After reviewing the record, including all memoranda and attached correspondence, and hearing argument, the trial court denied plaintiff's motion to set aside the dismissal. In oral reasons, the trial court stated:

> [A] letter saying ... we can set up a deposition on whatever date or these dates are good, without any formal setting of the deposition or any of the pleadings actually being filed with the court does not constitute an act ... such that it would interrupt or continue the prosecution of the matter. I find . . . at least three years inactivity and consequently, the motion to vacate is denied.

A judgment was signed on October 20, 2014, wherein the matter was dismissed by operation of law as of May 17, 2011, in accordance with La. Code Civ. P. art. 561. Plaintiff appealed, arguing that the trial court erred in finding that plaintiff's suit was abandoned.

STANDARD OF REVIEW

In this case, the pertinent facts are undisputed, and the issue concerns a question of law. The scope of appellate review for an issue of law is simply to determine whether the trial court's interpretive decision is legally correct; *i.e.*, whether the trial court applied the law appropriately. **Voisin v. International Companies & Consulting, Inc.**, 2005-0265 (La. App. 1st Cir. 2/10/06), 924 So.2d 277, 279, writ denied, 2006-1019 (La. 6/30/06), 933 So.2d 132. Appellate courts owe no deference to the legal conclusions of the trial court. **Jackson v. BASF Corp.**, 2004-2777 (La. App. 1st Cir. 11/4/05), 927 So.2d 412, 415, writ denied, 2005-2444 (La. 3/24/06), 925 So.2d 1231.

LAW AND ANALYSIS

Louisiana Code of Civil Procedure article 561 governs abandonment of a lawsuit, providing that an action "is abandoned when the parties fail to take any step

in its prosecution or defense in the trial court for a period of three years[.]" The Louisiana Supreme Court has held that Article 561 is self-executing, occurring automatically upon the passing of three years without either party taking a step, and is effective without a court order. **Clark v. State Farm Mut. Auto. Ins. Co.**, 2000-3010 (La. 5/15/01), 785 So.2d 779, 784. Article 561 imposes three requirements to avoid abandonment: (1) a party must take some step toward the prosecution or defense of the action; (2) the step must be taken in the proceeding and, with the exception of formal discovery, must appear in the record; and (3) the step must be taken within three years of the last step taken by either party. See **Clark**, 785 So.2d at 784. A "step" is a formal action before the court intended to hasten the suit towards judgment, or the taking of a deposition with or without formal notice. **Voisin**, 924 So.2d at 280.

Plaintiff argues that the June and August 2011 letters sent by defendants' counsel suggesting various dates for scheduling depositions were sufficient to interrupt the three-year abandonment period and clearly demonstrate an intent to not abandon the lawsuit. While these letters were not offered into evidence at the hearing, the parties acknowledge the existence of the correspondence, and the record contains copies of the letters in attachments to plaintiff's objection to the dismissal and motion to set aside the dismissal. Further, we note that the trial court apparently considered the letters before ruling that they did not constitute an act that would interrupt the abandonment period.

A review of the jurisprudence confirms the result reached by the trial court. Many courts have found that informal correspondence between parties regarding discovery matters is not a step sufficient to interrupt abandonment. See **Louisiana Dept. of Transp. and Development v. Oilfield Heavy Haulers, L.L.C.**, 2011-0912 (La. 12/6/11), 79 So.3d 978, 982-83. Additionally, this court has specifically held that "simply attempting to schedule" a discovery matter such as a deposition through

informal correspondence before a formal notice of deposition is filed or mailed or the deposition actually takes place, is not a step in the prosecution of an action for purposes of interrupting or waiving abandonment. **Jackson v. Moock**, 2008-1111 (La. App. 1st Cir. 12/23/08), 4 So.3d 840, 845. Further, ongoing informal discussions and correspondence regarding the scheduling of depositions does not prevent a plaintiff from taking some formal action in or before the trial court to hasten the matter to judgment. **Id.** As in the **Jackson** case, no depositions ever actually took place in this case, so there was nothing binding upon the parties when they attempted, through correspondence, to schedule the depositions for some time in the future. **Id.**

Louisiana jurisprudence is clear that correspondence such as took place in this case is viewed as merely an extra-judicial effort which is insufficient to constitute a step for the purposes of interrupting abandonment. Thus, the trial court correctly found that plaintiff's suit was abandoned by operation of law.

CONCLUSION

For the outlined reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed against plaintiff-appellant, R. L. Hall and Associates, Inc.

AFFIRMED.