

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0456

W. Brown
amp

RAYMOND DYSON

VERSUS

JANICE E. SEAL AND GEICO CASUALTY COMPANY

Judgment Rendered: DEC 22 2021

* * * * *

On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court Docket No. 667767

The Honorable Donald R. Johnson, Judge Presiding

* * * * *

Stephen Dale Cronin
Baton Rouge, LA

Attorney for Defendant-Appellant,
GEICO County Mutual Insurance
Company

Derek E. Elsey
Jennifer O. Robinson
Sophia J. Riley
Willie G. Johnson, Jr.
Baton Rouge, LA

Attorneys for Plaintiff-Appellee,
Raymond Dyson

* * * * *

BEFORE: WHIPPLE, C.J., PENZATO, AND HESTER, JJ.

Hester, J. Dissents in part and assigns reasons.

WHIPPLE, C.J.

This matter is before us on appeal by defendant, GEICO County Mutual Insurance Company, from a judgment of the trial court overruling its dilatory exceptions of unauthorized use of summary proceedings and improper cumulation of actions. For the following reasons, we dismiss the appeal.

FACTS AND PROCEDURAL HISTORY

Raymond Dyson filed suit against Janice E. Seal and her insurer, GEICO County Mutual Insurance Company¹ (“GEICO”), for damages sustained as a result of an automobile accident. Dyson and GEICO submit that they entered into a binding and enforceable settlement agreement. However, a dispute arose in connection with the payment of the settlement, causing both parties to file motions to enforce the settlement agreement.

In Dyson’s motion seeking to enforce the settlement, he also sought damages, penalties, and attorney fees pursuant to LSA-R.S. 22:1973 on the basis that GEICO failed to pay a settlement within thirty days after it was reduced to writing. After initially opposing Dyson’s motion to enforce, GEICO also filed dilatory exceptions asserting the objections of unauthorized use of summary proceedings and improper cumulation of actions. GEICO urged the trial court to hear and determine its exceptions prior to the hearing on Dyson’s motion to enforce and to assess damages, penalties, and attorney fees.

The trial court ultimately continued the hearing on Dyson’s motion and held a hearing on GEICO’s objections on December 8, 2020. At the conclusion of the hearing, the trial court took the matter under advisement and instructed the parties to each submit proposed judgments. On January 11, 2021, the trial court signed Dyson’s proposed judgment overruling GEICO’s dilatory exceptions. The judgment

¹GEICO Casualty Company was originally named as a defendant, and GEICO County Mutual Insurance Company was later added as an additional defendant.

was certified as final in accordance with LSA-C.C.P. art. 1915.² On February 9, 2021, GEICO filed a motion for suspensive appeal, seeking review of the January 11, 2021 judgment.

APPELLATE JURISDICTION

After the record was lodged, this court issued a show cause order on the basis that the January 11, 2021 judgment denying exceptions was not susceptible of certification pursuant to LSA-C.C.P. art. 1915(B). Young v. City of Plaquemine, 2004-2305 (La. App. 1st Cir. 11/4/05), 927 So. 2d 408, 411 (Article 1915(B) does not authorize a trial court to designate a judgment denying an exception as final.); see also Bannister v. SFB Companies, Inc., 2019-0079, 2019-0367 (La. App. 1st Cir. 11/15/19), 290 So. 3d 1134, writ denied, 2020-00263 (La. 5/1/20), 295 So. 3d 943. The parties concede that the judgment at issue is not appealable, and GEICO further acknowledges that the January 11, 2021 judgment does not qualify for certification pursuant to LSA-C.C.P. art. 1915(B). However, GEICO requests that this court convert the appeal to an application for supervisory writ.

In cases in which peremptory exceptions are overruled, appellate courts generally do not exercise supervisory jurisdiction, since the exceptor may win on the merits or may reurge the exception on appeal. Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc., 396 So. 2d 878 (La. 1981) (per curiam). Under the criteria set forth by the Louisiana Supreme Court, appellate courts are cautioned to exercise supervisory jurisdiction in cases where the overruling of the exception is arguably incorrect, when a reversal will terminate the litigation, and when there is no dispute of fact to be resolved, such that judicial efficiency and fundamental fairness to the litigants would dictate that the merits of the application

² While a subsequent, second judgment denying the exceptions was signed by the trial court on January 13, 2021, the second judgment overruled the exception but did not contain the LSA-C.C.P. art. 1915 designation. GEICO appealed from the first judgment only, contending that the January 11, 2021 judgment was the properly appealable judgment.

for supervisory writs should be decided in an attempt to avoid the waste of time and expense of a possibly useless future trial on the merits. See Herlitz Construction Company, Inc., 396 So. 2d at 878. However, none of those circumstances are demonstrated herein.

Here, where the parties concede that the judgment at issue is not appealable and a reversal will not terminate the litigation, we decline to exercise our plenary power of supervisory jurisdiction, as the merits of the instant case do not meet the criteria set forth by the Louisiana Supreme Court in Herlitz Construction Company, Inc., 396 So. 2d at 878.

CONCLUSION

For the above and foregoing reasons, GEICO's appeal of the trial court's January 11, 2021 judgment is dismissed. Costs of this appeal are assessed against the defendant/appellant, GEICO County Mutual Insurance Company.

APPEAL DISMISSED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2021 CA 0456

RAYMOND DYSON

VERSUS

JANICE E. SEAL AND GEICO CASUALTY COMPANY

CHIT

HESTER, J., dissents in part and assigns reasons.

HESTER, J., dissenting in part.

I agree with the majority's opinion insofar as it concludes that the January 11, 2021 judgment overruling GEICO County Mutual Insurance Company's ("GEICO") dilatory exceptions asserting the objections of unauthorized use of summary proceedings and improper cumulation of actions was interlocutory and not an appealable judgment. However, for the reasons that follow, I respectfully disagree with the majority's refusal to convert the appeal to a supervisory writ.

The proper procedural vehicle to contest the January 11, 2021 interlocutory judgment is an application for supervisory writ. See La. Code Civ. P. arts. 1841, 2201; see also **State in the Interest of J.C.**, 2016-0138 (La. App. 1st Cir. 6/3/16), 196 So.3d 102, 107. Pursuant to Uniform Rules-Courts of Appeal, Rules 4-2 and 4-3, a party intending to apply to this court for a supervisory writ shall give notice of such intention by requesting a return date to be set by the trial court, which shall not exceed thirty days from the date of the notice of judgment. In this case, GEICO filed its motion for suspensive appeal within the thirty-day delay for seeking a supervisory writ, and I would exercise this court's discretion to convert the appeal to an

application for supervisory writ. See La. Uniform Rules-Courts of Appeal, Rule 4-3; La. Code Civ. P. art. 1914; **Stelluto v. Stelluto**, 2005-0074 (La. 6/29/05), 914 So.2d 34, 39.

Relying solely on **Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc.**, 396 So.2d 878 (La. 1981) (per curiam) and finding that the reversal of the judgment will not terminate the litigation, the majority declines to exercise the court's plenary power of supervisory jurisdiction. I, however, would consider the merits of this appeal under this court's supervisory jurisdiction, as I find that the overruling of the exception was incorrect. Moreover, I do not find that the error of improper use of summary procedure can be adequately remedied on appeal in this case.

Summary proceedings are those which are conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all the formalities required in ordinary proceedings. La. Code Civ. P. art. 2591. Summary proceedings may be used for the disposition of incidental questions arising in the course of a judicial proceeding and any issue which may be raised properly by an exception, contradictory motion, or rule to show cause. La. Code Civ. P. art. 2592. An action to enforce a settlement agreement may be properly addressed by summary proceeding, *i.e.*, a motion, in lieu of a new civil action. See **Banque De Depots v. Bozel Mineracao E Ferroligas**, 98-0742 (La. App. 4th Cir. 1/27/99), 728 So.2d 533, 538, writ denied, 99-0557 (La. 4/23/99), 742 So.2d 882.

Plaintiff herein utilized summary proceedings to enforce the settlement agreement with GEICO, which he is permitted to do. **Id.** However, in addition to seeking to enforce the settlement agreement, plaintiff sought to recover damages and attorney fees. Damages are not recoverable on a rule to show cause. Article 2592 does not provide for the recovery of damages in summary proceedings. Damages,

in the absence of special provisions, may only be recovered via ordinary proceedings. **Major v. Hall**, 262 La. 243, 248-49; 263 So.2d 22, 24 (1972).

While La. Code Civ. P. art. 2592(1) permits the award of and the determination of reasonableness of attorney fees to be via summary proceedings, such award and determination must be an incidental question arising in the course of the proceedings. See **MAPP Construction, LLC v. Amerisure Mutual Insurance Co.**, 2013-1074 (La. App. 1st Cir. 3/24/14), 143 So.3d 520, 530. “None of the matters in which the Code of Civil Procedure authorizes the use of summary proceedings (by rule to show cause) includes a determination of attorney’s fees in a separate controversy. ... Summary proceedings cannot be used to fix and recover attorney fees; an ordinary process is required for that purpose.” **Id.**

Additionally, La. Code Civ. P. art. 462 provides, in part, that a plaintiff may cumulate against the same defendant two or more actions even though based on different grounds, if all of the actions cumulated employ the same form of procedure. The requirement that all of the actions employ the same form of procedure refers merely to whether each of the cumulated actions employ ordinary, executory, or summary procedure. **Abadie v. Cassidy**, 581 So.2d 657, 657 (La. 1991). Louisiana Code of Civil Procedure art. 464 provides as follows:

When the court lacks jurisdiction of, or when the venue is improper as to, one of the actions cumulated, that action shall be dismissed.

When the cumulation is improper for any other reason, the court may: (1) order separate trials of the actions; or (2) order the plaintiff to elect which actions he shall proceed with, and to amend his petition so as to delete therefrom all allegations relating to the action which he elects to discontinue. The penalty for noncompliance with an order to amend is a dismissal of plaintiff’s suit.

In plaintiff’s compound motion, plaintiff sought to enforce the settlement agreement via summary procedure (instead of filing a new civil action or supplementing the petition with the new claim) and sought to recover damages and attorney fees through the same summary process. However, as noted above, ordinary proceedings must be employed for the recovery of damages and non-

incidental attorney fees. **Major**, 263 So.2d at 24; **MAPP Construction, LLC**, 143 So.3d at 530.

Considering the applicable law, I find that GEICO's dilatory exceptions asserting the objections of unauthorized use of summary proceedings and improper cumulation of actions are well-founded. The damages and attorney fees sought herein are not recoverable under summary proceedings, and plaintiff's motion cumulated actions that employ different forms of procedure. Based on the foregoing, I would find that the trial court erred as a matter of law in overruling GEICO's exceptions, and instruct the trial court to order plaintiff to remove by amendment the grounds of the objection. La. Code Civ. P. art. 933; see also **Bank of America, N.A. v. Erazo**, 2013-153 (La. App. 5th Cir. 10/9/13), 128 So.3d 383, 389.