

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CW 0260R

LIONEL A. BUTLER AND JENNIFER BUTLER, INDIVIDUALLY AND
ADMINISTRATOR OF THE STATE OF THEIR MINOR CHILDREN,
LYNELL BUTLER AND MAGGIE BUTLER; AND BRIAN A. RUFFIN

VERSUS

ZATHAN BOUTAN, MOTEL 6 OPERATING, L.P. AND
ACCOR NORTH AMERICA, INC.

Judgment rendered DEC 05 2013

On Remand from the Supreme Court of Louisiana on
Application for Supervisory Writs from the Judgment of the
18th Judicial District Court
in and for the Parish of West Baton Rouge, Louisiana
Trial Court No. 38,713
Honorable James J. Best, Judge

CY J. D'AQUILA, JR.
C. JEROME D'AQUILA
NEW ROADS, LA

MICHAEL R. SISTRUNK
MATTHEW J. GARVER
COVINGTON, LA

ATTORNEYS FOR
PLAINTIFFS-RESPONDENTS
LIONEL A. BUTLER, ET AL.

ATTORNEYS FOR
DEFENDANTS-RELATORS
MOTEL 6 OPERATING, L.P. AND
ACCOR NORTH AMERICA, INC.

BEFORE: KUHN, PETTIGREW, and McDONALD, JJ.

PETTIGREW, J.

At issue herein in this writ application is whether the trial court was correct in denying defendants Motel 6 Operating, L.P. and its parent company, Accor North America, Inc.'s Motion for Summary Judgment.

FACTS AND PROCEDURAL HISTORY

Plaintiffs filed a suit for damages against Motel 6 Operating, L.P., Accor North America, Inc., and Deputy Zathan Boutan¹, alleging the fault of Boutan, individually and as an employee of Motel 6, for wrongful arrest, false imprisonment, battery, assault, and intentional infliction of emotional distress. Defendants Motel 6 and Accor filed a motion for summary judgment. They sought to dismiss the claims against them on the following legal issues: whether Boutan was acting as an employee or an independent contractor of Motel 6 in his role as a security guard and whether they were vicariously liable for Boutan's actions. The 18th Judicial District Court denied the motion, finding that neither side proved its entitlement to judgment as a matter of law.

Motel 6 and Accor filed an application for supervisory writs with this court. After conducting a *de novo* review, we denied the writ. Motel 6 and Accor then applied for writs with the Louisiana Supreme Court, which were granted. The Supreme Court remanded the matter to this court and ordered briefing, argument, and a full opinion.

Upon receiving the record on remand, we observed there is no record of service or notice to Boutan of the motion for summary judgment and the order signed in connection therewith. Boutan has not been represented by counsel since his counsel's withdrawal on February 11, 2011. The instant motion for summary judgment was filed on August 17, 2012. The Certificate of Service indicates it was mailed to all counsel of record. The rule to show cause attached to the motion requested that service be made upon plaintiffs' counsel and Boutan in proper person. The rule, however, was stricken through and a handwritten note was added, stating "please see attached order." The order referred to

¹ Hereinafter, Motel 6 Operating, L.P. will be referred to as "Motel 6," Accor North America, Inc. will be referred to as "Accor," and Deputy Zathan Boutan will be referred to as "Boutan".

was signed by the trial court on August 23, 2012. Therein, the trial court ordered the parties opposing the motion to file memoranda into the record, noting the matter would then be taken under advisement without oral argument. The order instructed the clerk to forward notice to all counsel of record – it did not include mention of pro se defendant Boutan.

Nowhere in the record is there any indication that Boutan, who has represented himself since February 2011, was sent notice of the motion and order at issue here. Therefore, on October 23, 2013, we continued oral argument of this matter, due to the incomplete record and pursuant to the consent of the parties, who filed briefs and appeared before us that date. We instructed counsel to research the record and prepare a joint motion to supplement it with reference to any notice provided to Boutan.

On October 25, 2013, plaintiffs and defendants, Motel 6 and Accor, filed a joint motion to supplement the record. They stated that they received a *Notice of Signing* of the trial court's order regarding the motion for summary judgment, but nothing in the record indicates that the notice was sent to Boutan. Accordingly, the parties requested that this court order that the record be supplemented with the motion and attached exhibits, that the trial court's judgment denying the motion for summary judgment be vacated, and that the matter be remanded to the trial court for rehearing.

DISCUSSION

Adequate notice is one of the most elementary requirements of procedural due process. After the original action is filed and properly served, almost every contested dispute involves the filing of subsequent pleadings by the parties. Procedural due process requires that an adverse party receive fair notice of the content of every pleading and of the action requested and be given a reasonable opportunity to respond.

Pursuant to La. Code Civ. P. art. 1313(C), a pleading or order that sets a court date must be served by registered or certified mail or as provided in La. Code Civ. P. article 1314. Article 1314 provides that the pleading must be served by the sheriff by either: 1) service on the adverse party in any manner authorized by La. Code Civ. P. arts. 1231 through 1266, or 2) personal service on the adverse party's counsel of record or delivery

of a copy of the pleading to the clerk of court, if there is no counsel of record and the address of the adverse party is not known.

In addition to the above referenced articles relative to service of pleadings, La. Code Civ. P. art. 966(B) requires that a motion for summary judgment be served at least fifteen days before the time specified for the hearing. This is designed to give fair notice of the evidentiary and legal bases for the motion. An adverse party then has time to respond with evidentiary documentation of his own, either in the form of affidavits or discovery responses, and to be prepared to meet the legal argument of the moving party.

Here, there is no evidence of record that Boutan was served with the motion and order as required by law. These procedural irregularities deprived Boutan of the opportunity to be heard, as well as notice of the pendency of the action. We consider Boutan to be adverse to the interests of the other defendants, Motel 6 and Accor, because whatever relationship is determined to exist between them will necessarily have a direct bearing on the ultimate outcome of the litigation. In the present case, plaintiffs allege that Motel 6 is vicariously liable for the actions of Boutan. If proven, that could affect the percentage of fault ultimately assessed to Boutan. Under these circumstances, we find that Boutan should have been given the opportunity to respond to the motion, as he has a "very real and actual interest" in this litigation. Even if Boutan was not considered to be an "adverse party" under La. Code Civ. P. art. 966(B), entitling him to service of the motion and supporting documents at least fifteen days before the hearing, he was entitled to notice of the hearing date under La. Code Civ. P. arts. 1571.²

We hold that Boutan is entitled to notice and an opportunity to respond and present his position. Because of the due process implications involved herein, this court finds that it has no alternative but to vacate the judgment denying summary judgment and to remand for a new hearing on the motion, to be held after legally sufficient service of the motion, as well as notice of the time and place of the hearing, is had upon Boutan.

² See **Hornage v. Cleco Power, L.L.C.**, 2004-1492 (La. App. 3 Cir. 4/6/05), 899 So.2d 153.

CONCLUSION

For the above and foregoing reasons, the trial court's ruling signed January 8, 2013, denying the motion for summary judgment filed by defendants, Motel 6 Operating, L.P. and Accor North America, Inc., is vacated and this matter is remanded to the trial court for further proceedings.

JUDGMENT OF JANUARY 8, 2013 VACATED; REMANDED.