

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1624

**BCCL ENTERPRISE, INC., D/B/A THE MAIDS HOME SERVICES,
CHARLOTTE D. BLANCHARD, DEAN BLANCHARD, AND JAMIE
BLANCHARD**

VERSUS

TONI RIZZO

Judgment Rendered: AUG 20 2014

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 582,756

Honorable Timothy E. Kelley, Judge Presiding

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

*Pettigrew, J. concurs in Part and Dissents in Part, and
Assigns Reasons.*

McCLENDON, J.

Plaintiff appeals a trial court judgment that granted defendant's special motion to strike under LSA-C.C.P. art. 971 and dismissed plaintiff's suit. For the following reasons, we amend the judgment to allow the plaintiff an opportunity to amend its petition, if it can, to state a cause of action for breach of contract. We affirm the judgment in all other respects.

FACTS AND PROCEDURAL HISTORY

In 2006, Toni Rizzo contracted with "The Maids Home Services," a maid service company owned and operated by BCCL Enterprises, Inc. ("BCCL"), to provide cleaning services for her personal residence. Ms. Rizzo alleges that in February 2007 she noticed a substantial quantity of jewelry missing from her home. She avers that she had kept jewelry, valued at over \$40,000.00, in a false "Ajax" brand cleaning can under a bathroom sink in her home. Ms. Rizzo further contends that the fake Ajax can had been removed and replaced with a real can of Ajax. Ms. Rizzo suspected the cleaning service was responsible for the loss of her jewelry, and she was advised by the cleaning service to report the suspected theft to the police department. After the police were contacted and found insufficient evidence to warrant criminal prosecution, the case was closed.

In December 2007, Ms. Rizzo filed a civil suit, naming BCCL¹ as a defendant, and alleging claims of negligent hiring and supervision, vicarious liability for theft by its employees, and false advertising. After completing some discovery, Ms. Rizzo voluntarily dismissed her suit in February 2009.

In September 2009, BCCL² filed suit against Ms. Rizzo asserting claims of defamation, malicious prosecution and/or abuse of process, and intentional infliction of emotion distress and/or negligent infliction of emotional distress. In its petition, BCCL asserted that Ms. Rizzo made false accusations and baseless claims against BCCL, without any proof or even the slightest indication that BCCL

¹ The petition also named the owners of BCCL, Charlotte Blanchard, Dean Blanchard, and Jamie Blanchard, as defendants.

² The owners listed in the preceding footnote were also named plaintiffs. For clarity, we will refer to the plaintiffs collectively as "BCCL."

or its employees were in any way involved in the theft of her jewelry. BCCL asserted that in performing cleaning services, it utilized products not otherwise available in the retail market, so its employees did not use products such as "Ajax." BCCL further alleged that its employees were not allowed to use any other products other than company products and were not allowed to open drawers or cabinets in customer's homes.

In November 2012, Ms. Rizzo filed a special motion to strike under LSA-C.C.P. art. 971, contending that the causes of action asserted by BCCL arose out of her conduct in her exercise of her right of petition and free speech under the United States and Louisiana constitutions. After a hearing, the trial court granted Ms. Rizzo's motion "as a Motion for Summary Judgment based on Louisiana Code of Civil Procedure Article 971," and dismissed all of BCCL's claims.³

BCCL has appealed, asserting that the trial court erred in converting Ms. Rizzo's motion to strike to a motion for summary judgment, thereby confusing the issues and changing the burdens imposed on the parties. BCCL also contends that the motion to strike was untimely and the trial court, in dismissing its suit, erred in failing to follow the clear language of Article 971.

DISCUSSION

The special motion to strike is governed by LSA-C.C.P. art. 971. Article 971 was enacted by the legislature as a procedural device to be used in the early stages of litigation to screen out meritless claims brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. **Thinkstream, Inc. v. Rubin**, 06-1595 (La.App. 1 Cir. 9/26/07), 971 So.2d 1092, 1100, writ denied, 07-2113 (La. 1/7/08), 973 So.2d 730. Under Article 971, a cause of action against a person's right to exercise right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of

³ We recognize that while a special motion to strike is akin to a summary judgment, the two procedures are separate and distinct. See **Savoie v. Page**, 09-0415 (La.App. 3 Cir. 11/4/09), 23 So.3d 1013, 1017, writ denied, 10-0096 (La. 4/5/10), 31 So.3d 365.

success on the claim. LSA-C.C.P. art. 971A(1). Under the shifting burdens of proof established by the article, the mover must first establish that the cause of action against him arises from an act by him in the exercise of his right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue. If the mover satisfies this initial burden of proof, the burden then shifts to the plaintiff to demonstrate a probability of success on the claim. **Thinkstream**, 971 So.2d at 1100.

The granting of a special motion to strike presents a question of law. **Id.** Appellate review regarding questions of law is simply a review of whether the trial court was legally correct or legally incorrect. **Id.** On legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and renders judgment on the record. **Id.**

BCCL asserts that Ms. Rizzo's motion to strike was untimely because it was not filed within ninety days of service of BCCL's petition. Article 971C(1) provides that the "motion may be filed within ninety days of the petition, or in the court's discretion, at any later time upon the terms the court deems proper."⁴ We note that Article 971C(1) uses the permissive word "may" as opposed to the mandatory "shall." The Article also affords the trial court discretion to allow a party to file the motion to strike "at any later time" that the court "deems proper." Although we question the delay of almost three years in filing the motion, because BCCL has cited no authority why Ms. Rizzo should not be allowed the opportunity to file the motion to strike, we cannot conclude that the trial court abused its discretion in allowing the article 971 motion to be filed.

BCCL asserts that the trial court also erred in converting the Article 971 motion to strike to a motion for summary judgment. At the outset, we note that this court reviews the trial court's grant of the motion to strike under Article 971 *de novo*, without any deference to the trial court's ruling. Nevertheless, prior to

⁴ We note that prior to its amendment by 2012 La. Acts No. 449, § 1, LSA-C.C.P. art. 971C(1) provided that "[t]he special motion may be filed within *sixty* days of service of the petition." [Emphasis supplied.]

granting the motion, we note that the trial court, despite referencing a summary judgment motion, properly applied the appropriate standard and shifting burden under Article 971. Specifically, the trial court indicated that Ms. Rizzo was entitled to the qualified privilege for the allegations, apparently concluding that the statements made in both the civil and criminal context were made in connection with a public issue. The trial court then indicated that the burden shifted to BCCL to show that Ms. Rizzo abused the qualified privilege (i.e. that BCCL could demonstrate a probability of success on the claim), but that BCCL was unable to meet its burden. Thus, even though the trial court indicated that a motion for summary judgment may have been the proper procedural vehicle, it specifically indicated that it was granting the motion “based on” Article 971.⁵

BCCL contends that Ms. Rizzo’s conduct that forms the basis of its suit does not implicate Ms. Rizzo’s alleged constitutional “free speech,” nor does it implicate a “public issue” as required by Article 971. Louisiana courts, however, have recognized that the public has an interest in possible criminal activity being brought to the attention of the proper authorities, and have extended a qualified privilege to remarks made in good faith. **Kennedy v. Sheriff of East Baton Rouge**, 05-1418 (La. 7/10/06), 935 So.2d 669, 683. As such, restaurant employees reporting receipt of an alleged counterfeit bill to police is “a matter affecting the public interest—the possible commission of a crime.” **Kennedy**, 935 So.2d at 687.

This court, citing **Kennedy**, has stated that “[a] good faith report to law enforcement officers of suspected criminal activity may appropriately be characterized as speech on a matter of public concern.” **Jalou II, Inc. v. Liner**, 10-0048 (La. App. 1 Cir. 6/16/10), 43 So.3d 1023, 1037. In **Jalou II**, a former employee of a truck stop and casino was arrested and charged with theft. The company that owned the truck stop also filed a civil suit against the former

⁵ Cf. **Savoie v. Page**, 23 So.3d 1013 at 1017, wherein the court found it inappropriate to convert an Article 971 motion to strike to a motion for summary judgment after the trial court determined that the statements in question were not made in connection with a public issue. Considering the foregoing, this argument is without merit.

employee in an effort to recover the missing funds. **Id.** at 1025. After the criminal charges were dismissed, the employee filed a reconventional demand in the civil suit for defamation and malicious prosecution. In response, the company filed a motion for summary judgment, asserting that both its communications to the police and its allegations in the civil suit were entitled to the qualified privilege. **Id.** at 1030. This court, in affirming the trial court's summary judgment and finding that the qualified privilege applied, concluded that the company's report to law enforcement officers as well as the allegations made in connection with the civil suit were properly characterized as speech on a matter of public concern. **Id.** at 1040-41.

Although BCCL recognizes the holdings in **Kennedy** and **Jalou II**, it contends that not all criminal activity is a matter of public concern.⁶ In support, BCCL cites **Lyons v. Knight**, 10-1470 (La.App. 3 Cir. 5/11/11), 65 So.3d 257, writ denied, 11-1229 (La. 10/14/11), 74 So.3d 215, which involved purported criminal activity. We find **Lyons** distinguishable from this case. **Lyons**, as noted by the third circuit, "involves a person with whom a private corporation and private citizens had a business relationship *allegedly failing to perform work or provide services in exchange for the money she received.*" **Lyons**, 65 So.3d at 265 (emphasis added). By contrast, while this case involves a private individual and a private company, the claims do not involve the failure to perform certain work or provide certain services. Rather, it involves a private individual alleging theft of jewelry to the police and in a civil suit. If BCCL's employees were stealing items from its customer's homes, it would implicate and concern anyone who utilized BCCL's services. Accordingly, we conclude that this matter was one of public concern.

Because this matter is one of public concern, the burden shifts to BCCL to demonstrate a probability of success on the claim. Article 971A(1); **Thinkstream**, 971 So.2d at 1100. To demonstrate a probability of success on

⁶ While BCCS notes that **Kennedy** and **Jalou II** both involved a motion for summary judgment as opposed to a special motion to strike, they nevertheless provide guidance concerning the "public issue" requirement of Article 971.

its claim, BCCL must demonstrate abuse of the conditional privilege by showing that Ms. Rizzo (a) knew the matter to be false, or (b) acted in reckless disregard as to its truth or falsity. See Jalou II, 43 So.3d at 1037, citing Kennedy, 935 So.2d at 684. To establish reckless disregard of the truth, a plaintiff must prove that the publication was deliberately falsified, published despite the defendant's awareness of its falsity, or the defendant in fact entertained serious doubts as to the truth of his publication. **Jalou II**, 43 So.3d at 1037-38, citing Kennedy, 935 So.2d at 688.

BCCL avers that Ms. Rizzo made knowingly false allegations in the criminal complaint and in the context of the civil suit. BCCL avers that on January 30, 2007, Ms. Rizzo first called BCCL's branch manager to allege that jewelry hidden underneath a bathroom sink in a single "Ajax" cleaning can had been taken. BCCL asserts that Ms. Rizzo advised that a member of the team was looking in the closed cabinet for cleaning products because the maid service had run out of "Ajax." BCCL asserts that it advised Ms. Rizzo of its security protocols during the course of the January 30, 2007 conversation.⁷ BCCL also asserts that Ms. Rizzo

⁷ The affidavits submitted by BCCL reflect that its protocols provide:

- 1) Cleaning performed by four (4) person teams;
- 2) Each team included a supervisor and an assistant;
- 3) The maids utilize only proprietary franchise formulated cleaning products and supplies;
- 4) The maids do no use over-the-counter cleaning products such as Ajax;
- 5) All company cleaning products are transported in company specific buckets;
- 6) Maids must wear designed uniforms;
- 7) Uniforms are basic and do not allow for concealment;
- 8) Team members can only wear uniforms in customer's homes;
- 9) Team members cannot wear jackets or bring purses or phones into customer's homes;
- 10) Team members are not allowed to open drawers or cabinets;
- 11) Supervisory performs inventory of cleaning products before department from office to ensure proper packing of all cleaning products;
- 12) Entire cleaning team departs from main officer and returns to main office in one vehicle;
- 13) Upon arrival at the cleaning location, supervisor inspects the home and notes the presence of valuables in plain view;

or an acquaintance was present in Ms. Rizzo's home each time her home was cleaned.

BCCL avers that in subsequent conversations, Ms. Rizzo's "story drastically changed" insofar as she advised that there were two fake Ajax cans, rather than one, and that the cans were not actually under the sink but placed out in the open on the bathroom floor. BCCL also asserts that Ms. Rizzo, who initially indicated that no one else had access to her home, admitted that other individuals did access her home around the time the jewelry was allegedly stolen.⁸ BCCL asserts that Ms. Rizzo then acknowledged that rather than two fake Ajax cans, there was only one.

Moreover, BCCL notes that its employees, at Ms. Rizzo's request, took and passed polygraphs. BCCL notes that it attempted to set Ms. Rizzo's deposition, but defendant dismissed her suit prior to being deposed. Considering the foregoing, BCCL concludes that defendant "knowingly and intentionally promoted the totally false and fabricated facts" in making a criminal complaint and filing the civil suit.

While we are troubled by the discrepancies in Ms. Rizzo's accounts, we are unable to find that BCCL has established a probability of success on its claim. Reckless disregard is typically found where a story is fabricated by the defendant, is the product of his imagination, or is so inherently improbable that only a reckless man would have communicated it. Mere negligence as to falsity

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- 14) Once the team enters the customer's home the team members cannot exit the premises until the cleaning is completed and exit as a team;
 - 15) Supervisor performs period inspections including final inspection upon completion of cleaning;
 - 16) Supervisor performs inventory of cleaning products before departure of customer's home;
 - 17) Even if sick on the job, a member can only leave the premises when field manager arrives to transport employee.

⁸ BCCL contends that defendant initially denied to BCCL and the investigating officer that anyone else had been in her home during the relevant time period. However, BCCL avers that a neighbor, who had a key to Ms. Rizzo's home, accessed Ms. Rizzo's home during the period at issue. Also, Ms. Rizzo's ex-husband had performed plumbing work to the sink and inside of the cabinet where the Ajax was stored around the time the jewelry was purportedly stolen. BCCL alleges that Ms. Rizzo knowingly misrepresented to the police that no one other than BCCL had access to her residence.

is not sufficient to prove abuse of the privilege, and the failure to investigate the matter fully before contacting police also does not present a jury question on whether a statement was communicated with reckless disregard. **Kennedy**, 935 So.2d at 688-89; **Callahan v. Circuit City Stores, Inc.**, 06-1663 (La.App. 1 Cir. 10/10/07), 971 So.2d 1116, 1119-20.

In its appellate brief, BCCL contends that Ms. Rizzo admitted that her factual allegations to the police and in the civil suit were “knowingly false allegations.” To support this contention, however, BCCL only refers to affidavits by its personnel, which mention the above inconsistencies. Moreover, BCCL contends that Ms. Rizzo acknowledged in the presence of the individuals attending BCCL personnel depositions that her allegations were not true. However, the only purported acknowledgement made by Ms. Rizzo at the depositions, which again is based solely on BCCL’s owner’s affidavit, was that there was only one can of Ajax as opposed to two. Even considering the entirety of the referenced affidavits,⁹ based on the record before us we are unable to find that Ms. Rizzo knowingly made false allegations of theft or acted in reckless disregard as to their truth or falsity. As such, BCCL has failed to demonstrate a probability of success on its claims.¹⁰

BCCL also asserts that the trial court erred in dismissing its cause of action for breach of contract. On appeal, BCCL contends that the parties reached an agreement wherein Ms. Rizzo agreed to pay all costs of administering the polygraph tests. In its petition, however, BCCL only alleges that Ms. Rizzo “refused to pay for the polygraphs” and BCCL seeks recovery for “costs of the polygraph examinations.” BCCL does not specifically allege that the parties reached an agreement whereby Ms. Rizzo would pay for the costs of the polygraph examinations. Accordingly, BCCL’s petition fails to state a cause of action for breach of contract. However, because the failure to state a cause of

⁹ BCCL has assigned as error the trial court’s ruling that struck some statements made in its personnel’s affidavits. We preterm discussion of this assignment of error, but note that we have considered the affidavits in their entirety.

¹⁰ Although Ms. Rizzo has requested attorney fees in her brief, she has not filed an answer to the appeal.

action may be removed by amendment of the petition, the court shall allow plaintiff to amend its petition. LSA-C.C.P. art. 934. Although Ms. Rizzo contends that the purported breach of contract claim arises solely from protected free speech under Article 971, we conclude that any such claim is an independent claim from that asserted under Article 971.

CONCLUSION

For the foregoing reasons, we amend the July 9, 2013 trial court judgment and remand this matter to the trial court to allow BCCL to amend its petition, if it can, to state a cause of action for breach of contract within thirty days of this court's action. In all other respects, the trial court's July 9, 2013 judgment is affirmed. Costs of this appeal are to be split between the parties.

JUDGMENT AMENDED AND, AFFIRMED AS AMENDED; MATTER REMANDED.

BCCL ENTERPRISE, INC., D/B/A
THE MAIDS HOME SERVICES,
CHARLOTTE D. BLANCHARD,
DEAN BLANCHARD, AND
JAMIE BLANCHARD

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ

PETTIGREW, J., CONCURS IN PART AND DISSENTS IN PART, AND ASSIGNS REASONS.

I concur with the majority's handling of the breach of contract claim. I disagree with the majority's handling of the remainder of the issues. I would reverse the trial court's judgment in its entirety.