NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 0140

PENNY MICKEN

VERSUS

DHC OPCO-NAPOLEONVILLE, LLC d/b/a HERITAGE MANOR OF NAPOLEONVILLE

DATE OF JUDGMENT: NOV 02 2018

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
NUMBER 35897, DIVISION E, PARISH OF ASSUMPTION
STATE OF LOUISIANA

HONORABLE ALVIN TURNER, JR., JUDGE

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* * * * * *

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Disposition: APPEAL MAINTAINED; JUDGMENT AFFIRMED.

CHUTZ, J.

Plaintiff, Penny Micken, appeals from a district court judgment dismissing her personal injury lawsuit on a peremptory exception of prescription. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 25, 2015, plaintiff worked as a sitter for a resident at a nursing home that operated under the business/trade name of Heritage Manor of Napoleonville. On that date, as plaintiff was walking toward the resident's room, she slipped and fell on a liquid substance on the floor. As a result, she allegedly sustained serious personal injuries.

On September 22, 2016, plaintiff filed a personal injury lawsuit, naming as defendant DHC OPCO-Napoleonville, LLC d/b/a Heritage Manor of Napoleonville (OPCO-Napoleonville), which she alleged was the owner/operator of the nursing home. OPCO-Napoleonville filed a motion for an extension of time to file responsive pleadings. An extension of time was initially granted until December 29, 2016, then a second extension was granted giving OPCO-Napoleonville until January 29, 2017,[1] to file responsive pleadings.

On January 24, 2017, plaintiff filed a pleading captioned as a "Motion to Substitute the Name of Defendant." Plaintiff requested therein that she be allowed to substitute the names "Heritage Manor of Napoleonville Limited Partnership d/b/a Heritage Manor of Napoleonville" (Heritage Manor) and "Community Care Center of Napoleonville, LLC d/b/a Heritage Manor of Napoleonville" (CCC) in place of the original named defendant, OPCO-Napoleonville. In the motion, plaintiff alleged she learned after filing her original petition that OPCO-Napoleonville was not the owner of the nursing home at the time of her accident. As recorded in the

[1] The order granting the second extension contains a typographical error in that it granted an extension until January 29, 2016, which was a date that preceded the December 7, 2016 date on which the order was signed. It is apparent that the extension was intended to be until January 29, 2017.

Assumption Parish conveyance records, OPCO-Napoleonville did not acquire ownership of the nursing home from Heritage Manor until a few months after plaintiff's accident, through an act of sale executed on December 1, 2015. Thus, since the nursing home was actually owned by Heritage Manor and leased to CCC on the date of her accident, plaintiff sought to substitute those parties as defendants in place of OPCO-Napoleonville.

On January 30, 2017, the trial court signed an order allowing plaintiff to substitute the name of OPCO-Napoleonville with the names of Heritage Manor and CCC as defendants. Further, the order authorized plaintiff to have the original petition for damages and the motion to substitute the name of defendant served on Heritage Manor and CCC. On plaintiff's motion, OPCO-Napoleonville was dismissed from the lawsuit without prejudice.

On March 20, 2017, the substituted defendants, Heritage Manor and CCC, filed a peremptory exception raising the objection of prescription. Following a hearing, the trial court sustained the exception and dismissed plaintiff's petition for damages against Heritage Manor and CCC, with prejudice. Plaintiff has now appealed.

RULE TO SHOW CAUSE

On February 5, 2018, this court *ex proprio motu* issued a rule to show cause in this matter on the grounds that the judgment on appeal appeared to lack the specificity required to constitute a final, appealable judgment since it failed "to specifically identify the party or parties in favor of and against whom judgment is rendered." Subsequently, on July 17, 2018, this court issued a provisional order maintaining the appeal but reserving the final determination on that issue to the panel which was assigned this appeal.

This court's appellate jurisdiction extends only to "final" judgments." See La. C.C.P. art. 2083(A); ***Adair Asset Management, LLC/US Bank v. Honey Bear***

Lodge, Inc., 12-1690 (La. App. 1st Cir. 2/13/14), 138 So.3d 6, 16. A final judgment must contain decretal language. ***Carter v. Williamson Eye Center***, 01-2016 (La. App. 1st Cir. 11/27/02), 837 So.2d 43, 44. Further, it is well settled that a final judgment must be precise, definite, and certain. ***Vanderbrook v. Coachmen Industries, Inc.***, 01-0809 (La. App. 1st Cir. 5/10/02), 818 So.2d 906, 913. Generally, a judgment must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied. The specific relief granted should be determinable from the judgment without reference to any extrinsic sources. ***Conley v. Plantation Management. Company***, 12-1510 (La. App. 1st Cir. 5/6/13), 117 So.3d 542, 547, writ denied, 13-1300 (La. 9/20/13), 123 So.3d 178; ***Vanderbrook***, 818 So.2d at 913-14.

In cases with multiple plaintiffs or defendants, the failure to name the plaintiff(s) or defendant(s) for or against whom the judgment is rendered makes the judgment fatally defective because one cannot discern from its face for or against whom it may be enforced. See ***Jenkins v. Recovery Technology Investors***, 02-1788 (La. App. 1st Cir. 6/27/03), 858 So.2d 598, 600. However, this court has found a judgment to be valid even though it did not refer to the plaintiff by name, where there was only one plaintiff involved in the case, and the plaintiff's name was discernible from the caption of the judgment. ***Hammonds v. Reliance Insurance Company***, 06-0540 (La. App. 1st Cir. 12/28/06) (unpublished).

In this case, the judgment signed by the trial court provides:

> JUDGMENT ON PEREMPTORY EXCEPTION OF PRESCRIPTION
>
> The PEREMPTORY EXCEPTION OF PRESCRIPTION of the defendants, HERITAGE MANOR OF NAPOLEONVILLE LIMITED PARTNERSHIP and COMMUNITY CARE CENTER OF NAPOLEONVILLE, LLC, d/b/a Heritage Manor of Napoleonville, came for hearing on May 22, 2017, before the Honorable Judge Alvin Turner, Jr. Present in court were Robert R. Faucheux, Jr., representing the plaintiff, Penny Mickens; and Charles A. Schutte, Jr., representing the defendants, Heritage Manor of Napoleonville Limited Partnership

and Community Care Center of Napoleonville, LLC, d/b/a Heritage Manor of Napoleonville.

After reviewing the evidence and hearing the argument of counsel, the court being of the opinion the Peremptory Exception of Prescription should be granted for the oral reasons assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that the Peremptory Exception of Prescription shall be granted, and the Petition for Damages filed against the defendants, Heritage Manor of Napoleonville Limited Partnership and Community Care Center of Napoleonville, L.L.C. shall be dismissed, with prejudice, at plaintiff's costs.

We find this judgment contains sufficient decretal language to constitute a final judgment in that it determines the rights of all the parties and dismisses the petition for damages filed against the only remaining defendants in this matter, Heritage Manor and CCC. The parties herein consist of a single plaintiff and two defendants, all of whom are identified in the first paragraph of the judgment. Although the decretal language does not expressly state that Penny Micken filed the petition against the defendants or that judgment was rendered against her, she was the only plaintiff in this matter, and she was identified as such both in the body of the judgment and in its caption. Without referring to other documents in the record, a third person could readily determine from reading the judgment that Ms. Micken was the plaintiff against whom the judgment was rendered. ***Conley***, 117 So.3d at 547; ***Vanderbrook***, 818 So.2d at 913-14. Since the judgment contains sufficient decretal language to constitute a final judgment, this appeal is maintained.

DISCUSSION

Plaintiff argues that even though Heritage Manor and CCC were not substituted as defendants in this matter until more than a year after her accident, the substitution related back to the filing of her original petition. Further, because the original petition was timely filed within one year of the accident, she contends the trial court erred in determining her claims against Heritage Manor and CCC were barred by prescription.

Statutes involving prescription are strictly construed against prescription and in favor of the obligation sought to be extinguished. ***Taranto v. Louisiana Citizens Property Insurance Corporation***, 10-0105 (La. 3/15/11), 62 So.3d 721, 726. In reviewing a peremptory exception of prescription, the standard of review requires an appellate court to determine whether the trial court's findings of fact were manifestly erroneous. Generally, the party urging the exception bears the burden of proving prescription. If the petition is prescribed on its face, then the burden of proof shifts to the plaintiff to negate the presumption by establishing a suspension or interruption. ***Taranto***, 62 So.3d at 726.

In this case, plaintiff's personal injury claim was subject to the one-year prescriptive period provided in La. C.C. art. 3492, which commenced on the date of her accident when she allegedly sustained injuries. See La. C.C. art. 3492; ***Renfroe v. State ex rel. Department of Transportation and Development***, 01-1646 (La. 2/26/02), 809 So.2d 947, 950. Plaintiff's original petition for damages was timely since it was filed on September 22, 2016, less than one year after her September 25, 2015 accident. Regardless, neither Heritage Manor nor CCC was named as a defendant in the original petition. Moreover, plaintiff's "Motion to Substitute the Name of Defendant," pursuant to which Heritage Manor and CCC were substituted as defendants, was not filed until January 18, 2017, well after the one-year prescriptive period had expired. Therefore, unless the substitution of Heritage Manor and CCC relates back to the filing of plaintiff's original petition, the plaintiff's claims against the substituted defendants would be prescribed.

Whether an amendment relates back to the original pleading is governed by La. C.C.P. art. 1153, which provides:

> When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading.

Through the substitution of Heritage Manor and CCC, plaintiff was not trying merely to correct the name of the defendant in this case. Instead, plaintiff attempted to entirely change the identity of the defendants. The Louisiana Supreme Court has established four criteria for determining whether Article 1153 allows an amendment that changes the identity of the parties sued to relate back to the filing of the original petition. These criteria are:

> (1) The amended claim must arise out of the same transaction or occurrence set forth in the original petition;
>
> (2) The purported substitute defendant must have received notice of the institution of the action such that he will not be prejudiced in maintaining a defense on the merits;
>
> (3) The purported substitute defendant must know or should have known that but for a mistake concerning the identity of the proper party defendant, the action would have been brought against him;
>
> (4) The purported substitute defendant must not be a wholly new or unrelated defendant, since this would be tantamount to assertion of a new cause of action which would have otherwise prescribed.

Renfroe, 809 So.2d 947 at 950-51; ***Ray v. Alexandria Mall, Through St. Paul Property and Liability Insurance***, 434 So.2d 1083, 1086-87 (La. 1983). Plaintiff argues the substitution of Heritage Manor and CCC relates back to the filing of the original petition because all of the above criteria have been met. We disagree.

It is evident that the first criterion is met, since the claim against the substituted defendants arises from the same occurrence set forth in the original petition. Nevertheless, under the criteria set forth by the Supreme Court, Article 1153 does not authorize the addition of wholly new or unrelated defendants by amendment/substitution relating back to a timely petition when the substituted defendants did not receive notice of the action from the original petition. See ***Melerine v. American Multi-Cinema, Inc.***, 04-292 (La. App. 5th Cir. 8/31/04), 882 So.2d 628, 630, writ denied, 04-2415 (La. 12/10/04), 888 So.2d 841; ***Sanders v. Schwegmann Supermarkets***, 96-0849 (La. App. 4th Cir. 6/4/97), 696 So.2d 264,

266. In order for the amendment/substitution to relate back, the original defendant and the new defendants must have an identity of interest, and the relationship between them must be of such a close nature that there is an inference of notice. ***Melerine***, 882 So.2d at 630; ***Sanders***, 696 So.2d at 266. For instance, an identity of interest has been found to exist between a parent corporation and a wholly owned subsidiary and between corporations with interlocking officers. ***Findley v. City of Baton Rouge***, 570 So. 2d 1168, 1171 (La. 1990).

In the instant case, the record reveals no identity of interest or relationship of any kind between the substituted defendants, Heritage Manor and CCC, and the original defendant, OPCO-Napoleonville, from which notice could be inferred. Each of these parties is a separate legal entity. At the hearing on the exception, the trial court asked plaintiff's counsel if there was any commonality between the original defendant and the substituted defendants, such as an overlapping board of directors. Plaintiff's counsel indicated the only thing the parties had in common was that they had all done business under the same trade name, "Heritage Manor of Napoleonville." Otherwise, plaintiff showed no connection between the original and substitute defendants other than the sale and purchase of the nursing home. See ***Burg v. Living Centers-East Inc.***, 09-248 (La. App. 5th Cir. 10/27/09), 28 So.3d 353, 355-57 (no "identity of interest" existed between the former and the current owners of a nursing home).

Further, the record reveals that Heritage Manor and CCC did not receive notice of the institution of plaintiff's lawsuit until over sixteen months after her accident.[2] Plaintiff argues the substituted defendants received notice of her claim within the prescriptive period since she filed an accident report on the date of the

[2] The record does not establish the exact date Heritage Manor and CCC received notice of plaintiff's lawsuit through the service of her original petition and motion to substitute the name of defendant. Yet, it is clear that service was not made until after the trial court signed an order on January 30, 2017, authorizing service upon Heritage Manor and CCC, which was over sixteen months after plaintiff's accident.

accident with an employee of "Heritage Manor of Napoleonville" (which was owned by Heritage Manor and leased and operated by CCC at that time). This argument ignores the fact that notice of the occurrence of an accident is not the same thing as notice of the institution of a lawsuit. ***Renfroe***, 809 So.2d at 951; ***Hodges v. Republic Western Insurance Company***, 05-0245 (La. App. 4th Cir. 12/14/05), 921 So.2d 175, 179. Nor is there any merit in plaintiff's contention that merely because "Heritage Manor of Napoleonville," was named in her original petition, all entities who ever used that trade name had constructive notice of the institution of the lawsuit. The records of the Louisiana Secretary of State, which were available to the public (including plaintiff), revealed that the trade name "Heritage Manor of Napoleonville" was assigned to OPCO-Napoleonville on December 2, 2015, the day after it purchased the nursing home.[3]

The trial court's ruling that this matter was prescribed was based on its apparent rejection of plaintiff's claim that the substitution of defendants related back to the original petition. In support of that ruling, the record shows that Heritage Manor and CCC failed to receive notice of plaintiff's lawsuit until after the applicable prescriptive period had expired. Moreover, Article 1153 does not permit the substitution of wholly new and/or unrelated defendants after prescription has expired, since such a substitution would be tantamount to asserting a new cause of action, which would otherwise be prescribed. See ***Renfroe***, 809 So.2d at 952;

[3] Plaintiff appears to argue that her error in originally naming OPCO-Napoleonville as defendant was excusable because it was reasonable to conclude from the Secretary of State's records that OPCO-Napoleonville was the proper defendant. She points out that OPCO-Napoleonville registered with the Secretary of State as a business on September 17, 2015, eight days before her accident. She further alleges the trade name and "ownership situation of 'Heritage Manor of Napoleonville' [was] clearly confusing." In ***Burg***, 28 So.3d at 357, the plaintiffs made a similar argument, contending "that the information on the [Secretary of State's] website was incorrect and misleading, thereby excusing their mistake in naming the correct defendant..." in a lawsuit against a nursing home. The ***Burg*** court rejected this argument, holding due diligence required "more action and research on the part of the plaintiffs." Additionally, the court observed that through phone calls to the appropriate regulatory agency or to the facility itself, the plaintiffs seemingly could have easily and accurately identified the correct owner/operator of the nursing home in question. See ***Burg***, 28 So.3d at 357. Agreeing with this reasoning, we reject plaintiff's argument that her error in naming the wrong defendant was excusable in some manner so as to allow the relation back to the original petition of her substitution of Heritage Manor and CCC as defendants.

Robinson v. Westin Hotel, 12-1454 (La. App. 4th Cir. 3/20/13), 177 So.3d 715, 719. Accordingly, we find no error in the trial court's ruling sustaining the exception of prescription filed by the substituted defendants, Heritage Manor and CCC.

Finally, we conclude plaintiff's contention that she should be given an opportunity to amend her petition pursuant to La. C.C.P. art. 934 is meritless. Under Article 934, when the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection raised through the exception cannot be so removed, however, the action shall be dismissed. ***Harris v. Breaud***, 17-0421 (La. App. 1st Cir. 2/27/18), 243 So.3d 572, 581. The decision to allow amendment of a pleading to cure the grounds for a peremptory exception is a matter within the discretion of the district court. In this matter, since plaintiff failed to present any evidence that the grounds for the exception of prescription can be removed by amendment to the petition, it was unnecessary to give her an opportunity to amend. See ***Harris***, 243 So.3d at 581.

CONCLUSION

For the above reasons, the judgment of the trial court sustaining the exception of prescription filed by Heritage Manor of Napoleonville Limited Partnership d/b/a Heritage Manor of Napoleonville and Community Care Center of Napoleonville, LLC d/b/a Heritage Manor of Napoleonville, and dismissing the lawsuit of plaintiff, Penny Micken, with prejudice, is affirmed. All costs of this appeal are assessed to plaintiff.

APPEAL MAINTAINED; JUDGMENT AFFIRMED.