

Relator, Philip Carter's writ application is granted to review his claims. We affirm the rulings of the district court.

On March 7, 1996, the plaintiffs, Jonathan and David Fine, filed suit against the ABC Insurance Company and Philip Carter. They alleged that they were limited partners in Canal Street Associates ("CSA"), a Louisiana Partnership in Commendam. They further claimed that the defendant, Philip Carter, was the General Partner of CSA, a partnership organized primarily for the purchase, development, renovation, mortgage, operation, lease and disposal of property located at 921 Canal Street. Both plaintiffs alleged they were limited partners in CSA at its inception in 1982. Each plaintiff subsequently sold a portion of his partnership interest to the relator, Philip Carter.

The plaintiffs allegedly entered into option agreements that gave each plaintiff the right to repurchase certain partnership interests from the relator, Carter. Pursuant to that agreement, the relator, Carter, agreed to notify the plaintiffs in advance of any transaction into which the partnership would enter that would have a significant economic effect on the partnership or its

assets. The plaintiffs claimed that Philip Carter breached this agreement by willfully failing to notify them of the sale of the assets of the partnership. Further, the plaintiffs alleged that Carter repeatedly breached his fiduciary duty to the CSA partnership between 1982 and 1993, defrauded his partners, misrepresented material facts, and misappropriated and diverted partnership funds for his personal benefit.

David Fine alleged that he provided extensive professional and legal services for CSA and for Philip Carter personally from 1982 through 1993 with the understanding that he would be compensated from the proceeds of the sale of the Maison Blanche building. However, Carter failed to compensate him for his services. The plaintiffs seek an accounting and damages.

Philip Carter asserts that the plaintiffs instructed the sheriff to withhold service of the petition, and the plaintiffs allegedly gave Carter no notice of the filing of the suit.

Carter claims that on March 24, 1997, a majority of the partners authorized liquidation and dissolution of the partnership in accordance with the partnership articles. All partners, including the plaintiffs, were allegedly given notice of the liquidation. The partnership was terminated on March 16, 1998. All creditors were paid, and all assets were delivered to the partners.

On March 5, 1999, the plaintiffs amended their suit to include allegations that Philip Carter drained and misappropriated the assets of the partnership by improperly using assets of the partnership for his own personal benefit and for the benefit of his other businesses. Additionally, the plaintiffs claimed that Carter misappropriated the assets and funds of the partnership by disbursing monies to himself, notwithstanding the enormous sums owed by him to the partnership. Upon filing the amended petition, the plaintiffs instructed the Sheriff to serve Carter. This was the first notice Carter received of the suit, which had been pending for over three years.

The relator Philip Carter filed exceptions of no right of action, non-joinder of an indispensable party, no cause of action and prescription. Carter also filed a motion to quash a subpoena directed to his attorney of record and a motion for sanctions for plaintiffs' failure to produce court-ordered discovery and for plaintiffs' failure to attend a deposition. The trial court dismissed all of Carter's exceptions and denied his motion for sanctions. However, the trial court upheld an exception of no cause of action filed by the plaintiffs in response to a reconventional demand filed by Carter, alleging that the plaintiffs' refusal to serve the suit until after the partnership was dissolved was an abuse of process. Carter's writ application followed.

Argument 1

Initially, Carter contends that the district court erred in holding that limited partners may sue a general partner for mismanagement without joining the partnership.

Citing La. C.C.P. art. 737, Carter maintains that a limited partner may not sue a general partner unless the partnership is a party to the suit. In *Beninate v. Bruno*, 497 So.2d 1022 (La. App. 5 Cir. 1986), the appellate court found that because the plaintiff's claims were so interwoven with the interests of the various partnerships concerned, the partnerships were either necessary or indispensable parties to that particular suit. *Id.*, 497 at 1024. The Fifth Circuit recognized that the general rule barring partners from suing each other during the partnership was not an absolute. The appellate court stated:

[T]he rule barring suit by one partner against another during the partnership may not be available in extreme cases, among which might be fraud, breach of a fiduciary duty specifically owed the plaintiff partner by the defendant partner, and wrongdoing or self-dealing so pervasive that the partnership has become a mere facade.
Beninate v. Bruno, 497 So.2d at 1024.

In the present case, the petition and the amended petition show that the plaintiffs are not alleging causes of actions against the partnership. Rather, the plaintiffs are suing Carter personally for alleged fraudulent acts of self-dealing, misrepresentation and misappropriation. Further, at the time

that Carter filed his exception based on the plaintiffs' failure to join an indispensable party, the partnership had already been liquidated and was not in existence. La. C.C.P. art. 737 does not apply. The district court correctly denied Carter's exception.

Argument 2

The relator Carter also contends that the district court erred in holding that a limited partner who is a creditor of the partnership may sue a general partner on that debt without joining the partnership. Carter argues that even if La. C.C.P. art. 737 does not apply to the allegations of mismanagement, it clearly applies to the claims made by plaintiff, David Fine, for compensation for services to the partnership, which the general partner obligated himself to pay.

However, a review of the petition reveals that David Fine is alleging that he and Carter entered into a personal contract whereby he would perform professional services in obtaining the Maison Blanche and RTA leases (two leases David Fine maintains the partnership needed to remain in business) in exchange for a percentage of Carter's revenue received from the liquidation of the partnership. It is this contract upon which David Fine is suing. La. C.C.P. art. 737 does not apply to David Fine's personal contractual claim against Carter.

Argument 3

Next, the relator Carter asserts that the district court erred in holding that a general partner is individually liable for compensation for services provided to the partnership.

La. C.C. art. 2809 makes a partner liable to both the partnership and the partners for violations of this nature. Generally, if a director and officers of a corporation do not purport to bind themselves individually, they do not incur personal liability for debts of a corporation except for acts of fraud, malfeasance or criminal wrong-doings. *Nicholson Management & Consultants, Inc. v. Bergman*, 96-0557, 96-0558 (La. App. 4 Cir. 9/25/96), 681 So.2d 471, *writ denied*, 96-2588 (La. 1/6/97), 685 So.2d 126.

Additionally, a shareholder, officer or director of a corporation shall not be held personally liable for a corporation debt except in cases of fraud or deceit. *LaPorte, Sehrt, Romig & Hand, CPA's v. Gulf Island Operations, Inc.*, 557 So.2d 359 (La. App. 4 Cir. 1990), *writ denied*, 561 So.2d 120 (La. 1990).

In the present case, the plaintiffs alleged that the relator Carter “personally agreed to compensate David Fine” in their Petition for Damages. The plaintiffs alleged that the relator Carter defrauded them, misrepresented material facts, and misappropriated as well as diverted funds from the

partnership. The various actions asserted by the plaintiffs are based on fraud. Thus, the general rule restricting individual personal liability does not apply.

Another exception to the general rule restricting individual personal liability involves the failure of a partner or partners to conduct business on corporate footing, thereby disregarding the corporate entity to such an extent that the corporation ceases to be distinguishable from its partners or shareholders. *Kingsman Enterprises, Inc. v. Bakerfield Elec. Co., Inc.*, (La. App. 1 Cir.1976) 339 So.2d 1280; *Hughes Realty Co. v. Pfister*, (La. App. 4 Cir.1971) 245 So.2d 757.

In the present case, the plaintiffs alleged that the relator Carter, while acting as general partner for CSA, violated his fiduciary duties and misused the assets of the corporation to further his other business interests. Because Carter had a much greater ownership interest in the partnership, the plaintiffs claimed that Carter profited from this wrongdoing. Given the allegations of the petition, the district court properly denied Carter's exception of no cause of action.

Moreover, contrary to Carter's representations, the February 5, 2001 judgment does not support Carter's contention that the district court found that he is liable for compensation of services provided to the partnership.

Rather, the district court only denied Carter's exception of no cause of action, thus recognizing that the allegations are sufficient to show that the case falls within one or more of the exceptions to the rule restricting individual personal liability of partners for compensation for services provided to the partnership.

Argument 4

The relator Carter also complains that the plaintiff David Fine's cause of action for compensation for services has prescribed after three years under La. C.C. art. 3494. However, pursuant to La. C.C. art. 3495, the prescriptive period commences to run from the day payment is exigible. In *Buras v Schultz*, 99-1997 (La. App. 4 Cir. 2/9/00), 752 So.2d 981, *writ denied*, 2000-0727 (La. 4/28/00), 760 So.2d 1178, this court defined an exigible debt as a "liquidated and demandable or matured claim." *Buras*, 99-1997, p. 6, 752 So.2d at 985.

In the present case the plaintiffs alleged that the contract called for the payment of services after the Maison Blanche building was sold. Accordingly, the payment for David Fine's services did not become exigible until after the building was sold. There is nothing in the pleadings to indicate when the building was sold. Accordingly, Carter failed to show that David Fine's claim has prescribed.

Argument 5

The relator Carter also maintains that the district court erred in holding that the plaintiff David Fine's claim against the partnership was not peremptorily barred even though it was not presented to the liquidator within the statutory period.

La. R.S. 12:147 requires that all claims of creditors against the partnership be presented during the course of the liquidation proceedings. As stated earlier, the plaintiffs are not asserting any claims against the partnership. Rather, the claims asserted are personal claims being asserted against the relator Carter, individually. La. R.S. 12:147 does not apply.

Further, if La. R.S. 12:147 applied, this would be an affirmative defense. The defense of a case being barred because it was not asserted in a liquidation proceeding is not included as an affirmative defense in La. C.C.P. art. 1005. However, the affirmative defenses listed in C.C.P. art. 1005 are illustrative and not exclusive. *Webster v. Rushing*, 316 So.2d 111 (La. 1975); *Trahan v. Ritterman*, 368 So. 2d 181 (La. App. 1 Cir. 1979). An "affirmative defense" is one that will have the effect of defeating the suit on the merits. *Abadie v. Markey*, 97-684 (La. App. 5 Cir. 3/11/98), 710 So.2d 327. The defense that the matter is barred because of the previous liquidation is analogous to an argument based on the claim of discharge in

bankruptcy, which is an affirmative defense. A discharge in bankruptcy is neither payment nor extinguishment of a debt but merely constitutes a bar to enforcement that must be set forth as an affirmative defense. *Giddens v. Giddens*, 98-868 (La. App. 3 Cir. 12/9/98), 722 So.2d 114,118, *writ denied*, 99-0080 (La. 3/12/99), 739 So.2d 203.

The party pleading an affirmative defense has the burden of proving it by a preponderance of the evidence. *Reily Elec. Supply, Inc. v. Hollenberg*, 535 So.2d 1321, 1323 (La. App. 5 Cir.1988), *writ denied*, 540 So.2d 331 (La. 1989). This argument is more properly made in a motion for summary judgment, demonstrating that the claims being asserted by the plaintiffs should properly have been presented in the liquidation proceedings.

Argument 6

The relator Carter also contends that the district court erred in holding that Carter's reconventional demand failed to state a cause of action for abuse of process.

In his reconventional demand, Carter alleged that the plaintiffs had misused the process for an ulterior motive, in an attempt to obtain a result not proper under law. Carter asserted that the plaintiffs sought to obtain a financial advantage by withholding notice of their suit against him until after

distribution of the profits of the partnership. Further, Carter claimed that the plaintiffs sought to deny him the benefit of the indemnity provisions of the articles of partnership by waiting until after the liquidation process was completed before having him served with the petition for damages.

To prove abuse of process, a plaintiff must show ulterior motive and willful acts in the use of process not proper in the regular conduct of litigation. *Ratcliff v. Boydell*, 93-0362 (La. App. 4 Cir. 4/3/96), 674 So.2d 272, 280, *as amended on rehearing* (5/31/96). It is not enough for the petition to merely claim that the plaintiffs had an ulterior motive for the actions they took. Rather, the petition must contain an allegation of irregularity. *Weldon v. Republic Bank*, 414 So.2d 1361, 1366 (La. App. 2 Cir. 1982). Regular use of process cannot constitute abuse, even though the user was actuated by a wrongful motive, purpose, or intent, or by malice. *Waguespack, Seago and Carmichael (A PLC) v. Lincoln*, 99-2016 (La. App. 1 Cir. 9/22/00), 768 So.2d 287.

In the present case, Carter asserts that withholding service of the petition constituted an irregular or improper use of process because ordinarily the sheriff is instructed to serve the citation and petition on the defendant when suit is filed. However, Carter notes that in its oral reasons, the district court stated that withholding service of process was not irregular

because when the suit was filed in 1996, La. C.C.P. art. 1201 had not yet been amended to require that service of citation be made within ninety days.

Carter argues that the amendment to article 1201 shows legislative recognition that filing suit and withholding citation and service is an abuse of process serious enough to require that suits be dismissed. Considering that the present case is governed by La. C.C.P. art. 1201 before it was amended, we agree with the district court's ruling that Carter failed to state a cause of action for abuse of process where previously there was no 90-day limitation on the time required for service of citation. The process was not irregular before La.C.C.P. art. 1201 was amended.

Argument 7

Next, the relator Carter claims that the district court erred in denying Carter's motion to quash the deposition subpoena directed to his attorney of record.

Carter notes that his attorney was served with a subpoena *duces tecum* ordering him to appear at a deposition and produce documents. Carter further avers that no order had been entered pursuant to La. C.C.P. art. 1452 B which provides, "No attorney of record representing the plaintiff or the defendant shall be deposed except under extraordinary circumstances and then only by order of the district court after contradictory hearing."

In the present case, notwithstanding the failure of the plaintiffs' attorney to comply with La. C.C.P. art. 1452 B, the district court did not quash the deposition subpoena directed to Carter's attorney.

Carter's attorney initially voluntarily consented to giving his deposition, according to the affidavit of Charles W. Nelson, Jr. However, because of a dispute concerning the production of various documents, Carter's counsel filed a motion to quash the subpoena pursuant to La. C.C.P. art. 1452.

In opposition to Carter's motion to quash the subpoena, the plaintiffs asserted that the district court was aware of the conflict of interest issues that permeated the case due to the fact that counsel for the relator Carter was also the former attorney for CSA, the partnership. However, the plaintiffs averred that counsel for Carter had maintained throughout that no such conflict existed and that he would agree to be deposed prior to any deposition being taken from Jonathan Fine. Consent to give his deposition was reasonable and mandated in view of the fact that as attorney for the partnership, he had a duty to make any records related to the partnership available to the plaintiffs, who were limited partners in the partnership.

Because of the nature of the allegations, we conclude that the parties agreed to dispense with the requirements of La. C.C.P. art. 1452 based upon

the circumstances of this case. The conflict that potentially existed in terms of having access to what might ordinarily be privileged and confidential information was apparent when Carter chose to employ the attorney who handled the liquidation as his attorney in this litigation involving alleged wrongdoing that occurred while the partnership was in existence. The district court did not penalize the plaintiffs because the general partner chose to have the same attorney represent him in the present litigation involving fraud against the limited partners. The district court properly denied Carter's motion to quash the deposition subpoena directed to Carter's attorney.

Argument 8

The relator Carter further contends that sanctions should have been imposed for the plaintiff Jonathan Fine's failure to comply with court-ordered discovery.

Carter argues that the district court ordered the plaintiff Jonathan Fine to answer interrogatories and produce documents requested by Carter by September 29, 2000. Although the plaintiffs failed to adhere to the court ordered discovery, the court allegedly refused to dismiss their action.

The district court has much discretion in selecting appropriate sanctions for failure to comply with discovery orders. La. C.C.P. art. 1471;

Payne v. Green, 2000-1655 (La. App. 4 Cir. 8/30/00), 769 So.2d 650; *Burst v Western Fidelity Ins. Co.*, 561 So.2d 980 (La. App. 4 Cir. 1990), *writ denied*, 566 So.2d 986 (La. 1990). In determining the penalty for violation of discovery orders, each case must be decided upon its own facts and circumstances. *Benware v. Means*, 99-1410 (La. 1/19/00), 752 So.2d 841. In the present case, this court finds no abuse of discretion in the district court's ruling to deny sanctions.

Argument 9

Finally, the relator Carter contends that the district court erred in failing to sanction Jonathan Fine for his failure to honor a deposition subpoena pursuant to La C.C.P. art. 1473.

The decision to impose sanctions pursuant to La. C.C.P. art. 1469 is within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *LeBlanc v. GMAC Financial Services*, 97-0131 (La. App. 4 Cir. 5/28/97), 695 So. 2d 1106; *LeJeune v. Lafayette Tower Services*, 94-1240 (La. App. 3 Cir. 4/5/95), 653 So. 2d 112.

In the present case, the parties agreed that counsel for Carter would be deposed prior to the taking of Jonathan Fine's deposition because of the potential conflict problems in the case. Yet, Carter's counsel later reneged on his promise and refused to voluntarily appear for his deposition. Upon

learning this, counsel for plaintiffs timely notified Carter that Jonathan Fine would not be present for his deposition because of the dispute engendered by Carter's counsel's failure to give his deposition. The testimony from Carter's counsel would have been needed prior to the taking of Jonathan Fine's deposition. In fact, in its order, the district court directed that the deposition of Carter's counsel should be taken first. Given the fact that the allegations of the petition indicate that Jonathan Fine resides in the State of Connecticut, counsel was not unreasonable in failing to produce Jonathan Fine until after Carter's counsel gave his deposition. The trial court did not abuse its discretion in denying Carter's motion for sanctions for the plaintiffs' failure to honor the deposition subpoena.

Accordingly, the rulings of the trial court are affirmed.