

**ADELE PERALTA**

\*

**NO. 2001-C-0985**

**VERSUS**

\*

**COURT OF APPEAL**

**JAZZLAND MANAGEMENT  
CO., LTD.**

\*

**FOURTH CIRCUIT**

\*

**STATE OF LOUISIANA**

\*

\*

\*\*\*\*\*

ON SUPERVISORY WRIT DIRECTED TO  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2000-17827, DIVISION "A"  
HONORABLE CAROLYN GILL-JEFFERSON, JUDGE

\*\*\*\*\*

**JOAN BERNARD ARMSTRONG**

**JUDGE**

\*\*\*\*\*

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones  
and Judge Dennis R. Bagneris, Sr.)

**IVAN A. ORIHUELA**

650 POYDRAS STREET, SUITE 2517  
NEW ORLEANS, LOUISIANA 70130

COUNSEL FOR PLAINTIFF-RELATOR

**J. DWIGHT LeBLANC, III  
ANGELA M. BOWLIN**

FRILOT, PARTRIDGE, KOHNKE, & CLEMENTS, L.C.  
3600 ENERGY CENTRE  
1100 POYDRAS STREET  
NEW ORLEANS, LOUISIANA 70163-3600

COUNSEL FOR DEFENDANT-APPELLEE

**REVERSED**

**WRIT GRANTED, JUDGMENT**

**REMANDED.**

**STATEMENT OF THE CASE**

Plaintiff, Adele Peralta, seeks supervisory review of a May 4, 2001 trial court judgment dismissing her suit without prejudice for failure to serve defendant within ninety days.

**FACTS**

Plaintiff filed this suit on November 21, 2000, seeking damages for injuries she allegedly sustained on June 10, 2000, while on the Muskrat Scrambler ride at the Jazzland Theme Park. She named one defendant, Jazzland Management Co., Ltd., and requested service on it on the same day the action was commenced. A disposition of service from the Office of the Civil Sheriff for Orleans Parish, printed on May 22, 2001, reflects that the request for service was entered on November 28, 2000, was released for service that same date, but that the petition was never served.

Plaintiff subsequently mailed a notice of deposition to Jazzland, Inc.,

through its agent for service of process, stating that she wished to depose one or more of its officers, directors, managing agents or other persons with knowledge of a number of matters, and to produce all documents concerning those matters. Plaintiff was seeking to depose a representative of a non-party, Jazzland, Inc., in order to discover exactly which entities might be responsible for her damages. Counsel for Jazzland, Inc. notified counsel for plaintiff, in a letter dated March 20, 2001, that the sole named defendant had not been served, and that therefore plaintiff needed leave of court to depose Jazzland, Inc.

At a May 4, 2001 hearing, the trial court first suggested that plaintiff had to serve a defendant before deposing it. Counsel for Jazzland, Inc. informed the court that it had advised plaintiff's counsel that it was the proper party to sue, and that the defendant named in the suit, Jazzland Management Co., Ltd., had no affiliation with the Jazzland amusement park. The trial court noted that plaintiff had failed to serve Jazzland, Inc. within ninety days, and stated that it was going to dismiss this case without prejudice for failure to timely serve defendant within the period required by La. C.C.P. art. 1201. Counsel for plaintiff noted that the matter was not before the court on a motion to dismiss. The trial court replied that it did not have to reach the issue framed by plaintiff, presumably referring to whether

it could depose Jazzland, Inc.

## **ANALYSIS**

The trial court dismissed plaintiff's action, citing La. C.C.P. art. 1201, which provides:

A. Citation and service thereof are essential in all civil actions except summary and executory proceedings and divorce actions under Civil Code Article 102. Without them all proceedings are absolutely null.

B. The defendant may expressly waive citation and service thereof by any written waiver made part of the record.

C. Service of the citation shall be requested on all named defendants within ninety days of commencement of the action. When a supplemental or amended petition is filed naming any additional defendant, service of citation shall be requested within ninety days of its filing. The defendant may expressly waive the requirements of this Paragraph by any written waiver.

La. C.C.P. art. 1672(C) provides:

C. A judgment dismissing an action without prejudice shall be rendered as to a person named as a defendant for whom service has not been requested within the time prescribed by Article 1201(C), upon contradictory motion of that person or any party or upon the court's own motion, unless good cause is shown why service could not be requested, in which case the court may order that service be effected within a specified time. (emphasis added).

Plaintiff submits that the trial court erred in dismissing her action on the ground that she had not served the named defendant within ninety days.

Plaintiff points out that La. C.C.P. art. 1201(C) does not require service within ninety days, only a request that service be made. We agree.

In Cacamo v. Liberty Mut. Fire Ins. Co., 99-3479 (La. 6/30/00), 764

So.2d 41, the Louisiana Supreme Court stated:

“We have consistently held that the starting point in interpreting any statute is the language of the statute itself. Theriot v. Midland Risk Ins., Co., 95-2895 (La. 5/20/97), 694 So.2d 184; Touchard v. Williams, 617 So.2d 885 (La.1993). Where a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written without further interpretation in search of legislative intent. La. Civ.Code art. 9; New Orleans Rosenbush Claims Serv., Inc. v. City of New Orleans, 94-2223 (La.4/10/95), 653 So.2d 538; Moore v. Gencorp, Inc., 93-0814 (La.3/22/94), 633 So.2d 1268. Courts are not free to rewrite laws to effect a purpose that is not otherwise expressed. White v. Wal-Mart Stores, Inc., 97-0393 (La.9/9/97), 699 So.2d 1081.”

The plain, unambiguous language of La. C.C.P. art. 1201(C) requires only that service be “requested” within ninety days. Similarly, the plain, unambiguous language of La. C.C.P. art. 1672(C) only authorizes dismissal of an action as to a person named as a defendant for whom service has not been “requested” within the time prescribed by La. C.C.P. art. 1201(C). These two sister provisions, added by Acts 1997, No. 518, § 2, eff. January 1, 1998, “were designed to deal more directly with the problems created by withholding service.” Cantrelle v. Block, 2000-0540, p. \_\_, n. 14 (La. 5/11/01), \_\_ So. 2d \_\_, \_\_, n. 14, 2001 WL 498970. Thus, the statutory scheme is intended to prevent a plaintiff from filing suit and either not requesting service, or requesting that service be withheld. La. R.S. 13:5107

(D), added by Acts 1996, 1st Ex. Sess., No. 63, § 1, pertaining to service of citation and process on the state, a state agency, political subdivision or any officer or employee thereof, also requires that service of citation “shall be requested within ninety days” of the commencement of the action. In Naquin v. Titan Indemnity Co., 2000-1585 (La. 2/21/01), 779 So. 2d 704, the Louisiana Supreme Court determined that the amendment adding La. R.S. 13:5107(D) applied retroactively and, therefore, “once the suit was filed, plaintiff had a full ninety days within which to request service.” (Emphasis added). 2000-1585 at p. 5, 779 So. 2d at 708. See also Rollins v. City of Zachary, 2000-0160 (La. App. 1 Cir. 2/16/01), \_\_\_ So. 2d \_\_\_, 2001 WL 133160 (attesting that request for service was placed in the regular U.S. mail insufficient to constitute a request of service under La. R.S. 13:5107 (D)). It is clear that La. C.C.P. arts. 1201(C) and 1672(C), as well as La. R.S. 13:5107(D), simply require that a request for service of citation be made within ninety days from the commencement of suit, not actual service.

In addition to the above, plaintiff seeks payment of costs and attorney’s fees associated with having to bring this writ application, citing La. C.C.P. arts. 863 and 864. Plaintiff argues that counsel for Jazzland, Inc. misrepresented the law to the trial court in its memorandum in opposition to her motion for leave to depose a Jazzland, Inc. representative. La. C.C.P.

art. 863(B) provides that the signature of an attorney or party on a pleading shall constitute a certification by him that any position asserted therein is warranted by existing law or a good faith argument for the extension of existing law, and is not interposed to harass or cause any unnecessary delay or needless increase in the cost of litigation. Subparagraph of (D) La. C.C.P. art. 863 permits a court to impose an appropriate sanction for the violation of Subparagraph (B). However, because Subparagraph (E) provides that such sanction shall be imposed only after a hearing at which any party or his counsel may present evidence or argument related to the issue of sanctions, the imposition of such sanctions is obviously a matter left to the discretion of the trial court.

For the foregoing reasons, the judgment of the trial court dismissing plaintiff's suit for failure to serve defendant within ninety days is reversed, and the case remanded for further proceedings, including a ruling on plaintiff's motion for leave to depose a representative of Jazzland, Inc.

**WRIT GRANTED, JUDGMENT**  
**REVERSED**  
**REMANDED.**