

NOT DESIGNATED FOR PUBLICATION

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| LOEFFELHOLZ PROPERTIES, L.L.C.; RUTH R. LOEFFELHOLZ; NEIL S. LOEFFELHOLZ TRUST; MICHAEL B. LOEFFELHOLZ TRUST; RALPH ROSENBLAT AND GERTRUDE ROSENBLAT | * * * * * * | NO. 2001-CA-1611 COURT OF APPEAL FOURTH CIRCUIT STATE OF LOUISIANA |
| VERSUS | | |
| LAFAYETTE INSURANCE COMPANY | * ***** | |

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-7865, DIVISION "C-6"
HONORABLE ROLAND L. BELSOME, JUDGE

JUDGE MAX N. TOBIAS, JR.

(COURT COMPOSED OF JUDGE CHARLES R. JONES, JUDGE
MICHAEL E. KIRBY, AND JUDGE MAX N. TOBIAS, JR.)

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-AND-

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AFFIRMED

The sole plaintiff in this case, Loeffelholz Properties L.L.C. (“Loeffelholz”), appeals a trial court judgment granting the defendant’s, Lafayette Insurance Company’s, exception of prescription and dismissing the plaintiff’s suit with prejudice. For the following reasons, we affirm.

On 2 December 1996, Loeffelholz filed suit against the defendant for damages and breach of contract stemming from insurance claim losses occurring in December 1995 and January 1996. On 1 March 2000, the trial court dismissed the case “with prejudice” on the grounds of abandonment pursuant to La. C.C.P. art. 561. On 15 May 2000, pursuant to a motion filed by Loeffelholz, the trial court amended the earlier judgment by ordering that the dismissal be “without prejudice.”

On 19 May 2000, Loeffelholz re-filed its lawsuit. The defendant filed an exception of prescription. The trial judge in the division to which the latter suit had been assigned heard the exception and rendered judgment on 6 March 2001 dismissing the exception without prejudice; the court further

ordered the transfer of the case to the division of the court to which the original 1996 suit had been allotted. The defendant then asked the trial court to which the case was transferred to consider its exception of prescription.

On 30 April 2001, the trial court rendered judgment granting the defendant's exception of prescription and dismissing the plaintiff's lawsuit with prejudice. In its reasons for judgment, the trial court stated:

Even though a dismissal "without prejudice" allows a cause of action to be filed again the issue of whether the original suit interrupted prescription depends on the grounds of the dismissal. Article 3463 of the Louisiana Civil Code clearly states that an action dismissed for abandonment is treated as never being brought. The Plaintiffs brought a timely suit within the one-year prescriptive period allowed on their action. The action was considered abandoned after a period of three years lapsed without activity. In accordance with article 3463 the suit is deemed never to have been brought and interruption of prescription did not occur. At the time the suit was filed in March 2000 the cause of action was 4 years old and therefore, prescribed.

From this judgment, Loeffelholz appeals.

La. C.C. art. 3463 provides:

An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending. *Interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses the action at any time either before the defendant has made any appearance of record or thereafter, or fails to prosecute the suit at the trial. (Emphasis added.)*

Article 3463 is clear, unambiguous, and definitive. The plaintiff's lawsuit has prescribed.

Loeffelholz, however, attacks in this appeal the propriety of the 15 May 2000 judgment rendered in the earlier suit that resulted in the judgment of dismissal for abandonment. We are precluded from considering the judgment rendered in the earlier suit for the following reasons.

First, Loeffelholz is attempting to assert errors in a judgment that has not been appealed and is not before us for review. The 15 May 2000 judgment of dismissal, rendered without prejudice, is a final judgment from which the plaintiff did not seek appellate review. Second, Loeffelholz cites *Batson v. Cherokee Beach and Campgrounds, Inc.*, 530 So.2d 1128, 1130 (La. 1988) to support its claim that prescription began to run anew after the earlier judgment of dismissal. The court's statement in *Batson* regarding prescription beginning to run anew does not apply to a case dismissed on the grounds of abandonment, especially in light of the clear language of La. C.C. art. 3463. It does not, therefore, support the plaintiff's position.

We decline to address Loeffelholz's arguments regarding the validity of the judgment of dismissal based on abandonment, for those arguments are not properly before us.

Loeffelholz also argues that the trial court erred in reconsidering the

6 March 2001 dismissal of the exception of prescription without prejudice. The denial of an exception of prescription is merely an interlocutory decree that may be reconsidered at a later time by a trial court for good cause. *Lee v. East Baton Rouge Parish School Board*, 623 So.2d 150, 154 (La. App. 1 Cir. 1993), *citing Babineaux v. Pernie-Bailey Drilling Co.*, 261 La. 1080, 262 So.2d 328 (1972). Since the first court dismissed the exception without prejudice and transferred the case to the appropriate division of court for further action, the second court was fully authorized by law to reconsider the exception when it saw fit to do so. The argument is without merit.

For the foregoing reasons, the judgment granting the defendant's exception of prescription and dismissing the plaintiff's lawsuit with prejudice is affirmed.

AFFIRMED.