NOT DESIGNATED FOR PUBLICATION

PATRICIA SAM	*	**NO. 2006-CA-0908**
VERSUS	*	**COURT OF APPEAL**
LLOYD VILLAVASO AND VILLAVASO INVESTMENTS, LLC	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-18914, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

* * * * * *

Charles R. Jones
Judge

* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris Sr., and Judge Terri F. Love)

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AFFIRMED;
EXCEPTION OF NO RIGHT
OF ACTION GRANTED

Plaintiff, Patricia Sam, appeals the trial court's judgment maintaining the exceptions of no cause of action and no right of action in favor of defendant, Excelth, Inc. We affirm.

On July 28, 2003, while in the course and scope of her employment as a childcare worker with Excelth, Ms. Sam was allegedly injured in a fall due to a hole in the floor. The incident occurred on the premises that Excelth leased from Lloyd Villavaso and Villavaso Investments, L.L.C. (collectively "Villavaso"), for the purpose of operating a drug rehabilitation center for women and their children. On December 22, 2003, Ms. Sam filed a petition for damages against Villavaso as the property owner. Ms. Sam amended her petition to name Excelth as a defendant alleging that Excelth had contractually assumed the liability of the lessor for maintenance of the property. Thereafter, a second amended petition was filed naming Excelth's insurer, Western World Insurance Company, as a defendant. Villavaso filed a cross claim against Excelth and Western World seeking indemnity. This cross claim by Villavaso was ultimately dismissed with prejudice.

On August 23, 2005, Excelth filed exceptions of no cause of action and no right of action, asserting that Ms. Sam was working in the course and scope of her employment with Excelth, and, as such, her exclusive remedy against Excelth falls within the Louisiana Workers' Compensation Act. On March 21, 2006, the trial court maintained the exceptions in favor of Excelth.[1] Ms. Sam's timely appeal followed. The record reflects that subsequent to the filing of this appeal, Ms. Sam settled with Villavaso. On July 24, 2006, the trial court dismissed Ms. Sam's claims against Villavaso with prejudice.

On appeal, Ms. Sam argues that the trial court erred in granting the exceptions of no cause of action and no right of action in favor of Excelth. Further, it is well established that trial court rulings sustaining exceptions of no cause of action and no right of action are reviewed *de novo* on appeal because both involve questions of law. *Industrial Companies, Inc. v. Durbin*, 2002-0665, pp. 6-7 (La. 1/28/03), 837 So.2d 1207, 1213.

As a preliminary matter, we note that although they are often confused and/or improperly combined in the same exception, the peremptory exceptions of no cause of action and no right of action are separate and distinct. La. C.C.P. arts. 927(4) and (5). The Louisiana Supreme Court has recognized that one of the primary differences between the two exceptions lies in the fact that a frequent focus in an exception of no cause of action is on whether the law provides a remedy against the particular defendant, while the focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the suit. *Industrial Companies, Inc.*, 837 So.2d at 1213.

[1] Western World, Excelth's insurer, is not named in either the exceptions or in the judgment.

The function of the peremptory exception of no cause of action is to question whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition. *Id*. The peremptory exception of no cause of action is designed to test the legal sufficiency of the petition by determining whether the particular plaintiff is afforded a remedy in law based on the facts alleged in the pleading. *Fink v. Bryant*, 2001-0987, p. 3 (La. 11/29/01), 801 So.2d 346, 348. The exception is triable on the face of the petition and, for the purpose of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. *Fink*, 2001-0987 at p. 4, 801 So.2d at 349.

Conversely, the exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. C.C.P. art. 927(5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n*, 94-2015, p. 5 (La. 11/30/94), 646 So.2d 885, 888. The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case is a member of the class that has a legal interest in the subject matter of the litigation. *Id*.

In the present case, although Excelth titled the exception as a no cause of action/no right of action, the exception in substance is an exception of no cause of action. Clearly, Ms. Sam, as the injured party, has a real and actual interest in the subject matter of this litigation. Therefore, our inquiry is focused on whether Ms. Sam has a cause of action against Excelth.

La. R.S. 23:1032(A), provides generally that an employee's exclusive remedy against his employer shall be workers' compensation benefits. Section (1)(a) states:

> Except for intentional acts provided for in Subsection B, the rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights, remedies, and claims for damages, including but not limited to punitive or exemplary damages, unless such rights, remedies, and damages are created by a statute, whether now existing or created in the future, expressly establishing same as available to such employee, his personal representatives, dependents, or relations, as against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal, for said injury, or compensable sickness or disease.

The statute was amended in 1989 by Acts No. 454, § 2, effective January 1, 1990 by, among other minor amendments, adding subsection (1)(b) as follows: "This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or principal or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine."

Ms. Sam's case against Excelth is based solely on the assertion that employees may sue their employers for injuries sustained on work premises leased by the employer when the employer voluntarily contracts for premises liability exposure in lease agreements.[2] In support of her argument, Ms. Sam cites *Brown v. Connecticut General Life Ins. Co.*, 2000-0229 (La. App. 4 Cir. 3/7/01), 793 So.2d 211 and *Norfleet v. Jackson Brewing Market, Inc.*, 99-1949 (La. App. 4 Cir.

[2]There is no dispute as to Excelth's status as Ms. Sam's employer. Furthermore, there is no allegation of an intentional act on the part of Excelth.

11/17/99), 748 So.2d 525. Ms. Sam argues that *Brown* and *Norfleet* stand for the position that an exception to the workers' compensation exclusivity rule exists, which allows an employee to sue the employer in a tort action when the employer contractually agrees to accept liability for defects in the leased property and to indemnify the property owner/lessor. We disagree. It is evident from a close reading of both *Brown* and *Norfleet* that these cases addressed the rights and liabilities of the property owner/lessor, rather than, as in the present case, the employee's tort action against the employer.

In *Brown*, the employee sued her employer's lessor for personal injuries she received on the job, and the lessor brought a third-party demand for indemnification against the employer. This Court held that the exclusive-remedy provision of workers' compensation law did not bar the employer's liability to its lessor for indemnification under lease agreement.

Similarly, in *Norfleet*, the employee brought a personal injury action against the property owner from whom his employer leased the premises. The property owner and its liability insurer filed a third-party demand against the employer and the employer's liability insurer seeking indemnity under the terms of the lease. The employer filed an exception of no cause of action against the third party demand. The trial court dismissed the third party demand. We reversed, holding that the provision in workers' compensation law, which immunized the employer from non-intentional tort claims of its employees, did not strip the property owner/lessor of its contracted-for right to indemnity under the terms of the lease.

It is clear that neither case relied on by Ms. Sam addressed the issue of the employee's tort action against the employer. This Court has, however, addressed the precise issue now before us. In *Dumestre v. Hansell-Petetin, Inc*., 96-1778 (La.

App. 4 Cir. 1/29/97), 688 So.2d 187, the plaintiff was working within the course and scope of his employment when he suffered injuries after tripping on a torn carpet at his employer's leased offices. The plaintiff filed suit against his employer and the owner of the building. The trial court granted summary judgment in favor of the employer. We affirmed, holding that pursuant to La. R.S. 23:1032 as amended in 1989, workers' compensation benefits were the employee's exclusive remedy against the employer. This court interpreted the statute to limit the injured employee's remedy to workers' compensation despite the fact that the employer assumed responsibility for the premises pursuant to a lease. *See also Smith v. French Market Corp*., 2003-1412, (La. App. 4 Cir. 10/6/04), 886 So.2d 527 and *Robinson v. Archdiocese of New Orleans*, 98-1238 (La. App. 4 Cir. 3/31/99) 731 So.2d 979.

Furthermore, it is evident that all of our appellate courts have reached the same conclusion that based on the broad language of the 1989 amendment to La. R.S 23:1032, the legislature intended to exclude all non-intentional tort claims of an employee against an employer for injuries, including those that resulted from the conditions of the employer's leased premises. *Bates v. King*, 2004-1591 (La. App. 3 Cir. 4/6/05), 899 So.2d 202; *Dufrene v. Insurance Company of State of Pennsylvania*, 2001-47 (La. App. Cir. 5 Cir. 5/30/01), 790 So.2d 660; *Martin v. Stone Container Corp*., 31,544 (La. App. 2 Cir. 2/24/99), 729 So.2d726; and *Douglas v. Hillhaven Rest Home, Inc*., 97-0596 (La. App. 1 Cir. 4/8/98), 709 So.2d 1079.

Considering the well-established law on the issue before us, we conclude that the trial court was correct in dismissing Ms. Sam's tort action against Excelth.

Finally, for the first time on appeal, Excelth raises the peremptory exceptions of no cause and no right of action as to its insurer, Western World.[3] Pursuant to La. C.C.P. art. 2163, this Court may consider a peremptory exception filed for the first time on appeal, "if pleaded prior to a submission of the case for decision, and if proof of the ground of the exception appears of record." While it does not appear that an exception has actually been filed, having merely presented the argument in a brief, exceptions of no cause and no right of action are among the peremptory exceptions that may be noticed by the appellate court on its own motion. La. C.C.P. art. 927(B). Accordingly, we shall consider the issue.

For reasons not reflected in the record, Western World was not included in the exceptions of no cause and no right of action originally filed by Excelth, nor did Western World file its own exception. When the trial court granted a dismissal of Western World's insured, Excelth, Ms. Sam's claim against Western World became a direct action against Western World under La. R.S. 22:655(B). Pursuant to La. R.S. 22:655(B)(1), a direct action may be brought against the insurer alone only when:

> (a) The insured has been adjudged a bankrupt by a court of competent jurisdiction or when proceedings to adjudge an insured a bankrupt have been commenced before a court of competent jurisdiction;
>
> (b) The insured is insolvent;
>
> (c) Service of citation or other process cannot be made on the insured;
>
> (d) When the action is for damages as a result of an offense or quasi-offense between children and their parents or between married persons;

[3] Ms. Sam has not filed a reply brief on this issue.

(e) When the insurer is an uninsured motorist carrier; or

(f) The insured is deceased

It has been held that under this statute, direct actions against insurers are strictly limited to those five enumerated circumstances, and when the insured is dismissed, there is no direct right of action against the insurer. *White v. State Farm Ins. Co*., 2003-0754 (La. App. 4 Cir. 11/26/03), 862 So.2d 263, 265. We note that Ms. Sam has not set forth any of the five enumerated circumstances under La. R.S. 22:655(B). Accordingly, we find that Ms. Sam has no right of action against Western World.

DECREE

For the foregoing reasons, we affirm the trial court's granting of the exception of no cause of action in favor of Excelth, Inc. Additionally, we hereby grant an exception of no right of action in favor of Western World Insurance Company, which was raised for the first time on appeal.

AFFIRMED;
EXCEPTION OF NO RIGHT
OF ACTION GRANTED