

KEVIN A. PADUA

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NO. 2007-CA-0824

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**MICHAEL TOWNSEND GRAY
AND GRAY AND COMPANY,
INC.**

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STATE OF LOUISIANA

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MURRAY, J., DISSENTS AND ASSIGNS REASONS

I find the trial court erred by dismissing the action on the basis of abandonment. La. C.C.P. art. 561 (B) provides:

Any formal discovery as authorized by this Code and served on all parties whether or not filed of record, including the taking of a deposition with or without formal notice, shall be deemed to be a step in the prosecution or defense of an action.

The plaintiff’s counsel submitted proof by affidavit that the notice of deposition was placed in the mail to defense counsel’s office on August 26, 2005, three days prior to Hurricane Katrina’s landfall. Moreover, the trial court apparently believed that the notice had been mailed, as evidenced by its Reasons for Judgment, which state: “...the court finds that under the facts of this case, *mailing defense counsel Notice of Deposition* did not constitute a step in prosecution.” (Emphasis added.)

I find this conclusion of the trial court to be contrary to the law as expressed in the Louisiana Code of Civil Procedure. La. C.C.P. art. 1313 (A) provides that every pleading subsequent to the original petition may be served by:

(1) Mailing a copy thereof to the counsel of record, or if there is no counsel of record, to the adverse party at his last known address, this service being complete upon mailing.

La. C.C.P. article 1474 further provides that all discovery notices that are required to be in writing and to be served on the adverse party may be served in accordance with Article 1313. Moreover, Part (C) 4 of Article 1474 states:

The serving of any discovery materials pursuant to the provisions of this Article shall be considered a step in the prosecution or defense of an action for purposes of Article 561, notwithstanding that such discovery materials are not filed in the record of the proceedings.

In view of this law, I believe that once the trial court found that the notice of deposition had been mailed prior to the expiration of the abandonment period, it was an error of law for the court not to conclude that this mailing constituted a step in the prosecution of the case which precluded abandonment. See *Charpentier v. Goudeau*, 95-2357(La. App. 4 Cir. 3/14/96), 671 So.2d 981. Considering that the abandonment statute is to be interpreted liberally in favor of maintaining actions, I would reverse the trial court's ruling and remand the matter to that court.

Accordingly, I respectfully dissent.