

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0453

WHITNEY NATIONAL BANK

VERSUS

R. E. COLEMAN, INC., COLEMAN RV, L.L.C., LOUIS W. "CHIP" BIGNAR,
BONITA BURATT BIGNAR, HANCOCK BANK, AND BAY WASH

July
EJG
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Judgment Rendered: December 28, 2006

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 530,584

Honorable Kay Bates, Judge

* * * * *

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* * * * *

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

This appeal involves a concursus proceeding filed by Whitney National Bank (Whitney). R. E. Coleman, Inc. and Coleman RV, L.L.C. (collectively Coleman) appeal the trial court's judgment denying their claim to an interest in the funds in the registry of the court. For the reasons that follow, we vacate the judgment of the trial court and remand this matter to the trial court for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

This concursus proceeding arises out of a separate suit filed in the Nineteenth Judicial District Court by Coleman entitled, *R.E. Coleman, Inc. and Coleman RV, LLC v. Louis W. Bignar, Lesa Callegan, and Louis Favorite*, Number 526,322, Division D (the embezzlement suit). In that suit, Coleman alleged that Louis W. "Chip" Bignar and others committed certain illegal acts, including the embezzlement or conversion of funds belonging to Coleman into certain accounts at Whitney.

Several months after Coleman filed the embezzlement suit, Whitney filed the instant concursus proceeding. Whitney alleged in its petition that it had been served with a subpoena in the embezzlement suit, requiring it to produce any and all documents relating to any account opened or maintained by Bignar. Whitney acknowledged that it was the custodian of four accounts in the name of Bignar and/or his wife, Bonita Buratt Bignar, and deposited the total funds from these accounts, \$47,825.46, into the registry of the court. Whitney impleaded Coleman, the Bignars, Hancock Bank, and Bay Wash to assert their claims to the funds.¹

On April 27, 2005, before any party had filed an answer to Whitney's petition, the Bignars and Bay Wash filed an unopposed motion to set the concursus

¹ Whitney impleaded Bay Wash because one of the accounts in its custody was in the name of Chip Bignar D/B/A Bay Wash.

for hearing.² The motion was signed only by the attorney for the Bignars and Bay Wash; however, it alleges that Coleman's attorney consented to having the matter set for hearing. The trial court set the matter for hearing on July 18, 2005.

On July 8, 2005, Coleman filed a motion to withdraw funds from the registry of the court, contending that it was entitled to the funds for the reasons alleged in the embezzlement suit.³ The Bignars and Bay Wash responded to this motion with a memorandum filed on July 11, 2005, contending that they were entitled to withdraw the funds.

On July 15, 2005, the Friday before the hearing on the concursus, Coleman filed various pleadings. First, Coleman filed a motion to withdraw its earlier motion to withdraw funds from the registry of the court. In the motion, Coleman acknowledged that it had initially consented to the setting of a hearing in the concursus proceeding, but was no longer willing to allow the matter to proceed to hearing, because the judge in the embezzlement suit had failed to rule on a discovery matter that Coleman alleged was critical to its ability to prove it had an interest in the concursus funds.⁴

In addition, Coleman filed a motion to strike the memorandum filed by the Bignars and Bay Wash, contending that the memorandum had not been timely filed in accordance with Rule 9.9 of the Rules for Louisiana District Courts. Coleman also filed a motion to vacate the unopposed motion to set the concursus for hearing

² On April 29, 2005, Hancock Bank answered the petition, denying that it had any interest in the funds and requesting that it be dismissed from the suit.

³ The trial court signed the order setting this motion for hearing on August 15, 2005; however, no hearing was held on that date, and it appears that the trial court simply heard the matter at the hearing on July 18, 2005.

⁴ Coleman contended that Bignar had filed a motion to quash the subpoena Coleman had issued to Whitney and that the trial court had failed to rule on the motion to quash, thus preventing Coleman from obtaining the bank records it needed to prove its entitlement to the funds.

and a motion to transfer and consolidate the concursus proceeding with the embezzlement suit.

On July 18, 2005, prior to attending the hearing that had been scheduled for that date, Coleman filed an answer to the petition for concursus, contending that the funds in the Whitney accounts belonged to it. At the hearing, Coleman attempted to have a preliminary default entered against the Bignars and Bay Wash by oral motion in open court based on the failure of the Bignars and Bay Wash to file an answer in the concursus proceeding. However, the trial court refused to enter the default.

The Bignars and Bay Wash introduced two affidavits attesting that the funds in the Whitney accounts belonged only to them. Coleman objected to the introduction of the affidavits, contending that they were hearsay; however, the trial court admitted the affidavits over Coleman's objection. Coleman introduced the complete records of the embezzlement suit and the concursus proceeding, but it did not offer any other evidence in support of its claim to the funds.

The trial court specifically denied all of Coleman's motions in open court, finding that they had not been timely filed,⁵ and concluded that the Bignars and Bay Wash were entitled to disbursement of the funds. A judgment in accordance with this ruling was signed on July 27, 2005. Coleman filed a motion for new trial, which was denied by judgment signed November 23, 2005. This suspensive appeal by Coleman followed.

DISCUSSION

In its first assignment of error, Coleman argues that the trial court erred in adjudicating the merits of the concursus proceeding on a summary basis. At the hearing on this matter, Coleman argued that the concursus proceeding was being

⁵ The trial court had originally signed Coleman's motion to withdraw its motion to withdraw funds from the registry of the court; however, the trial court denied the motion in open court, and the judgment appealed from also denies the motion.

handled in a summary fashion, without following the procedures applicable to ordinary proceedings. The trial court responded that, in fact, the matter had been set for trial that morning as an ordinary proceeding. After Coleman introduced the records of the embezzlement suit and the concursus proceeding, but did not offer any testimony, the trial court awarded the funds to the Bignars and Bay Wash based on the affidavits they had submitted.

A concursus proceeding is one in which two or more persons having competing or conflicting claims to money, property, or mortgages or privileges on property are impleaded and required to assert their respective claims contradictorily against all other parties to the proceeding. La. C.C.P. art. 4651. Generally, the rules applicable to an ordinary proceeding apply to a concursus proceeding. See La. C.C.P. art. 4662. Service of citation and a copy of the petition in a concursus proceeding shall be made in the same form and manner, and the delays for answering are the same, as in an ordinary proceeding. La. C.C.P. art. 4655.

District courts are required to establish the procedure for assigning cases for trial; however, the rules established by the courts shall not allow the assignment of ordinary proceedings for trial except after answer filed. See La. C.C.P. art. 1571. At the time the trial court set the matter for trial, neither Coleman nor the Bignars and Bay Wash had answered the petition. Therefore, we conclude that the trial court improperly set this matter for trial, and the judgment of the trial court is hereby vacated.

Coleman also challenges the trial court's denial of its motion to transfer and consolidate this concursus proceeding with the embezzlement suit. All pleadings filed in the district court shall be randomly assigned to a particular section or division of the court. See La. C.C.P. art. 253.1. However, when two or more separate actions are pending in the same court, the section or division of the court

in which the first filed action is pending may order consolidation of the actions for trial after a contradictory hearing, and upon a finding that common issues of fact and law predominate. La. C.C.P. art. 1561(A). In addition, Rule 9.3, Rules for Louisiana District Courts, Appendix 3, authorizes the judge of the second filed matter to order the transfer and consolidation of the matter with the first filed matter.⁶ Consolidation shall not be ordered if it would prevent a fair and impartial trial, give one party an undue advantage, or prejudice the rights of any party. See La. C.C.P. art. 1561(B).

In this matter, the trial court simply denied as untimely Coleman's motion to transfer and consolidate the two suits. No contradictory hearing was held to consider the factors set forth in La. C.C.P. art. 1561. Accordingly, we remand this matter to the trial court for a hearing on Coleman's motion to transfer and consolidate.⁷

DECREE

For the reasons assigned above, we hereby vacate the judgment of the trial court and remand this matter to the trial court for proceedings consistent with this opinion. All costs of this appeal are assessed to Louis W. Bignar, Bonita Buratt Bignar, and Louis W. Bignar D/B/A Bay Wash.

JUDGMENT VACATED AND REMANDED.

⁶ Rule 9.3, Appendix 3 provides, in pertinent part:
Suits or proceedings not in their nature original, but growing out of suits or proceedings previously pending, ... shall not be docketed as separate suits, but shall be treated as parts of the original suits out of which they arise, shall be docketed and numbered as parts of such suits, and shall follow the prior allotment or assignment to the respective Division of the Court. Whenever, by error or oversight, this rule shall be violated, the Judge to whom the matter shall have been allotted shall have power to order same transferred to the proper Division, there to be consolidated with the original suit.

⁷ We pretermitted discussion of Coleman's remaining assignments of error.