

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1071

DUPRE LOGISTICS, LLC

VERSUS

CYNTHIA BRIDGES, SECRETARY, DEPARTMENT OF REVENUE,
STATE OF LOUISIANA

Judgment rendered December 22, 2010.



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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C586301
Honorable Janice Clark, Judge

* * * * *

CHRISTOPHER J. DICHARRY
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PLAINTIFF-APPELLANT
DUPRE LOGISTICS, LLC

ATTORNEY FOR
DEFENDANT-APPELLEE
CYNTHIA BRIDGES, SECRETARY
DEPARTMENT OF REVENUE
STATE OF LOUISIANA

* * * * *

BEFORE: KUHN, PETTIGREW, JJ. , and KLINE, J., *pro tempore*.¹

KUHN, J CONCURS & ASSIGNS REASONS

¹ Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

PETTIGREW, J.

Dupre Logistics, LLC ("Dupre") appeals a judgment in favor of Cynthia Bridges, Secretary of the Louisiana Department of Revenue ("the Department"), sustaining the Department's exceptions raising the objections of no right of action and lack of subject matter jurisdiction and dismissing, with prejudice, its suit against the Department. For the following reasons, we reverse in part, affirm in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

According to the record, the Department determined that Dupre owed Louisiana Motor Vehicle Sales Taxes on the purchase of certain vehicles. By Notices of Assessment ("Notices") dated May 19, 2008, the Department sought to assess Dupre taxes in the total amount of \$171,664.62 (inclusive of interest and penalties) on the vehicles' purchased. On December 2, 2009, the Department filed a Notice of Levy and/or Garnishment to Dupre's bank listing the amounts due for the unpaid sales tax. On December 21, 2009, Dupre paid \$171,664.62 to the Department, under protest, pursuant to La. R.S. 47:1576(A)(1)(a).

Thereafter, Dupre filed the instant suit on January 11, 2010, for refund of the taxes it paid under protest. Dupre alleged that the assessments were invalid, that it did not become aware of the assessments until the Department initiated steps to begin seizing Dupre's property, that the Department failed to follow the statutorily-mandated procedures for the valid assessment of taxes and for the issuance of Notices, and that the Department's attempt to seize Dupre's assets was improper. In response to Dupre's petition, the Department filed exceptions raising the objections of no right of action, no cause of action, and lack of subject matter jurisdiction.

The exceptions were heard by the trial court on March 15, 2010, at which time the trial court heard arguments from both sides. The trial court overruled the Department's no cause of action exception, finding that Dupre stated a valid cause of action in its petition. With regard to the remaining issues, the trial court found that the assessments had become final at the time Dupre filed its petition for refund of taxes paid under protest. Thus, the trial court sustained the no right of action and lack of subject matter

jurisdiction exceptions and dismissed, with prejudice, Dupre's suit against the Department. A judgment in accordance with these findings was signed by the trial court on April 7, 2010.

This appeal by Dupre followed, wherein the following assignments of error were specified:

I. The Trial Court erred in granting the exception of no right of action where the allegations of the petition indicate that Dupre has a right of action and no evidence was introduced into the record to establish that Dupre did not have a right of action.

II. The Trial Court erred in granting the exception of lack of subject matter jurisdiction where the lack of subject matter jurisdiction does not appear on the face of Dupre's petition and no evidence was introduced into the record to establish that the district court lacks subject matter jurisdiction over this lawsuit.

NO RIGHT OF ACTION

Generally an action can only be brought by a person having a real and actual interest that he asserts. La. Code Civ. P. art. 681. The objection of no right of action tests whether the plaintiff who seeks relief is the person in whose favor the law extends a remedy. **Howard v. Administrators of Tulane Educational Fund**, 2007-2224, p. 16 (La. 7/1/08), 986 So.2d 47, 59. An exception pleading the objection of no right of action tests whether the plaintiff has any interest in judicially enforcing the right asserted. La. Code Civ. P. art. 927 A(6). **Louisiana State Bar Ass'n v. Carr and Associates, Inc.**, 2008-2114, p. 8 (La. App. 1 Cir. 5/8/09), 15 So.3d 158, 165, writ denied, 2009-1627 (La. 10/30/09), 21 So.3d 292. The objection 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. **Taylor v. Babin**, 2008-2063, p. 5 (La. App. 1 Cir. 5/8/09), 13 So.3d 633, 637, writ denied, 2009-1285 (La. 9/25/09), 18 So.3d 76.

Evidence supporting or controverting an objection of no right of action is admissible. **Jackson v. Slidell Nissan**, 96-1017, p. 6 (La. App. 1 Cir. 5/9/97), 693 So.2d 1257, 1261. The party raising a peremptory exception bears the burden of proof.

Falco Lime, Inc. v. Plaquemine Contracting Co., Inc., 95-1784, p. 5 (La. App. 1 Cir. 4/4/96), 672 So.2d 356, 359. To prevail on a peremptory exception pleading the objection of no right of action, the defendant must show that the plaintiff does not have an interest in the subject matter of the suit or legal capacity to proceed with the suit. **Jones v. McDonald's Corp.**, 618 So.2d 992, 995 (La. App. 1 Cir. 1993). Whether a plaintiff has a right of action is ultimately a question of law; therefore, it is reviewed *de novo* on appeal. **Jackson v. St. Helena Parish Sheriff's Dept.**, 2001-2792, p. 2 (La. App. 1 Cir. 11/8/02), 835 So.2d 842, 844.

SUBJECT MATTER JURISDICTION

Jurisdiction is the legal power and authority of a court to hear and determine an action of the parties and to grant the relief to which they are entitled. La. Code Civ. P. art. 1. Subject matter jurisdiction is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute or the value of the right asserted. La. Code Civ. P. art. 2. The issue of subject matter jurisdiction addresses the court's authority to adjudicate the cause before it. The issue may be raised at any time and at any stage of an action. **McPherson v. Foster**, 2003-2696, p. 8 (La. App. 1 Cir. 10/29/04), 889 So.2d 282, 288. If a lack of subject matter jurisdiction is not apparent on the face of the plaintiffs' petition, then the onus is on the defendant to offer evidence in support of the exception. La. Code Civ. P. art. 930; **Crockett v. State Through Dept. of Public Safety and Corrections**, 97-2528, p. 5 (La. App. 1 Cir. 11/6/98), 721 So.2d 1081, 1084, writ denied, 98-2997 (La. 1/29/99), 736 So.2d 838.

DISCUSSION

On appeal, Dupre argues that because the Department did not introduce any evidence into the record in support of its exceptions, it failed in its burden of proof and was not entitled to judgment in its favor. The Department asserts that because the tax assessments were final, the payment under protest procedure was no longer available to Dupre and Dupre had no right of action to challenge the assessments. The Department alleges further that Dupre's failure to appeal the assessments to the Board

of Tax Appeals and the assessments becoming final resulted in the trial court losing subject matter jurisdiction.

The record before us contains a memorandum in support of the Department's exceptions, which was supplemented with various exhibits. However, the record contains no evidence, and there is no indication in the transcript, minutes, or judgment that any of the attachments to the Department's memorandum were offered into evidence at the hearing on the exceptions.² Pursuant to La. Code Civ. P. art. 2164, an appellate court must render its judgment upon the record on appeal. The record on appeal is that which is sent by the trial court to the appellate court and includes the pleadings, court minutes, transcript, jury instructions, judgments and other rulings, unless otherwise designated. La. Code Civ. P. arts. 2127 and 2128; Official Revision Comment (d) for La. Code Civ. P. art. 2127. An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. **Our Lady of the Lake Hosp. v. Vanner**, 95-0754, p. 4 (La. App. 1 Cir. 12/15/95), 669 So.2d 463, 465. A court cannot consider exhibits filed into the record as attachments to a memorandum, because such attachments are not evidence. Since such attachments are not evidence, they are not properly part of the record on appeal. **Satterthwaite v. Byais**, 2005-0010, p. 6 (La. App. 1 Cir. 7/26/06), 943 So.2d 390, 395.

In this case, the Department had the burden of proving whether Dupre belonged to the class of persons to whom the law grants the cause of action asserted in the suit and whether the trial court had subject matter jurisdiction over the matter. Because we are not authorized by law to consider the Department's attachments to its memorandum in support of its exception and because the record before us contains no evidence submitted by the Department to support the exceptions, we find that the

² At the beginning of the record, the clerk's office inserted a page entitled, "CIVIL EVIDENCE LIST" that states: "NO EVIDENCE HAS BEEN FILED WITH THE CLERK OF COURT'S OFFICE AS OF JUNE 11, 2010." *Cf. Our Lady of the Lake Hosp. v. Vanner*, 95-0754, pp. 4-5 (La. App. 1 Cir. 12/15/95), 669 So.2d 463, 465, in which the minute entry and judgment reflected that evidence had been introduced at the exception hearing, but the record did not include any such evidence. This court remanded for an evidentiary hearing on the issue of whether the evidence had been introduced and for supplementation of the record with the evidence, if properly introduced.

Department failed to meet its burden of proof in this matter. Thus, the trial court was in error in sustaining the objections of no right of action and lack of subject matter jurisdiction.

CONCLUSION

For the above and foregoing reasons, we reverse that portion of the trial court's April 7, 2010 judgment that sustained the Department's no right of action and lack of subject matter exceptions and dismissed Dupre's suit with prejudice. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings. Appeal costs in the amount of \$1,188.32 are assessed against defendant-appellee, Cynthia Bridges, Secretary of the Louisiana Department of Revenue.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

DUPRE LOGISTICS, INC.


FIRST CIRCUIT

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 **KUHN, J., concurring.**

I do not believe the exceptions have merit regardless of whether the attachments are considered. Accordingly, I concur in the reversal.