NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0691

CAPITAL ONE, N.A.

VERSUS

SERVICE DOOR & MILLWORK, LLC, MICHAEL S. MARKS, EDGAR S. MILTON, IV, AND RALPH L. FLETCHER

DATE OF JUDGMENT: NOV - 9 2011

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
NUMBER 90,726, DIV. A, PARISH OF ASCENSION
STATE OF LOUISIANA

HONORABLE RALPH TUREAU, JUDGE

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Robert W. Barton Baton Rouge, Louisiana	Counsel for Third-party Defendants-Appellees Robert W. McBride and Masonite Corporation D/B/A Louisiana Millwork
Ralph L. Fletcher Anne Brunett Baton Rouge, Louisiana	Counsel for Defendants/Third-party Plaintiffs-Appellants Service Door & Millwork, Ralph L. Fletcher and Ralph L. Fletcher Properties

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KUHN, J.

Appellants Service Door & Millwork, LLC (Service Door), Ralph L. Fletcher (Fletcher), and Ralph L. Fletcher Properties, LLC (Fletcher Properties), appeal a judgment sustaining an exception of lis pendens and dismissing their third-party demands against appellees, Robert W. McBride (McBride) and Masonite Corporation D/B/A Louisiana Millwork (Louisiana Millwork). Appellants argue the district court erred because the two lawsuits at issue are based on completely different causes of action and involve different parties. For the following reasons, we affirm the district court judgment in part, reverse it in part, and remand.

FACTS AND PROCEDURAL BACKGROUND

On October 21, 2008, Louisiana Millwork filed a suit on open account in Calcasieu Parish against Service Door and Ralph Fletcher.[1] The petition alleges that Louisiana Millwork provided services and sold building materials to Service Door on an open account basis, the terms of which included a written credit agreement, and that Service Door failed to pay $136,092.12 due on the account, despite amicable demand. It further alleges that Fletcher personally guaranteed the obligations of Service Door.

Subsequently, Capital One, N.A., (Capital One) filed a suit on a promissory note and commercial guaranty in Ascension Parish against Service Door, Fletcher, and Fletcher Properties. The petition alleges that Service Door has refused, despite amicable demand, to pay the principal sum of $485,250.23 due on a

[1] The suit also named Edgar Milton, IV and Michael Marks as defendants. According to the briefs filed by appellants and appellees, Milton and Marks subsequently filed for bankruptcy protection and their debts were discharged in bankruptcy.

promissory note executed by Fletcher and others on behalf of Service Door. The petition further alleges that Fletcher executed a commercial guaranty in which he personally obligated himself for the indebtedness of Service Door to Capital One.

In response, the defendants filed answers and recoventional demands against Capital One. Additionally, Service Door, Fletcher, and Fletcher Properties each separately filed a third-party demand against Louisiana Millworks and McBride claiming damages due to breach of contract, material misrepresentations, detrimental reliance, and unfair debt collection acts. Specifically, appellants alleged that McBride, as an employee and part owner of Louisiana Millworks, encouraged the start up of Service Door and promised that Louisiana Millwork would extend credit to it for ninety days before payment was due for goods and services purchased. The alleged purpose of the ninety-day credit period was to allow the new business to go through three monthly billing cycles to collect from its customers before being required to pay Louisiana Millwork.

It is further alleged in the third-party petitions that, after Service Door began operations, McBride advised them that, after talking to the co-owners of Louisiana Millwork, interest-free credit could be extended to Service Door for only sixty days, rather than ninety. According to the petitions, the invoice received from Louisiana Millwork after Service Door's first order actually only allowed it twenty-seven days of interest-free credit, after which large amounts of interest became due. The petitions allege that Service Door was never able to get into a firm financial position due to the alleged material misrepresentations by McBride and breach of contract by Louisiana Millwork and was forced to go out of business. They further allege that McBride made the misrepresentations in an

attempt to generate additional business for Louisiana Millwork so that he could sell his interest in Louisiana Millwork for greater gain.

Additionally, in his third-party petition, Fletcher alleges that, had he known that Louisiana Millwork would not extend ninety days credit, he never would have invested in or participated in the formation of Service Door. In its petition, Service Door also alleges it never would have been formed if Fletcher and the other investors had known that Louisiana Millwork would not extend ninety-days credit. In its third-party petition, Fletcher Properties additionally alleges that it sustained a loss of rental revenue from the premises it formerly leased to Service Door as a result of that business' demise.

In response to the third-party demands, McBride and Louisiana Millwork filed a declinatory exception raising the objection of lis pendens, arguing that the demands arose from the same transaction or occurrence as the suit on open account filed by Louisiana Millwork in Calcasieu Parish. Following a hearing, the district court agreed and sustained the exception of lis pendens. A written judgment in accordance with that ruling was signed. In its written reasons for judgment, the district court stated:

> A comparison of the third party demands filed herein and the suit filed by Masonite/Louisiana Millwork in Calcasieu Parish establish [sic] that Louisiana Millwork sued Service Door and Ralph Fletcher in the Calcasieu lawsuit for the exact same business transaction now raised in the third party demand in the Ascension lawsuit by Ralph Fletcher, Fletcher Properties, and Service Door. Both suits involve the same parties and the same transaction or occurrence. As such, the declinatory exception of lis pendens is proper.

Upon lodging of the appellate record in this matter, this Court determined that the district court judgment was defective in that it lacked proper decretal

language disposing of and/or dismissing the claims of petitioners. This Court, *ex proprio motu*, issued an order remanding this matter to allow the district court to sign an amended judgment containing proper decretal language. On August 2, 2011, the district court signed an amended judgment complying with this order.

LAW

Under La. C.C.P. art. 531, when two or more suits are pending in Louisiana Courts "on the same transaction or occurrence, between the same parties in the same capacities," the defendant may have all but the first suit dismissed by filing a declinatory exception raising the objection of lis pendens. See La. C.C.P. art. 925A(3). Since the requirements for establishing lis pendens conform to the requirements of res judicata, the test for lis pendens is whether a final judgment in the first suit would be res judicata in the subsequently filed suit. See ***Martin v. ANR Pipeline Company***, 11-0751, p. 5 (La. App. 1st Cir. 8/23/11), ____ So.3d ____; ***Newman v. Newman***, 96–1062, pp. 4–5 (La. App. 1st Cir. 3/27/97), 691 So.2d 743, 745.

Under La. R.S. 13:4231, res judicata bars relitigation of a subject matter arising from the same transaction or occurrence as a previous suit.[2] In determining whether this requirement is met, the crucial inquiry is not whether the second suit is based on the same cause of action as the first suit, but whether the second suit asserts a cause of action that arises out of the same transaction or occurrence that

[2] Prior to the amendments to Louisiana res judicata law that became effective in 1991, a judgment in a prior suit precluded a second suit only if it involved the same parties, the same cause of action, and the same object of demand as the prior suit. However, under La. R.S. 13:4231, as amended, res judicata now bars relitigation of a subject matter arising from the same transaction or occurrence as a previous suit. See ***Leon v. Moore***, 98-1792, p. 4 (La. App. 1st Cir. 4/1/99), 731 So.2d 502, 504, ***writ denied***, 99-1294 (La. 7/2/99), 747 So.2d 20.

was the subject matter of the first suit. See ***Leon***, 98-1792 at p. 4, 731 So.2d at, 504.

An identity of parties exists whenever the same parties, their successors, *or others* appear, so long as they share the same quality as parties. ***Mandalay Oil & Gas, L.L.C. v. Energy Development Corporation***, 01-0993, pp. 16-17 (La. App. 1st Cir. 8/4/04), 880 So.2d 129, 140, ***writ denied***, 04-2426 (La. 1/28/05), 893 So.2d 72. Thus, the jurisprudence does not require that the parties in the two lawsuits be physically identical as long as they share the same quality as parties. ***Welch v. Crown Zellerbach Corporation***, 359 So.2d 154, 156 (La. 1978); ***Jensen Construction Company v. Department of Transportation and Development***, 542 So.2d 168, 171 (La. App. 1st Cir.), ***writ denied***, 544 So.2d 408 (La. 1989). In considering whether an identity of parties existed for res judicata purposes, the Louisiana Supreme Court stated in ***Mandalay***, 01-0993 at p. 19, 880 So.2d at 142, that the preclusive effect of a judgment binds the parties to the action, *as well as those nonparties who are deemed "privies" of the parties* in circumstances where "the nonparty's interests were adequately represented by a party to the action, who may be considered the 'virtual representative' of the nonparty, because the interests of the party and the nonparty are so closely aligned."

LIS PENDENS

In their first assignment of error, appellants/third-party plaintiffs, Service Door, Fletcher, and Fletcher Properties, argue that the district court erred in sustaining the exception of lis pendens because: 1) the causes of action in the two suits are completely different; and 2) the parties in the two suits are not the same.

In arguing that the two suits involve entirely different types of litigation and causes of action, appellants point to the fact that the Calcasieu suit is a suit on an open account, while the Ascension suit is an action on a promissory note and bank credit line. However, this argument is flawed in that it compares the principal demand made by Capital One in the Ascension suit to the demands made in the Calcasieu suit, even though the exception of lis pendens is directed only at the third-party demands made in the Ascension suit. Thus, the proper analysis is to compare only the third-party demands made in the Ascension suit with those made in the Calcasieu suit. See ***United General Title Ins. Co. v. Casey Title, Ltd.***, 01-600, p. 8 (La. App. 5th Cir. 10/30/01), 800 So.2d 1061, 1065-66.

When a comparison of the demands in the Calcasieu suit is made to the third-party demands in the Ascension suit, it is clear that, even though the causes of action are different, all of the demands arise out of the open account credit agreement between Louisiana Millwork and Service Door. In the Calcasieu suit, Louisiana Millwork is seeking to recover sums allegedly due on the open account. At the same time, the third-party plaintiffs, Service Door, Fletcher, and Fletcher Properties, are seeking damages in the Ascension suit based on an alleged breach of contract, misrepresentations, detrimental reliance, and unfair debt collection practices that are all related to the same open account and credit agreement. Accordingly, the district court correctly concluded that the requirement that the two suits be based on the same transaction or occurrence was met in this case.

Appellants further argue that the requirement of an identity of parties is not present, because the parties in the Calcasieu and Ascension suits are different. In particular, they note that neither Capital One, McBride, nor Fletcher Properties (all

parties in the Ascension lawsuit) are parties in the Calcasieu suit. Accordingly, appellants contend the exception of lis pendens was improperly sustained.

As we have already noted, the proper analysis in the instant case is to compare the third-party demands in the Ascension suit to the demands in the Calcasieu suit. Thus, appellant's arguments regarding Capital One are meritless, since Capital One is not a party involved in the third-party demands, but only in the principal demand in the Ascension suit.

Another flaw in appellant's argument is the contention that Fletcher Properties is an additional party included in the third-party demands, although it is not a party in the Calcasieu suit. In fact, a review of the pleadings filed in the Ascension suit reflects that each of the appellants filed a separate third-party petition in which he or it was the sole named third-party plaintiff.[3] Therefore, Fletcher Properties is not a party to the respective third-party demands filed by either Service Door or Fletcher. Accordingly, McBride is actually the only additional party in the third-party demands filed by Service Door and Fletcher who was absent from the Calcasieu suit.

Nevertheless, even though McBride was not physically a party to the Calcasieu suit, this fact alone does not necessarily defeat the exception of lis pendens. It is not essential that the parties in the two suits be physically identical as long as they share the same quality as parties. ***Welch***, 359 So.2d at 156; ***Jensen***, 542 So.2d at 171. In ***Jensen***, this Court held that where parties shared

[3] Accordingly, the only parties in Service Door's third-party demand are Service Door, McBride, and Louisiana Millwork; the only parties in Fletcher's third-party demand are Fletcher, McBride, and Louisiana Millwork; the only parties in Fletcher Properties' third-party demand are Fletcher Properties, McBride, and Louisiana Millwork.

identical interests in the lawsuit, the physical absence of one of the parties in the first lawsuit does not preclude an identity of parties.

For example, in ***Bowman v. Liberty Mut. Ins. Co.***, 149 So.2d 723, 726 (La. App. 1st Cir. 1963), this Court held that an identity of parties existed where, even though an employee was not named as a party in the prior suit, his employer was so named. In reaching this conclusion, this Court noted that the allegations upon which relief was sought against the employer were based on the employee's negligence while acting within the scope of his employment. Similarly, in ***Louisiana Cotton Ass'n Workers' Compensation Group Self-Insurance Fund v. Tri-Parish Gin Co., Inc.***, 624 So.2d 461, 464 (La. App. 2d Cir. 1993), the Second Circuit held that the identities of two employees were virtually merged into one with the identity of their employer where there were no allegations that the employees acted outside the scope of their employment so as to render their capacity anything other than that of employees. See also ***Middleton v. Parish of Jefferson***, 97-324, pp. 7-8 (La. App. 5th Cir. 1/14/98), 707 So.2d 454, 457, ***writ denied***, 98-0403 (La. 3/27/98), 716 So.2d 896 (an identity of persons existed between a corporation and its president).

In the instant case, an examination of the pertinent petitions reveals that, while he was not a party in the Calcasieu suit, McBride shared an identity of interests with Louisiana Millwork. The basis of the Calcasieu suit was an open account credit agreement that the appellants allege McBride was instrumental in negotiating in his capacity as an employee and co-owner of Louisiana Millwork. Therefore, his interests in upholding the validity of that credit agreement and enforcing its terms are identical to that of Louisiana Millwork. In fact, appellants'

allegations against McBride are made against him in his capacity as an employee and co-owner of Louisiana Millwork. Given these circumstances, we believe the interests of McBride and Louisiana Millwork are so closely aligned that an identity of parties exists between them for purposes of lis pendens. Therefore, the district court properly sustained the exception of lis pendens as to the third-party demands filed in the Ascension suit by Service Door and Fletcher, who are also parties in the Calcasieu suit arising from the same open account credit agreement.

However, we find that the district court erred in dismissing Service Door's and Fletcher's third-party demands without providing that the dismissals were without prejudice. The function of a declinatory exception is to decline the jurisdiction of the court, but it does not tend to defeat the action. La. C.C.P. art. 923; ***Dupre v. Floyd***, 02-0153, p. 3 (La. App. 1st Cir. 12/20/02), 845 So.2d 370, 371. Hence, a dismissal with prejudice is generally contrary to the underlying rationale of a declinatory exception, since such an exception should not defeat the action. ***Dupre***, 02-0153 at pp. 3-4, 845 So.2d 370 at 371. Furthermore, we note that counsel for both appellants and appellees acknowledged at oral arguments before this Court that the dismissals herein should have been without prejudice. Accordingly, the district court judgment will be amended to provide for dismissal without prejudice of the third-party demands of Service Door and Fletcher.

An entirely different situation is presented with respect to the third-party demand filed in the Ascension suit by Fletcher Properties, which is not a party to the suit pending in Calcasieu Parish. In addition to being a nonparty to the Calcasieu suit, no showing was made that Fletcher Properties is a privy of any of the parties to that suit, or that its interests are so closely aligned with any of those

parties that it should be considered the same party for lis pendens purposes. Accordingly, since an identity of parties was not established, the district court erred in sustaining the exception of lis pendens with respect to the third-party demand of Fletcher Properties.

RULE 9.5 VIOLATION

In their second assignment of error, appellants contend the district court violated Rule 9.5 of the Uniform Rules of District Court by preparing and signing the judgment sustaining the exception of lis pendens prior to the October 6, 2010 hearing held on the exception. Appellants also attempt to attach significance to the fact that the judgment was incorrectly dated 2009 instead of 2010.

Initially, we note that, since the exception of lis pendens was not filed until June 2010, the inclusion of the 2009 date on the judgment was an obvious typographical error and, as such, is of no moment. Further, the record does not support appellant's assertion that the district court violated Rule 9.5. The record reveals that the district court rendered judgment immediately following argument of counsel, and also handed out its reasons for judgment at that time. In doing so, the district court specifically noted that counsel had raised no arguments other than those contained in their memoranda. However, even though the court clearly prepared a judgment and written reasons based on the arguments made in counsel's memorandums prior to the hearing, there is no indication the court signed the judgment before hearing arguments and determining that counsel had nothing new to present at the hearing. Moreover, Rule 9.5 provides that if a judgment is not immediately signed upon its rendition, a party who later presents a proposed judgment to the court must first circulate that judgment to all parties at

least three working days prior to its presentation to the court. Thus, Rule 9.5 imposes an obligation upon the parties, rather than upon the district court. In any event, we believe this assignment of error is moot due to the fact that, as previously noted, the district court signed an amended judgment in this case on August 2, 2011.

CONCLUSION

For the above reasons, the portion of the district court judgment sustaining the exception of lis pendens and dismissing the third-party demands of Fletcher and Service Door is hereby amended to provide that the dismissals shall be without prejudice and, as amended, that portion of the judgment is affirmed. However, the portion of the district court judgment sustaining the exception of lis pendens and dismissing the third-party demand of Fletcher Properties is hereby reversed, and this matter is remanded to the district court for further proceedings consistent with this opinion. One-half of the costs of this appeal are to be paid by Fletcher and Service Door, and the other one-half of the costs are to be paid by McBride and Louisiana Millwork.

AFFIRMED IN PART, AS AMENDED; REVERSED IN PART; AND REMANDED.