

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2012 CA 0540**

**MARLA B. WHITTINGTON**

**VERSUS**

**HOSPICE CARE SERVICES OF LOUISIANA, L.L.C.**

Judgment Rendered: **FEB 25 2013**

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On Appeal from the 19th Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Docket No. 559,169, Section 24

The Honorable R. Michael Caldwell, Judge Presiding

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**BEFORE: PARRO, HUGHES, AND WELCH, JJ.**

**HUGHES, J.**

This is an appeal of a judgment that sustained exceptions of no right of action. For the reasons that follow, we reverse in part and remand.

**FACTS AND PROCEDURAL HISTORY**

This suit arose as an action for damages for the alleged wrongful termination of Ms. Marla Whittington's employment by Hospice Care Services of Louisiana, L.L.C. (Hospice Care). The trial court initially rendered summary judgment in favor of Hospice Care, but this court reversed that judgment on September 10, 2010, and remanded the case to the trial court for further proceedings. **Whittington v. Hospice Care Services of Louisiana, L.L.C.**, 10-0206 (La. App. 1 Cir. 9/10/10) (unpublished).

On December 31, 2009, during the pendency of the summary judgment appeal, an "Assignment of LLC Membership Right" was executed by Hospice Care's only members, Richard and Linda Mahoney. In that assignment, the Mahoneys transferred 100% of their membership interest in Hospice Care to Dynafab, USA, L.L.C. (Dynafab) and resigned employment with Hospice Care and as managers of Hospice Care.

Dynafab consisted of a sole member and manager, Mr. Randal A. Gomez. Mr. Gomez was also the managing member of Life Hospice, L.L.C. (Life Hospice), which he co-owned with Mr. David E. Roberts. On June 1, 2010 Mr. Gomez executed an "Asset Sale Agreement with Assumption of Certain Liabilities," wherein Hospice Care, through Mr. Gomez, as managing member, transferred to Life Hospice, through Mr. Gomez, as its managing member, the following:

1. Hospice Care's DHH license;
2. All furniture, fixtures, equipment, inventory, and supplies located at Hospice Care;

3. All of Hospice Care's patient records, software and records for billing; and
4. Hospice Care's right to receive all outstanding payments due from Medicare.

The sale agreement further stated that "[Life Hospice] shall not be deemed to have assumed any obligation or liability of [Hospice Care] other than the Medicare Overpayment described above." As a result of the assignment and sale, Hospice Care remained a limited liability company in good standing, but was left without any assets. Thus, Ms. Whittington supplemented and amended her pleadings to add Dynafab, Life Hospice, and Mr. Gomez as additional defendants in the suit, alleging that they had conspired to defraud her. Life Hospice filed an exception, raising the objection of no right of action; Dynafab and Mr. Gomez also filed exceptions, raising the objections of no right of action, no cause of action, and vagueness. The hearing on the exceptions and the trial on the merits were held the same day. Prior to the trial, the court rendered judgment on the exceptions, sustaining the exceptions of no right of action raised by Dynafab, Mr. Gomez, and Life Hospice, and denying the exceptions of no cause of action and vagueness raised by Dynafab and Mr. Gomez. The judgment on the exceptions was signed on July 12, 2011. Ms. Whittington appeals and assigns error to the trial court's ruling sustaining the exceptions of no right of action.<sup>1</sup>

At the conclusion of the trial, the court ruled in favor of Ms. Whittington on the merits of her wrongful termination claim and found that

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<sup>1</sup>On appeal, Ms. Whittington also makes the following assignments of error: 1) The trial court erred in finding that Ms. Whittington did not have a right of action against Life Hospice, as the successor-in-interest to Hospice Care; 2) The trial court erred in finding that Dynafab became a member of Hospice Care; and 3) The trial court erred in finding that Hospice Care's liabilities did not shift with its assets under the continuation doctrine. Because we conclude herein that Ms. Whittington's assignment of error regarding the exception of no right of action has merit, we preterm discussion of the other assignments of error.

Hospice Care was liable to her for damages in the amount of \$151,265.00.

That judgment was signed on July 26, 2011 and was not appealed.

### LAW AND ANALYSIS

The exceptions of no cause of action and no right of action are often confused, but are separate and distinct. One of the primary differences between the two exceptions lies in the fact that the focus in an exception of no cause of action is on whether the law provides a remedy against a 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. **Robertson v. Sun Life Financial**, 09-2275 (La. App. 1 Cir. 6/11/10), 40 So.3d 507, 511. The function of the exception urging 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. **Robertson**, 40 So.3d at 511. 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. **Robertson**, 40 So.3d at 511.

In this case, Ms. Whittington's pleadings state a cause of action for damages as a result of her wrongful termination. As the person wrongfully terminated, there is no question that she belongs to the class that has a legal interest in the subject matter of the litigation (*i.e.*, to pursue a judgment for the damages she herself sustained.) Thus, she has stated a valid right of action and the trial court erred in sustaining that exception. Accordingly, we must reverse the trial court's judgment in that respect. Because the trial court's ruling denying the exceptions of no cause of action and vagueness raised by Dynafab and Mr. Gomez were not appealed, those issues are not before us for review.

## **CONCLUSION**

For the foregoing reasons, the portion of the judgment sustaining the exceptions of no right of action in favor of Dynafab USA, L.L.C., Randal A. Gomez, and Life Hospice, L.L.C. is reversed. This case is remanded to the trial court for further proceedings. Costs of this appeal are assessed to the defendants/appellees, Dynafab USA, L.L.C., Life Hospice, L.L.C., and Mr. Randal A. Gomez.

**REVERSED IN PART AND REMANDED.**