

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1882

ROBERT L. LUCIEN

VERSUS

ENERGY OF LOUISIANA, LLC AND  
ABC PROFESSIONAL TREE SERVICE, INC.

**Judgment Rendered: June 7, 2013**

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APPEALED FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT,  
IN AND FOR THE PARISH OF ST. HELENA  
STATE OF LOUISIANA  
DOCKET NUMBER 21263

HONORABLE BRENDA BEDSOLE RICKS, JUDGE

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**BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.**

*J.P.* Pettigrew, J. concurs.

**McDONALD, J.**

Plaintiff-appellant appeals the dismissal with prejudice of his lawsuit. For the following reasons, we affirm.

**FACTS**

On January 28, 2011, plaintiff filed suit against Entergy Louisiana L.L.C. (Entergy) and ABC Professional Tree Services, Inc. (ABC) alleging that some time in January 2010 a Yamaha Grisly 4 Wheeler was removed from a building on his property on the same day that tree trimming work along the power lines on his property was done by ABC. Plaintiff alleges that after ABC completed its work, the gate surrounding an enclosed building protecting the vehicle was left open and the vehicle was stolen. Plaintiff contends that but for the negligence and/or direct actions of defendants, his vehicle would not have been taken.

It is further alleged that Entergy and ABC are jointly responsible because they were and are partners in business, and Entergy commissioned the services of ABC to work on plaintiff's property "on the day and time" that plaintiff's vehicle disappeared. It is alleged that ABC breached its duty of care when it failed to secure the premises upon leaving, which resulted in plaintiff's vehicle being taken. Entergy is responsible by virtue of its business relationship with ABC and is responsible for ABC's failure to carry out procedures that would have secured plaintiff's property.

On April 19, 2011, before conducting any discovery, plaintiff filed a motion for summary judgment. It was set to be heard on June 24, 2011. ABC's counsel had a longstanding conflict on that date. When plaintiff's counsel was contacted regarding the hearing, she originally agreed to a continuance to the next available court date, and signed a joint motion for continuance to reset the summary judgment hearing. However, she subsequently changed her mind and advised counsel for ABC that she was opposed to the continuance. A motion for

continuance was filed by ABC, which the trial court granted, and the hearing was reset for August 26, 2011.

On June 17, 2011, defendant, ABC, mailed interrogatories and requests for production to plaintiff's counsel. Defense counsel subsequently filed a Rule 10.1 certification that he had written to plaintiff's counsel on July 20, 2011, requesting a telephone conference on July 28, 2011, to amicably resolve the discovery issues, and plaintiff's counsel did not participate. On August 15, 2011, a motion to compel discovery was filed. A rule for the plaintiff to show cause why he should not be compelled to respond to the interrogatories and request for production of documents was ordered to be heard on October 21, 2011.

After the hearing on October 21, 2011, the court ordered plaintiff to respond to discovery. A judgment was signed by the trial court on February 15, 2012, ordering that plaintiff had thirty days in which to respond to defendant's discovery requests. Plaintiff's motion for summary judgment was continued without date.

Not having received any response to its discovery requests, on March 2, 2012, ABC filed a motion to dismiss for failure to comply with discovery order or alternatively a motion for summary judgment.

The hearing on this motion was held on June 22, 2012. Entergy's legal counsel was present and advised the court that ABC's legal counsel represented both Entergy and ABC in this matter, and that Entergy concurred in ABC's motions. Plaintiff's counsel was not present. The trial court asked a clerk representing the clerk of court whether service had been made on plaintiff. The clerk stated that personal service had been made on plaintiff's counsel on March 15, 2012.

ABC's counsel told the trial court that nothing had been received in response to the trial court's October 21, 2011 order regarding discovery requests. Further, ABC's counsel stated that she had been unable to contact plaintiff's

counsel. When she called the office, no one answered and she was not provided the opportunity to leave a message. A copy of the motion and exhibits were introduced into the record. ABC's counsel represented that it had not received a title or evidence that plaintiff owned the vehicle in question. She also pointed out that the timeline indicated that ABC and Entergy were on plaintiff's property on January 14, 2010, doing some maintenance work. According to plaintiff's petition for damages, it was alleged that when they left the property, the gate was left open, resulting in plaintiff's Yamaha Grisly 4-wheeler vehicle being taken. The vehicle had been stored for years prior to the defendants' presence on the property; plaintiff did not call the sheriff to report that the vehicle had been stolen until February 1, 2010.

The trial court granted the motion. ABC's counsel advised the court that she would draft and circulate a judgment. Subsequently, the judgment was signed granting defendants' motion to dismiss for failure to comply with discovery order or alternatively, motion for summary judgment, and dismissing plaintiff's claims with prejudice.

Thereafter, plaintiff's attorney filed a motion to strike or for a new trial, which the trial court denied. The judgment rendered on June 22, 2012, and signed July 19, 2012, appealed by plaintiff's original counsel, is the matter we are addressing.

## **DISCUSSION**

Plaintiff<sup>1</sup> alleges that the trial court committed manifest error when the court held the hearing on the defendant-appellee's motion for summary judgment because plaintiff-appellant did not have representation by legal counsel. The plaintiff further asserts, that the trial court was informed of plaintiff's lack of

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<sup>1</sup> This appeal was briefed by a different counsel from the one who originally represented plaintiff.

professional representation in advance of the hearing. Therefore, plaintiff maintains he was denied a fair hearing in violation of his constitutional rights. It is also alleged that the trial court's denial of the motion for a new trial was a denial of procedural due process and that there were motions from both parties that are unresolved.

The facts in the matter before us reveal that after filing the original petition, plaintiff failed to make a good faith effort to comply with discovery. ABC's counsel confirmed that the interrogatories and requests for production were unanswered, even after the trial court's order of October 21, 2011, giving plaintiff thirty additional days to comply. Defendant noted that there were some telephone conversations with opposing counsel, but there was never any formal response to its discovery requests. Additionally, the necessary documentation that would have established ownership in the vehicle allegedly taken was never received.

Plaintiff, Robert Lucien, addressed correspondence dated June 27, 2012, to Kimberly Anderson, ABC's counsel who had filed the motion for dismissal and for summary judgment. In his letter, he informed her that he had received her proposed judgment of the trial court's order granting the motions heard on June 22, 2012. He implored her to give him a chance to offer a defense as he was unrepresented at the hearing and lost by default. Also, his motion for new trial, which was denied, was premised on having been unrepresented at the hearing.

We note that the plaintiff alleges he noticed the vehicle was removed on "the same day that the tree trimming was done by defendants." Entergy and ABC are alleged to be jointly responsible because they are partners in business and "[Entergy] commissioned the work and services of [ABC] on [p]laintiff's property on the day and time that [p]laintiff's property disappeared." There are no facts establishing that the vehicle disappeared on the "same day and time" that

defendants were on plaintiff's property. In fact, the theft of the vehicle was not reported to the Sheriff's Office until February 1, 2010.

The Code of Civil Procedure provides ample directions concerning discovery and the failure to respond, at all or ineffectively. See La. C.C.P. arts. 1420 – 1475. The jurisprudence fully substantiates the necessity to use dismissal sparingly and as a last resort. See *Hutchinson v. Westport Ins. Corp.*, 04-1592, p. 2 (La. 11/08/04), 886 So.2d 438, 440; *Lirette v. Babin Farms, Inc.*, 02-1402, p. 3 (La. App. 1 Cir. 4/2/03), 843 So.2d 1141, 1143. The plaintiff maintains that the proceeding against him is unjust. Defendant asserts that the inaction of plaintiff warrants harsh sanctions. However, regardless of our findings on dismissal, we are left with a grant of summary judgment to consider. More to the point, it is not only plaintiff who is entitled to justice.

The record indicates that the defendants responded to every communication by plaintiff. On the other hand, plaintiff failed to respond to any of defendants' attempts to get information, and also failed to attend any hearings to explain his position. Defendants maintain that "[p]laintiff's failure to cooperate in discovery made it impossible for the defense to proceed and placed the defense at a disadvantage if they had to try the case without the discovery."

At the June 22, 2012, dismissal/summary judgment hearing, neither plaintiff nor his counsel was present, although the trial court verified that notice had been served on plaintiff's counsel. Louisiana Code of Civil Procedure art. 966(A)(2) provides that "The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action.... The procedure is favored and shall be construed to accomplish these ends." The code also provides that it is not necessary to negate all elements of the adverse party's claim, "but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim." La. C.C.P. art. 966 (C)(2).

Among the speculative allegations with no evidence to confirm, there was no evidence that plaintiff owned the property he claimed was taken, an essential element of his claim.

We have conducted a *de novo* review of this record as is required when an appellate court reviews a trial court's judgment on a motion for summary judgment. See *Yokum v. 615 Bourbon Street, L.L.C.*, 07-1785, p. 25 (La. 2/26/08), 977 So.2d 859, 876. The motion to file a late brief is granted and the brief is made part of the record.

We find no error by the trial court and concur in its judgment granting the motion for summary judgment. Accordingly, the judgment appealed is affirmed. Costs are assessed against plaintiff, Robert Lucien.

**AFFIRMED; MOTION GRANTED.**