

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0379

DONALD LEE HEINE, M.D.

VERSUS

WAYNE J. PHARO, INDIVIDUALLY, WAYNE J. PHARO, M.D., A
PROFESSIONAL MEDICAL CORPORATION, AND HEART
CENTER OF LAFOURCHE AND ABC INSURANCE COMPANY

Judgment Rendered: NOV 01 2013

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On Appeal from the
17th Judicial District Court,
In and for the Parish of Lafourche,
State of Louisiana
Trial Court No. 90672

Honorable Jerome J. Barbera, III, Judge Presiding

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

On February 1, 1998, plaintiff, Donald Lee Heine, M.D. and defendant, Wayne J. Pharo, M.D., entered into a Physician Employment Agreement and partnership. The Agreement was mutually terminated in May 1999. On February 13, 2001 Dr. Heine filed a "Petition for Breach of Contract, Damages, and Temporary Restraining Order" against Wayne J. Pharo, M.D., individually, Wayne J. Pharo, A Professional Medical Corporation, and the Heart Center of Lafourche. In his petition, Dr. Heine contends that defendants breached the terms of the Agreement "in failing to provide [Dr. Heine] with an accounting of all income received by the Heart Center of Lafourche and by failing to remit all monies due and owing plaintiff pursuant to the [Agreement]." Dr. Heine further alleges defendants "breached the fiduciary responsibility in failing to properly and timely file insurance claims, failing to appeal disallowed medical claims and insurance claims and in failing to properly maintain an accounts receivable account."

On August 10, 2012, defendants filed a motion for summary judgment contending there were no genuine issues of material facts and, therefore, they were entitled to summary judgment. In support of defendants' motion for summary judgment, they attached an affidavit of Dr. Pharo stating that per the Agreement, Dr. Heine received an accounting of all the income, and Dr. Pharo timely filed insurance claims and appealed disallowed medical claims and insurance claims that had been discovered in accordance with his standard operating policy and procedures during the period of employment with Dr. Heine.

The motion for summary judgment was heard on October 15, 2012. Dr. Heine did not introduce any evidence in opposition. Judgment was signed on October 28, 2012, granting summary judgment in favor of defendants and dismissing Dr. Heine's claims with prejudice. It is from this judgment that Dr. Heine has appealed, contending that the trial court erred.

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. **Gonzales v. Kissner**, 2008-2154 (La. App. 1st Cir. 9/11/09), 24 So.3d 214, 217. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. P. Art. 966(B). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. Code Civ. P. art. 966(A)(2); **Aucoin v. Rochel**, 2008-1180 (La. App. 1st Cir. 12/23/08), 5 So.3d 197, 200, writ denied, 2009-0122 (La. 3/27/09), 5 So.3d 143.

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must 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, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. Code Civ. P. art. 966(C)(2); **Robles v. ExxonMobile**, 2002-0854 (La. App. 1st Cir. 3/28/03), 844 So.2d 339, 341.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Boudreaux v. Vankerkhove**, 2007-2555 (La. App. 1st Cir. 8/11/08), 993 So.2d 725, 729-730. An appellate court thus asks the same questions as does the trial court in

determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. **Ernest v. Petroleum Service Corp.**, 2002-2482 (La. App. 1st Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 2003-3439 (La. 2/20/04), 866 So.2d 830.

After a *de novo* review of the record, we find that defendants satisfied their initial burden of proof on the motion for summary judgment with Dr. Pharo's affidavit. Dr. Heine failed to produce any factual support to establish that he will be able to satisfy his evidentiary burden of proof at trial.

Louisiana Civil Code article 1831 provides in pertinent part "A party who demands performance of an obligation must prove the existence of the obligation." Dr. Heine introduced no evidence at the summary judgment hearing. The Agreement that defendants allegedly breached is not in the record. The petition indicates that Dr. Heine attached a copy of the Agreement to his petition, however it is not attached to the petition, and no party offered it into evidence at the hearing. Arguments and pleadings are not evidence. **In re Melancon**, 2005-1702 (La. 7/10/06), 935 So.2d 661, 666. Thus, not only did Dr. Heine fail to produce any evidence that defendants breached the Agreement; he also failed to prove the existence of the obligation on the part of the defendants.

When a motion for summary judgment is made and supported as provided in La. Code. Civ. P. art. 967, an adverse party may not rest on the mere allegations or denials of his pleadings, but must respond with affirmative evidence. See Thomas v. Hodges, 2010-0678 (La. App. 1st Cir. 10/29/10), 48 So.3d 1274, 1281, writ denied, 2010-2637 (La. 2/11/11), 54 So.3d 1109.

Dr. Heine failed to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. See La. Code Civ. Proc. art. 966(C)(2). The record is devoid of any evidence that defendants breached any Agreement. Therefore, the motion for summary judgment was properly granted.

For the foregoing reasons, the judgment of the trial court is affirmed. All costs of this appeal are assessed to plaintiff-appellant, Dr. Donald Lee Heine.

AFFIRMED.