

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

*WDM
JEW*

NUMBER 2013 CA 1499

FLOYD P. DONLEY, SR.

VERSUS

HUDSON'S SALVAGE LLC & EMPLOYEES
(LOIS PELTIER, JERRY HOLLIFIELD, JOHN DOE, LINDA COX,
VELMA ELAINE HINGLE AND ALAN SPALLINGER)

Judgment Rendered: MAR 21 2014

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Number 2009-0004174

The Honorable Bruce C. Bennett, Judge Presiding

Floyd P. Donley
Amite, LA

In Proper Person/Appellant

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Metairie, LA

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Hudson's Salvage, LLC

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Lois Peltier, Jerry Hollifield, Linda
Cox, Velma Elaine Hingle & Alan
Spallinger

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, J.J.

Crain, J concurs in result

WHIPPLE, C.J.

This matter is before us on appeal by plaintiff, Floyd P. Donley, from a judgment of the trial court revoking plaintiff's right to proceed *in forma pauperis*. For the reasons that follow, we amend, and as amended, affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff herein has filed several actions arising from an incident that allegedly occurred on September 24, 2008, at the Dirt Cheap Store, which is owned and operated by Hudson Salvage, LLC, in Amite, Louisiana.¹ This particular action, involves a suit against Hudson Salvage, LLC, Hudson's Insurance Carrier, and its employees, Linda Cox, Velma Elaine Hingle, Angie Carter, and Alan Spallinger, as well as Lois Peltier and Jerry Holifield, two of Hudson's managerial employees in its Hattisburg, Mississippi headquarters office, (collectively referred to herein as "the defendants").²

On December 1, 2009, plaintiff filed a pro se petition for damages against the defendants. After submitting an income and expense affidavit, on December 2, 2009, the trial court signed an order allowing plaintiff the right to proceed *in forma pauperis*.³

On March 11, 2013, the defendants in this protracted litigation⁴ filed a motion to traverse plaintiff's right to litigate as an indigent. Therein, the defendants contended that in July of 2009, plaintiff and his wife created a trust

¹See Donley v. Acadian Ambulance Service, 2011-1289 (La. App. 1st Cir. 3/23/12)(unpublished opinion) and Donley v. Reid, 2010-1217 (La. App. 1st Cir. 12/22/10)(unpublished opinion), writ denied, 2011-0208 (La. 3/25/11), 61 So. 3d 669, cert. denied, ___ U. S. ___, 132 S. Ct. 113, 181 L. Ed. 2d 38 (2011).

²The extensive facts and protracted procedural history of this matter are more fully developed in the companion case to this appeal, Donley v. Hudson's Salvage, LLC, 2013-1498 (La. App. 1st Cir. ___/___/___) (unpublished opinion), also handed down this date.

³*In forma pauperis* is defined as "[i]n the manner of an indigent who is permitted to disregard filing fees and court costs." Black's Law Dictionary 783 (7th ed. 1999).

⁴See also Donley v. Hudson's Salvage, LLC, 2010-1315 (La. App. 1st Cir. 12/22/10)(unpublished opinion).

and donated their home, consisting of a 4,900 square foot house, and improvements located on over seven acres of land, to the trust, reserving a usufruct and homestead on the property. Defendants further contended that plaintiff and his wife were the named settlors and sole beneficiaries of the trust. Defendants contended that shortly after the trust was created, plaintiff began to file civil suits in state and federal court alleging that he is indigent, when in truth and in fact, he is not. In support of the motion to traverse, defendants attached a copy of the trust agreement, which had been filed and recorded in the public records registry of Tangipahoa Parish, evidencing the above terms, and a copy of the 2012 tax assessment data on the property.

The motion was heard before the trial court on June 17, 2013. At the hearing, plaintiff testified that he had previously owned his own business, that he and his wife were retired, that they received minimal social security benefits, and that he also received an airforce disability check. Plaintiff conceded that he had created the trust, to which he donated his home and property, shortly before he began filing state and federal lawsuits arising from this underlying incident. After hearing the evidence, the trial court revoked its previous order allowing plaintiff to proceed *in forma pauperis* and ordered plaintiff to pay all accrued costs of these proceedings within thirty days.

A written judgment was signed by the trial court on July 12, 2013, thereby: (1) granting the defendants' motion to traverse plaintiff's right to litigate as indigent with prejudice, (2) revoking plaintiff's right to proceed *in forma pauperis*, and (3) ordering plaintiff to pay any and all filing fees for any further filings submitted by plaintiff in this matter. The judgment was designated as a final judgment for purposes of appeal with an express determination that there

were no just reasons for delay.⁵ It is from this judgment that plaintiff now appeals.⁶

DISCUSSION

At the outset, we recognize that in one instance, the July 12, 2013 judgment on appeal herein erroneously identifies the defendants as “Dixie RV Superstores, L.L.C.,” after otherwise correctly identifying the defendants twice, as well as the name of the counsel for the defendants. In particular, the judgment correctly states that the matter is before the court on “defendants, Salvage, LLC, Hudson’s Insurance Carrier, Linda Cox, Elaine Hingle, Alan Spallinger, Lois Peltier, Angie Carter, and Jerry Holifield (collectively referred to as the ‘Hudson’s Defendants’), Motion to Traverse Plaintiff’s Right to Litigate as Indigent.” The judgment then correctly identifies “Counsel for the Hudson’s Defendants.” However, in granting the motion to traverse, the judgment states that the motion was filed on behalf of the defendant, “Dixie RV Superstores, L.L.C.,” as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion to Traverse Plaintiff’s Right to Litigate as Indigent, filed on behalf of the Defendant, Dixie RV Superstores, L.L.C. is **GRANTED**, with prejudice.

On appeal, the defendants contend that the reference to “Dixie RV Superstores, L.L.C.” is merely a typographical error, given that the judgment

⁵Although the judgment was certified as a final judgment by the trial court in accordance with LSA-C.C.P. art. 1915(B)(1), we note that the July 12, 2013 judgment of the trial court, maintaining defendants’ exception of no cause of action and dismissing plaintiff’s case in its entirety with prejudice, is also before us on appeal by plaintiff, and is clearly a final judgment. As such, plaintiff is entitled to seek review of all adverse interlocutory rulings rendered in this case that are prejudicial to him. See LSA-C.C.P. art. 1841; Ballard v. Waitz, 2006-0307 (La. App. 1st Cir. 12/28/06), 951 So. 2d 335, 338, writ denied, 2007-0846 (La. 6/15/07). As this court has previously recognized, when an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. Welch v. East Baton Rouge Parish Metropolitan Council, 2010-1531 (La. App. 1st Cir. 3/25/11), 64 So. 3d 244, 247, n.2.

⁶Although plaintiff’s brief does not set forth specific assignments of error in compliance with the requirements of Uniform Rules – Courts of Appeal, Rule 2-12.4, in light of his pro se status, this court will consider the merits of his appeal, despite the improper form of his appellate brief. See LSA-C.C.P. art. 2164; Putman v. Quality Distribution, Inc., 2011-0306 (La. App. 1st Cir. 9/30/11), 77 So. 3d 318, 320; Jones v. International Maintenance Corporation, 2010-2181 (La. App. 1st Cir. 5/6/11), 64 So. 3d 893, 895.

taken as a whole references “Hudson’s Defendants” as the party bringing the motion and that Dixie RV Superstores, L.L.C. is not a party in these proceedings or otherwise involved in this litigation.

Contrariwise, plaintiff contends that the error in the judgment herein is substantive and “cannot be amended except as provided in Art. 1951.” Changing the name of a party cast in the judgment is a change of substance and not of phraseology, and such change requires a contradictory hearing before the trial court. Turnstall v. Stierwald, 2001-1765 (La. 2/26/02), 809 So. 2d 916, 920. However, the erroneously named defendant named herein was not cast in judgment, but was merely identified as the party bringing the motion to traverse. Nevertheless, LSA-C.C.P. art. 1951⁷ only provides the trial court power to correct judgment errors **before** an appeal has been taken. See LSA-C.C.P. art. 1951, Official Revision Comments, Comment (c).

However, once the trial court is divested of jurisdiction and that of the appellate court attaches, the appellate court is empowered to correct both clerical and substantive errors in judgments under the authority provided by LSA-C.C.P. art. 2164. See LSA-C.C.P. art. 1951, Official Revision Comments, Comment (d); Gray v. Holiday Inns, Inc., 99-1292 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1172, 1174-1175 (where the trial court made an “obvious clerical error in casting Holiday Inns, Inc. in judgment rather than MM Louisiana, Inc.,” the appellate court amended the judgment under the authority granted it by LSA-C.C.P. art. 2164 to name the correct defendant); Harvey v. Traylor, 96-1321 (La. App. 4th

⁷Louisiana Code of Civil Procedure article 1951, entitled, “Amendment of judgment,” provides as follows:

On motion of the court or any party, a final judgment may be amended at any time to alter the phraseology of the judgment, but not its substance, or to correct errors of calculation. The judgment may be amended only after a hearing with notice to all parties, except that a hearing is not required if all parties consent or if the court or the party submitting the amended judgment certifies that it was provided to all parties at least five days before the amendment and that no opposition has been received.

Cir. 2/5/97), 688 So. 2d 1324, 1329, writ denied, 97-0587 (La. 4/18/97), 692 So. 2d 454 (where, after finding the trial court erred in amending a judgment after it was divested of jurisdiction and without a contradictory hearing as required for a substantive change, the appellate court amended the judgment under LSA-C.C.P. art. 2164, where it “was obvious that the trial court’s intent was to cast the Sheriff’s Office in judgment”); see also Carter v. Brothers Lapalco, L.L.C., 13-1 (La. App. 5th Cir. 5/16/13), 118 So. 3d 1194, 1197 (where the appellate court amended a judgment that erroneously named a nonparty pursuant to LSA-C.C.P. art. 2164) and Turnstall v. Stierwald, 809 So. 2d at 920-921 (where, after the district court changed the name of a party cast in judgment without a contradictory hearing, the Supreme Court, pursuant to LSA-C.C.P. art. 2164, vacated the amended judgment, reinstated the original judgment, then revised the original judgment to delete a “non-entity” and add in its place the proper party defendant). Thus, whether the error herein is clerical or substantive, this court has the authority to correct same on appeal.

Clearly, the trial court’s intent herein after stating, “filed on behalf of the Defendant,” was to identify the defendant who actually filed the motion to traverse, i.e., “Hudson’s Defendants.” Thus, the trial court obviously erred in identifying “Dixie RV Superstores, L.L.C.,” a non-party to this litigation, as the defendant who filed the motion to traverse.

Louisiana Code of Civil Procedure article 2164 provides, in pertinent part that “[t]he appellate court shall render any judgment which is just, legal, and proper upon the record on appeal.” Pursuant to this authority, we amend the judgment to substitute “Hudson’s Defendants” for “Dixie RV Superstores, L.L.C.” See Gray v. Holiday Inns, Inc., 762 So. 2d at 1174-1175.

Motion to Traverse

An individual who is unable to pay the costs of court because of his poverty and lack of means may prosecute or defend a judicial proceeding in any trial or appellate court without paying the costs in advance or as they accrue or furnishing security therefor. LSA-C.C.P. art. 5181. This privilege is restricted to litigants who are clearly entitled to it, with due regard to the nature of the proceeding, the court costs which otherwise would have to be paid, and the ability of the litigant to pay them or to furnish security therefor, so that the fomentation of litigation by an indiscriminate resort thereto may be discouraged, without depriving a litigant of its benefits if he is entitled thereto. LSA-C.C.P. art. 5182.

Louisiana Code of Civil Procedure article 5184 authorizes an adverse party to traverse the facts alleged in an opponent's affidavits of poverty and states that the court shall rescind its order if, on the trial of the rule to traverse, it finds that the litigant is not entitled to exercise the privilege. Perry v. Monistere, 2008-1629, 2008-1630 (La. App. 1st Cir. 12/23/08), 4 So. 3d 850, 853-854. The general rule is that, in the absence of clear abuse, the appellate courts do not disturb the trial court's discretion in granting, denying, or rescinding the privilege to litigate *in forma pauperis*, based upon the trial court's factual determination of the litigant's ability or inability to pay the court costs or to make bond therefor. Benjamin v. National Super Markets, Inc., 351 So. 2d 138, 142 (La. 1977); Perry v. Monistere, 4 So. 3d at 854. In the absence of a clear abuse of that discretion, an appellate court will not disturb the trial court's finding. Starks v. Universal Life Insurance Company, 95-1003 (La. App. 1st Cir. 12/15/95), 666 So. 2d 387, 394, writ denied, 96-0113 (La. 3/8/96), 669 So. 2d 400.

On appeal, plaintiff contends that the trial court erred in revoking his pauper status where his "property is encumbered" and where he paid fees to the Louisiana Supreme Court "when funds were available" despite his pauper status.

In support of their motion to traverse, defendants attached a copy of the "Donley Living Trust" executed on July 7, 2009, and subsequently filed for registry and recorded in the Clerk of Court's Office for Tangipahoa Parish, as well as a tax assessment data sheet for the year 2012 on the home and property conveyed to the trust in support of their motion to traverse. To the extent that plaintiff contends on appeal that he has paid some fees, the record shows he made no mention of it at the hearing and offered no evidence of it in support of this claim.

At the hearing on the motion to traverse, plaintiff testified to his income at the time, consisting of air force disability benefits and social security benefits that he and his wife received. Plaintiff candidly admitted to creating a trust to which he and his wife donated all of their assets, including their 4,900-square-foot home and improvements located on 7.26 acres of land, and to naming themselves as sole beneficiaries to the trust therein. The record shows that after creating the trust in July of 2009, the instant litigation ensued on December 1, 2009, and the trial court granted plaintiff pauper status on December 2, 2009.

After hearing the plaintiff's testimony, reviewing the evidence, and weighing the credibility of plaintiff, the trial court revoked plaintiff's right to litigate without payment of costs, noting:

The defendant [in rule] has alienated all or substantially all of his assets as a donation *omnium bonorum* to, in essence, himself as a beneficiary of a trust. I consider that to be an action, in essence, to defraud the rights of the court in terms of the litigation expenses.

On review, we find the evidence amply supports the trial court's finding that plaintiff was not indigent. Accordingly, in the absence of a clear abuse of the trial court's discretion, we decline to disturb the trial court's decision to revoke plaintiff's right to proceed *in forma pauperis*.

Thus, we find no merit to plaintiff's appeal.

CONCLUSION

For the above and foregoing reasons, the July 12, 2013 judgment of the trial court, granting defendants' motion to traverse, revoking plaintiff's right to proceed *in forma pauperis*, and ordering plaintiff to pay any and all filing fees for any further filings submitted by plaintiff in this matter, is amended to delete the name of "DIXIE RV Superstores, L.L.C." and to insert in its place, "the Hudson's Defendants," and as amended, is hereby affirmed. Costs of this appeal are assessed to the plaintiff/appellant, Floyd P. Donley, Sr.

AMENDED, AND AS AMENDED, AFFIRMED.