NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2014 CA 0810

GLENN J. PATRICK AND SAMUEL E. CARVILLE

VERSUS

JAMES H. DUPONT, DUPONT, DUPONT & DUPONT, LTD.,
A PROFESSIONAL LAW CORPORATION,
STEPHEN PANEPINTO, PLAQUEMINE BANK & TRUST COMPANY,
RICKY J. PATRICK, MELISA PATRICK AND J. PATRICK, INC.,
MACHINE PUMP & FABRICATION

Judgment Rendered: MAR 11 2015

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APPEALED FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF IBERVILLE
STATE OF LOUISIANA
DOCKET NUMBER 71393

HONORABLE ANNE SIMON, JUDGE AD HOC
HONORABLE MARION F. EDWARDS, JUDGE AD HOC
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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.

McDONALD, J.

In this appeal, the plaintiffs challenge a judgment granting a peremptory exception raising the objection of no cause of action, finding that the plaintiffs could not amend their petition to state a cause of action, and dismissing the suit with prejudice.

FACTS AND PROCEDURAL HISTORY

This case involves protracted litigation among several parties originating from as far back as the year 2000. The complex factual and procedural history will not be recited in full here.[1] Briefly, however, before 2000, Bayou Fabricators Machine and Pump, Inc. (Bayou Fabricators) was apparently owned by James Patrick, his brother, Glenn Patrick, and Samuel Carville. After James Patrick's death in February 2000, his interest in the company devolved to his children, Ricky Patrick and Melisa Patrick. As part of a settlement agreement intended to resolve a dispute regarding ownership, Ricky Patrick and Melisa Patrick bought out Glenn Patrick's interest and Samuel Carville's interest in Bayou Fabricators (which at the time had been renamed J. Patrick, Inc., Machine Pump & Fabrication (J. Patrick, Inc.)) for approximately $1 million. The settlement was finalized in May 2003. James H. Dupont, an attorney, provided legal services to the company. In 2002, J. Patrick Inc., issued fifteen shares of stock to Mr. Dupont as compensation for this legal work.

More than eight years later, on March 8, 2012, the plaintiffs, Glenn Patrick and Samuel Carville, filed the instant suit alleging they were fraudulently induced to divest their ownership in Bayou Fabricators at an artificially low price after being deceived as to the true value of the company via a scheme implemented by

[1] On July 14, 2014, this Court granted a motion to place three related appeals, docketed under 2014 CA 0810, 2014 CA 0811, and 2014 CA 0812, before the same panel and on the same docket. The plaintiffs' appeal in 2014 CA 0811 is from a judgment handed down in favor of the Dupont defendants; and, in 2014 CA 0812, is from a judgment in favor of the Bank defendants. Our opinions in those two related appeals are also handed down this day.

the defendants, Ricky Patrick, Melisa Patrick, and J. Patrick, Inc., (Patrick defendants); James Dupont and Dupont, Dupont & Dupont, Ltd. law firm (Dupont defendants); and Stephen Panepinto and Plaquemine Bank & Trust Company (Bank defendants). Specifically, the plaintiffs allege that, shortly after James Patrick died, the Patrick defendants retained attorney Dupont, who arranged a meeting at which he, Ricky Patrick, and Mr. Panepinto, president of the Plaquemine Bank & Trust, met at the bank and agreed among themselves (and Melisa Patrick later agreed) to divert income properly payable to Bayou Fabricators into certain unauthorized accounts, which would then be accessible by the Patrick defendants.

The suit alleged that to hide the unauthorized diversion of funds, Mr. Dupont and the Patrick defendants created "warranty files" within Bayou Fabricator's business records, which falsely indicated that certain work was performed at no charge as "warranty" work, when in fact, payment had actually been received for the work and deposited into the unauthorized bank accounts set up by Mr. Panepinto at Plaquemine Bank & Trust, rather than deposited into Bayou Fabricator's business account (warranty scheme). According to the plaintiffs, as a result of the warranty scheme, the defendants were able to fraudulently deflate Bayou Fabricator's income, convert business income into cash for their personal benefit, and deceive them into "walking away from their business" and selling their interests in Bayou Fabricators at a deflated price.

In their original and amended petitions, the plaintiffs allege that they first learned of the warranty scheme "on or after approximately June 1, 2011," when Ricky Patrick confessed the details to Glenn Patrick and Samuel Carville. The plaintiffs made claims of fraud, conspiracy, violation of the Louisiana Unfair Trade Practices Act, La. R.S. 51:1401, et seq., negligent misrepresentation, and unjust enrichment/detrimental reliance.

In response to the plaintiffs' petition, on May 22, 2012, the Patrick defendants filed a peremptory exception raising the objection of no cause of action, asserting that the plaintiffs failed to assert a viable cause of action against them because the plaintiffs did not first tender the amount paid to plaintiffs for the sale of their interest in Bayou Fabricators. The Patrick defendants further asserted that because the plaintiffs did not tender, they were bound by the terms and conditions of the settlement agreements. On September 14, 2012, the plaintiffs filed a first amended and supplemental petition, restating the allegations in the original petition, and in the alternative, asking for rescission of the underlying settlement agreements.

Thereafter, the Patrick defendants' exception raising the objection of no cause of action was heard and taken under advisement. Judgment was rendered on April 8, 2013, by Judge ad hoc Anne Simon, granting the Patrick defendants' exception raising the objection of no cause of action and dismissing the plaintiffs' claims against the Patrick defendants. In Judge Simon's unsigned reasons for judgment, and at the hearing, she indicated that **Aultman v. Entergy Corp.**, 98-2244 (La. App. 1 Cir. 11/5/99), 747 So.2d 1151 and **Ackerman v. McShane**, 9 So. 483 (La. 1891), the cases relied upon by the Patrick defendants, were persuasive and tender of the money received in the sale was a necessary prerequisite to the plaintiffs having a cause of action to file suit to set the settlement aside based upon claims of fraud.

On April 25, 2013, the plaintiffs filed a motion for new trial. Judge Simon, was recused from the case on May 1, 2013. Judgment was rendered on August 8, 2013, by Judge ad hoc Marion F. Edwards, denying the motion for new trial. The plaintiffs appealed the judgments sustaining the Patrick defendants' exception raising the objection of no case of action and denying the plaintiffs' motion for new

trial.[2] The plaintiffs make the following assignments of error.

1. The trial court abused its discretion in denying plaintiffs' motion for new trial on the Patrick Defendants' Exception of No Cause of Action.

2. The trial court committed legal error and abused its discretion in ruling that plaintiffs failed to state a cause of action against the [Patrick] Defendants.

3. The trial court's finding that rescission of the Agreement is required is clear legal error and an abuse of discretion.

4. By refusing to consider plaintiffs' Amended Petition pleading rescission in the alternative, the trial court committed clear legal error and abused its discretion.

5. The trial court's finding that prior tender is required to rescind a contract on the grounds of fraud is clear legal error and an abuse of discretion.

6. The trial court erred and abused its discretion in finding that plaintiffs' claims against the Patrick Defendants are barred by the fraudulently induced Agreement.

7. The trial court erred and abused its discretion in denying plaintiffs the opportunity to amend their petition to state a cause of action.

ASSIGNMENTS OF ERROR NOS. 1, 2 3, 5, AND 6
LAW AND ANALYSIS

These assignments of error all essentially assert that the trial court erred in finding that the plaintiffs failed to state a cause of action against the Patrick defendants. When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection raised through the exception cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed. La. C.C.P. Art. 934.

In reviewing a trial court's ruling sustaining an exception of no cause of action, the appellate court should subject the case to de novo review because the

[2] On June 27, 2014, the plaintiffs filed a motion with this court to remand the case to the trial court for written reasons for judgment. On July 14, 2014, the motion was denied by this court. We note that the trial court provided oral reasons for judgment at the hearing.

exception raises a question of law and the trial court's decision is based only on the sufficiency of the petition. Simply stated, a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief. **Kinchen v. Livingston Parish Council**, 2007-0478 (La. 10/16/07), 967 So.2d 1137, 1138, citing **Fink v. Bryant**, 2001-0987 (La. 11/28/01), 801 So.2d 346, 348-49.

In their original petition the plaintiffs sought compensatory damages caused by the alleged fraudulent scheme to deflate the true value of Bayou Fabricators. Plaintiffs have specifically pled that a number of parties conspired with one another to defraud them. Two of the alleged co-conspirators, attorney James Dupont and bank president Stephen Panepinto, were not parties to the 2003 settlement. If the plaintiffs prove that all of the defendants conspired to defraud them, all of the defendants will be liable to the plaintiffs. *See* **Boudreaux v. Jeff**, 03-1932 (La. App. 1 Cir. 9/17/04), 884 So.2d 665, 672. Thus, requiring plaintiffs to tender the monetary amount they received from a settlement more than a decade ago, in order to rescind the settlement and be put back into their previous position, as to *only some* of the defendants, is not a workable requirement. Furthermore, the parties cannot be put back into their position prior to the settlement. The business enterprise that formerly operated as Bayou Fabricators is now J. Patrick Inc., a distinct successor entity. If the plaintiffs were to tender the amount they received for their interest in Bayou Fabricators and the settlement rescinded, what would they receive in turn? A portion of a different business, worth more or less than the one they previously held ownership in? And all of the defendants would not be included in any such rescission.

Louisiana law provides a line of cases wherein the courts have ruled that tender was not a prerequisite to filing a suit alleging fraud in the inducement of a sale. In **Nicol v. Jacoby**, 103 So. 33 (La. 1925), plaintiffs filed suit to annul a sale of real estate and other property attached to the realty, on the grounds of fraud. After defendant raised an exception of failure to tender the proceeds from the sale prior to filing suit, the court in **Nicol** ruled that previous tender is not required in a suit to set aside a sale on the grounds of fraud. **Nicol**, 103 So. at 36-37. In **Consolidated-Progressive Oil Corp. v. Standard Oil Co. of Louisiana**, 105 So. 36 (La. 1925), plaintiffs filed suit to annul the assignment of an oil lease, which they claimed was obtained by fraud and forgery. The defendants raised an exception of no cause of action, asserting that the plaintiffs had failed to tender the price received, as a condition precedent to their action for rescission of the assignment of the lease and recovery of the oil produced. The court found that previous tender was not required in a suit to set aside a sale on the grounds of fraud. **Consolidated-Progressive Oil Corp.**, 105 So. at 38.

In **American Guaranty Co. v. Sunset Realty & Planting Co.**, 23 So.2d 409 (La. 1945) (on rehearing) the plaintiff filed two suits to set aside two quitclaim deeds on the grounds that they had been obtained through fraud. The defendants raised the exception of no cause of action, asserting that plaintiffs had failed to allege tender or payment of the price received, and the court found that "this contention is not sound, as previous tender is not required in a suit to set aside a sale on the ground of fraud, as in the present case." **American Guaranty Co.**, 23 So.2d at 430, quoting **Consolidated-Progressive Oil Corp.** In **American Guaranty Co.**, the court held that "[w]hile previous tender is not indispensable before a suit for recission on the grounds of fraud is instituted, the Court will require the complaining party to restore the consideration or price received as a condition in the decree of annulment." **American Guaranty Co.**, 23 So.2d at 466.

The issue of tender was also addressed in **Johnson v. Mansfield Hardwood Lumber Co.**, 143 F.Supp. 826 (W.D. La. 1956), wherein the plaintiffs sought to rescind stock sales made to defendants and prayed for an accounting, alleging that the defendants had fraudulently induced them to sell their stock. The defendants responded, in part, that plaintiffs had failed to state a cause of action, and had no claim for rescission of the sale where they failed to tender the consideration received in the sale. The court in **Johnson**, citing **American Guaranty Co.** as the last word on the subject by the Louisiana Supreme Court, determined that "[a]s applied here, therefore, these plaintiffs are not required to tender back to defendant the amounts they received for their stock, especially since they pray for an accounting which, if granted, would entitle them to recover more than five times the price they were paid, less the amounts they received." **Johnson**, 143 F.Supp at 834.

In the more recent case of **Contogouris v. Westpac Resources**, 856 F.Supp.2d 846 (E.D. La. 2012), the court followed **Nicol** and **American Guaranty Co.,** finding that Louisiana law did not require tender back when the plaintiff alleges fraud in the making of a compromise, and determining that plaintiffs did not ratify the sale at issue in that case by failing to tender. **Contogouris**, 856 F.Supp.2d at 853.

Likewise we find that, under the facts of this case, previous tender was not required of the plaintiffs in their suit alleging fraud in the making of the settlement and seeking damages in the amount of the difference between what their stock appeared to be worth and what they allege it was actually worth.

We have considered the cases relied upon by the Patrick defendants, **Aultman v. Entergy Corp.**, 98-2244 (La. App. 1 Cir. 11/5/99), 747 So.2d 1151 and **Ackerman v. McShane**, 9 So. 483 (La. 1891), and find that they are not persuasive in the present case.

In **Ackerman**, the plaintiff sued to nullify the sale of her interest in a partnership and obtain another $9,000.00 in payment, claiming she had been given fraudulent information by the seller. The fraud was discovered a short time after the compromise, and the court found that a tender of the money received for the sale was a necessary prerequisite to the suit. The court in **Ackerman** noted that there were exceptions to the rule of tender, and that the exceptions did not apply in that case because the "issues are well defined and the amounts fixed." **Ackerman**, 9 So. at 483. Besides the fact that the issues are not well defined and the amounts are not fixed in our present case, we are guided by the more recent jurisprudence from the supreme court, cited above, holding that tender is not necessary in a suit to set aside a sale based upon fraud.

In **Aultman**, an employee accepted a voluntary severance package from his employer and signed a waiver of any claim of employment discrimination based on age. The employee later filed suit against his employer, asserting he had been discriminated against because of his age. The court in **Aultman** found that the employee was barred from attacking the validity of the waiver that he had signed because he had failed to return the monies that he had received. **Aultman**, 747 So.2d at 1155. In **Aultman** the claim was not based upon fraud, but rather, plaintiff claimed that he could not waive an age discrimination suit against his employer under the law, thus the waiver was invalid. **Aultman**, 747 So.2d at 1153. Thus, **Aultman** is distinguishable from the present case.

After a de novo review, we find that the plaintiffs have stated a cause of action, we find that the trial court committed legal error in granting the exception raising the objection of no cause of action, and we find that the trial court abused its discretion in failing to grant a new trial. The judgment granting the exception

raising the objection of no cause of action is reversed, and the case is remanded to the trial court for further proceedings.[3]

For the foregoing reasons, the judgment granting the exception raising the objection of no cause of action is reversed, and the matter is remanded to the trial court for further proceedings. The costs of this appeal are assessed against the Patrick defendants.

REVERSED AND REMANDED.

[3] As we have found that the plaintiffs have stated a cause of action in their original petition, we need not address assignments of error numbers four and seven, which addressed the refusal of the trial court to consider the plaintiffs' amended petition pleading rescission in the alternative, and the trial court's refusal to allow the plaintiffs an opportunity to amend their petition to state a cause of action.