

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 1462

DAVID D. BLANK AND RICHARD J. BLANK

VERSUS

**EQUISOL, L.L.C., GULF STATES CHLORINATOR & PUMP, INC.
AND MICHAEL D. PARRISH**

Judgment Rendered: JUN 18 2015

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 593245

The Honorable William A. Morvant, Judge Presiding

W. Luther Wilson
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Michael D. Parrish

Carlton Jones, III
Baton Rouge, Louisiana

Counsel for Plaintiffs/Appellees
David Blank and Richard Blank

BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

Guidry, J. concurs.

THERIOT, J.

In this suit arising from an alleged breach of contract, the defendant appeals the judgment of the Nineteenth Judicial District Court in favor of the plaintiffs. For the reasons that follow, we deny the defendant's peremptory exceptions, and affirm.

FACTS AND PROCEDURAL HISTORY

Gulf States Chlorinator and Pump, Inc. (GSC), which was owned and operated by its president David D. Blank, was sold to Equisol, L.L.C.¹ (Equisol) for \$350,000 in an asset purchase agreement executed on December 1, 2005. On March 1, 2006, a stock purchase agreement was executed in which Mr. Blank transferred stock in GSC to Gulf States Acquisition, L.L.C.² (GSA). On March 17, 2006, Mr. Blank entered into an employment agreement with Equisol to be employed full-time as the president of GSC.³ On the same date, Mr. Blank's brother, Richard J. Blank, entered into an employment agreement with Equisol to be employed full-time as the vice president of GSC. The Blanks were contracted to be so employed for a minimum term of five years and were designated a base yearly salary of \$60,000, plus bonuses and benefits. Michael D. Parrish, as president, executed the above transactions on behalf of Equisol and GSA.

The Blanks claimed that over the next four years, they had difficulties with Equisol in that payments to vendors and creditors were often delinquent, thereby impairing their ability to conduct business properly at their local office in Baton Rouge, Louisiana. In 2009, Mr. Parrish left his position as president and CEO at Equisol to become CEO of another company, thereby relinquishing his involvement with Equisol entirely.

¹ Equisol, L.L.C. is a limited liability company formed in the state of Pennsylvania and authorized to do business in the state of Louisiana.

² Gulf States Acquisition, L.L.C. is a Louisiana limited liability company.

³ GSC is named Equisol Louisiana in the employment agreement. We shall continue to refer to the company as GSC for consistency.

According to Mr. Parrish's affidavit attached to his motion for new trial, he became the CEO of Environmental Infrastructure Holdings Corporation (EIHC) through a reverse merger. Although Equisol and GSC were EIHC's subsidiaries, Mr. Parrish claimed oversight of those companies was transferred away from him and he had no further involvement with the Blanks. Kurt Given became the president of Equisol and Don Gibson its vice president, with Mr. Gibson being Equisol's primary contact with GSC.

As a result of the financial difficulties with Equisol, the Blanks resigned from their positions via a letter dated July 29, 2010, addressed to Mr. Parrish, Mr. Given, Equisol, and EIHC. The Blanks filed a petition for breach of contract, unpaid wages, declaratory judgment, and damages against Equisol, GSC, and Mr. Parrish on August 4, 2010. The Blanks alleged injury based on the following acts committed by Equisol: poor business practices that impaired the productivity of GSC; withholding of equity ownership units and bonuses to which the Blanks were entitled under their employment agreements; and failure to release David Blank as a personal guarantor in a lease agreement.

Mr. Parrish, a resident of Pennsylvania, was properly served via the Long Arm Statute.⁴ All of the defendants filed a joint motion for extension of time in which to plead, which was granted. On October 5, 2010, all of the defendants filed a joint answer, reconventional demand, intervention and third-party demand. All of the defendants were represented by the same counsel.

Litigation continued for three years. On July 9, 2013, counsel for the defendants filed a motion to withdraw. The motion was initially denied by the district court for non-compliance with Rule 1.16 of the Rules of

⁴ La. R.S. 13:3201-3207.

Professional Conduct.⁵ Counsel for the defendants filed another motion to withdraw on October 23, 2013, attaching to the motion a scheduling order, which had been given to the defendants, showing a fixed trial date of May 27, 2014.⁶ The district court signed an order releasing the defendants' counsel from representation on January 21, 2014.

On the date of trial, May 27, 2014, the Blanks appeared in court, prepared to try the case. Mr. Parrish was not present. An attorney hired by Mr. Parrish made his first appearance the morning of trial. The attorney attempted to enroll as counsel for Mr. Parrish in open court, but the district court denied the motion. Counsel then requested that he be allowed to review the suit record and confer by telephone with Mr. Parrish. After communicating with Mr. Parrish, counsel withdrew his motion to enroll. The trial proceeded with none of the defendants present.

During the trial, the Blanks introduced the issue of fraud for the first time. The district court decided that even though the term "fraud" was not specifically used, paragraphs 27-30 of the Blanks' petition provided sufficient allegations to constitute a specific pleading of fraud.

The district court signed a judgment in favor of the Blanks on June 16, 2014. The defendants were found liable to David Blank in solido for damages totaling \$109,489.37, plus interest, and for attorney fees of \$37,500.00⁷, plus interest, and to Richard Blank in solido for damages totaling \$102,989.37, plus interest, and for attorney fees of \$37,500.00, plus interest. It is from this judgment that Mr. Parrish timely appeals. Subsequent

⁵ In the first motion to withdraw, counsel for the defendants had not supplied the defendants with a scheduling order outlining pertinent dates such as the trial date.

⁶ In the second motion, counsel certified that he informed the defendants both in writing and verbally of the scheduled dates to comply with Rule 1.16 of the Rules of Professional Conduct. A notation appears at the bottom of this scheduling order, initialed by counsel, that the "matter is not ready for trial" due to a lack of payment by the defendants. The notation does not indicate, however, that the district court or the Blanks were not ready for trial.

⁷ As contemplated in the asset purchase agreement, attorney fees were awarded to the Blanks pursuant to La. R.S. 23:632.

to the motion for appeal, Mr. Parrish filed peremptory exceptions raising objections of prescription and no cause or right of action with this Court.

ASSIGNMENTS OF ERROR

Mr. Parrish cites five assignments of error:

1. The district court erred in not exercising its broad discretion and granting a continuance of the trial and giving Mr. Parrish and counsel an untenable position on the issue of continuance versus enrollment.
2. The district court erred during the course of the trial allowing the petition to be amended to allege fraud on the part of Mr. Parrish.
3. The district court erred in determining that the Blanks had a right of action or cause of action for the damages they claim.
4. The district court erred in entering a judgment against Mr. Parrish and in favor of David Blank.
5. The district court erred in entering a judgment against Mr. Parrish and in favor of Richard Blank.

DISCUSSION

Motion to Continue

The first assignment of error suggests that Mr. Parrish's motion to continue was denied, but that is not what occurred. Mr. Parrish's counsel's motion to enroll was denied, and, therefore, a motion to continue was not presented to the district court. However, due to Mr. Parrish's counsel stating to the district court that he would have moved for a continuance following his enrollment, the denial of his enrollment was effectively a denial of a continuance, and we shall treat the district court's action as a denial of a continuance.

A district court has broad discretion in the control of its docket, in case management, and in determining whether a motion for continuance should be granted. *Shields & Shields, APLC v. State/LA Dept. of Revenue*, 2014-0693 (La. App. 1 Cir. 3/4/15), ___ So.3d ___, ___. While the district

court's discretion to grant or deny a continuance is not absolute and may not be exercised arbitrarily, appellate courts reluctantly interfere in such matters. *St. Tammany Parish Hosp. v. Burris*, 2000-2639 (La. App. 1 Cir. 12/28/01), 804 So.2d 960, 963.

On or about October 23, 2013, Mr. Parrish was informed by his counsel of record that the trial was scheduled for May 27, 2014. Although his counsel did not officially withdraw until January 21, 2014, Mr. Parrish was aware of his counsel's intent to withdraw on or about July 9, 2013. Mr. Parrish was thus aware for approximately ten months that he would have to hire another attorney. He was aware for approximately seven months of the date by which he would need to hire an attorney. Either length of time was more than sufficient for Mr. Parrish to hire new counsel. The record does not establish when Mr. Parrish retained new counsel; however, the record is clear that Mr. Parrish's new counsel first made an appearance in the case on the morning of trial.

The district court viewed Mr. Parrish's actions as an attempt to obtain an "eleventh hour" continuance. We find that the district court was within its broad discretion to deny the motion to enroll, which in effect denied the motion to continue that would have immediately followed. This assignment of error lacks merit.

District Court's Judgment against the Defendants

In civil cases, the appropriate standard for appellate review of factual determinations is the manifest error-clearly wrong standard, which precludes the setting aside of a district court's finding of fact unless that finding is clearly wrong in light of the record reviewed in its entirety. *Hall v. Folger Coffee Co.*, 2003-1734 (La. 4/14/04), 874 So.2d 90, 98. Thus, a reviewing

court may not merely decide if it would have found the facts of the case differently. *Id.*

Since neither Mr. Parrish nor any other defendant were present at the trial to present evidence or testimony, the only evidence submitted before the district court was by the Blanks. We therefore do not find that the district court's assessment of the facts in the instant case is manifestly erroneous, and the judgment will not be set aside. Assignments of error number 4 and 5 lack merit.

Fraud

Mr. Parrish alleges in his second assignment of error that the district court erred in allowing the Blanks to amend their petition during the trial to expand the pleadings to include the allegation of fraud. However, we note that the district court did not allow the Blanks to amend their petition to include allegations of fraud. The district court simply made a finding of fraud from its own reading of the petition; therefore, we will discuss whether the district court's finding that fraud was pled is legally correct.

Because Mr. Parrish's allegation that the district court erred in finding that the Blanks properly asserted a claim for fraud, which in essence questions whether the Blanks established a cause of action for fraud, we must conduct a *de novo* review of the record to determine whether a cause of action for fraud exists. See *Charming Charlie, Inc. v. Perkins Rowe Associates, L.L.C.*, 2011-2254 (La. App. 1 Cir. 7/10/12), 97 So.3d 595, 599. Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. La. C.C. art. 1953. In pleading fraud, the circumstances constituting the fraud shall be alleged with particularity. La. C.C.P. art. 856; see also *Advance, Inc. v. Harris-Smith Corp.*, 211 So.2d

343, 344 (La. App. 1 Cir. 1968), writ refused, 252 La. 875, 214 So.2d 547 (1968).

The term “fraud” is not mentioned in the Blanks’ petition, and the issue of fraud was never discussed until the trial, when the Blanks cited paragraphs 27 through 30 in their petition as their basis for a fraud claim.

Those paragraphs read as follows:

27.

As between plaintiffs and Parrish, plaintiffs are entitled to a declaration of rights and a Judgment from this Court finding that Parrish, as an individual owner, President and representative of Equisol, is solidarily and individually liable, jointly and solidarily with Equisol as a corporate entity, for breaches of contract, for the monetary amounts owed to plaintiffs, and the damages owed to plaintiffs given the personal offenses, quasi offenses and breaches of contract committed by Parrish.

28.

Parrish owed a fiduciary duty to Equisol, and thus to [GSC], to discharge his duties in good faith, with diligence, care, judgment and skill in order to protect and promote the success of the company. Instead, whether through his gross negligence, intentional tortious conduct, or intentional breaches of duty, Parrish has failed to discharge his duties as required by law and thus stands responsible for the acts taken by him as alleged herein.

29.

Further, as to Parrish, as a corporate officer with knowledge of the contractual responsibilities owed by Equisol and [GSC], Parrish’s acts (or failures to act) reflect an intent by him to cause Equisol to breach contractual obligations owed to the plaintiffs and to third parties. There is no legal justification for the actions taken by Parrish. Those actions have caused damages to the plaintiffs and to [GSC] and create personal liability for Parrish.

30.

Further, as to Parrish, plaintiffs allege on information and belief that there has been a comingling of funds, a failure to observe statutory formalities in the operation of Equisol, under capitalization as to Equisol, failure to maintain separateness of bank accounts and financial information and a failure to conduct regular meetings of shareholders and directors, any or all of which have contributed to damages to plaintiffs and to [GSC], thereby permitting the piercing of the corporate veil and the assessment of personal liability to Parrish.

These paragraphs of the petition allege breach of contract, breach of fiduciary duties, negligence, intentional tort, and poor business judgment. Can these allegations, when taken as a whole, equate to a specific pleading of fraud as the district court found?

There are three basic elements to an action for fraud against a party to a contract: (1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to...the contract. Thus, fraudulent intent, or the intent to deceive, is a necessary and inherent element of fraud. Fraud cannot be predicated upon mistake or negligence, no matter how gross.

Charming Charlie, Inc., 97 So.3d at 599 (citations omitted.)

We cannot find any specific mention of any misrepresentation, suppression of truth, or omission of truth on the part of Mr. Parrish in the Blanks' petition. While paragraph 29 does relate to the intent of Mr. Parrish to cause the Blanks to breach their contractual obligations through his actions as a corporate officer, no particular connection of those actions to a misrepresentation of the truth is expressed. Therefore, it cannot be readily understood from the petition that Mr. Parrish induced any error in the Blanks' consent to the agreements through a fraudulent act.

The allegations of a comingling of funds, a failure to follow statutory formalities, undercapitalization, a failure to maintain separate bank accounts and records, and a failure to hold regular shareholder and director meetings, do show cause to pierce the corporate veil and hold Mr. Parrish individually as well as solidarily liable for the Blanks' damages. See *Charming Charlie, Inc.*, 97 So.3d at 598. However, these allegations alone do not satisfy the elements of fraud. We find the district court committed legal error when it ruled paragraphs 27-30 of the petition stated a claim of fraud.

Prescription

Mr. Parrish filed a peremptory exception of prescription with this Court on November 3, 2014. No such peremptory action was filed in district court. An appellate court may consider a peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record. *Kerr-McGee Corp. v. McNamara*, 2000-0770 (La. App. 1 Cir. 6/22/01), 826 So.2d 1, 4. Although Mr. Parrish did not plead prescription in his answer or reconventional demand, it is evident from the Blanks' petition that Mr. Parrish's actions at issue commenced in 2006 and extended through 2010. Mr. Parrish cites La. C.C. art. 3492⁸ as the basis for the exception, and we find prima facie grounds for the exception in the record.

Mr. Parrish argues that since the Blanks amended their claims to include fraud during the trial, they are subject to the one-year delictual prescriptive period. As we have discussed, we find the district court legally erred in its findings that fraud was adequately pleaded within the petition. Consistent with this determination, we pretermitt any discussion of the exception relative to the issue of fraud.

The party urging a peremptory exception raising prescription bears the burden of proof. Only if prescription is evident from the face of the pleadings will the plaintiff bear the burden of showing an action has not prescribed. *Onstott v. Certified Capital Corporation*, 2005-2548 (La. App. 1 Cir. 11/3/06), 950 So.2d 744, 747. Mr. Parrish submitted with the exception the Blanks' petition and pre-trial inserts as evidence of prescription. In both documents, the Blanks alleged the defendants became delinquent in payments to vendors, creditors, and subcontractors of GSC beginning in

⁸ Louisiana Civil Code article 3492 states, in pertinent part: "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained."

2006, and that from 2006 to 2010, GSC was placed by many vendors on a “cash only” basis due to a poor payment history. The IRS filed tax liens against GSC, and the Blanks were forced to make purchases for GSC with their personal credit cards to maintain business relationships.

The applicable prescriptive period for breach of contract is ten years. La. C.C. art. 3499; see also *Arceneaux v. Courtney*, 448 So.2d 197, 198 (La. App. 1 Cir. 1984). The Blanks entered into their employment agreements on March 17, 2006, so their breach of contract claims have not prescribed.

As to the breach of fiduciary duty claim, we must consider the underlying claim to determine if the action is indeed one for breach of fiduciary duty, which is governed by the ten-year prescriptive period for a personal action under La. C.C. art 3499, or merely a suit against a fiduciary for negligence, which is governed by the one year prescriptive period for delictual actions under La. C.C. art. 3492. *Beckstrom v. Parnell*, 97-1200 (La. App. 1 Cir. 11/6/98), 730 So.2d 942, 947.

Paragraph 28 of the petition, which addresses the breach of fiduciary duty claim, supposes that the breach by Mr. Parrish was either negligent or intentional. The difference in these words could lead to a great difference in the applicable prescriptive period. Mere negligence, as stated in *Beckstrom*, would only result in a prescriptive period of one year, and the Blanks’ claim for breach of fiduciary duty would be prescribed. However, by looking more closely at the Blanks’ allegations, we see that they have accused the defendants of placing them in disadvantageous financial positions with vendors and creditors, withholding necessary financial information, diverting profits away from GSC to other entities owned and operated by Equisol, and prohibiting David Blank from being released as a personal guarantor.

The essence of the fiduciary duty lies in the special relationship between the parties. The fiduciary's duty includes the ordinary duties owed under tort principles, as well as a legally imposed duty which requires the fiduciary to handle the matter as though it were his own affair. In addition, the fiduciary may not take even the slightest advantage, but must zealously, diligently and honestly guard and champion the rights of his principal against all other persons whomsoever, and is bound not to act in antagonism, opposition or conflict with the interest of the principal to even the slightest extent. It is this duty of loyalty which distinguishes the fiduciary relationship.

Beckstrom, 730 So.2d at 947-948 (quotation marks and citations omitted.)

The overall context of the Blanks' allegations indicated that Mr. Parrish did not handle their matters as though they were his own affair, and that he did not guard the rights of the Blanks and acted in conflict of their own interests. Since the ten-year prescriptive period does apply in the instant case for a breach of fiduciary duty as well as for breach of contract, we find the Blanks' claims have not prescribed and overrule Mr. Parrish's peremptory exception raising prescription.

Right or Cause of Action

Mr. Parrish filed a peremptory exception asserting no cause or right of action with this Court on January 15, 2015. This exception is properly before this Court. See *Kerr-McGee*, 826 So.2d at 4. The issue of privity of contract appears frequently in the record as Mr. Parrish's defense against the breach of contract claim.⁹ No right of action for breach of contract may lie in the absence of privity of contract between the parties. *Estate of Mayeaux v. Glover*, 2008-2031 (La. App. 1 Cir. 1/12/10), 31 So.3d 1090, 1095, writ denied, 2010-0312 (La. 4/16/10), 31 So.3d 1069.

To prevail on an exception of no right of action, the defendant must show that the plaintiff does not have an interest in the subject matter of the

⁹ Mr. Parrish does not make a distinct argument as to no cause of action. Matters not briefed are considered abandoned. See La. Uniform Rules of Court of Appeals, Rule 2-12.4; *Keesler Federal Credit Union v. Rivero*, 2014-0095 (La. App. 1 Cir. 9/19/14), 153 So.3d 1218, 1223 n. 4.

lawsuit or the legal capacity to proceed. *Shorter v. Akins*, 2011-1553 (La. App. 3 Cir. 4/4/12), 86 So.3d 883, 885, writ denied, 2012-1363 (La. 10/8/12), 98 So.3d 853.

Based on the petition, the Blanks entered into their purchase and employment agreements with Equisol when Mr. Parrish was its president and CEO. The Blanks alleged sufficiently that Mr. Parrish conducted business in such a way that he was essentially the alter-ego of Equisol, and that when the Blanks contracted with Equisol, they were contracting with Mr. Parrish as well. Although Mr. Parrish subsequently separated himself from Equisol, he was present to sign the agreements with the Blanks and was present with Equisol from the time the agreements were signed in 2006 until 2009. It was during this period of time that the Blanks claim that actions by the defendants caused business to be inconvenienced and suffered damages due to breaches of contract and fiduciary duties. Due to Mr. Parrish's close involvement with Equisol during that time period, we find that the Blanks do show they have a right of action by the allegations in their petition. Assignment of error number 3 lacks merit. Mr. Parrish's peremptory exception of no right or cause of action is therefore overruled.

CONCLUSION

We find that the Blanks' petition establishes a right of action to proceed against Mr. Parrish and that their claims of breach of contract and fiduciary duty have not prescribed. Due to Mr. Parrish's lack of effort to retain counsel in a timely manner, the district court was well within its discretion to deny the enrollment of defense counsel, rendering the subsequent anticipated motion to continue moot. We find the district court erred in finding the petition satisfied the elements of fraud. However, under the facts of this case, such error does not change the end result. Since the

evidence presented at trial is in favor of the Blanks and none of the defendants appeared to dispute the Blank's evidence, we hereby affirm the judgment of the district court.

DECREE

The peremptory exceptions urging prescription and no cause or right of action filed by the appellant, Michael D. Parrish, are overruled. The judgment of the district court awarding damages and attorney fees to David D. Blank and Richard J. Blank is affirmed. All costs of this appeal are assessed to Michael D. Parrish.

**PEREMPTORY EXCEPTIONS OVERRULED. JUDGMENT
AFFIRMED.**