

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 0391

RICHARD L. KATZ, INDIVIDUALLY, AND
AS A REPRESENTATIVE OF THE CLASS
OF ALL OTHERS SIMILARLY SITUATED

VERSUS

PROGRESSIVE SECURITY INSURANCE COMPANY

Judgment Rendered: NOV 09 2015

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 626,824

Honorable Timothy E. Kelley, Judge Presiding

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BEFORE: PETTIGREW, HIGGINBOTHAM, AND CRAIN, JJ.

TMH
920
WJ.

HIGGINBOTHAM, J.

This appeal concerns the dismissal of a petition for a writ of mandamus seeking to compel the Louisiana Commissioner of Insurance (Commissioner) to conduct a hearing regarding a challenge to a 2003 approval of an automobile insurance rate increase.

BACKGROUND

The history of this case is long and convoluted. In 2003, Progressive Security Insurance Company (Progressive) proposed a rate increase for its automobile liability insurance policies issued in Louisiana. On July 7, 2003, the increased rate was approved by the Louisiana Insurance Rating Commission (the LIRC) and was later implemented by Progressive.¹ On June 8, 2004, Richard L. Katz submitted a written complaint (referred to as the “first complaint”) to the Louisiana Department of Insurance (the Department) concerning what he considered to be an excessive increase in Progressive’s insurance premium. Mr. Katz complained that Progressive charged him an increased rate during two consecutive semi-annual renewal periods resulting in an increased annual rate that was higher than that which was approved by the LIRC. The Department conducted an investigation into the first complaint and asked Progressive for a formal explanation of how it implemented the approved rate increase.

Progressive responded to Mr. Katz’s first complaint and, at Mr. Katz’s request, the matter was then set for a hearing, pursuant to former La. R.S. 22:1412(B)

¹ The LIRC was a legislatively created board that was vested with power to fix and regulate equitable insurance rates. See former La. R.S. 22:1401-1424. See also **State Farm Fire and Casualty Company v. Louisiana Insurance Rating Commission**, 97-0368 (La. App. 1st Cir. 4/8/98), 710 So.2d 819, 820; **Guillory v. Louisiana Insurance Rating Commission**, 357 So.2d 599, 602 (La. App. 1st Cir.), writ denied, 358 So.2d 632 (La. 1978). The LIRC was abolished by the legislature by La. Acts 2007, No. 459 § 1, when the Commissioner took over the regulation of insurance rates effective January 1, 2008. See La. R.S. 22:1451(B). We note that the Legislature, by La. Acts 2008, No. 415, § 1, amended and reenacted Title 22 pertaining to the Louisiana Insurance Code, which resulted in a new numbering scheme without changing the substance of the provisions. The new format and numbering of the Louisiana Insurance Code became effective on January 1, 2009. Since the disputed rate at issue in this case was approved by the LIRC under the former system of regulation and old numbering format in 2003, we refer to the former statutory scheme where applicable.

and former La. R.S. 22:1351(2), before a hearing officer for the LIRC on March 16, 2005. Mr. Katz and his attorney, as well as counsel for Progressive, attended the hearing where evidence was presented. After the hearing, the hearing officer recommended that the LIRC “revisit the approval” of Progressive’s rate increase due to the need for clarification as to how the rate increase was to be implemented. The day after the hearing, on March 17, 2005, Mr. Katz filed a petition against Progressive in the 24th Judicial District Court, Suit Number 618-133 (hereafter referred to as “Katz I”), seeking recovery, individually and as a representative of a purported class of all others similarly situated, of alleged excessive premiums paid.

Meanwhile, as the administrative process proceeded, Mr. Katz’s first complaint was added to the agenda of the LIRC’s meeting held on April 26, 2005. Mr. Katz was not present at the meeting, but his first complaint was considered by five of the seven members of the LIRC, along with Progressive’s response and the hearing officer’s recommendation that the LIRC revisit Progressive’s rate-increase approval. At the conclusion of that meeting, the LIRC voted to reject the hearing officer’s recommendation by a 3-to-2 vote. Mr. Katz was notified in writing of the LIRC’s action, as well as his right to request a hearing before the full LIRC board within thirty days; however, Mr. Katz never filed a hearing request. No further administrative relief was sought within the required thirty-day time period.²

² Former La. R.S. 22:1412(B) provided, in pertinent part:

Any party affected by the action of such rating organization or such insurer . . . on such request may, *within thirty days after written notice of such action*, appeal to the Louisiana Insurance Rating Commission, which, after a hearing held upon not less than ten days’ written notice to the appellant and to such rating organization or insurer, may affirm or reverse such action. [Emphasis added.]

Former La. R.S. 22:1351 provided, in pertinent part:

The commissioner of insurance, or any qualified employee of the insurance department designated by him for the purpose, may hold a hearing for any purpose within the scope of this Code as he may deem necessary. *He shall hold a hearing:*

* * *

(2) Upon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the commissioner of insurance to act, if such failure is

Although he did not seek the outlined administrative remedy, Mr. Katz continued to pursue his Katz I lawsuit, wherein Progressive had filed peremptory exceptions raising the objections of no cause of action, lack of subject matter jurisdiction, and failure to exhaust administrative remedies. Eight years after Katz I was filed, a judgment was rendered in the 24th Judicial District Court on March 7, 2013, sustaining Progressive's exceptions and dismissing Mr. Katz's claims "without prejudice to any rights he may have to pursue administrative remedies[.]" No appeal was taken from the judgment dismissing Katz I.

After the dismissal of Katz I, Mr. Katz filed a second complaint with the Department on May 30, 2013, reiterating the same allegations as in his first complaint from 2004. On June 26, 2013, the Department responded to Mr. Katz's second complaint, advising him, through his attorney, that the Department had "no statutory basis to hear the same complaint twice and therefore, there are no further additional (sic) actions the [Department] can take" to resolve his second complaint that obviously involved "the same parties, the same rate issue[,] and . . . the same set of operative facts[.]" The Department's position was that, because Mr. Katz's first complaint was previously heard and decided by the LIRC and Mr. Katz never requested an administrative hearing within the mandatory statutory time frame, he had failed to exhaust his administrative remedies, and therefore, the matter became final and non-appealable.

deemed an act under any provision of this Code, or by any report, promulgation, or order of the commissioner of insurance other than an order on a hearing of which such person was given actual notice or at which such person appeared as a party, or order pursuant to the order on such hearing.

* * *

(c) *Any demand for such hearing shall be made within thirty days of receipt of actual notice* or, if actual notice is not received, within thirty days of the date such person learned of the act upon which the demand for hearing is based as described in this Paragraph. [Emphasis added.]

Once again, Mr. Katz did not request a hearing within thirty days of being notified of the Department's position as to his second complaint.³ Instead, on December 16, 2013, Mr. Katz filed a second lawsuit against Progressive, in the 19th Judicial District Court, Suit Number 626,824, (hereafter referred to as "Katz II"). Like Katz I, the petition in Katz II was to recover the same premiums that had been allegedly improperly collected by Progressive, and it was filed by Mr. Katz individually, as well as a representative of a purported class of all others similarly situated.

Progressive responded to the Katz II petition by filing a peremptory exception of res judicata and a motion for sanctions, asserting that Mr. Katz's claims against Progressive had already been adjudged and are frivolous. Mr. Katz then filed a motion to voluntarily dismiss his petition in Katz II, without prejudice, on April 24, 2014, wherein he admitted that he had "not yet exhausted his administrative remedies." On May 8, 2014, the trial court signed a judgment of voluntary dismissal in Katz II, thereby ordering that all of Mr. Katz's claims against Progressive be

³ Former La. R.S. 22:1351 was renumbered by La. Acts 2008, No. 415, § 1, effective January 1, 2009, as La. R.S. 22:2191, which was then amended by La. Acts 2009, No. 317, § 1, and by La. Acts 2012, No. 271, § 1; however, the amended version of the statute that was applicable at the time of Mr. Katz's second complaint still provided for a mandatory thirty-day time period as to any demand for an administrative hearing regarding any action of the Department through the Commissioner. The applicable version of La. R.S. 22:2191 in 2013 provided, in pertinent part, as follows:

- A. The division of administrative law shall hold a hearing in accordance with the Administrative Procedure Act, R.S. 49:950 et seq., and shall hold a hearing under either of the following circumstances:

* * *

(2) Upon written demand for a hearing made by an person aggrieved by any act, order of the commissioner, or failure of the commissioner of insurance to act, if such failure is deemed an act under any provision of this Code, or by any report, promulgation, or order of the commissioner of insurance other than an order on a hearing of which such person was given actual notice or at which such person appeared as a party, or order pursuant to the order on such hearing.

- B. (1) *Any such demand for a hearing shall be filed with the division of administrative law and with the commissioner within thirty days after notice of such act or order is mailed, faxed, or delivered to the aggrieved party at his last known address specifying in what respects such person is so aggrieved and the grounds to be relied upon as basis for the relief to be demanded at the hearing.* . . . [Emphasis added.]

“DISMISSED without prejudice to any rights he may have to pursue administrative remedies.” Additionally, in light of the voluntary dismissal, the trial court denied Progressive’s motion for sanctions.

A few days later, on May 12, 2014, Mr. Katz, through his attorneys, directed a third complaint and written demand to the Department, demanding that the Commissioner “properly invoke those procedures set forth to hear his [second] complaint against Progressive as set forth in the Louisiana Administrative Code.” Mr. Katz also requested a hearing regarding the Department’s handling of his second complaint filed on May 30, 2013, wherein the Department refused to hold a second hearing concerning Mr. Katz’s first complaint against Progressive. In addition, Mr. Katz filed a petition for writ of mandamus directed to the Commissioner on August 15, 2014, in the *same* Katz II lawsuit that had been voluntarily dismissed three months earlier. Pursuant to former La. R.S. 22:1367, Mr. Katz requested a writ of mandamus compelling the Commissioner to set a hearing on his complaint.⁴ However, on August 25, 2014, the Department once again sent written notification to Mr. Katz, through his attorneys, that Mr. Katz had failed to timely pursue his administrative remedies regarding his second complaint, thereby reaffirming the Department’s position that it lacked authority to conduct another hearing.

The Commissioner filed exceptions to Mr. Katz’s writ of mandamus on September 9, 2014, raising the objections of lack of subject matter jurisdiction, res judicata, prescription, failure to exhaust and/or timely assert administrative remedies, and failure to state a cause of action and/or a right of action for mandamus.

⁴ Louisiana Revised Statutes 22:2207 is the current version of former La. R.S. 22:1367, which provides as follows:

Nothing contained in this Chapter shall deprive a person of his right, or delay the exercise of such right, to seek a writ of mandamus compelling the commissioner of insurance to perform a ministerial duty as established by law where it is alleged that the commissioner of insurance is fraudulently or not impartially fulfilling his duties, or where the delay involved in obtaining ordinary relief may cause injustice. No provision of this Chapter shall be a bar to, or grounds for delay, continuance, or deferral of the prompt adjudication of a petition for writ of mandamus directing the commissioner of insurance to do his duty.

The matter came for hearing before the trial court on November 17, 2014, and the trial court signed a judgment on December 2, 2014, granting all but one of the Commissioner's exceptions. Additionally, due to the rulings on the exceptions, the trial court denied Mr. Katz's writ of mandamus with prejudice. It is from this judgment that Mr. Katz appeals, generally assigning error to each of the trial court's rulings regarding the Commissioner's exceptions and on the mandamus action.

SUBJECT MATTER JURISDICTION

According to La. Code Civ. P. art. 1, "[j]urisdiction is the legal power and authority of a court to hear and determine an action or proceeding involving the legal relations of the parties, and to grant the relief to which they are entitled." The jurisdiction of a court over the subject matter of an action or proceeding cannot be conferred by consent of the parties or waived; a judgment rendered by a court which has no jurisdiction over the subject matter of the action or proceeding is void. See La. Code Civ. P. arts. 3 and 2002(A)(3); **Boudreaux v. State, Dept. of Transp. and Development**, 2001-1329 (La. 2/26/02), 815 So.2d 7, 12. The issue of subject matter jurisdiction addresses the court's authority to adjudicate the cause before it; the issue may be considered at any time, even by an appellate court on its own motion, at any stage of an action. **Boudreaux**, 815 So.2d at 13. Moreover, it is the duty of a court to examine subject matter jurisdiction *sua sponte*, even when the issue is not raised by the litigants. **Id.**; **City of Baton Rouge v. Bernard**, 2001-2468 (La. App. 1st Cir. 1/22/03), 840 So.2d 4, 6, writ denied, 2003-1005 (La. 6/27/03), 847 So.2d 1278. Thus, subject matter jurisdiction is a threshold issue. **Citizens Against Multi-Chem v. Louisiana Dept. of Environmental Quality**, 2013-1416 (La. App. 1st Cir. 5/22/14), 145 So.3d 471, 474, writ denied, 2014-1464 (La. 10/10/14), 151 So.3d 586.

Whether a court has subject matter jurisdiction raises a question of law, which is reviewed *de novo*. **Hoffoss v. Alex, LLC**, 49,649 (La. App. 2d Cir. 3/4/15), 162

So.3d 661, 664. In this case, the trial court granted the Commissioner's exception concerning subject matter jurisdiction over Mr. Katz's mandamus action, reasoning that the Commissioner did not have a mandatory duty to hold a hearing regarding Mr. Katz's second complaint, as he failed to seek a timely administrative review within the thirty-day time period after the Commissioner's action.⁵ We agree that the trial court lacked jurisdiction over the mandamus action, but for a different reason.

Mr. Katz exercised his right to voluntarily dismiss Katz II without prejudice. The trial court rendered judgment dismissing Mr. Katz's lawsuit against Progressive in Katz II, without prejudice, on May 8, 2014.⁶ The Commissioner was not a party to the Katz II litigation, and there was no pending mandamus action at the time that Katz II was dismissed. Katz II was terminated by the judgment of dismissal, thereby divesting the trial court of jurisdiction to consider the petition for mandamus subsequently filed in that *same* proceeding. See American General Inv. Corp. v. St. Elmo Lands, 391 So.2d 570, 573 (La. App. 4th Cir. 1980), writ denied, 395 So.2d 682 (La. 1981) (the trial court erred in retaining jurisdiction once a joint motion to dismiss was filed); Wells v. Fruth, Jamison & Elsass, PLLC, 2014-826 (La. App. 3d Cir. 2/4/15), 158 So.3d 216, 221 (once judgment is rendered, the trial

⁵ We briefly note that mandamus never issues in doubtful cases. Wiginton v. Tangipahoa Parish Council, 2000-1319 (La. App. 1st Cir. 6/29/01), 790 So.2d 160, 163, writ denied, 2001-2541 (La. 12/07/01), 803 So.2d 971. Mandamus is an extraordinary remedy, which must be used sparingly by the court only to compel action that is clearly provided by law, and only where it is the only available remedy or where delay occasioned by the use of any other remedy would cause injustice. Allen v. St. Tammany Parish Police Jury, 96-0938 (La. App. 1st Cir. 2/14/97), 690 So.2d 150, 153, writ denied, 97-0599 (La. 4/18/97), 692 So.2d 455. Thus, mandamus will be denied when there has been an unreasonable delay in applying for it. La. Code Civ. P. art. 3862, comment (b). See also Dantzer v. Hammond Fire and Police Civil Service Bd., 2004-1498 (La. App. 1st Cir. 8/3/05), 923 So.2d 40, 43-44, writ denied, 2005-2208 (La. 2/17/06), 924 So.2d 1016. At the time that Mr. Katz filed his petition for a writ of mandamus, more than nine years had passed since the LIRC heard and acted on Mr. Katz's first complaint, more than one year had passed since the Commissioner responded to Mr. Katz's second complaint, and more than three months had passed since the Commissioner received Mr. Katz's third complaint. A hearing is not mandated if it is not requested within thirty days of the Commissioner's action. See former La. R.S. 22:1351 and current La. R.S. 22:2191.

⁶ The record reflects that the trial court also signed an order the previous day, May 7, 2014, that dismissed the suit without prejudice.

court lacked the continuing jurisdiction to allow a supplemental and amending petition to be filed).

While a judgment of dismissal without prejudice does not bar the filing of *another* suit on the same cause of action, it terminates the instant suit and generally deprives the trial court of jurisdiction to take further action in the *same* case that is no longer pending before it. See La. Code Civ. P. art. 1673. See also **Batson v. Cherokee Beach and Campgrounds, Inc.**, 530 So.2d 1128, 1131 (La. 1988). Thus, the trial court lost jurisdiction over Katz II as of the date of dismissal, leaving the parties in the same position as if the suit had never been filed. See **Clement v. Gulf Refining Co. of La.**, 173 La. 249, 252-53, 136 So. 581, 582 (1931). If Mr. Katz wished to assert a mandamus action against the Commissioner, he should have brought the action in a new and separate suit, not in Katz II that was no longer viable. See Id. See also **Scheuermann v. Allstate Ins. Co.**, 212 So.2d 504, 505 (La. App. 4th Cir. 1968).

CONCLUSION

For the above reasons, we affirm that portion of the trial court's judgment granting the Commissioner's exception raising the objection of lack of subject matter jurisdiction and consequently denying Mr. Katz's petition for mandamus with prejudice. All other portions of the trial court's judgment are vacated because the trial court lacked jurisdiction to enter judgment on the remaining exceptions. We find that this ruling moots the remaining assignments of error. Costs of this appeal are assessed to plaintiff-appellant, Richard L. Katz.

AFFIRMED IN PART AND VACATED IN PART.