

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2017 CA 0360**

**DEMPSEY PENDARVIS**

**VERSUS**

**DOHERTY MICHAEL JARREAU AND SUSAN M. JARREAU**

**Judgment Rendered: DEC 18 2017**

**\* \* \* \* \***

On Appeal from the Thirty-Third Judicial District Court  
In and for the Parish of Ascension  
State of Louisiana  
No. 98,584

Honorable, Katherine Tess Stromberg, Judge Presiding

**\* \* \* \* \***

Donnie L. Floyd  
Kevon V. Howald  
Prairieville, LA

Counsel for Plaintiff/Appellee  
Dempsey Pendarvis

and

John-Paul Robert  
Gonzales, LA

Robert Ryland Percy III  
Cody M. Martin  
Gonzales, LA

Counsel for Defendants/Appellees  
Doherty Michael Jarreau and Susan M. Jarreau

and

Stephen P. Sheets  
Ricky L. Babin  
Gonzales, LA

**\* \* \* \* \***

**BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.**

*Handwritten signatures:*  
MC  
MJ  
JW

**McCLENDON, J.**

Plaintiff appeals a judgment dismissing his suit as abandoned for failure to take a step in its prosecution for a period of three years. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

The instant matter arises from a suit to partition property between the plaintiff, Dempsey Pendarvis, and the defendants, Doherty Michael Jarreau and Susan M. Jarreau, which was commenced on December 13, 2010. The parties later entered a settlement agreement that partitioned the property, and a stipulated judgment to that effect was read, rendered and signed by the trial court on March 13, 2012. Thereafter, plaintiff placed notices of lis pendens on the property partitioned in the "Stipulated Judgment," and defendants filed a rule for contempt on August 19, 2013. The rule for contempt was heard on October 3, 2013. Thereafter, the parties entered a stipulation that ordered plaintiff to remove all encumbrances on the property. Following the stipulation, plaintiff subsequently filed a "Cancellation of Lis Pendens" in the record on October 25, 2013.

The record shows that no further action was taken in the underlying suit until May 26, 2016, when a motion to enroll as counsel of record on behalf of plaintiff was filed by attorney Jean-Paul Robert. Plaintiff's counsel then fax filed a "Witness List" into the record on October 17, 2016, and the original was received and filed on October 21, 2016.

On October 26, 2016, defendants filed an "Ex Parte Motion and Order to Dismiss for Abandonment." Defendants' motion was subsequently granted by an order signed on October 28, 2016. Plaintiff then filed a "Motion for New Trial" on November 7, 2016, which was denied by the trial court on November 14, 2016. Plaintiff subsequently filed a "Motion to Set Aside Dismissal Pursuant to La. C.C.P. Art. 561(4)," which motion was denied on December 13, 2016.

Plaintiff has appealed, assigning the following errors:

- I. The district court erred in dismissing the claims of plaintiff/appellant Dempsey Pendarvis for abandonment because there were filings made by plaintiff/appellant Pendarvis prosecuting the case within three years.

- II. The district court erred in refusing to hear and grant plaintiff/appellant Dempsey Pendarvis' La.C.C.P. Art. 561(4) Motion to Set Aside Dismissal.

### DISCUSSION

Louisiana Code of Civil Procedure article 561 addresses abandonment and provides, in pertinent part:

- A. (1) An action ... is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years[.]

\*\*\*

(3) This provision shall be operative without formal order, but, on ex parte motion of any party or other interested person by affidavit which provides that no step has been timely taken in the prosecution or defense of the action, the trial court shall enter a formal order of dismissal as of the date of its abandonment. The sheriff shall serve the order in the manner provided in Article 1314, and shall execute a return pursuant to Article 1292.

(4) A motion to set aside a dismissal may be made only within thirty days of the date of the sheriff's service of the order of dismissal. If the trial court denies a timely motion to set aside the dismissal, the clerk of court shall give notice of the order of denial pursuant to Article 1913(A) and shall file a certificate pursuant to Article 1913(D).

Louisiana Code of Civil Procedure article 561 imposes three legal requirements on plaintiffs: (1) a party must take some "step" in the prosecution or defense of the action; (2) the step must be taken in the proceedings and appear in the record of the suit, unless the action is formal discovery; and (3) the step must be taken within the legislatively-prescribed time period from the last step taken by either the plaintiff or the defendant. **Louisiana Dept. of Transp. and Development v. Oilfield Heavy Haulers, L.L.C.**, 11-0912 (La. 12/6/11), 79 So.3d 978, 981.

Abandonment is not a punitive concept; rather, it is a balancing concept. **Clark v. State Farm Mutual Automobile Ins. Co.**, 00-3010 (La. 5/15/01), 785 So.2d 779, 787. Abandonment balances two equally sound, competing policy considerations: "on the one hand, the desire to see every litigant have his day in court, and not to lose same by some technical carelessness or unavoidable delay; on the other hand, the legislative purpose that suits, once filed, should not indefinitely linger, preserving stale claims from the normal extinguishing operation of prescription." **Id. citing, Sanders v. Luke**, 92 So.2d 156, 159 (La.App. 1 Cir. 1957).

Article 561 is to be liberally construed in favor of maintaining a lawsuit. Because dismissal is the harshest of remedies, any reasonable doubt regarding abandonment should be resolved in favor of allowing the litigation to continue. **Louisiana Dep't of Transp. & Dev.**, 79 So.3d at 981-82. The intention of Article 561 is not to dismiss suits as abandoned based on technicalities, but only those cases where plaintiff's inaction during the three-year period has "clearly demonstrated his abandonment of the case." **Clark**, 785 So.2d at 785-86 citing, **Kanuk v. Pohlmann**, 338 So.2d 757, 758 (La.App. 4 Cir. 1976), writ denied, 341 So.2d 420 (La. 1977).

Whether a step in the prosecution of a case has been taken in the trial court for a period of three years is a question of fact subject to a manifest error analysis on appeal. **Hinds v. Global Intern. Marine, Inc.**, 10-1452 (La.App. 1 Cir. 2/11/11), 57 So.3d 1181, 1183. On the other hand, whether a particular act, if proven, precludes abandonment is a question of law that we review by simply determining whether the trial court's interpretative decision is correct. **Id.**

On appeal, plaintiff avers that the filing of the cancellation of lis pendens on October 25, 2013, began the tolling of the three-year abandonment period.<sup>1</sup> The only filings in the record after that date are the May 26, 2016 motion to enroll and the October 17, 2016 witness list.

The parties do not dispute that the motion to enroll filed on May 26, 2016 was not a step in the prosecution or defense. As such, it could not interrupt the three-year abandonment period. See **Paternostro v. Falgoust**, 03-2214 (La.App. 1 Cir. 9/17/04), 897 So.2d 19, 22.<sup>2</sup> Plaintiff contends, however, that the witness list fax filed on October 17, 2016, and received and filed on October 21, 2016, was a sufficient step

---

<sup>1</sup> We need not decide whether the filing of the cancellation of lis pendens is a step in the prosecution or defense sufficient to prevent abandonment because, as noted below, there have been no additional steps taken by either party in prosecution or defense that hastens the matter toward judgment within three years of that filing.

<sup>2</sup> In **Paternostro**, this court addressed motions involving counsel in the context of abandonment as follows:

The jurisprudence clearly establishes that motions to withdraw or enroll as counsel or to substitute counsel are not considered formal steps before the court in the prosecution of the suit. Such motions grant to counsel the right to take steps, or to prepare to take steps, toward the prosecution or defense of a case, but are not considered steps because they do not hasten the matter to judgment.

**Id.**, 897 So.2d at 22.

in the prosecution to interrupt the three-year abandonment period. In opposition, the defendants maintain that the mere filing of a witness list when there is no hearing or trial date pending is not a sufficient step in the prosecution of the case intended to hasten the matter towards judgment.

This court has not specifically addressed whether filing a witness list into the record is a sufficient step to interrupt the tolling of the three-year abandonment period. However, this court has previously found the following steps to be sufficient: motions for summary judgment that sought resolution of a suit (**State ex rel. Div. of Admin., Office of Community Development v. Tujague**, 15-1457 (La.App. 1 Cir. 4/15/16), 193 So.3d 223, 228); plaintiff's request for a conference to set timelines in a consolidated action (**Dendy v. City Nat. Bank**, 06-2436 (La.App. 1 Cir. 10/17/07), 977 So.2d 8, 13); and plaintiffs' filing of requests for scheduling conferences to select deadlines for the parties to conclude all pretrial matters (**Hidalgo v. Catfish Queen Partnership in Commendam**, 06-1531 (La.App. 1 Cir. 5/4/07), 961 So.2d 434, 437-39). By contrast, this court has found the following steps insufficient to interrupt the tolling of the abandonment period: ongoing settlement negotiations outside of the record (**Porter v. Progressive Specialty Ins. Co.**, 99-2542 (La.App. 1 Cir. 11/8/00), 771 So.2d 293, 294-95); correspondence outside of the record (**R. L. Hall and Associates, Inc. v. Brunt Const., Inc.**, 15-1092 (La.App. 1 Cir. 11/9/15), 2015 WL 6951252 (unpublished)); and a motion to set a matter for trial that was submitted to the clerk but was returned unfiled for failing to comply with court rules (**Parson v. Daigle**, 96-2569 (La.App. 1 Cir. 12/29/97), 708 So.2d 746, 748).

While not controlling, our brethren of the Fifth Circuit have recently addressed whether filing a witness list is a sufficient step. In **Lewis v. Jones**, 16-48 (La.App. 5 Cir. 5/26/16), 193 So.3d 546, 550, the trial court had determined the action had been abandoned. The trial court noted that no motion to set trial or motion for a scheduling order had been filed by either party, and the plaintiffs' witness list alone was a "passive and gratuitous filing just to try to interrupt the abandonment." **Id.** On appeal, the Fifth Circuit noted that its review of the jurisprudence revealed that there was no case directly on point addressing whether the filing of a witness list is a "step" in the

prosecution. **Id.** at 549. After reviewing what courts have and have not deemed sufficient steps,<sup>3</sup> the Fifth Circuit agreed with the trial court. Specifically, the Fifth Circuit concluded that under the facts presented “the act of filing a witness list was the preparation to take a step toward the prosecution of a case, but did not hasten the matter to judgment.” **Id.** at 550. As such, the appellate court found no error in the trial court’s “finding that the filing of a witness list was not a step in the prosecution of [the] case.” **Id.**

In the instant case, there was no motion to set the matter for trial or motion for a scheduling order filed, either prior to or along with the filing of the witness list. Moreover, the witness list filed by plaintiff only named the parties to the suit and an unnamed “[e]xpert as to valuation of property.” Considering the foregoing, we conclude that the filing of the instant witness list did not hasten the matter towards judgment. Therefore, it was not a step sufficient to interrupt the three-year abandonment period.

We recognize a plaintiff-oriented jurisprudential exception based on *contra non valentem* that applies when the failure to prosecute is caused by circumstances beyond the plaintiff’s control. **Clark**, 785 So.2d at 784-85. Plaintiff notes the flooding that occurred around the Baton Rouge area in August of 2016. Counsel admits, however, that neither his office nor his home flooded. Also, the motion to enroll was filed on May 26, 2012, over two months prior to the August flood. Additionally, plaintiff filed the witness list almost five months after the motion to enroll. Under these circumstances, we cannot conclude that the jurisprudential exception would apply.

Considering the foregoing, we conclude that the trial court did not err in granting the defendants’ motion to dismiss for abandonment and did not err in denying the

---

<sup>3</sup> The court noted that the following actions had been sufficient to prevent abandonment: filing of interrogatories; filing of answers to interrogatories; supplemental answers to interrogatories; filing of motions to compel answers to interrogatories; filing of requests for production of documents to a named party; filing of motions to take depositions; filing of transcripts of depositions; filing of motions to proceed *in forma pauperis*; filing of motions to set for trial; filing of joint stipulations dismissing certain parties; and payment of costs where payment was in response to a formal rule before the court by the clerk of court for the payment of a fee required in order to preserve the plaintiff’s right to a jury trial. **Lewis**, 193 So.3d at 550 (Internal citations omitted). By contrast, the court noted that the following actions were not “steps” in the prosecution or defense because they merely grant to counsel the right to take steps, or to prepare to take stakes toward the prosecution or defense of a case, but do not hasten the matter to judgment: a motion to terminate counsel of record; a request for production of documents from a non-party that was not served on all parties; and payment of court costs or the request for notice of hearings. **Id.** (Internal citations omitted.)

plaintiff's motion to set aside the dismissal. Plaintiff's assignments of error are without merit.

### **CONCLUSION**

For the foregoing reasons, the trial court's October 28, 2016, judgment dismissing the underlying suit as abandoned is affirmed. Costs of this appeal are assessed to plaintiff, Dempsey Pendarvis.

**AFFIRMED.**