

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0695

KINGDOM BUILDERS COMMUNITY DEVELOPMENT  
CORPORATION

VERSUS

LOUISIANA BOARD OF ELEMENTARY AND SECONDARY  
EDUCATION AND LOUISIANA DEPARTMENT OF EDUCATION

Judgment Rendered: NOV 01 2017

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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. 647,294

Honorable Wilson Fields, Judge Presiding

\* \* \* \* \*

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

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**HIGGINBOTHAM, J.**

This appeal challenges whether the trial court properly denied plaintiff's motion for new trial seeking annulment of a judgment in favor of one defendant that sustained a peremptory exception of no cause of action because plaintiff claims it was not properly served with the hearing date.

**FACTS AND PROCEDURAL HISTORY**

Plaintiff, Kingdom Builders Community Development Corporation (Kingdom Builders) applied for a charter for operation of a charter school in Lafayette Parish. On March 3, 2016, the Louisiana Board of Elementary and Secondary Education (BESE) denied Kingdom Builder's charter school application. On April 4, 2016, pursuant to La. R.S. 49:964 *et seq.*,<sup>1</sup> Kingdom Builders filed a petition for judicial review in the 19th Judicial District Court seeking judicial review of BESE's decision. The Louisiana Department of Education (LDE) and BESE were named as defendants.

In response, LDE filed a peremptory exception raising the objection of no cause of action. In its exception, LDE contended that Kingdom Builders failed to state a cause of action because under La. R.S. 17:3981 and La. R.S. 17:3983 the decision whether to grant or deny Kingdom Builder's application for a charter is a decision made by BESE, not LDE. Additionally, LDE contended that Kingdom Builders failed to state a cause of action for judicial review because BESE's decision under La. R.S. 17:3981 and La. R.S. 17:3983 was not an "adjudication" that resulted in a "decision" or "order" as defined by the Louisiana Administrative Procedure Act.

LDE certified that a copy of its exception was mailed and faxed to Kingdom Builder's attorney of record at the address and fax number provided in Kingdom Builder's petition. LDE's exception was accompanied by a proposed order requesting that the exception be set for hearing.

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<sup>1</sup> Louisiana Revised Statute 49:464 is part of the Administrative Procedure Act, and provides for judicial review for a person who is aggrieved by a final decision or order of an agency in an adjudication proceeding.

On September 19, 2016, LDE's exception was heard by the trial court. Kingdom Builders was not present at the hearing. The copy of the exception that LDE mailed to Kingdom Builders' attorney of record, who had apparently moved offices and had not updated his address, was returned to sender around September 26, 2016, stating "not at this address." On October 3, 2016, Kingdom Builders filed a motion to substitute counsel, which was granted. On November 10, 2016, the trial court signed a judgment sustaining LDE's peremptory exception of no cause of action and dismissing Kingdom Builder's claims against LDE with prejudice.

Thereafter, Kingdom Builders filed a motion for new trial on LDE's exception of no cause of action contending that it was not served with LDE's exception nor was its previous counsel of record served by means of a legally correct method; therefore, Kingdom Builders argued that the November 10, 2016 judgment was an absolute nullity and should be vacated. After a hearing, the trial court denied Kingdom Builders' motion for new trial in a judgment signed on March 7, 2017. It is from the March 7, 2017 judgment denying its motion for new trial that Kingdom Builders appeals.<sup>2</sup>

## LAW AND ANALYSIS

Kingdom Builders contends that the trial court erred in sustaining LDE's peremptory exception of no cause of action because neither Kingdom Builders nor its former counsel received notice of the exception of no cause of action filed by LDE as required by La. Code Civ. P. articles 1313 and 1314. Louisiana Code of Civil Procedure article 1313(A) allows service of *most* post-petition pleadings by regular mail or by electronic means, "[e]xcept as otherwise provided by law," subject to an express exception in La. Code Civ. P. art. 1313(C) for pleadings or orders

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<sup>2</sup> The denial of a motion for a new trial is not an appealable judgment absent a showing of irreparable harm. **Morrison v. Dillard Department Stores, Inc.**, 99-2060 (La. App. 1st Cir. 9/22/00), 769 So.2d 742, 744, writ denied, 2000-3379 (La. 2/2/01), 784 So.2d 646. However, the supreme court has directed us to consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits as well, when it is clear from the appellant's brief that it intended to appeal the merits of the case. See Reno v. Perkins Engines, Inc., 98-1686 (La. App. 1st Cir. 9/24/99), 754 So.2d 1032, 1033, writ denied, 99-3058 (La. 1/7/00), 752 So.2d 863. It is obvious from Kingdom Builder's brief that it intended to appeal the judgment on the merits. Thus, we will treat the appeal accordingly.

setting a court date, which must be served by registered or certified mail or by the sheriff.

LDE's exception of no cause of action contained an order setting the matter for hearing; thus, the required service for LDE's exception was by either registered or certified mail or by the sheriff. The certification provided by LDE does not verify service by registered or certified mail as opposed to regular mail. Here, neither Kingdom Builders nor their attorney appeared at the hearing on LDE's exception of no cause of action, and nothing in the record suggests any waiver by Kingdom Builder of the formal service requirements. Failure to properly serve a defendant with process as required by law is a vice of form upon which a judgment shall be nullified. La. Code Civ. P. art. 2002(A)(2). As service of process on Kingdom Builders was not made as required by law, the trial court's judgment sustaining LDE's exception is an absolute nullity.<sup>3</sup>

### **CONCLUSION**

For the foregoing reasons, the November 10, 2016 judgment sustaining the objection of no cause of action is vacated as an absolute nullity, and this matter is remanded to the trial court for further proceedings. The costs of this appeal in the amount of \$660.50 are assessed to the Louisiana Department of Education.

**NOVEMBER 10, 2016 JUDGMENT VACATED; CASE REMANDED.**

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<sup>3</sup> Citing *Jones v. Chevalier*, 579 So.2d 1217, 1218 (La. App. 3d Cir. 1991), LDE argued that Kingdom Builders was not prejudiced by not receiving notice of the peremptory exception of no cause of action, because no evidence can be introduced on an exception of no cause of action, and the trial court can notice the exception of no cause of action on its own motion. We disagree, as La. Code Civ. P. art. 929 clearly provides that a peremptory exception when pleaded before or in the answer "shall be tried" and decided in advance of trial.