

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1711

OLIVER ROGERS

VERSUS

NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PA AND ASSOCIATED GROCERS, INC.

**DATE OF JUDGMENT:** JUN 01 2018

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT  
NUMBER C648196, SECTION 23, PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

HONORABLE WILLIAM A. MORVANT, JUDGE

\* \* \* \* \*

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Company of Pittsburg, PA and  
Associated Grocers, Inc.

\* \* \* \* \*

BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

**Disposition: AFFIRMED.**

**CHUTZ, J.**

Plaintiff-appellant, Oliver Rogers, appeals a judgment in which the trial court denied his motion for a continuance and granted a motion for summary judgment in favor of defendants-appellees, Associated Grocers, Inc. (Associated Grocers) and National Fire Insurance Company of Pittsburgh, PA, dismissing Rogers' claims for damages. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

On May 12, 2015, while delivering produce to an Associated Grocers' warehouse as a truck driver for Taylor Fresh Foods, Inc., the loading dock that Rogers needed to use to unload his delivery did not align level with his truck. As he attempted to lift a loaded hand truck onto the dock, Rogers fell and was injured. Rogers filed this lawsuit on May 11, 2016, averring that the cause of his accident was the unreasonably dangerous and defective nature of the Associated Grocers' loading dock. On June 30, 2016, defendants filed an answer.

On August 26, 2016, in proper person, Rogers filed a pleading he entitled, "Motion for Stay in Proceedings and Motion for Stay in Discovery." According to the memorandum in support of the motion, Rogers' attorney who had initiated the lawsuit had taken employment with the State and was no longer able to "assist in plaintiff's personal injury case." Rogers sought a 90-day stay to allow him to obtain "proper legal counsel." Rogers failed to attach an order or set the matter for a hearing. Rogers' attorney and his law firm subsequently filed an unopposed motion to withdraw as counsel of record. The trial court ordered the withdrawal on October 28, 2016.

On May 1, 2017, defendants filed a motion for summary judgment averring entitlement to dismissal of Rogers' claims since there was no genuine issue of material fact that the condition of the loading dock was not unreasonably dangerous or defective. Attached to the motion was the affidavit of the Associated

Grocers' Director of Risk Management attesting to the condition of the loading dock. The matter was set for hearing on August 7, 2017.

On May 30, 2017, defendants' attorney filed an affidavit of service into the record, outlining the dates that the motion for summary judgment and the trial court's signed order setting the summary judgment hearing for August 7, 2017 had been served on Rogers. Copies of the certified mail receipts, signed by Rogers on May 10 and May 15, 2017, were attached to the affidavit.

Defendants filed a reply brief and an objection to plaintiff's response to the motion for summary judgment on August 4, 2017, averring that Rogers' pleading, which apparently had been filed on August 4, 2017, was untimely. They requested the exclusion of Rogers' response and the documentation attached to it as well as forfeiture of oral argument at the hearing.<sup>1</sup>

Rogers filed a motion to continue into the record on August 7, 2017. Defendant had already filed an opposition to Rogers' motion to continue on August 4 2017. The opposition stated that the motion to continue had been faxed to defendant on August 3, 2017.

At the August 7, 2017 hearing, the trial court denied the motion to continue, excluded Rogers' response to the motion for summary judgment and all attached documentation, and ordered forfeiture of Rogers' oral argument. Thereafter, summary judgment was granted and Rogers' claims were dismissed. This appeal followed.<sup>2</sup>

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<sup>1</sup> See La. C.C.P. art. 966B(2)(requiring the filing and service of an opposition to a motion not less than fifteen days prior to the hearing on the motion) and La. Dist. Court Rule 9.9(e) (providing that a party who fails to serve a memorandum in opposition to a motion may forfeit the privilege of oral argument).

<sup>2</sup> When an unrestricted appeal is taken of a final judgment determinative of the merits, the appellant is generally entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. *Judson v. Davis*, 2011-0623 (La. App. 1st Cir. 11/9/11), 81 So.3d 712, 724, writ denied, 2011-2747 (La. 2/17/12), 82 So.3d 288. Accordingly, we will consider the merits of the assignments of error herein where Rogers challenges the trial court's denial of his motion for continuance.

## DISCUSSION

On appeal, Rogers challenges the trial court's ruling, denying his motion for continuance. He urges that he had an insufficient opportunity to secure counsel. He also contends that he was unable to obtain the client file from prior counsel.

The trial court may grant a continuance on peremptory or discretionary grounds. La. C.C.P. arts. 1601 and 1602. One basis for a continuance on peremptory grounds is when the party seeking the continuance, despite due diligence, has been unable to obtain material evidence. La. C.C.P. art. 1602.

Absent peremptory grounds, a continuance rests within the sound discretion of the trial court. Article 1601 provides for a continuance "if there is good ground therefor." The trial court must consider the particular facts of a case when deciding whether to grant or deny a continuance. The trial court should consider the diligence and good faith of the party seeking the continuance and other reasonable grounds. The trial court may also weigh the condition of the court docket, fairness to the parties and other litigants before the court, and the need for orderly and prompt administration of justice. *St. Tammany Parish Hosp. v. Burriss*, 2000-2639 (La. App. 1st Cir. 12/28/01), 804 So.2d 960, 963.

In support of his contention that he had an inadequate opportunity to secure counsel, Ramez F. Shameih, Rogers' attorney at the August 7, 2017 hearing, asserted that he was plaintiff's third attorney. According to Shameih, Rogers' second attorney had been Brandon Briscoe, who was no longer able to practice law after a serious accident. Rogers contacted Shameih in April 2017 at which time Shameih decided to represent Rogers. According to Shameih, he emailed defendants' attorney, Andrew Eversberg, and then spoke with Eversberg over the phone, advising that he was taking over Rogers' case. Shameih stated that he had unsuccessfully attempted to file notices of appearances into the district court

record, but conceded that he failed to follow up and ensure they had been filed. He also admitted that he had not filed a motion to enroll.

Shameih advised the trial court that he first learned of the motion for summary judgment on the afternoon of August 2, 2017. He immediately filed an opposition to defendants' summary judgment motion, a motion to enroll, a motion to continue, and a memorandum in support of the continuance. Shameih indicated that he had been reaching out to Briscoe for Rogers' file to no avail.

Eversberg acknowledged having received Shameih's email and said he asked Shameih to telephone him. Eversberg said the two attorneys discussed the case, after which his impression was that Shameih was considering representing Rogers. According to Eversberg, other attorneys had contacted him about the case before but he never heard back from them after initial contact. When Eversberg filed the motion for summary judgment in May 2017, he checked the record and, because no attorney had enrolled as counsel for Rogers, he had Rogers served. He indicated that he had sent two copies of the motion for summary judgment and two copies of the order setting the hearing for August 7, 2017 to Rogers. One set of copies had been sent by regular mail and a second set was sent by certified mail. The last correspondence to Rogers from Eversberg was the trial court's setting order, which was sent by certified mail and signed for by Rogers on May 15, 2017.

Based on our review of the record, we find no error in the trial court's conclusion that Rogers failed to establish peremptory grounds warranting the granting of a continuance. Although Rogers claims he had inadequate time to secure an attorney and Shameih complains that he only learned of the summary judgment hearing on August 2, 2017, the record establishes that Rogers had from October 2016 to find an attorney and that he was aware of the hearing in May 2017 shortly after Shameih says he began representing Rogers. Thus, we cannot say that Rogers established that despite due diligence, he was unable to obtain evidence

since it was Rogers' failure to timely secure counsel and then to timely communicate to Shameih that he had been served with the motion for summary judgment and the order setting the hearing for August 7, 2017 which hindered his ability to obtain material evidence.

Insofar as the grant of a continuance on discretionary grounds, it was incumbent on Shameih to enroll in the case. This he did not do. Thus, the motion for summary judgment and order setting the hearing were served on Rogers rather than on Shameih as attorney for Rogers. The trial court did not err in finding an absence of a good ground for a discretionary continuance since no attorney of record had enrolled in the matter, and Rogers, who was timely served, failed to communicate to his attorney for over three months that a motion for summary judgment was pending and a hearing was set for August 7, 2017. Therefore, the trial court did not abuse its discretion in denying a continuance on this basis.

Likewise, Shameih's concerns about obtaining a client file from Briscoe similarly fails to establish a good ground for a continuance. Briscoe never enrolled or appeared as an attorney of record. As noted by the trial court, "A simple call to the clerk [of court], [and Shameih] could have gotten a copy of the entire suit record, which at that point, consisted of a petition, an answer, [a] motion to withdraw, and the motion for stay for 90 days [filed] by Rogers." Given that over two years had lapsed since the accident giving rise to the lawsuit, over a year had passed since the petition had been filed, the hearing had been set for over three months, Rogers had been timely served, and the continuance was sought no earlier than two days before the hearing, we find no abuse of the trial court's discretion in denying a continuance on this basis as well.

Rogers nevertheless maintains that he had an insufficient opportunity to conduct discovery. A defendant's motion for summary judgment may be made at any time. La. C.C.P. art. 966A(1). It is not an abuse of a trial court's wide

discretion to entertain a motion for summary judgment before discovery has been completed. The trial court has discretion to render summary judgment if appropriate or to allow further discovery. Although the parties must be afforded the opportunity to conduct “adequate discovery” to present their claims, see La. C.C.P. art. 966C(1), there is no absolute right to delay action on a motion for summary judgment until discovery is complete. The only limit to the trial court’s discretion is that the parties must be given a fair opportunity to present their claims. *Ellis v. Louisiana Bd. of Ethics*, 2014-0112 (La. App. 1st Cir. 12/30/14), 168 So.3d 714, 725, writ denied, 2015-0208 (La. 4/17/15), 168 So.3d 400.

The record supports a finding that Rogers was provided an opportunity to conduct adequate discovery in the year that his suit had been pending. We find no abuse of discretion by the trial court in the timing of its rendition of summary judgment particularly since there is no absolute right to delay action on a motion for summary judgment until discovery is completed. Rogers’ lack of discovery is imputable to him and, thus, he failed to demonstrate that he was denied a fair opportunity to present his claims.

Rogers maintains that Eversberg violated La. State Bar Articles of Incorporation, Art. 16, Rules of Prof. Conduct, Rule 4.2 when he served the motion for summary judgment and order setting the hearing on Rogers instead of on Shameih who was his attorney. Rogers urges that this court “should not uphold the summary judgment when such a violation exists.” Rule 4.2(a) states, “Unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order, a lawyer in representing a client shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.”

Eversberg advised the trial court that when he filed defendants' motion for summary judgment, he served Rogers personally because the record contained no attorney of record. According to La. C.C.P. art. 1313:

A. Except as otherwise provided by law, every pleading subsequent to the original petition, and every pleading which under an express provision of law may be served as provided in this Article, may be served either by the sheriff or by:

(1) Mailing a copy thereof to the counsel of record, or **if there is no counsel of record, to the adverse party at his last known address**, this service being complete upon mailing. ...

C. Notwithstanding Paragraph A of this Article, if a pleading or order sets a court date, then service shall be made either by registered or certified mail or as provided in Article 1314, or by actual delivery by a commercial courier. [Emphasis added.]

Rogers' initial attorney had withdrawn pursuant to the October 28, 2016 court order. No other attorney had enrolled or appeared on Rogers' behalf. Thus, the record established that there was no counsel of record on May 1, 2017. Pursuant to La. C.C.P. art. 1313, Eversberg mailed both the motion for summary judgment, which was a pleading subsequent to the original petition, and the order setting the motion for summary judgment for a hearing on August 7, 2017 by regular and certified mail to Rogers, who signed the return receipt acknowledging delivery. Because Eversberg was authorized under law, i.e., La. C.C.P. art. 1313, to communicate with Rogers in the manner that he did, his actions of mailing the motion for summary judgment and the order setting the hearing for August 7, 2017 were outside the ambit of Rule 4.2. Thus, there was no Rule 4.2 violation and the trial court correctly granted summary judgment.<sup>3</sup>

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<sup>3</sup> On appeal, Rogers suggests that the failure of the trial court to rule on the motion for a 90-day stay that he filed in proper person on August 26, 2016 precludes the grant of summary judgment. Mindful that the motion for the stay did not contain an order for the trial court to sign or to set for hearing, because Rogers failed to submit the issue to the trial court, we find the matter is not properly before us in this appeal. See La. U.R.C.A. Rule 1-3 (providing that courts of appeal will review only issues which were submitted to the trial court unless the interest of justice clearly requires otherwise).



## **DECREE**

For these reasons, the trial court's denial of a continuance, which was appealed in conjunction with the grant of summary judgment in favor of defendants, dismissing Rogers' claims, is affirmed. Appeal costs are assessed against plaintiff-appellant, Oliver Rogers.

**AFFIRMED.**