STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 1045

LISA OLSON

VERSUS

CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE & CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE PERSONNEL BOARD

Judgment Rendered: JUN 21 2019

* * * * * *

On Appeal from the Nineteenth Judicial Trial Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. C613036

Honorable Timothy E. Kelley, Judge Presiding

* * * * * *

Robert N. Aguiluz
Baton Rouge, Louisiana

Counsel for Plaintiff/Appellant
Lisa Olson

Dawn N. Guillot
Baton Rouge, Louisiana

Counsel for Defendant/Appellee
City of Baton Rouge/Parish of East Baton Rouge

* * * * * *

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

Higginbotham, J. Concurs in the result.

McCLENDON, J.

The plaintiff appeals a trial court judgment that granted defendant's motion for summary judgment, treating it as an exception of prescription. For the reasons that follow, we reverse and remand to the trial court with instructions.

FACTS AND PROCEDURAL HISTORY

The plaintiff, Lisa Olson, was employed by the City of Baton Rouge/Parish of East Baton Rouge (the City/Parish) in the Department of Emergency Medical Services (EMS). Mrs. Olson contends that while employed she received a letter from the City/Parish dated May 15, 2007, demoting her from the position of Prison Healthcare Manager to the position of Assistant EMS Business Manager. It is undisputed that Mrs. Olson timely appealed her demotion to the Personnel Board (the Board), and the Board scheduled a hearing in the matter.[1] The Board was unable to complete the hearing in one day, and a second day was scheduled for March 27, 2008. Thereafter, because the parties believed they had reached a settlement, the March 27, 2008 hearing date was cancelled.

However, due to the parties' failure to confect a settlement agreement, the City/Parish scheduled a hearing for October 16, 2008, to enforce said settlement agreement.[2] That hearing date was cancelled, and no further actions were taken by any party for approximately three years and seven months until June 19, 2012, when Mrs. Olson filed her petition for damages against the City/Parish and the Personnel Board (collectively the City/Parish).

In her petition, Mrs. Olson asserted that, despite her request, the City/Parish failed and refused to reschedule the remainder of her hearing after negotiations for a settlement failed. She contended that pursuant to the home rule charter for the City/Parish and the rules governing classified service, the City/Parish was obligated to provide her with the appeal hearing. Mrs. Olson also maintained that because she

---

[1] Although both parties agree that the City/Parish's home rule charter applies in this matter, we note that neither party offered into evidence the City/Parish's plan of government.

[2] In her petition, Mrs. Olson asserted that the settlement negotiations failed. However, the City/ Parish stated in its answer that a settlement was reached by the parties, but Mrs. Olson refused to sign the release documents.

continued to remain in a lower ranking position at a lower pay grade, she has suffered damages in the form of lost wages and retirement benefits. According to Mrs. Olson, because she was denied her appeal hearing, she was denied due process of law guaranteed by the United States Constitution and the State of Louisiana. Therefore, Mrs. Olson requested that the trial court issue a judgment ordering the City/Parish to provide her with a hearing and for all damages incurred as a result of the City/Parish's violation of its Home Rule Charter and rules governing classified service.[3]

The City/Parish answered the petition and specifically asserted that Mrs. Olson's claims were "abandoned and/or prescribed due to the failure of the plaintiff to take any action whatsoever to pursue her claims to the Personnel Board and in any other appropriate jurisdiction." Thereafter, on May 12, 2016, the City/Parish filed a motion for summary judgment, asserting that there was no genuine issue as to material facts and that they were entitled to judgment as a matter of law. Following a hearing on September 9, 2016, the trial court treated the motion for summary judgment as "a motion to dismiss on the grounds of abandonment and/or prescription" and granted same. The trial court signed a judgment on October 5, 2016, dismissing Mrs. Olson's claims with prejudice. Mrs. Olson has appealed.

DISCUSSION

After an opportunity for adequate discovery, a motion for summary judgment is properly granted if the motion, memorandum, and supporting documents, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966A(3). The mover bears the burden of proving that he is entitled to summary judgment. However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. LSA-C.C.P. art. 966D(1). If the moving party points out that

[3] Although Mrs. Olson requested damages in her petition, her prayer for relief makes no mention of damages and asks only for a hearing in accordance with the City/Parish's home rule charter and rules governing classified service. Further, in her appellate brief Mrs. Olson has conceded that she is only seeking mandamus relief.

there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.[4] LSA-C.C.P. art. 966D(1); **Holmes v. Lea**, 17-1268 (La.App. 1 Cir. 5/18/18), 250 So.3d 1004, 1009.

Although typically asserted through the procedural vehicle of the peremptory exception, the defense of prescription may also be raised by motion for summary judgment. **Hogg v. Chevron USA, Inc.**, 09-2632 (La. 7/6/10), 45 So.3d 991, 997. When prescription is raised by motion for summary judgment, review is *de novo,* using the same criteria used by the trial court in determining whether summary judgment is appropriate. **Id.**

In her appeal, Mrs. Olson concedes that this matter came before the trial court solely as a mandamus action. She contends that the trial court erred in finding that her personnel action and mandamus action were prescribed or abandoned and, further, that the trial court lacked authority to declare that her personnel action pending before the personnel board had prescribed or had been abandoned. In contrast, the City/Parish maintains that any duty owed by the Board to Mrs. Olson was fulfilled when it scheduled her hearing and was subsequently extinguished when Mrs. Olson "voluntarily dismissed" the matter before the Board in 2008. The City/Parish also contends that Mrs. Olson did not ask the Board to reset the matter and took no action for more than three years.

In connection with the motion for summary judgment, the City/Parish submitted the affidavit of Dr. Annette Bookter and Mrs. Olson's responses to discovery requests filed by the City/Parish. Mrs. Olson filed no opposition to the motion for summary judgment.

---

[4] Louisiana Code of Civil Procedure Article 966F provides that a summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time. Although, in its motion, the City/Parish asked for summary judgment "on the grounds that the pleadings, discovery and affidavits show that there is no genuine issue as to material facts and movers are entitled to summary judgment as a matter of law," the accompanying memorandum clearly sets forth its argument of prescription and abandonment.

Dr. Bookter testified in her deposition that she is the Director of Human Resources for the City/Parish. She stated that, pursuant to the City/Parish's plan of government, she is also the secretary for the Personnel Board. In that capacity, Dr. Bookter handles administrative matters for the Board and is responsible for notifying employees of their right to appeal to the Personnel Board. With regard to Mrs. Olson's case, Dr. Bookter stated that she was not involved, but had her staff gather the documentation for her review. Dr. Bookter testified that her records indicated that the hearing was not completed after the first day, the Board was subsequently notified that the case had settled, and it was not rescheduled for another hearing date. Dr. Bookter also stated that her documentation established that a hearing was scheduled for October 16, 2008, but that the City/Parish withdrew its request to go before the Board.

With regard to Mrs. Olson's discovery responses, Mrs. Olson was asked to identify all actions or efforts she made in pursuing the appeal and to produce any and all documents showing her actions. In her Answer to Discovery, Mrs. Olson gave the same answer to both requests:

> None. Per the City of Baton Rouge/Parish of East Baton Rouge's Plan of Government and rules of its civil service board, the only request for hearing that must be made is the one in the Original appeal. Dr. Annette Bookter, defendant's Human Resources Director during the time in question, testified that defendant's Human Resources Department schedules the hearing without any request from the appellant.

Thereafter, on September 8, 2016, the day prior to the hearing on the motion for summary judgment, the parties entered into the following joint stipulations:

> 1. The second day of testimony of the Lisa Olson hearing before the Personnel Board was scheduled for March 27, 2008.
>
> 2. The date was cancelled by mutual agreement of counsel for Mrs. Olson and for the City because the parties believed they had reached a settlement.
>
> 3. The date of October 16, 2008 was set by the Personnel Board to hear the City's request to enforce the settlement agreement. It was not set as a second day of testimony for Mrs. Olson's hearing.
>
> 4. The City withdrew the request because the Board's Attorney advised he did not believe the Board had jurisdiction to enforce the settlement. Therefore the October 16, 2008 date was cancelled.

At the hearing on the motion for summary judgment, the parties advised the trial court of the joint stipulations, which were filed into the record. After argument, the court explicitly treated the motion for summary judgment as a motion to dismiss on the grounds of prescription or abandonment and granted same. The trial court stated:

> The case was filed on June 19, 2012. The last action that occurred prior to the filing of the lawsuit was October 18, 2008. Now, while it is true that the plaintiff in the case has a property stake in [her] job, [she] did not take any action for nearly four years. On October 18, 2008 when the plaintiff was informed that the Personnel Board would not reset the matter for further hearing, plaintiff should have instituted this action promptly. However, the plaintiff waited over three-and-a-half years to seek action from this court; therefore, the action regarding the underlying facts had prescribed. It is not an ongoing, or a continuing tort matter.
>
> Further, with regard to the lawsuit itself, even though prescribed when filed, there is no activity in the case for a period longer than three years from the last action in the case; therefore, it is also on those grounds deemed abandoned.
>
> So, I will grant prescription, and to the extent that prescription is improper, I will grant dismissal for abandonment in this matter and dismiss the claims.

The Disciplinary Action

As previously noted, Mrs. Olson argues that the trial court lacked the authority to determine that her personnel action is prescribed and abandoned. We agree.

Jurisdiction 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. LSA-C.C.P. art. 1. Jurisdiction over the subject matter is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted. LSA-C.C.P. art. 2. A judgment rendered by a court which has no jurisdiction over the subject matter of the action or proceeding is void. LSA-C.C.P. art. 3.

Louisiana Constitution Article 10, § 8(A) provides:

> **(A) Disciplinary Actions.** No person who has gained permanent status in the classified state or city service shall be subjected to disciplinary action except for cause expressed in writing. A classified employee subjected to such disciplinary action shall have the right of appeal to the appropriate commission pursuant to Section 12 of this Part. The burden of proof on appeal, as to the facts, shall be on the appointing authority.

Louisiana Constitution Article 10, § 12(B) also provides, in pertinent part:

> **(B) Cities.** Each city commission ... shall have the exclusive power and authority to hear and decide all removal and disciplinary cases, with subpoena power and power to administer oaths. It may appoint a referee to take testimony, with subpoena power and power to administer oaths to witnesses. The decision of a commission shall be subject to review on any question of law or fact upon appeal to the **court of appeal** wherein the commission is located, upon application filed with the commission within thirty calendar days after its decision becomes final. [Emphasis added.]

While we can find no decision or other disposition regarding Mrs. Olson's disciplinary action in the record before us, the review of any decision of a commission is in the court of appeal and not in the district court. See LSA-Const. art. 10, § 12(B). The only matter before the trial court was Mrs. Olson's request for mandamus relief. Therefore, to the extent that the trial court ruled on Mrs. Olson's personnel action, the trial court lacked the authority to make those determinations and its judgment to the contrary is legally incorrect.

The Mandamus Action

The trial court also dismissed Mrs. Olson's mandamus action.[5] We must therefore next address whether the mandamus action was properly dismissed.

Louisiana Code of Civil Procedure Article 3863 provides that a writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law. Mandamus is an extraordinary remedy, which must be used sparingly by the court and only to compel action that is clearly provided by law. Mandamus will not lie in matters in which discretion and evaluation of evidence must be exercised, however slight. **Bonvillian v. Department of Ins.**, 04-0332 (La.App. 1 Cir. 2/16/05), 906 So.2d 596, 598-99, writ not considered, 05-0776 (La. 5/6/05), 901 So.2d 1081.

The October 5, 2016 judgment specifically "granted an abandonment of the suit as there ... was no action taken in the suit record for a period of more than three (3) years." We find that the trial court legally erred.

---

[5] While somewhat ambiguous, the trial court's judgment dismissed all of Mrs. Olson's claims, including her request for a judgment ordering the City/Parish to provide her with a hearing. We note that appellate courts review judgments, not reasons for judgment. **Wooley v. Lucksinger,** 09-0571 (La. 4/1/11), 61 So.3d 507, 572.

Louisiana Code of Civil Procedure Article 561A(1) 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. [Emphasis added.]
>
> * * *
>
> (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.
>
> (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).
>
> (5) An appeal of an order of dismissal may be taken only within sixty days of the date of the sheriff's service of the order of dismissal. An appeal of an order of denial may be taken only within sixty days of the date of the clerk's mailing of the order of denial.

Abandonment is both historically and theoretically a form of liberative prescription that exists independent from the prescription that governs the underlying substantive claim. **Clark v. State Farm Mut. Auto. Ins. Co.**, 00-3010 (La. 5/15/01), 785 So.2d 779, 787. The policy underlying LSA-C.C.P. art. 561 is the prevention of protracted litigation that is filed for purposes of harassment or without a serious intent to hasten the claim to judgment. **Brown v. Kidney and Hypertension Associates, L.L.P.**, 08-0919 (La.App. 1 Cir. 1/12/09), 5 So.3d 258, 264-65.

In its memorandum in support of its motion for summary judgment, the City/Parish relied on LSA-C.C.P. art. 561 for its argument that Mrs. Olson's disciplinary action was abandoned. However, the record is devoid of the ex parte motion and affidavit required by Article 561. Moreover, although we question whether LSA-C.C.P. art. 561 applies to an administrative procedure, we find that the trial court failed to follow the mandates of Article 561 and, therefore, legally erred in finding Mrs. Olson's mandamus action abandoned.

The trial court also granted summary judgment based on prescription.[6] Prescription statutes are strictly construed against prescription and in favor of maintaining the cause of action. Thus, if there are two possible constructions, the one which favors maintaining an action, as opposed to barring, should be adopted. **Roberts v. USAA Cas. Ins. Co.**, 14-0384 (La.App. 1 Cir. 11/7/14), 168 So.3d 418, 420. Ordinarily, the burden is on the party raishing the objection of prescription to prove the facts necessary to support the objection. **Doyle v. Mitsubishi Motor Sales of America, Inc.**, 99-0459 (La.App. 1 Cir. 3/31/00), 764 So.2d 1041, 1045, writ denied, 00-1265 (La. 6/16/00), 765 So.2d 338.

There is no prescription other than that established by legislation. LSA-C.C. art. 3457. Further, there is no time limitation in LSA-C.C.P. arts. 3861 through 3866 in which an action for mandamus may be brought, and LSA-C.C. arts. 3492, *et seq.*, addressing liberative prescription, do not provide any time limitation for instituting mandamus proceedings. See **Dantzler v. Hammond Fire and Police Civil Service Bd.**, 04-1498 (La.App. 1 Cir. 8/3/05), 923 So.2d 40, 43, writ denied, 05-2208 (La. 2/17/06), 924 So.2d 1016.

There being no clear prescriptive period applicable to a writ of mandamus, the City/Parish argues that Mrs. Olson's mandamus claim is prescribed based on the doctrine of laches. However, the Louisiana Supreme Court in **Fishbein v. State ex rel. Louisiana State University Health Sciences Center**, 04-2482 (La. 4/12/05), 898 So.2d 1260, 1270, recognized that the doctrine of laches is in conflict with this state's civil laws of prescription. The supreme court stated that because the doctrine of laches is in conflict with this state's civil laws of prescription, the statements contained in civil opinions that suggest the doctrine may be applicable under certain circumstances are repudiated. **Fishbein**, 898 So.2d at 1270. Nevertheless, the supreme court suggested that equitable considerations and estoppel could be considered when there is no positive written law to the contrary. The court referenced

---

[6] In its judgment, the trial court stated that "based upon the content of the defendant's motion for summary judgement, the Court has granted an exception of prescription."

Article 4 of the Louisiana Civil Code, which provides in part that "[w]hen no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity." **Fishbein**, 898 So.2d at 1270. Accordingly, the remaining issue before us is whether Mrs. Olson's mandamus action is time barred by the affirmative defense of equitable estoppel.

Shortly after the decision in **Fishbein**, this circuit decided the **Dantzler** case, which is relied upon by the City/Parish in support of its argument. In **Dantzler**, the employee appealed a judgment denying his request for a writ of mandamus directed to the Fire and Police Civil Service Board to hold a hearing after his termination from the city's police department. Mr. Dantzler originally requested a hearing before the Board on the effective date of his termination, but the Board did not grant him a hearing or conduct an investigation as statutorily required. Nearly a year later, he again requested a hearing. The Board scheduled a hearing, but on the date of the scheduled hearing, Mr. Dantzler's attorney requested that the hearing be continued and rescheduled because he was recently hired and unable to attend the scheduled hearing. More than four years later, the employee filed his petition for mandamus, contending that the civil service board was mandated to grant him a hearing after it had been continued. **Dantzler**, 923 So.2d at 41-42.

The trial court determined that, based on the doctrines of laches and res judicata, his request was barred. In affirming the trial court's decision, this court pointed out that, despite the improper reference to the doctrine of laches, the trial court correctly relied on equity and LSA-C.C. art. 4 to resolve the issues presented by the petition for mandamus. This court stated that Mr. Dantzler filed his petition for mandamus more than four and a half years after his request for a continuance. We also found that, during that time, he was actively pursuing a discrimination claim in federal court based on his employment. Of particular importance, this court referred to Mr. Dantzler's deposition testimony wherein he stated that he was no longer processing the disciplinary action. Specifically, the following colloquy occurred:

[By the attorney for the City of Hammond:]

Q: Are you still processing the Civil Service hearing? Are you still trying to get that, or have you given up-

[By Mr. Dantzler:]

A: -no sir. It's over with. I ain't worried about. (sic) I'll deal with it in a different route.

Dantzler, 923 So.2d at 43-44.

The facts of **Dantzler** are distinguishable from the present matter. Mr. Dantzler, while waiting over four years to seek a rescheduling of his hearing, also pursued relief against his former employer in federal court based on allegations of discrimination arising out of the same facts that were the subject matter of his disciplinary action. Further, in his deposition taken in connection with his federal litigation, Mr. Dantzler testified of his intent to no longer pursue the disciplinary action.[7]

In this matter, although the City/Parish alleges that Mrs. Olson voluntarily dismissed the appeal of her personnel action in 2008, upon our review of the record, we can find no dismissal or other disposition of the appeal. Further, there is nothing in the record to indicate that, in October 2008, Mrs. Olson was informed by the Board that the matter would not be reset for hearing, as stated by the trial court. The record merely shows that the date scheduled for the second day of the hearing was cancelled. The record is devoid of any facts explaining why Mrs. Olson waited more than three years to file her request for a hearing. However, there is nothing in the record before us to suggest that Mrs. Olson was not attempting to proceed with the appeal of her disciplinary action.

We find that, to the extent that the City/Parish is relying on the defense of equitable estoppel in its argument that Mrs. Olson's lawsuit is time barred, this defense was not properly raised. A defendant is required to affirmatively set forth in his or her

---

[7] Compare **Gaudet v. City of Sulphur Mun. Police and Fire Civil Service Bd.**, 497 So.2d 63 (La.App. 3 Cir. 1986) (In **Gaudet**, the trial court reversed a decision of the civil service board denying a terminated employee's request to reschedule a hearing based on the fact that too much time had passed since her termination. The third circuit affirmed, reasoning that the record merely revealed that the employee waited over a year to request another hearing. The employee was given an opportunity to present evidence to the civil service board explaining the lapse of time between the postponed hearing and her request to reschedule. **Gaudet**, 497 So.2d at 64-65.).

answer any matter constituting an affirmative defense upon which he or she will rely. LSA-C.C.P. art. 1005. An affirmative defense raises a new matter which, assuming the allegations in the petition to be true, constitutes a defense to the action and will have the effect of defeating plaintiff's demand on its merits. **Hebert v. ANCO Insulation, Inc.**, 00-1929 (La.App. 1 Cir. 7/31/02), 835 So.2d 483, 492, writs denied, 02-2956, 02-2959 (La. 2/21/03), 837 So.2d 629.

The purpose of the requirement that certain defenses be affirmatively pled is to give the plaintiff fair and adequate notice of the nature of the defense and, thereby, prevent last minute surprise to the plaintiff. **Hebert**, 835 So.2d at 492. Because affirmative defenses raise matters for judicial resolution outside of issues raised by plaintiff's petition, plaintiff must be made aware of these matters so that plaintiff can prepare an opposition to the defense and adjust his case, if necessary, in light of the new facts and issues raised by the affirmative defense. **Id.**

The City/Parish did not specifically plead the affirmative defense of equitable estoppel in its answer. Therefore, the City/Parish is precluded from arguing equitable estoppel as a defense in this mandamus action.

Accordingly, the trial court erred in denying Mrs. Olson's petition for a writ of mandamus. Mrs. Olson was entitled to the issuance of a writ of mandamus from the trial court directing the Personnel Board to reset and complete her disciplinary hearing.

CONCLUSION

Based on the foregoing, we reverse the October 5, 2016 judgment that denied Mrs. Olson's petition for a writ of mandamus. We remand this matter to the trial court and order the trial court to issue a writ of mandamus in favor of Ms. Olson, directing the Personnel Board to reset and complete the hearing in her disciplinary matter within forty-five days of the finality of this opinion. Costs of this appeal in the amount of $806.50 are assessed to the City of Baton Rouge/Parish of East Baton Rouge.

REVERSED AND REMANDED WITH INSTRUCTIONS.