

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 1117

SUSAN RUSSO MARCHAND, ET AL

VERSUS

TEXAS BRINE COMPANY, LLC, ET AL

Judgment Rendered:

MAY 06 2019

On appeal from the
Twenty-Third Judicial District Court
In and for the Parish of Assumption
State of Louisiana
Docket No. 34,270

Honorable Jason Verdigets, Judge Presiding

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* * * * *

BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

GUIDRY, J.

This appeal stems from a summary judgment dismissing a third-party demand against an insurer. In the underlying case, Texas Brine Company, LLC filed third-party demands against several parties, including Sol Kirschner, who at one time owned a 2.25 percent interest in the Hooker #1 oil and gas well, which happened to be located in the area where a massive sinkhole appeared in Assumption Parish in August 2012. Although the pleading wherein Texas Brine asserts claims against Mr. Kirschner's homeowner's insurance provider is not in the record before us, on November 21, 2017, the insurer, National Surety Corporation,¹ filed a peremptory exception raising the objection of res judicata along with a motion for summary judgment seeking the dismissal of Texas Brine's claims against it. In that combined pleading, National Surety Corporation alleged that the policy issued to Mr. Kirschner does not provide coverage for Texas Brine claims based on a business activities exclusion contained in the policy. Following a hearing on National Surety Corporation's exception and motion, the trial court overruled the exception, but granted the motion for summary judgment to dismiss Texas Brine's claims against the insurer with prejudice in a judgment signed February 22, 2018. Texas Brine devolutively appeals that judgment herein.

As the primary defendant in the litigation that has been filed regarding the sinkhole in Assumption Parish, Texas Brine has responded to those lawsuits, in part, by filing identical third-party claims, including claims identical to the third-party claims against Mr. Kirschner and National Surety Corporation discussed herein. Notably, in Labarre v. Occidental Chemical Company, 17-1370, pp. 3-4 (La. App. 1st Cir. 6/4/18), 251 So. 3d 1092, 1095, writ denied, 18-1380 (La.

¹ In its memorandum in support of its exception and motion, National Surety Corporation describes the insurance provided to Mr. Kirschner as "a homeowner's policy with excess coverage" that is furnished through coverage that National Surety Corporation identifies as the "National Surety Primary Policy" and the "National Surety Excess Policy."

12/3/18), 257 So. 3d 196, Texas Brine similarly filed a third-party demand against Mr. Kirschner and National Surety Corporation, and National Surety Corporation similarly filed a motion for summary judgment seeking dismissal of Texas Brine's claims based on the business activities exclusion contained in its policy. Also similarly, the trial court granted summary judgment in favor of National Surety Corporation, dismissing Texas Brine's third-party claims with prejudice in a judgment signed June 28, 2017, which Texas Brine appealed. Labarre, 17-1370 at p. 5, 251 So. 3d at 1096.

Consequently, the issues before us in the instant appeal involving the same parties have previously been considered and decided by this court, albeit in a different proceeding. Having likewise considered the evidence presented and the applicable law in this matter, we agree with the panel's reasoning and holding in Labarre and hereby adopt the holding and reasoning of that decision as our own. Thus, we issue this memorandum opinion reversing the February 22, 2018 summary judgment appealed herein and remand this matter to the trial court for further proceedings.² See Uniform Rules of Louisiana Courts of Appeal, Rule 2-16.1(B). All costs of this appeal are cast to National Surety Corporation.

REVERSED AND REMANDED.

² We likewise recognize, as mentioned by Judge Holdridge in his concurrence in Labarre, that this matter may potentially be rendered moot based on other judgments that dismiss Texas Brine's claims against Mr. Kirschner; however, those judgments are not yet final and definitive. See, e.g., Pontchartrain Natural Gas System v. Texas Brine Company, LLC, 18-0606 (La. App. 1st Cir. 12/21/18), ___ So. 3d ___, 2018 WL 6718522. Moreover, while National Surety Corporation, in its appellee brief, suggests that this panel should stay the current appeal based on the judgments dismissing the claims against Mr. Kirschner potentially becoming final and definitive, in light of the fact that National Surety Corporation failed to formally request such relief pursuant to a motion properly filed with this court, we decline to do so. See Uniform Rules of Louisiana Courts of Appeal, Rule 2-7.3.