

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 1526

BRIAN LEWIS

VERSUS

GOVERNOR BOBBY JINDAL, MAYOR KIP HOLDEN, ATTORNEY
GENERAL BOBBY CALDWELL, LSU HEALTH CENTER, LSU
SURGICAL CENTER, BATON ROUGE MEDICAL CENTER, OUR
LADY OF THE LAKE MEDICAL CENTER, UROLOGY CENTER
FOR BOTH MEDICAL CENTER, DOCTOR JAMES RHORER,
ELLISON B. ABAJ, ANNA SMITH, LUANN BARNETT, DAM
FLOWERS, JAMES MORRISON, MINH SO, BRITTNEY DENLEY,
HENRY HOLLIER, BARBARA LOUISE COHN, BEAU BLACK,
KENNETH B. BANK-DALE, DONALD HELTZ, PAMELA BARA,
ROBERT F. HAYSEN, COTY TROTTER, BAPTISTE W. BRUNNER,
KENNETH M. BLUE, JR., OTL-BROWN-FINANCIAL
DEPARTMENT, GAIL MAHER-CASE MANAGER, LESLIE ALTER-
CASE MANAGER

DATE OF JUDGMENT: MAY 31 2019

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 634,850, SECTION 27, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE TODD W. HERNANDEZ, JUDGE

Brian Lewis
Baton Rouge, Louisiana

Plaintiff-Appellant
In Proper Person

Michael M. Remson
Craig J. Sabottke
Courtney S. Herndon
Baton Rouge, Louisiana

Defendant-Appellee
Baton Rouge General
Medical Center

BEFORE: WELCH, CHUTZ, AND LANIER, JJ.

Disposition: AFFIRMED.

WELCH J. concurs without reasons

CHUTZ, J.

Plaintiff-appellant, Brian Lewis, appeals from a district court judgment dismissing his medical malpractice suit pursuant to a dilatory exception raising the objection of prematurity and a peremptory exception raising the objection of no cause of action. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On November 5, 2014, plaintiff filed suit, *in forma pauperis*, in the 19th Judicial District Court against numerous defendants, including Baton Rouge General Medical Center (BRGMC).¹ In his *pro se* petition, plaintiff raised multiple complaints about the medical treatment and/or lack of treatment he received from various defendants, including BRGMC. He alleged his physicians lied to him about taking care of his health promptly, refused to see him at times, neglected to inform him about a mass on his kidney, refused to do anything about blood in his urine, and did a poor job of helping him with his health issues. BRGMC filed a dilatory exception raising the objection of prematurity and a peremptory exception raising the objection of no cause of action, both exceptions being based on the contention that plaintiff's suit was premature because he failed to present his claims to a medical review panel prior to filing suit in district court. Plaintiff did not appear at the hearing held on the exceptions. The district court sustained BRGMC's exceptions and signed a written judgment dismissing plaintiff's malpractice claims against BRGMC, without prejudice and at plaintiff's costs. Plaintiff appealed, and this court vacated the judgment due to a lack of proper service upon plaintiff of the hearing date. The matter was remanded to the district court. See *Lewis v. Jindal*, 16-0759 (La. App. 1st Cir. 12/22/16) (unpublished).

¹ BRGMC is the only defendant involved in this appeal. Plaintiff's claims against the other defendants were dismissed in prior judgments. See *Lewis v. Jindal*, 15-1329 (La. App. 1st Cir. 4/15/16) (unpublished), writ denied, 16-0840 (La. 6/17/16), 192 So.3d 772, and *Lewis v. Jindal*, 15-1330 (La. App. 1st Cir. 4/15/16) (unpublished).

Upon remand, BRGMC refiled exceptions of prematurity and no cause of action. The initial hearing date on the exceptions was passed because service on plaintiff had not been perfected. Under La. C.C.P. art. 891(A), a plaintiff is required to include an address in his petition that is not a post office box for purposes of receipt of service. In his petition and subsequent filings, plaintiff provided the district court with only a post office box as his address.

On June 4, 2018, BRGMC filed a motion to reset the exceptions for hearing, and the matter was reset for August 6, 2018. On the same date that the motion to reset was filed, BRGMC mailed a copy of the motion to plaintiff at his last known street address both by regular and by certified mail. On July 11, 2018, BRGMC send by certified mail addressed to the post office box provided by plaintiff as his address copies of the motion to reset BRGMC's exceptions for hearing, the signed order resetting the hearing date on the exceptions, and a copy of the notice of hearing issued by the clerk of court. BRGMC also attempted to have the sheriff's office serve plaintiff at his last known street address, but the attempt was unsuccessful despite due and diligent efforts by the sheriff's office.

A hearing was held on BRGMC's exceptions on August 6, 2018. Plaintiff did not appear at the hearing, either in person or through counsel. The district court sustained the exceptions and signed a written judgment dismissing plaintiff's claims, without prejudice, on September 4, 2018. Plaintiff appealed that judgment.

DISCUSSION

On appeal, plaintiff raises no issue regarding the merits of BRGMC's exceptions of prematurity and no cause of action.² Instead, plaintiff argues the

² We note that a peremptory exception of no cause of action is not the proper procedural mechanism to raise the prematurity of a plaintiff's claim. *Moreno v. Entergy Corporation*, 10-2281 (La. 2/18/11), 62 So.3d 704, 706 (*per curiam*). The proper procedural mechanism to raise the failure of a medical malpractice plaintiff to submit his claim to a medical review panel before filing suit is the dilatory exception of prematurity. *Blevins v. Hamilton Medical Center, Inc.*, 07-127 (La. 6/29/07), 959 So.2d 440, 444. In *Moreno*, 62 So.3d at 706, the Louisiana Supreme Court explained that the exceptions of prematurity and no cause of action serve completely different functions, stating:

judgment dismissing his suit should be vacated because he was never served by the sheriff or otherwise notified to appear for the rescheduled hearing on BRGMC's exceptions.

Louisiana Code of Civil Procedure article 1313(A)(1) provides that service on a *pro se* party of a pleading, other than the original petition, is complete upon the mailing of a copy of the pleading to the party's last known address. When a pleading or order sets a court date, however, Article 1313(C), requires that the service upon the adverse party "shall be made either by registered or certified mail or as provided in [La. C.C.P. art.] 1314, or by actual delivery by a commercial courier." If service is made by mail, Article 1313(B) requires that the party making the service file a certificate in the record of the manner in which service was made. The sheriff may serve an adverse party either by personal or domiciliary service. La. C.C.P. arts. 1314(A)(1) and 1231. If the adverse party is not represented by counsel and his address is unknown, La. C.C.P. art. 1314(A)(2)(a) allows the sheriff to make service by "delivery of a copy of the pleading to the clerk of court...."

In this case, counsel for BRGMC filed a certificate of service into the record pursuant to La. C.C.P. art. 1313(B) certifying that service was made upon plaintiff

An exception of no cause of action tests "the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the pleading." An exception of prematurity serves a completely different purpose: "The dilatory exception of prematurity provided in La. Code Civ. Proc. art. 926 questions whether the cause of action has matured to the point where it is ripe for judicial adjudication." These are two separate lines of inquiry, and the court of appeal erred in conflating them. [Citations and footnote omitted.]

Although the court of appeal claimed it was entering an exception of no cause of action, the judgment was not truly based on the legal insufficiency of the allegations. It is clear that the court based its ruling solely on the theory that Entergy's indemnity claim was not ripe for adjudication, **which is properly raised only via dilatory exception.** [Emphasis added.]

Nevertheless, because plaintiff did not raise the issue, we will not consider the propriety of BRGMC raising the issue of prematurity through an exception of no cause of action. To do so would have no practical effect in any event since, in addition to filing the exception of no cause of action, BRGMC also filed an exception of prematurity. Therefore, the issue of the prematurity of plaintiff's suit was properly raised and ruled upon by the district court on the exception of prematurity.

in accordance with La. C.C.P. arts. 1313 and 1314. Specifically, counsel certified that on July 11, 2018, copies of BRGMC's motion to reset its exceptions for hearing, the signed order rescheduling the hearing, and the notice from the clerk of court's office of the date, time, and place of the rescheduled hearing was mailed to plaintiff by certified mail addressed to his last known address. Counsel further certified that after the sheriff was unable to personally serve plaintiff with a copy of the signed order resetting the hearing date, despite diligent efforts, the copy of the signed order was returned to the clerk of court's office.

Based on our review, we find the record contains sufficient proof of service of the notice of hearing on BRGMC's exceptions. Plaintiff failed to comply with the La. C.C.P. art. 891(A) requirement that he provide the district court with a street address in his petition. Given this omission, BRGMC effected service upon plaintiff in accordance with La. C.C.P. art. 1313(C) when it mailed to plaintiff, by certified mail addressed to his last known address (a post office box), copies of the signed order rescheduling the hearing and the notice from the clerk of court's office of the date, time, and place of the rescheduled hearing. See Lewis, 16-0759 at p. 5. Louisiana Code of Civil Procedure article 1571(B) provides that "[t]he failure of a party to provide [an address] does not affect the validity of any judgment rendered *if notice of trial or other matters was sent to the party's last known address of record.*" (Emphasis added.) Therefore, because proper service was made on plaintiff in accordance with the provisions of the Louisiana Code of Civil Procedure, there is no merit in plaintiff's contention that the judgment dismissing his claims against BRGMC, without prejudice, should be vacated.

CONCLUSION

For the above reasons, the district court's September 4, 2018 judgment dismissing plaintiff, Brian Lewis', medical malpractice claims against defendant, Baton Rouge General Medical Center, without prejudice, is affirmed. All costs of this appeal are assessed to plaintiff, Brian Lewis.

AFFIRMED.