**NOT DESIGNATED FOR PUBLICATION**

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| **CORINNE WATTS, WIFE OF/AND WILLIAM WATTS** | * | **NO. 2000-CA-2377** |
| | * | **COURT OF APPEAL** |
| **VERSUS** | * | **FOURTH CIRCUIT** |
| **COSMO HOMES, CHARLES F. HODGINS, NORMAN HODGINS, AND OTHER UNKNOWN INDIVIDUALS AND FIRST FINANCIAL INSURANCE COMPANY,** | * | **STATE OF LOUISIANA** |
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-18479, DIVISION "K-14"
Honorable Richard J. Ganucheau, Judge
* * * * * *
**Judge Terri F. Love**
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Joan Bernard Armstrong, Judge Terri F. Love)

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**AFFIRMED**

Plaintiffs, Corinne and William Watts (The Wattses), appeal from a judgment dismissing their case, with prejudice, after they failed to appear for trial on the merits. Additionally, they appeal the trial court's denial of their motion for a new trial.

**FACTS**

In October 1997, the Wattses, through attorney Melvin N. Cade, filed a petition for damages against Cosmo Homes (Homes), First Financial Insurance Company (First Financial), Charles F. Hodgins and others. The

matter was originally set for trial on October 27, 1999 per agreement of Herbert A. Cade, attorney for plaintiffs, and Michael P. Mentz, attorney for defendants Homes and First Financial. According to the Notice of Trial and the Trial Order issued to counsel of record on August 18, 1999, the case was fixed for trial on the merits at 9:30 a.m. on October 27, 1999. On the morning of trial, Herbert A. Cade filed a Motion to Withdraw as counsel because the Wattses had discharged him. In that motion, he asked that the trial be continued to allow his former clients sufficient time to engage new counsel. The trial court signed that motion on October 27, 1999.

On the following day, the trial court mailed a new Notice of Trial to counsel for defendants and to the Wattses, directly, at their address of record. That notice set the matter for trial on February 22, 2000, however, no time was noted therein. The record contains another Trial Order, also dated October 28, 1999, which fixed the case for trial at 9:30 a.m. on February 22, 2000. It is unclear from the record whether the new Trial Order reflecting the time of trial was mailed to the Wattses or to counsel for defendants.

On December 13, 1999, the Wattses filed, in proper person, a Motion for Extension of Time to File Responsive Pleadings. The trial judge granted the Motion on December 15, 1999, but added the following language to the

order: "but this order shall NOT delay the trial set herein on Feb 22, 2000." The record does not reflect whether the Wattses received a copy of the motion as annotated by the judge.

At 10:00 a.m. on February 22, 2000, the matter was taken up for trial. Present in the courtroom were defense counsel, Mr. Mentz, and James E. Uschold, an attorney "filling in" for Richard Kanuch, the Wattses' newly hired, but not formally enrolled, counsel. Mr. Uschold informed the judge that Ms. Watts was on her way, and moved for a continuance on her behalf. The judge denied that motion finding that Mr. Uschold did not have the capacity to make such motion. After being told by Mr. Uschold that he was not ready to enroll as counsel for plaintiffs and to proceed with their case, the judge granted defendants' motion for involuntary dismissal of the case. A judgment was signed on February 24, 2000, in favor of defendants, dismissing plaintiffs' action with prejudice.

On March 6, 2000, Richard Kanuch filed a Motion to Enroll as Counsel for the Wattses, as well as, a Motion for New Trial. On March 13, 2000, the trial judge signed the order allowing Kanuch to enroll as counsel for the Wattses, but he denied their Motion for New Trial.

The Wattses are before this Court appealing both the judgment dismissing their suit and the denial of their Motion for New Trial.

## ASSIGNMENTS OF ERROR

Plaintiffs assert three assignments of error. First, they contend that the trial court erred when it mailed them an inadequate notice of trial and failed to inquire whether they had received such notice. Second, they contend that the trial court erred when it dismissed their action without giving them an opportunity to be heard. And finally, they contend that the trial court erred when it denied their motion for a new trial.

## I. DID THE TRIAL COURT GIVE THE PLAINTIFFS ADEQUATE NOTICE OF THE TRIAL?

Rule 10, Section 4 of the Civil District Court Rules (the Local Rules) provides, in pertinent part, as follows:

> … the minute clerk of the division shall mail to the attorneys of record in the case a notice of trial not less than twenty-one days prior to the date fixed for said trial… In any matter in which a litigant is not represented by an attorney of record, notice of such trial date shall be mailed to the litigant to the address as shown by the record.

This rule implements La. C.C.P. art. 1571(A) which obliges district courts to prescribe the procedure for assigning cases for trial by rules which "require adequate notice of trial to all parties." La. C.C.P. art. 1571(B) further provides:

> A party who appears in proper person before the court shall advise the court of his current address and any change of address during the pendency of the proceedings. The address and change of address shall be entered in the record of the

> proceedings. The failure of a party to provide such information 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.

Comment (a) to article 1571 states: "Except as provided in art. 1572, infra, no particular type or kind of notice is required, since the matter is to be regulated by the local rules of court." LSA-C.C.P. art. 1571; Mitchell v. Dresser Industries, Inc., 472 So.2d 183, 185 (La. App. 4 Cir. 1985)(citing Prejean v. Ortego, 262 So.2d 402 (La. App. 3 Cir 1972)). Article 1572 requires notice of trial by certified mail, only when a written request has been filed in the record or made by registered mail. Because plaintiffs made no such written request for notice, article 1572 is inapplicable to the instant case.

Plaintiffs acknowledge, and the record reflects, that notice of the February 22, 2000 trial was sent to them directly, at their address of record, after the trial court signed the motion allowing Mr. Cade to withdraw as their attorney and continuing the original October 27, 1999 trial date. Nevertheless, they assert that the record is devoid of any inquiry by the trial court as to whether they actually received the notice sent by the clerk. In addition, the Wattses claim that the record does not contain a notice by the clerk attesting that the new Trial Order containing the time for trial was mailed to them. Finally, they claim that the record fails to show whether

their Motion for Extension of Time to File Responsive Pleadings, as annotated by the judge that his granting of the motion shall not delay the February 22, 2000 trial date, was ever mailed or served upon them.

Plaintiffs' arguments are without merit. There is no question that the clerk mailed, and the Wattses received, a Notice of Trial informing them of the February 22, 2000 trial date. That notice was sent nearly four months prior to the trial date. We conclude that such notice was sufficient to satisfy the requirements of Local Rule 10 and the Code of Civil Procedure. The court was under no obligation to inquire into whether the plaintiffs had actually received the notice that it sent to them. This is especially true where there is no allegation that the plaintiffs failed to receive such notice.

Plaintiffs suggest that Jones v. U.S. Fidelity, 596 So.2d 834 (La. App. 4 Cir. 1992) required their former counsel to prove to the court that he provided them with unequivocal written notice of trial. Initially, we point out that the plaintiffs only quoted a portion of the Century Bank in New Orleans v. Doley, 527 So.2d 437 (La. App. 4 Cir. 1988) procedural rule that the Jones court affirmed. In doing so, the plaintiffs gave the false impression that Jones and Century Bank apply to the instant matter. The rule espoused in those cases, in its entirety, provides as follows:

> When a trial date is scheduled by the court, and written notice is given to the attorney of record and thereafter the attorney of record petitions the court for permission to withdraw as the

> attorney of record, it is the responsibility of the trial court to ensure that the client/litigant receives the notice of the pending trial in writing. The court can satisfy the notice of trial requirement by reissuing the notice of trial to the unrepresented litigant directly, if the address is known, … or the court must receive reasonable proof that the withdrawing attorney had notified the client in writing of the trial date. This can be accomplished by attaching to the motion to withdraw, a certified letter to the client or other evidence indicating the client has received unequivocal written notice of trial.

Jones at 836.

As correctly pointed out by defendants, that rule does not apply here because Mr. Cade withdrew before the court scheduled the February 22, 2000 trial date. Even if the rule were to apply, however, it was satisfied by the court's mailing of the Notice of Trial to the Wattses at their address of record.

Plaintiffs' allegation that they were unaware of the time their trial was set to commence is unconvincing. Although they complain that the record does not indicate whether the new Trial Order, containing the time for trial, was mailed to them, the Wattses do not assert that they failed to receive such order. On the other hand, the defendants claim that the trial court reissued both the Notice of Trial and the Trial Order to both themselves and the plaintiffs. Whether the plaintiffs were mailed the Trial Order is irrelevant. Plaintiffs knew that their trial had been reset for February 22, 2000. They had informed their newly hired attorney of that trial date, as he had sent

another attorney to “fill in” for him. If they were truly unaware of when the trial was scheduled to begin on February 22, 2000, a simple phone call to the court would have provided them with such information.

Whether plaintiffs received a signed copy of their Motion for Extension of Time to File Responsive Pleadings, as annotated by the judge, is also irrelevant. That motion was filed on December 13, 1999. Therein they requested that the court grant them an additional thirty days to file responsive pleadings. They were aware that trial in the matter had been set for February 22, 2000. If they desired a continuance of that trial, they should have so stated in their motion. In addition, if they wanted a signed copy of their motion, they should have walked it through to the judge or requested that a copy be sent to them after signing. They did neither. The trial court was under no obligation to provide them with a signed copy of the motion.

In sum, the Notice of Trial sent to plaintiffs informing them of the February 22, 2000 trial date was adequate. They were not denied any procedural due process.

**II. DID THE TRIAL COURT COMMIT ERROR IN DISMISSING THE PLAINTIFFS’ SUIT WITH PREJUDICE AFTER THEY FAILED TO APPEAR FOR TRIAL?**

La. C.C.P. art. 1672(A) provides:

> A judgment dismissing an action shall be rendered upon application of any party, when the plaintiff fails to appear on the day set for trial. In such case, the court shall determine whether the judgment of dismissal shall be with or without prejudice.

In reviewing a trial court's decision to dismiss a case with prejudice, an appellate court must recognize that the trial court is vested with great discretion. Guidry v. Lafayette Building Association, 93-1302, p.3 (La. App. 3 Cir. 5/4/94) 640 So.2d 436, 438.

In Mitchell v. Dresser Industries, Inc., 472 So.2d 183 (La. App. 4 Cir. 1985) we affirmed the trial court's dismissal, with prejudice, of the plaintiff's case after it was duly scheduled and called for trial and plaintiff's counsel of record was absent. In its judgment, the trial court noted that the record showed that counsel for plaintiff had been mailed notice of the trial date, and that numerous continuances had been requested by counsel for plaintiff and granted. We found that, under the circumstances, the judge committed no error in granting defendant's motion to dismiss. In addition, we found that the trial judge's refusal to grant plaintiff a new trial was entirely within his discretion.

Similarly, in Guidry, 93-1302 (La. App. 3 Cir. 5/4/94) 640 So.2d 463, the Third Circuit affirmed the dismissal of a plaintiff's suit, with prejudice,

where plaintiff had constructive notice of the trial date, and neither he, nor any counsel representing him, appeared before the court on the day of trial. We note that there had been only one fixing for trial in that matter.

Plaintiffs allege that the trial court's dismissal of their claim, with prejudice, was not reasonable because they were unrepresented by counsel when the trial date was fixed, and because the trial court failed to inquire into whether they had received notice of the trial date. In addition, they claim that the trial court proceeded to judgment prematurely, despite the sole continuance request made on their behalf. The Wattses cite no relevant authority in support of their arguments.

As discussed previously, the record clearly reflects that plaintiffs were mailed a notice informing them of the February 22, 2000 trial date. In addition, the matter had already been continued once before, at the request of plaintiffs, when they discharged their original attorney of record on the eve of the first trial setting. In addition, as the trial judge correctly noted, the "fill-in" attorney sent to the trial by the Wattses' unenrolled counsel, lacked the capacity to request a continuance on their behalf. The plaintiffs had actual notice of the trial date nearly four months before that trial was to take place. Thus, there was more than enough time for a new attorney to prepare for trial and enroll as counsel. The judge was required under C.C.P. 1672 to

dismiss the Wattses' action, upon defendants' motion for such relief, after the plaintiffs failed to appear on the day set for trial. Pursuant to that article, the judge had the option of dismissing the case with or without prejudice. Under the circumstances, we cannot say that he abused his discretion in dismissing the case with prejudice.

**III. DID THE TRIAL COURT ERR IN DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL?**

Plaintiffs' claim that the trial court erred in denying their motion for new trial because it failed to inquire into the circumstances of Ms. Watts' belated appearance, or to consider the affidavits of either she or James Uschold. Again, plaintiffs cite no relevant authority in support of these arguments.

According to C.C.P. art. 1973, a new trial may be granted in any case if there is good ground therefore, except as otherwise provided by law.

In the instant case, the record showed that plaintiffs had been mailed a notice informing them that their case had been set for trial on February 22, 2000. The plaintiffs failed to appear or to ensure that an attorney of record appeared on their behalf at that trial. We assume that the trial judge considered the Memorandum in Support of the Motion for New Trial as well as the affidavits attached thereto, in deciding to deny plaintiffs' request for a

new trial. Nowhere therein do plaintiffs offer any explanation for their non-appearance at trial. The matter had been continued once before at the plaintiffs' request. Under the circumstances, we cannot say that the trial judge abused his discretion in denying plaintiffs' Motion for New Trial.

The judgment dismissing plaintiffs' suit with prejudice, as well as the judgment denying plaintiffs' Motion for New Trial are affirmed.

**AFFIRMED.**