

NOT DESIGNATED FOR PUBLICATION

SUSAN SORTINA * **NO. 2001-CA-2312**
VERSUS * **COURT OF APPEAL**
MOBIL OIL COMPANY, KOLL * **FOURTH CIRCUIT**
MANAGEMENT SERVICES, *
INC., FIREMAN'S FUND * **STATE OF LOUISIANA**
INSURANCE COMPANY AND *
THE CITY OF NEW ORLEANS *

*

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-3090, DIVISION "I-7"

Honorable Kim M. Boyle, Judge Pro Tempore

Judge David S. Gorbaty

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr.,
Judge David S. Gorbaty)

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SERVICES, INC. AND FIREMAN'S FUND INSURANCE CO.

AFFIRMED

Plaintiff Susan Sortina appeals two judgments dismissing her claims against all defendants, without prejudice. For the following reasons, we affirm the judgments of the trial court.

STATEMENT OF THE CASE:

A petition for damages was filed on behalf of Susan Sortina on February 20, 1998, naming as defendants Mobil Oil Company, Koll Management Services, Inc., Fireman's Fund Insurance Company, and the City of New Orleans. The petition included instructions to "Hold Service" on each defendant. On December 19, 2000, a letter from plaintiff's attorney was filed into the record requesting service on each of the four defendants. On January 16, 2001, Koll Management and Fireman's Fund filed a Motion to Dismiss for Failure to Timely Request Service. On January 24, 2001, the

City of New Orleans filed an identical motion. On February 28, 2001, Mobil Oil Corporation filed an Exception of Insufficiency of Service of Process, seeking dismissal of plaintiff's claims against it.

Contemporaneously with the filing of the above exception, Mobil filed exceptions of insufficiency of citation, no cause of action, no right of action, and prescription.

On April 10, 2001, the trial court signed a judgment in connection with Mobil's Exception of Insufficiency of Service of Process, dismissing plaintiff's claims against Mobil, without prejudice. On April 16, 2001, the trial court signed a judgment dismissing plaintiff's claims against Koll Management, Fireman's Fund, and the City of New Orleans, without prejudice. After some procedural quagmires, the trial court signed an order on August 21, 2001, granting plaintiff a devolutive appeal.

DISCUSSION:

In her sole assignment of error, plaintiff argues that the trial court erred in dismissing her claims. According to plaintiff, in March of 1998, copies of the petition that had been filed in February and all medicals to date were forwarded to an adjuster for Fireman's Fund. On April 6, 1998,

plaintiff's counsel sent a letter via mail to the Clerk of Court for Civil District Court requesting that service be made on all defendants. Service instructions were included in the letter. Thus, plaintiff argues, service was requested timely. However, this letter is not contained in the record of these proceedings.

Plaintiff further alleges that the Fireman's Fund adjuster indicated early on that it was his intention to settle the claim. At some point, well after the ninety-day service requirements of La. Code Civ. Proc. 1201 C had expired, the adjuster originally assigned to the claim was replaced. The new adjuster indicated that he was not willing to settle the claim. Plaintiff's counsel sent a second letter on December 19, 2000, to the Clerk's office. The letter, which is filed in the record, indicated that the record was missing, and that copies of the original petition and "other documents" were included with the letter. The letter requested that the enclosures be placed on file, and that service be reissued to all four defendants.

Service was made on all defendants, and each party filed its exceptions and/or motions to dismiss.

Louisiana Code of Civil Procedure art. 1201 C provides:

Service of citation shall be requested on all named defendants within ninety days of commencement of the action. When a supplemental or amended petition is filed naming any additional defendant, service of citation shall be requested within ninety days of its filing. The defendant may expressly waive the requirements of the Paragraph by any written waiver.

Louisiana Code of Civil Procedure art. 1672 C provides:

A judgment dismissing an action without prejudice shall be rendered as to a person named as a defendant for whom service has not been requested within the time prescribed by Article 1201(C), upon contradictory motion of that person or any party or upon the court's own motion, unless good cause is shown why service could not be requested, in which case the court may order that service be effected within a specified time.

Thus, the two articles read together provide that if a plaintiff fails to request service of the petition within ninety days as required by Art. 1201 C, any defendant for whom service has not been requested is entitled to a judgment dismissing the action without prejudice as to that defendant. Such a dismissal should not be reversed absent manifest error. *Patterson v. Jefferson Davis Parish Sch. Bd.*, 2000-00580 (La.App. 3 Cir. 12/6/00), 773 So.2d 297, 299.

In its reasons for judgment, the trial court explained that although plaintiff claims to have mailed a letter to the Clerk of Court for Civil District

Court on or about March 28, 1998, there was nothing **in the record** to substantiate this claim. Indeed, the copy of the letter provided by plaintiff did not contain any indication that the letter was ever received, such as a “filed” or “received” stamp.

Our review of the record confirms that the letter plaintiff claims to have sent to the Clerk of Civil District Court is not in the record. Thus, the record supports the trial court’s factual finding that there was insufficient proof that plaintiff had attempted to have service effected on the defendants within the statutory time limits.

The trial court also made the factual determination that none of the defendants made an express, written waiver of service. Plaintiff argues that the settlement negotiations in which her counsel was engaged should serve as a tacit waiver of service. However, the express language of the statute requires a **written** waiver. Even a defendant’s actual knowledge of a legal action cannot supply the want of citation because proper citation is the foundation of all actions. *Naquin v. Titan Indem.Co.*, 2000-1585, p. 8 (La. 2/21/00), 779 So.2d 704, 710. The record does not contain a written waiver by any defendant.

Lastly, plaintiff argues that she demonstrated “good cause” as provided in La. Code Civ. Proc. art. 1672, and, therefore, the trial court erred in granting defendants’ motions. Plaintiff argues that she relied to her detriment on the representations made by the adjuster for Fireman’s Fund in that neither party would take any adverse actions pending settlement.

In *Naquin*, the Supreme Court found that an expectation of settlement did not constitute good cause for failure to comply with statutory requirements. The Court ruled that a plaintiff’s obligation to request service within ninety days is not satisfied by the fact that a defendant is aware of a pending suit. The Court further found that the statutory requirements did not place an unreasonable burden on a plaintiff. *Naquin, supra* at p. 9, 779 So.2d at 710.

The trial court considered plaintiff’s arguments as to “good cause” for not effecting service timely. The court noted that each defendant has a registered agent for service of process, information easily attainable by any interested party, and that service was readily made on all defendants after the December 19, 2000, letter was sent to the clerk. We agree.

Accordingly, for the reasons assigned, we affirm the judgments of the

trial court dismissing plaintiff's suit, without prejudice.

AFFIRMED