NOT DESIGNATED FOR PUBLICATION

BRODERICK MORRIS	*	**NO. 2003-C-1920**
VERSUS	*	**COURT OF APPEAL**
ELECTRIC MOBILITY, INC.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON APPLICATION FOR SUPERVISORY WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 02-5120, DIVISION "J"
Honorable Nadine M. Ramsey, Judge
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JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF JUDGE MAX N. TOBIAS, JR., JUDGE DAVID S. GORBATY, AND JUDGE EDWIN A. LOMBARD)

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APPLICATION FOR SUPERVISORY WRITS DENIED.

In this case, the defendant/relator, Electric Mobility, Inc., seeks supervisory writs from this court to review a decision of the Civil District Court for the Parish of Orleans denying its motion to dismiss the plaintiff/respondent's suit. For the following reasons, we deny the timely filed application for supervisory writs.

In its 30 October 2003 application, the relator alleges that plaintiff/respondent, Broderick Morris, filed suit on 1 April 2002, but did not pay the filing fees of the clerk of court until 14 October 2002. Once the filing fees were paid, relator *alleges* that "service was requested and finally made" upon relator on 19 November 2002. Relator asserts that the trial court should have dismissed relator's suit pursuant to La. C.C.P. art. 1201, because service was not requested until more than 90 days after the 1 April 2002 filing.

In support of its verified application, relator attaches only the following: (1) a notice of its intent to file an application for supervisory writs; (2) an order of the trial court dated 28 October 2003 giving relator until 1 November 2003 to file its application seeking review of the 2 October 2003 judgment; (3) a copy of the 2 October 2003 judgment and the notice of

judgment dated that same day; (4) a copy of its motion to dismiss filed in the trial court; (5) a copy of a facsimile transmission from the clerk of district court dated 1 April 2002 sent to counsel for respondent advising (a) that filing fees of $263.00 were owed, which included the $5.00 fee for the facsimile filing, and (b) reflecting by a stamp noted on one corner of the document that the filing fees were paid on 14 October 2002; (6) a Civil District Court civil cover sheet reflecting the name and "parish of residence" of the plaintiff as Orleans Parish and the name and "parish or residence" of the defendants as "Sewell, New Jersey"; (7) a copy of a letter from the clerk of court dated 14 October 2002 to respondent's counsel advising that because "counsel's name and bar number does not appear in our database, the processing of your paperwork cannot be completed;" and (8) a copy of relator's trial court memorandum in support of its motion to dismiss. Subsequent to the filing of its writ, the relator supplemented its application with the written reasons for judgment of the trial court.

On 5 November 2003, we issued an order to respondent to file a memorandum in opposition to relator's application by 12 November 2003. Respondent has filed no response.

La. C.C.P. art. 1201(C), the portion of the article relevant to the issue at bar, states:

> Service of citation shall be requested on all

> named defendants within ninety days of commencement of the action. When a supplemental or amending 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 this Paragraph by any written waiver.

La.C.C.P. art. 1672(C) states:

> 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.

Rule 4-5 of the Uniform Rules of Courts of Appeal requires an applicant for a supervisory writ to file with the application all relevant and pertinent documents in support of the application, listing certain documents that must be attached.

Reading this court's rule with La. C.C.P. arts. 1201(C), we find that we have inadequate information to review relator's application and grant relator the relief sought.

First, we note that article 1201 only requires that the plaintiff

"request" service within 90 days of the filing of the petition. The article is silent with respect to whether payment of court costs within 90 days must be made. Second, we note that the civil cover sheet that respondent's counsel transmitted to the clerk of court does state that relator's "residence" is in Sewell, New Jersey. Such implies to us that some sort of address was furnished the clerk at the time of filing. Whether a more detailed address was noted in the petition (which relator did not furnish this court with a copy) or whether "Sewell, New Jersey" is a small enough community that no street address is needed for purposes of mail or other service delivery of the petition and citation is unknown. Third, the trial court in its reasons for judgment states that it denied the motion to dismiss because the clerk of court attempted to contact respondent's counsel regarding a problem with processing the suit due to the absence of attorney's name and bar number not appearing in the court's database. The court noted that no evidence was presented to show that original counsel ever responded and confusion existed therein as to whether respondent's original counsel or subsequent counsel was responsible for effecting service. The court concluded that good cause was shown pursuant to article 1672(C) why service had not been effected within the 90 days.

We disagree with the trial court's interpretation of what constitutes

good cause in these circumstances because confusion as to which counsel was to make sure that service was *effected* is irrelevant to the issue of "why service could not be *requested*" as required by La. C.C.P. 1672(C). (Emphasis added.) Requesting service is different from effecting service. The record before us is devoid of evidence why service could not be *requested* and the trial court does not address the issue of the request.

Fourth, we note that relator states that the matter was removed to the United States District Court for an unspecified period of time, but the federal court remanded the matter to state court. We do not know what, if anything, happened in the federal court proceedings.

We note the recent case of *Cubas v. Brown*, 03-0664 (La. App. 4 Cir. 9/3/03), 853 So.2d 1138, wherein this court held that one must request service within 90 days and that the failure to do so requires the trial court to dismiss a suit when service has not been requested. However, we cannot say that the case is relevant because relator has not furnished this court with a copy of the respondent's petition, which by custom normally reflects service instructions in some form therein.

Relator has failed to carry its burden that the trial court erred. We have no evidence in the record before us that the petition that respondent

filed did not contain an address. We know of no law that requires that service must be effected within 90 days, for the law only requires that service be requested within 90 days. (We are aware that from time to time people do attempt to dodge service.) Although respondent apparently availed himself of the provisions of La. R.S. 13:850, which permits a facsimile filing of a petition provided the original of the petition is filed with the clerk of court within 5 days, we find no law that says that the failure to pay court costs within 90 days is grounds for dismissal absent a contradictory motion addressing that issue, which is not the case before us. We have no evidence that respondent did not actually file the original of the petition within that 5-day period. Additionally, we note that respondent did in some form advise the clerk of an "address" in New Jersey. The record before us does not reflect whether that address was adequate or not. That respondent ignored our order to file a written response to relator's application, although unwise and inappropriate, nevertheless we are required to follow the law and the rules of our court that place the burden upon a relator to show to this court that the trial court erred as a matter of law or abused its vast discretion.

For the foregoing reasons, we find that on the showing made by the relator, we are unable to conclude that the trial court erred or abused its

discretion.

Accordingly, we deny the application for supervisory writs.

APPLICATION FOR SUPERVISORY WRITS DENIED.