

NOT DESIGNATED FOR PUBLICATION

DON PUZZIO * NO. 2003-CA-1217
VERSUS * COURT OF APPEAL
POLY TRUCKING, INC. AND * FOURTH CIRCUIT
ROGER BROLSMA * STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-14462, DIVISION "B-15"
Honorable Rosemary Ledet, Judge

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr.,
and Judge Leon A. Cannizzaro, Jr.)

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AFFIRMED AS AMENDED

This is an appeal from the granting of an exception of improper venue, dismissing plaintiff's action with prejudice. For the reasons set forth below, we affirm the granting of the exception of improper venue, but amend to provide that the dismissal be without prejudice.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter involves an automobile accident that occurred in Missouri between plaintiff/appellant, Don Puzio, and defendants/appellees, Roger Brolsma, the driver of an eighteen wheeler, and his employer, Poly Trucking, Inc. Appellant is a resident of the Parish of St. Tammany, Louisiana. Roger Brolsma is a resident of Texas and Poly Trucking, Inc. is a Texas Corporation with its principal place of business in Grand Prairieville, Texas. The petition for damages was filed in the Civil District Court for the Parish of Orleans.

Appellees filed a declinatory exception of improper venue, originally set for hearing on November 22, 2002. The matter was rescheduled and subsequently heard on April 4, 2003. Appellant was not present at the

hearing. A proposed judgment, granting the exception of improper venue and dismissing appellant's suit with prejudice was submitted by the attorney for appellees and was signed in open Court. Appellant was notified of the signing of judgment on April 4, 2003.

On June 4, 2003, appellant filed a motion for new trial and a devolutive appeal. The Trial Court signed the order for appeal on June 6, 2003 and set the hearing on the motion for new trial for July 18, 2003.

At the hearing for the new trial appellant's attorney explained to the Court that he was unable to attend the hearing on the exception of improper venue due to his mother's serious illness. He further informed the Court that he discussed the exception with counsel for appellees and had no opposition to the exception going forward so that appellant could file a new action in Texas. The apparent confusion or misunderstanding was whether the exception would be dismissed with or without prejudice. In fact, appellant's motion for new trial alleges that the dismissal with prejudice was done through fraud and ill practice.

After hearing argument of counsel on the motion for new trial, the Trial Court ruled that it was divested of jurisdiction due to the signing of the appeal order. The motion for new trial was therefore denied. The Trial Court further expressed the opinion that had appellant presented his

opposition at the hearing on the exception, she would not have dismissed the case with prejudice. With the denial of the new trial, appellant proceeded with this appeal. The record indicates that although the motion for new trial was not timely filed, the motion for devolutive appeal was timely.

Appellant asserts as his assignment of error the Trial Court's granting of the exception of improper venue with prejudice. Specifically, appellant contends that a dismissal granted on a dilatory or declinatory exception should be made without prejudice in order to preserve and not jeopardize nor have any prejudicial effect upon the plaintiff's contingent future rights.

Bogan v. Byrom, 151 So. 2d 718 (La. App. 3 Cir. 1963). Appellant argues that the dismissal with prejudice has in fact prevented him from proceeding with the case in Texas.

In defense of this appeal, appellees submit that dismissal was proper pursuant to La. C.C.P. art. 121. Article 121 provides:

When an action is brought in a Court of improper venue, the Court may dismiss the action, or in the interest of justice transfer it to a Court of proper venue.

Appellees also rely on Marler v. Petty, 94-1851 (La. 4/10/95), 653 So. 2d 1167, wherein the Louisiana Supreme Court stated that when a plaintiff knowingly files suit in the wrong venue, dismissal is proper. Appellees submit that it is clear from the facts presented in the petition that appellant

knowingly filed in the wrong venue.

DISCUSSION

We find no error in the Trial Court's granting of the exception of improper venue. In fact, appellant had acknowledged that venue is not proper in Orleans Parish. However, we do find error in the Trial Court's dismissal with prejudice.

While we recognize that the Trial Court rendered the judgment upon the assertion of the attorney for appellees that there was no opposition, our Courts have taken the position that declinatory exceptions should be dismissed without prejudice. In a factually similar case of Maxwell v. Swain, 524 So. 2d 826 (La. App. 3 Cir. 1988) the Third Circuit Court stated:

The function of the declinatory exception is to decline the jurisdiction of the Court; it does not defeat the action. La.C.C.P. art. 923. As a dismissal with prejudice would defeat the action on the merits, a dismissal with prejudice based on the declinatory exception of improper venue would be inconsistent with the underlying rationale of the declinatory exception since such an exception should not defeat the action.

This principle was also adhered to by this Court in Sanchez v. Commodore Cruise Lines, Ltd., 97-2355 (La. App. 4 Cir. 4/22/98), 713 So. 2d 572. In Sanchez, we amended the granting of an exception of improper venue to dismiss without prejudice in order that the plaintiff, a foreign seaman, could pursue his claim for damages in the proper venue. We find

this same result to be proper in the present case.

CONCLUSION

Accordingly, for the reasons assigned, the judgment of the Trial Court is amended to dismiss appellant's suit without prejudice. Otherwise, it is affirmed.

AFFIRMED AS AMENDED