

NOT DESIGNATED FOR PUBLICATION

**CARTER & SONS PLUMBING
& HEATING CO., INC.**

*

NO. 2003-CA-1661

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**BAHA TOWERS LIMITED
PARTNERSHIP IN
COMMENDAM, AND TRIUNE
CONSTRUCTION SERVICES,
INC.**

*

STATE OF LOUISIANA

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**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-00167, DIVISION "A"
Honorable Carolyn Gill-Jefferson, Judge**

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Judge Terri F. Love

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(Court composed of Judge Dennis R. Bagneris Sr., Judge Terri F. Love,
Judge David S. Gorbaty)

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AFFIRMED

Plaintiff, Carter and Sons Plumbing & Heating Co., Inc., filed suit against defendants, Baha Towers Limited Partnership in Commendam and Triune Construction Services, Inc. asserting breach of a construction contract. The trial court confirmed a preliminary default against Baha Towers and determined service was proper by a declaratory judgment. Subsequently, this appeal was lodged asserting two assignments of error. For the following reasons we affirm.

FACTS AND PROCEDURAL HISTORY

Carter and Sons Plumbing & Heating Co., Inc. (“Carter”) is a subcontractor working for Triune Construction Services, Inc. hired to complete rough-in and finish plumbing according to plans and specifications on renovations for Plaza Tower, a building owned by Baha Towers Limited Partnership in Commendam (“Baha Towers”). After numerous change orders, the work was completed and Carter attempted to collect payment but

was unsuccessful. Carter sued Triune Construction Services, Inc. and Baha Towers for breach of contract in the amount of \$25,330.00.

Carter filed suit against Baha Towers on January 6, 1997. The petition was served via Louisiana long arm statute on Baha Towers through its general partner, Baha Development, Inc. (“Baha Development”) in Columbus, Ohio. The return on the service indicated it was accepted by Schumann Rafizadeh on January 13, 1997 at 611 E. Weber Road, Columbus, Ohio. This address was listed as the address for the agent of Baha Development, as set forth in the Articles of Incorporation filed June 13, 1999, with the Ohio Secretary of State.

Baha Development is the sixty percent (60%) general partner of Baha Towers. Schumann Rafizadeh is a twenty percent (20%) limited partner in Baha Towers and an officer of the general partner, Baha Development. His spouse, Mondonna Rafizadeh is also an officer in Baha Development and the remaining twenty percent (20%) limited partner in Baha Towers.

On January 28, 1997, an affidavit of Proof of Service of Process with a duplicate citation attached was filed in Civil District Court. On March 4, 1997, a motion for preliminary default was filed and an order of preliminary

default was entered against Baha Towers. On March 18, 1997, no answer had been filed and Baha Towers had not made an appearance. The preliminary default entered on March 4th was confirmed on March 18, 1997. The judgment became final on May 28, 1997.

On June 6, 1997, Baha Towers filed a Petition to Annul Judgment alleging it had no knowledge of the prior proceedings that lead to the judgment against it, and it was not legally served to appear. On June 27, 1997, Carter answered the petition denying faulty service and filed a reconventional demand for sanctions and attorney's fees. After discovery, Carter filed a motion for summary judgment.

The court was of the opinion the relief sought was a declaratory judgment, not a motion for summary judgment. The trial court on March 27, 2002, declared Baha Towers was legally served with service of process on January 13, 1997; and the judgment rendered on March 18, 1997, by the district court was legally obtained. The trial court granted a declaratory judgment dismissing the Petition for Nullity, but found the reconventional demand filed by Carter lacked merit. It is from the declaratory judgment that Baha Towers lodges this appeal.

Standard of Review

On appeal, the scope of appellate review is confined to a

determination of whether or not the trial court abused its discretion by granting or refusing to render a declaratory judgment. *In re Peter*, 98-0701, p. 4-5 (La. App. 4 Cir. 12/23/98) 735 So.2d 665, 667.

It should also be noted that the Louisiana Supreme Court has declared that "[t]rial courts are vested with wide discretion in deciding whether to grant or refuse declaratory relief." *Louisiana Supreme Court Committee on Bar Admissions v. Roberts*, 2000-2517, p. 3 (La. 2/21/01), 779 So.2d 726, 728, citing (*Liberto v. Rapides Parish Police Jury*, 95-456 (La. App. 3 Cir. 11/2/95) 667 So.2d 552).

ANALYSIS

Baha Towers argues it was not properly served, therefore the preliminary default judgment is not valid. First, Baha Towers contends both entities, Baha Towers and Baha Development, are registered to do business in the State of Louisiana and Baha Development had a registered agent for service of process in the State of Louisiana, therefore the petition was not properly served via the Long Arm Statute. Second, Baha Towers argues the general partner attempted to be served was a corporation and the rules of service on corporations apply.

The appellee, Carter, answers the appeal alleging this appeal is frivolous and taken solely for delay. Carter requests that the declaratory

judgment be affirmed, the appellant condemned to pay legal costs in this appeal, and an award of damages for the defense of this frivolous appeal.

FIRST ASSIGNMENT OF ERROR

Baha Towers argues it and its general partner, Baha Development, Inc. are both registered to do business in the State of Louisiana and Baha Development, Inc. had a registered agent for service of process in the State of Louisiana, therefore this matter was not properly served via the Long Arm Statute. It should have been served personally to its appointed agent of service in Louisiana. Carter contends the entity sued was a partnership, not a corporation. Carter cites Louisiana Code of Civil Procedure art. 1263 requiring “Service of citation or other process on a partnership is made by personal service on a partner.” Carter also urges a partnership has no agent for service of process within the state.

The purpose of the long-arm statute is to extend personal jurisdiction of Louisiana courts over nonresidents to the full limits of due process.

Green v. Group Programs, Inc., 622 So.2d 275 (La. App. 1st Cir. 1993).

See, La. R.S. 13:3201. La. R.S. 13:3206 defines non-resident. In 1997, the year Baha Towers was served, it provided:

As used in R.S. 13:3201, "nonresident" includes an individual, his executor, administrator, or other legal representative, who at the time of the filing of the suit is not domiciled in this state, or a partnership, association, or any other legal or commercial entity (other than a corporation) not then domiciled in this state,

or a corporation which is not organized under the laws of, and is not then licensed to do business in, this state.

La. R.S. 13:3206 (1997)

The long-arm statute is not available for domestic entities, including partnerships and corporations. The term “non-resident”, as defined in R.S. 13:3206, does not include a foreign corporation licensed to do business in this state with a registered agent. *Byles Welding & Tractor Co., Inc. v. Cap-Con International, Inc.*, 342 So.2d 700, 701 (La. App. 3rd Cir. 1977).

In the instant case, Carter served Baha Towers, a Louisiana limited partnership through their general partner, Baha Development, Inc. in Columbus, Ohio. Baha Towers is a registered limited partnership in Louisiana. Baha Development is a registered corporation under the laws of Ohio. Baha Development is licensed to do business in Louisiana and has a registered agent. The long-arm statute is not an available vehicle to serve Baha Towers via Baha Development.

Service on one of the members of a partnership is sufficient to bring a partnership into court. *Baton Rouge Bldg. Trades Council v. T.L. James & Co.*, 10 So.2d 606 (La. 1942). The Code of Civil Procedure provides the articles for service on legal and quasi legal entities. In 1997, the year Baha was served, La. C.C.P. art. 1263 read as follows:

Service of citation or other process on a partnership is made by personal service on a partner. When the officer certifies that he

is unable, after diligent effort, to make service in this manner, he may take personal service on any employee of suitable age and discretion at any place where the business of the partnership is regularly conducted.

La. C.C.P. art. 1263 (1997)

Schuman Rafidazeh is a 20% limited partner of Baha Towers. At the time of service he was not domiciled in Louisiana according to the records of the Secretary of State. Therefore, he was a non-resident and subject to the long arm statute. Schuman Rafidazeh accepted service on January 13, 1997, at the address listed with the Secretary of State in Ohio. One member of the partnership was served, therefore service is sufficient to bring the partnership into court. Baha Towers was properly served. This assignment of error lacks merit.

Finding service was proper, we pretermite discussion of the second assignment of error.

FRIVOLOUS APPEAL

Carter answered the appeal, requesting damages for frivolous appeal. Although authorized by La. C.C.P. art. 2164, damages for frivolous appeal will only be awarded when the appellant's purpose for filing the appeal is to delay the action or if the appealing counsel does not seriously believe the law he or she advocates, because appeals are favored. *In re Succession of Baker*, 99-0051, p. 5-6 (La. App. 4 Cir. 7/14/99) 739 So.2d 925, 927. In the

instant case, we cannot say that damages for frivolous appeal are warranted.

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision.

AFFIRMED