NOT DESIGNATED FOR PUBLICATION

DEBRA CASIMERE	*	**NO. 2003-CA-1873**
VERSUS	*	**COURT OF APPEAL**
MARK BLAY AND ROYAL MILTON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 2002-51875, SECTION "A"
Honorable Charles A. Imbornone, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

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

James E. Stovall
313 Lee Lane
Covington, LA 704332903

COUNSEL FOR PLAINTIFF/APPELLEE

Pius A. Obioha
1550 North Broad Street
New Orleans, LA 70119

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

In this appeal, defendants contend that the trial court erred in dismissing their reconventional demand. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

On March 18, 2002, plaintiff/ lessor/ appellant filed suit against defendants/ lessees/ appellees, Mark Blay and Milton Royal, asserting breach of the lease. Service was accomplished on Blay on March 23, 2002. The record does not reveal whether Milton was ever served, but the two defendants answered and filed a reconventional demand April 30, 2002. The record does not reflect whether service of the reconventional demand was ever accomplished. The appellants allege that they mailed a copy of the reconventional demand, and the appellee does not appear to contest she did have actual notice.

Appellee filed a Motion and Order to Reset on Motion to Dismiss Reconventional Demand on January 27, 2003. On that motion appears a stamp "constable costs paid", a check mark, a date of 2/10/03, and initials next to the request for service. A service return reveals appellants' counsel was served February 14, 2003. No motion to dismiss the reconventional demand appears in the record. However, a hearing was held March 19, 2003

wherein appellee's counsel alleged such motion had been filed. Both parties were represented. The appellants' attorney alleged that he had timely requested service and paid for it; but that for some unknown reason, the sheriff's office did not serve the appellee. The appellee alleged that costs were not paid. The trial court stated that it sympathized with appellants, but that the appellants were under a duty to check the record to see whether service had actually been accomplished. The court dismissed the reconventional demand without prejudice.

Appellants' counsel faxed a Memorandum in Opposition to Defendants' Motion to Dismiss Plaintiff's Reconventional Demand to First City Court on March 25, 2003. A hard copy was filed March 27, 2003. In the memorandum, appellants' counsel stated that he had timely requested service and paid the costs, but for some unknown reason the sheriff's office had not served the reconventional demand.

The appellants filed a petition for appeal April 4, 2003. The trial court signed a judgment granting the appellee's motion to dismiss, without prejudice, appellants' reconventional demand on April 8, 2003, and granted the appeal that day. On June 11, 2003, the Clerk for First City Court filed a rule to show cause by July 31, 2003 why the appeal should not be dismissed for failure to pay costs. The appellants filed motions to proceed *in forma*

pauperis, which were denied. The appellants moved to continue the rule to show cause on July 31, 2003, and it was continued to September 8, 2003. A notice of appeal was subsequently signed on September 9, 2003.

DISCUSSION

La. C.C.P. 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 requested within a specified time.

La. C.C.P. art. 1201 (C) provides:

> Service of the 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 this Paragraph by any written waiver.

La.C.C.P. art. 1292 provides:

> The sheriff shall endorse on a copy of the citation or other process the date, place, and method of service and sufficient other data to show service in compliance with law. He shall sign and return the copy promptly after the service to the clerk of court who issued it. The return, when received by the clerk, shall form part of the record, and shall be considered prima facie correct. The court, at any time and upon such terms as are just, may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

Proper citation is the cornerstone of all actions and actual notice cannot supplant the need for strict compliance with the requisites of proper citation. *Rivers v. Groth Corp*., 95-2509 (La. App. 1 Cir. 9/27/96), 680 So.2d 762. As such, even though the appellee may have had actual notice of the reconventional demand, service was a requisite.

The appellants argue they requested service and paid for it, and the fact that the sheriff did not attempt service is no fault of their own. The appellee alleges that costs were not paid. The appellants presented absolutely no evidence that costs were paid, and the record contains no such evidence. The fact that appellants did not prove costs were paid is reason enough to affirm the trial court's ruling.

In addition, the trial court found that whether the costs were paid or not, the appellants had a further duty to ascertain whether their reconventional demand had actually been served. This court's own jurisprudence holds that the trial court was correct. *Anderson v. Norfolk Southern R. Co,.*, 2002-0230 (La.App. 4 Cir. 3/27/02), 814 So.2d 659. In *Anderson*, plaintiffs sued in First City Court stating claims of personal injury and property damage. At the time plaintiffs' counsel filed suit, he requested service upon the defendant via the long arm statute. Ninety-three days after

suit was filed, plaintiffs' counsel forwarded a copy of the citation and petition for damages to defendant via certified mail. Defendant filed a motion to dismiss arguing that because plaintiffs failed to effect service of process within ninety days of filing suit, La. C.C.P. art. 1201(C) mandated that the suit be dismissed. Plaintiffs responded to the motion to dismiss conceding that long-arm service of process was not effected within the ninety-day statutory period. However, plaintiffs' counsel averred that despite his request for issuance of long-arm citation in May 2001, the clerk's office did not forward the citation to him. Moreover, counsel stated that he did not discover the clerk's error until he inquired of the clerk's office as to the status of the citation, three days after the time limitation imposed by La. C.C.P. art. 1201(C) had run. Consequently, counsel invoked the "good cause" exception of C.C.P. art. 1672(C) to excuse his inability to serve defendant within the ninety-day statutory period. Counsel further pointed out that although there was a notation in the record of this matter, presumably from an unidentified employee of the clerk's office, indicating that the long-arm citation was mailed to counsel, he did not receive it.

In opposition to the motion, plaintiffs' counsel offered the affidavit of his employee, who attested that she personally inspected the record in this matter and saw the hand-written notation, which indicated citations were

mailed to plaintiffs' counsel. However, according to her affidavit, she also discovered that there were no copies of the citations in the file. She also noticed that the original conformed copies which she left with the clerk's office when she filed the petition were still in the clerk's file. According to her affidavit, these copies would have been attached to the citations had the clerk's office, in fact, mailed out the citations. Following a hearing on the motion, the trial court ruled that the defendant's motion to dismiss should be denied because it was not through the fault of the plaintiffs that the clerk's office did not timely produce Long Arm Statute Citations.

This court reversed:

> La. C.C.P. art. 1201(C) provides in pertinent part that "[s]ervice of the citation shall be requested on all named defendants within ninety days of commencement of the action." If service is not requested within the time period provided by La.C.C.P. art. 1201(C), La. C.C.P. art. 1672(C) mandates that the action be dismissed without prejudice, "unless good cause is shown why service could not be requested."
>
> *Anderson,* p.3, 814 So.2d 661.

After a lengthy review of supporting case law, this court stated:

> In this case, plaintiffs' counsel did not explain why he could not have ascertained the status of citation, until after the statutory period had run. Counsel's request for service three days after the ninety-day period had expired strongly suggests counsel either miscalculated or mis-calendared the deadline. Such inadvertence does not constitute good cause. *Young v. Roth, supra.*
>
> In this case, many months, far longer than ninety days, passed with no

apparent attempt by appellant's counsel to ascertain whether service had been accomplished. The appellants have failed to show "good cause" why the opposing party was not served.

CONCLUSION

Accordingly, for the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED