NOT DESIGNATED FOR PUBLICATION

CHARLENE GUERRA	*	**NO. 2004-CA-0684**
VERSUS	*	**COURT OF APPEAL**
BALLY'S LOUISIANA, INC. D/B/A BALLY'S CASINO NEW ORLEANS AND ABC INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-16839, DIVISION "D-16"
Honorable Lloyd J. Medley, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge Terri F. Love, Judge Max N. Tobias Jr.)

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AFFIRMED

This is a personal injury action. From a judgment granting a judgment on the pleadings in favor of defendant-Bally's Louisiana and sustaining defendant-Belle of New Orleans, L.L.C.'s exception of prescription, the plaintiff, Charlene Guerra, appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 4, 2000, Ms. Guerra alleges that she was injured while a patron at Bally's Casino in New Orleans. Her injury allegedly occurred when the handle of the slot machine that she was playing fell off and struck her.

On November 6, 2000, Ms. Guerra filed suit against Bally's Louisiana ("Bally's), d/b/a Bally's Casino New Orleans and ABC Insurance Company.

On November 8, 2002, Ms. Guerra filed an amended petition adding Belle of New Orleans, L.L.C. ("Belle") and its insurer, Continental Insurance Company, as defendants.

Belle filed a prescription exception, arguing that the petition could not be amended beyond the one-year prescription period to add a party who was not a solidary obligor. Bally's filed a motion for judgment on the pleadings, arguing that under La. R.S. 12:1320(C) it is not a proper party to this

proceeding. Particularly, the language in Section 1320(C) on which Bally's relies is that "[a] member . . . of a limited liability company is not a proper party to a proceeding by or against a limited liability company, except when the object is to enforce such a person's rights against or liability to the limited liability company." Bally's represents that it is a member of Belle, a limited liability company, and thus not a proper party to this proceeding. The trial court agreed and granted Bally's motion. The trial court also sustained Belle's prescription exception. Ms. Guerra appealed, and Bally's and Belle answered the appeal.

JUDGMENT ON THE PLEADINGS

A judgment on the pleadings is authorized by La. C.C.P. art. 965, which provides:

> Any party may move for judgment on the pleadings after the answer is filed, or if an incidental demand has been instituted after the answer thereto has been filed, but within such time as not to delay the trial. For the purposes of this motion, all allegations of fact in mover's pleadings not denied by the adverse party or by effect of law, and all allegations of fact in the adverse party's pleadings shall be considered true.

La. C.C.P. art. 965. A trial court may grant a motion for judgment on the pleadings whenever it finds no genuine issue of material fact exists. *Canal Motors, Inc. v. Campbell*, 241 So. 2d 5 (La. App. 4th Cir. 1970).

Granting the motion for judgment on the pleadings, the trial court

relied on the undisputed fact that Bally's, as a member of Belle, which is a limited liability company, is not a proper party to this proceeding. The Louisiana Limited Liability Company Law generally provides that a member is not personally liable in his or her capacity as a member for any debt, obligation, or liability of the limited liability company and that the limitations on the liability of a member cause a Louisiana limited liability company to have the corporate characteristic of limited liability. The Louisiana Legislature codified this principle of limited liability in La. R.S. 12:1320. Applying that principle to the facts, we find the trial court did not err in granting Bally's motion for judgment of the pleadings and dismissing Bally's from this proceeding.

PRESCRIPTION EXCEPTION

The trial court's decision sustaining Belle's exception of prescription was based on two findings. First, the trial court found that there is no solidary relationship between Belle and Bally's. *See Curole v. Oschner Clinic, L.L.C.*, 2001-1734 (La. App. 4 Cir. 2/20/02), 811 So. 2d 92 (holding that there is no solidary relationship between a limited liability company and its members). Second, the trial court found that the criteria for relationship back under La. C.C.P. art. 1153, as enunciated in *Ray v. Alexandria Mall*, 434 So. 2d 1083 (La. 1983), were not satisfied in this case. As to the latter

finding, the trial court distinguished this case from *Ray*, stating:

> [T]he plaintiff in *Ray* substituted the party and did not, as here, add a new, separate, and distinct entity. Another distinction is the fact that plaintiff knew full well who she was filing suit against. Unlike *Ray* where "it is obvious that the plaintiff merely made a mistake as to the proper name of the defendant and that service was ultimately made upon the proper party defendant, the plaintiff here correctly named Bally's Louisiana, Inc. Yet another distinction is that here, unlike in . . . *Ray*, Bally's advised plaintiff a total of *seven* times that she had sued the wrong entity. Three of those times were before the prescriptive period had run. Bally's and Belle, therefore, did not engage in a "smokescreen of legalistic maneuvering in order to dodge judicial resolution of the merits of plaintiff's claim." (Emphasis in original).

On appeal, Ms. Guerra challenges only the latter finding. She argues that, contrary to the trial court's finding, all of the criteria of *Ray* have been met. We find this argument unpersuasive for two reasons.

First, we find Ms. Guerra has failed to satisfy the fourth *Ray* criteria. We find, as the trial court did, that Belle is a wholly new and unrelated defendant such that the amended petition was tantamount to the assertion of a new cause of action. This finding is in accord with the Louisiana Supreme Court's recent discussion of the fourth *Ray* criterion in *Renfroe v. State, Dep't of Trans. and Dev.*, 2001-1646 (La. 2/26/02), 809 So. 2d 947.

In *Renfroe,* the plaintiff timely sued the DOTD, believing the DOTD to be responsible for the roadway on which the accident occurred. After the one-year anniversary of the accident, the plaintiff filed amending petitions

joining Road District No. 1 and GNOEC as owners of the roadway. Reversing the trial court's finding that the plaintiff's amending petitions related back, the Louisiana Supreme Court found the second and fourth *Ray* criteria were not satisfied. As to the fourth criterion, the Court reasoned:

> In *Ray*, the plaintiff merely made a mistake as to the proper name of the defendant, naming as the defendant the "Alexandria Mall," rather than the "Alexandria Mall Company." In this case, the plaintiff clearly intended to name the DOTD as the proper defendant, as the plaintiff thought that the DOTD owned and maintained that portion of Causeway Boulevard. When plaintiff later learned that a wholly new defendant, either Road District No. 1 or the GNOEC, owned and maintained that portion of the road, he filed supplemental and amending petitions against them after the prescriptive period. As we held in *Findley*, the *Ray* criteria seek "to prevent injustice to plaintiffs who mistakenly named an incorrect defendant, at least when there was no prejudice to the subsequently named correct defendant. . . [;] the rule however [does] not apply when the amendment sought to name a new and unrelated defendant."

2001-1646, p. 8, 809 So. 2d 952 (quoting *Findley v. Baton Rouge*, 570 So. 2d 1168, 1170 (La. 1990)).

Writing for the Court in *Renfroe*, Justice Victory also cites *Newton v. Ouachita Parish School Bd*., 624 So. 2d 44 (La. App. 2nd Cir. 1993), in support of the finding that the fourth *Ray* criterion was not met. The *Newton* case refutes several of the arguments Ms. Guerra makes in this appeal, including the argument that the same counsel represents both Bally's and Belle, and we find the reasoning in that case persuasive.

In *Newton,* the plaintiff sued the Ouachita Parish School Board ("OPSB") within the one-year prescription period; the plaintiff thought that OPSB supervised and controlled the school at which the tort occurred. After OPSB was served with the petition, its counsel (who was also counsel for the Monroe City School Board's ("MCSB") liability insurance carrier) informed plaintiff that MCSB supervised and controlled the school. Four days after the one-year anniversary date, plaintiff filed an amending petition naming MCSB as a defendant. MCSB responded by filing a prescription exception, which the trial court denied. The Second Circuit granted MCSB's supervisory writ and reversed. Writing for the court, Justice (then Judge) Victory reasoned that when the *Ray* criteria are satisfied, an amending petition to correct a "misnomer" relates back and avoids prescription. Focusing solely on the plaintiff's failure to satisfy the fourth criterion and pretermitting discussing the first three criteria, the court reasoned that "it is clear that the purpose of the plaintiff's amendment was not merely to correct a misnomer, but to name a wholly new defendant." 624 So. 2d at 45. As to the fact OPSB's counsel also represented MCSB's liability carrier, the court reasoned that "this does not automatically create a relationship between the two which satisfies the fourth *Ray* criterion. There is no indication here that MCSB's attorneys misled Newton [the plaintiff] as

to which entity was the proper defendant and promptly told plaintiff's attorney of the error." 624 So. 2d at 46. The court thus found the amendment did not relate back.

Likewise, we find Ms. Guerra's amending petition was not intended merely to correct a misnomer; rather, her amended petition joined a wholly new defendant. As in *Newton,* we find the fact Belle and Bally's share a common attorney is not dispositive. Moreover, as in *Newton,* Bally's counsel promptly notified Ms. Guerra in its answer that she had sued the wrong defendant and that the right defendant was Belle. The fourth *Ray* criterion was thus not satisfied.

Our finding that Ms. Guerra's claim against Belle is prescribed is further supported by the fact that she delayed so long after being notified to file an amending petition. A plaintiff's delay in amending his or her petition to join the proper party cannot be ignored in determining whether such an amendment relates back so as to avoid prescription. *See* Frank L. Maraist and Thomas C. Galligan, *Louisiana Tort Law* §10-4(k)(citing *Booker v. Piggly Wiggly Corp.,* 393 So. 2d 844, 846 (La. App. 2d Cir. 1981) and noting that "[d]elay in amending may affect the plaintiff's claim that the amendment avoids prescription.") Indeed, "when a plaintiff learns the name and address of the proper but unnamed defendant, who is not solidarily

obligated with the named defendant, the interruption of prescription then begins to run anew." *Booker,* 393 So. 2d at 846. Applying that principle here, Ms. Guerra was informed by Bally's in its answer, which was filed on December 18, 2000, that she had sued the wrong defendant and that the right defendant was Belle, which does business as Bally's Casino Lakeshore Resort. Indeed, as the trial court stressed, Bally's advised Ms. Guerra seven times that she had sued the wrong entity and that three of those times were before the one-year prescriptive period ran. Nonetheless, she delayed filing an amended petition joining Bally's until November 8, 2002. Moreover, as noted above, Belle and Bally's are not solidary obligors. Given the facts of this case, we find Ms. Guerra's lengthy delay in filing an amended petition buttresses our holding that her claim against Belle is prescribed.

FRIVOLOUS APPEAL

Defendants, Bally's and Belle, answered Ms. Guerra's appeal to a assert a claim for damages and attorneys fees for the filing of a frivolous appeal under La. C.C.P. art. 2164. The fact that an appeal is unsuccessful does not mean that it is frivolous. Appeals are favored. Penalties for frivolous appeals are awarded only in exceptional cases, such as "when there are no serious legal questions, or when it is manifest that the appeal is taken solely for the purpose of delay, or when it is evident that appellant's counsel

is not serious in advocating the view of the law he presents." *Rhone v. Boh Bros.*, 2001-0270 (La. App. 4 Cir. 12/12/01), 804 So. 2d 764. This is not such an exceptional case. Although we have found Ms. Guerra's assignments of error unpersuasive, we cannot say that they were frivolous.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed against the appellant, Ms. Guerra.

AFFIRMED