

NOT DESIGNATED FOR PUBLICATION

NATHANIEL DOWL * **NO. 2006-CA-1337**
VERSUS * **COURT OF APPEAL**
RICHARD ARIAS * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-4011, DIVISION "E"
Honorable Madeleine Landrieu, Judge

* * * * *

Judge Patricia Rivet Murray

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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge Terri F. Love)

Nathaniel Dowl
2339 Pensiton Street
New Orleans, LA 70115
IN PROPER PERSON, PLAINTIFF/APPELLANT

REVERSED AND REMANDED

This is a Rule for Possession of Premises. The plaintiff, Nathaniel Dowl, appeals the judgment of the trial court granting an exception of *res judicata* in favor of defendant, Richard Arias. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On May 10, 2006, Mr. Dowl filed in the Civil District Court for the Parish of Orleans a Petition for Damages and Rule for Possession of Premises against Mr. Arias. Mr. Dowl alleges an ownership interest in the property located at 8631 Zimple Street in New Orleans. He claims that he acquired ownership of the property by virtue of a lien for grass cutting and maintenance services. He claims that he performed these services on the property from 1994 to 2000. Mr. Dowl also challenges Mr. Arias' contention that he acquired the property through a quitclaim in December 1999, from the heirs of Elizabeth Niemann, one of the previous owners who died in January 1999.¹

¹ The merits of Mr. Dowl's claims are not at issue in this appeal. Nonetheless, we note that the basis of Mr. Dowl's claim to the property is a grass-cutting lien that he filed in May 2006. Mr. Dowl and his ex-wife lived next door to 8631 Zimple Street. Mr. Dowl claims that he voluntarily cut the grass at the adjoining property and boarded up the property when it was unoccupied. Because of the services he rendered, which were apparently unsolicited by the owners of the property, Mr. Dowl considered himself an agent for the property and thus entitled to ownership.

On June 23, 2006, the trial court heard this matter. On July 6, 2006, the trial court rendered judgment sustaining Mr. Arias' oral exception of *res judicata* and dismissing Mr. Dowl's action with prejudice.

DISCUSSION

On appeal, Mr. Dowl argues that the trial court erred in granting an exception of *res judicata* that was not properly before the court. Citing La. C.C.P. art. 927, Mr. Dowl contends that the exception of *res judicata* may not be made by oral motion; rather, it must be specifically pleaded.

It is undisputed that there was prior litigation between the parties. The ruling on the *res judicata* exception was based on the previous eviction action that Mr. Dowl filed against Mr. Arias in First City Court.² The question presented on appeal is whether the objection of *res judicata* was properly before the trial court. Nothing in the record indicates that Mr. Arias filed a written pleading raising the exception of *res judicata*. To the contrary, it is apparent from the trial court's judgment that *res judicata* was raised by oral motion at trial.

Like prescription, the exception of *res judicata* must be specially pleaded; a court cannot supply it. La. C.C.P. art. 927.³ The exception must be presented in a formal pleading; it cannot be injected as an issue solely by brief or oral argument. *Union Planters Bank v. Commercial Capital Holding Corp.*, 2004-1520, p. 5 (La. App. 1 Cir. 3/24/05), 907 So.2d 131, 133.

In the instant case, the record is void of any pleading properly raising the exception of *res judicata*. Since Mr. Arias did not specially plead the issue of *res judicata* as required by La. C.C.P. art. 927, the issue was not properly before the trial court. Likewise, the issue is not properly before this court. Pursuant to La.

² The prior action filed in First City Court is entitled *Dowl v. Arias*, Case No. P-06-01557, Division "C." On May 24, 2006, the city court rendered a judgment dismissing Mr. Dowl's case. Mr. Dowl filed an appeal with this court, and this court affirmed the city court's judgment. 2006-CA-0874 (La. App. 4 Cir. 2/13/07).

³ See 1 Frank L. Maraist and Harry T. Lemmon, *Louisiana Civil Law Treatise: Civil Procedure* §6.7 (1999)(noting "[t]his Code provision is puzzling, since the court clearly has a strong interest in preventing relitigation.")

C.C.P. art. 2163, “[an] appellate court may consider the peremptory exception filed for the first time in that court, if pleaded prior to submission of the case for a decision, and if proof of the ground of the exception appears of record.” La. C.C.P. art. 2163. Mr. Arias, however, did not file an exception of *res judicata* with this court.

DECREE

For the foregoing reasons, the judgment of the trial court sustaining the exception of *res judicata* is reversed, and this matter is remanded for further proceedings.

REVERSED AND REMANDED