NOT DESIGNATED FOR PUBLICATION

LASHON HENRY	*	**NO. 2006-CA-1457**
VERSUS	*	**COURT OF APPEAL**
FOREST ISLE APARTMENTS LIMITED PARTNERSHIP	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
SECOND CITY COURT OF NEW ORLEANS
NO. 03-424
Honorable Mary "KK" Norman, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge James F. McKay III, Judge David S. Gorbaty, Judge Leon A. Cannizzaro Jr.)

Elizabeth M. Gaudin
Pierre F. Gaudin
GAUDIN & GAUDIN
1088 Fourth Street
P.O. Box 156
Gretna, LA 70054
COUNSEL FOR PLAINTIFF/APPELLANT

Sidney W. Degan III
Travis L. Bourgeois
DEGAN, BLANCHARD & NASH
400 Poydras Street
2600 Texaco Center
New Orleans, LA 70130
COUNSEL FOR DEFENDANT/APPELLEE

REVERSED AND REMANDED

This appeal arises out of a personal injury suit filed by LaShon Henry, on August 18, 2003, naming Forest Isle Apartments Limited Partnership (hereinafter Forest Isle) as a defendant. Forest Isle allegedly owned the building where Henry alleged to have been injured. On June 28, 2005, Henry filed a first supplemental and amending petition, changing the named defendant from Forest Isle to Berk-Cohen Associates, L.L.C.[1] Berk-Cohen filed an exception of prescription, which the trial court sustained after a hearing, dismissing Henry's claims. For the reasons assigned below, we reverse and remand for further proceedings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

Henry, a resident of Forest Isles, claimed that she sustained injuries as a result of a fall down a set of stairs outside of her apartment on August 17, 2002. On August 18, 2003, Henry filed suit, alleging Forest Isle to be the owner of the apartment complex at issue. She requested service upon Forest Isle on November 17, 2003, at 5000 Woodlawn Drive, New Orleans, Louisiana 70114. Berk-Cohen received the petition at the address requested, and subsequently filed an exception of insufficient citation, alleging that citation was not addressed to the proper party.

[1] Throughout the record, defendant/appellee is identified interchangeably as Berk-Cohen or Burke-Cohen. We will use Berk-Cohen.

The trial court held a hearing on the exception of insufficient citation and thereafter, on June 16, 2005, issued a judgment, granting the exception and granting Henry fifteen days to request proper service and citation on the proper party.

On June 23, 2005, Henry filed a first supplemental and amending petition, changing the name of the defendant from Forest Isle to Berk-Cohen Associates, L.L.C., and requesting service and citation upon Berk-Cohen at 5000 Woodlawn Drive, New Orleans, Louisiana 70114. Upon receiving the first supplemental and amending petition, Berk-Cohen filed an exception of prescription. On April 25, 2006, the trial court sustained the exception of prescription, dismissing Henry's claims against Berk-Cohen in their entirety.

ASSIGNMENT OF ERROR:

Henry argues that the trial court erred in holding that the instant suit prescribed because Berk-Cohen, as a substituted defendant, did not have notice of the filing of the action.

STANDARD OF REVIEW:

An appellate court should not disturb the finding of the trial court unless it is clearly wrong. *Bd. of Commissioners v. Estate of Smith*, 2003-1949, p.6 (La.App. 4 Cir. 9/2/04), 881 So.2d 811, 815. When evidence is introduced and evaluated at the trial of a peremptory exception, an appellate court must review the entire record to determine whether the trial court manifestly erred with its factual conclusions. *Id*.

DISCUSSION:

After the trial court granted Berk-Cohen's exception of insufficiency of citation, it allowed Henry fifteen days to amend her petition and serve the proper party defendant. Henry thereafter filed a first supplemental and amending petition, correctly naming Berk-Cohen as defendant, and requesting service on it. In

response to the first supplemental and amending petition, Berk-Cohen filed an exception of prescription. In opposition to the exception, Henry argued that the filing of the first supplemental and amending petition related back to the original filing.

An amended petition relates back to the date of the filing of the original petition when the action asserted in the amended petition arises out of the conduct, transaction, or occurrence set forth in the original pleading. La. Civ. Code art. 1153. The Louisiana Supreme Court developed a four prong test which must be satisfied before there can be a relation back to the original petition:

> (1) the amended claim must arise out of the same transaction or occurrence set forth in the original petition;
> (2) the purported substitute defendant must have received notice of the institution of the action such that he will not be prejudiced in maintaining a defense on the merits;
> (3) the purported substitute defendant must know or should have known but for a mistake concerning the identity of the proper party defendant, the action would have been brought against him; and
> (4) the purported substitute defendant must not be a wholly new or unrelated defendant, since this would be tantamount to an assertion of a new cause of action, which would have otherwise prescribed.

Ray v. Alexander Mall, 434 So.2d 1083, 1087 (La. 1983).

In the instant case, the trial court applied the *Ray* test and found that the first, third, and fourth prongs were clearly met. This Court agrees with that finding as the amended claim arises out of the same transaction as that set forth in the original petition, namely a claim for damages due to injuries sustained in a fall. As to the third prong, Henry caused the original petition to be served at the office of the purported substitute defendant, Berk-Cohen. Therefore, Berk-Cohen knew or should have known that, but for a mistake in identity, the action would have been brought against it. Finally, as the purported substitute defendant purchased the apartment complex where the injuries occurred, the purported substitute defendant (Berk-Cohen) is not a wholly new or unrelated defendant.

However, the trial court found that the second prong of the *Ray* test proved troublesome. The second prong requires notice of the institution of the action such that the purported substitute defendant will not be prejudiced in maintaining a defense on the merits.

Berk-Cohen argued at trial that *Sanders v. Schwegmann Supermarkets,* 96-0849 (La.App. 4 Cir. 6/4/97), 696 So.2d 264, totally supported its position. In *Sanders,* plaintiff, who had been injured in The Real Superstore, sued Schwegmann Supermarkets, an entity that had purchased the named defendant's assets. Schwegmann filed a motion for summary judgment arguing that it had only purchased the assets, not the liabilities, of The Real Superstore, and therefore was an improper party. Plaintiff amended her petition, naming The Real Superstore, National Canal-Villere Supermarkets, That Stanley Supermarkets, and XYZ Insurance Company. National Tea Company (the parent company of the named defendants) excepted on the ground of prescription. Plaintiff argued that she had corresponded frequently with the manager of The Real Superstore, and an adjuster for it insurer prior to filing suit, thereby putting it on notice. This Court found that notice of a claim, a demand letter, or similar correspondence did not satisfy the notice requirement as anticipated in *Ray*, *supra*.

We find *Sanders* distinguishable. In this case, the trial court found that the amended claim arose out of the same transaction as that alleged in the original petition. It also found that Berk-Cohen knew or should have known that, but for a mistake in identity, the action would have been brought against it. Lastly, the trial made the factual finding that Berk-Cohen was a related defendant insofar as it purchased the apartment complex from Forest Isle where Henry allegedly was injured. However, the trial court did not find that Berk-Cohen received timely notice of the filing of the lawsuit. In *Sanders,* Schwegmann Supermarkets was served and filed a motion for summary judgment. National Tea Company was not

served, nor did it have notice of the filing of the suit. Here, Berk-Cohen received timely notice that a suit had been filed when it accepted service for Forest Isle. Indeed, it was Berk-Cohen that filed the exception of insufficiency of citation. Berk-Cohen was clearly on timely notice that a suit had been filed against Forest Isle, an entity whose assets and liabilities it had purchased.

Accordingly, for the reasons stated herein, the judgment of the trial court sustaining the exception of prescription and dismissing Henry's claims is hereby reversed, and the matter remanded for further proceedings.

REVERSED AND REMANDED