

**ROSETTA IRONS, RICKEY
NYE, WILLIAM WATTS,
SYLVIA VAN BUREN, ROSE
THOMAS & SHANNON
THOMAS, LYNELL CLARK
AND BRUNO & BRUNO, LLP**

*** NO. 2007-CA-0570
* COURT OF APPEAL
* FOURTH CIRCUIT
* STATE OF LOUISIANA**

VERSUS

US BANK, INC.

*** * * * ***

TOBIAS, J., CONCURS AND ASSIGNS REASONS.

I respectfully concur in order to assign reasons that in my view support the majority's conclusion that US Bank waived its right to object to the fifteen day advance notice for the hearing provided for in La. C.C.P. art. 966B on the appellant's motion for summary judgment.

After unsuccessful correspondence with US Bank extending over months trying to obtain US Bank's signature on checks for insurance settlement proceeds, the plaintiffs filed their petition for concursus; the trial court by order dated 14 July 2006 simultaneously set a show cause hearing for 11 August 2006 on a show cause order why Bruno & Bruno, L.L.P., the appellant, should not be allowed to withdraw his 25% of the monies deposited in the court's registry for their legal fees. On 3 August 2006, an order was signed that set a show cause hearing for 11 August 2006 why the appellant should not be allowed to withdraw 33% of a portion of the funds in the court registry as its fee.¹ Service was effected by the long arm statute.

On 10 August 2006, one day prior to the hearing and following US Bank obtaining an extension of time to plead, US Bank removed the case to the United States District Court for the Eastern District of Louisiana that by operation of law

¹ Technically, this order was invalid because it was not signed by a judge, but by a court crier. The order signed did more than merely set a hearing date.

stayed the 11 August 2006 hearing. Following remand by federal court, the appellant obtained an order on 13 September 2006 resetting their show cause hearing for 11 November 2006.² US Bank propounded discovery to the appellant on 2 October 2006.³

On 23 October 2006, US Bank answered the petition. On 24 October 2006, US Bank filed a dilatory exception of unauthorized use of summary proceedings, asserting that the appellant could not obtain the sought relief by rule, that contained an order setting a hearing on US Bank's motion for 17 November 2006.⁴ US Bank also filed a motion to compel answers to their discovery that was also set by court order for 17 November 2006.⁵

On 2 November 2006, US Bank filed a peremptory exception of no cause of action and obtained an order on 3 November 2006 setting a hearing date of that motion for 17 November 2006.⁶ The substance of the memorandum in support of the exception is a defense to the as yet unfiled motion for summary judgment. The appellant timely filed an opposition to same.

On 6 November 2006, the appellant filed the motion for summary judgment at issue in this appeal and a memorandum in support thereof; and a hearing date was set for 17 November 2006.

Subsequently, US Bank filed a reply memorandum on 15 November 2006 to the appellant's opposition to the exception of no cause of action. The opposition can be read to essentially address the same issues in the appellant's motion for summary judgment.

² Again this order was signed by a court crier.

³ This discovery was formally objected to on 24 October 2006 by the appellant asserting the discovery sought was privileged and irrelevant, and a formal opposition was filed thereto.

⁴ See footnote 2.

⁵ See footnote 2.

⁶ See footnote 2.

On the morning of 17 November 2006, prior to the hearing of all set motions, US Bank filed an opposition to the appellant's motion for summary judgment, accompanying with it a statement of uncontested facts.

On 11 December 2006, the trial court rendered a written judgment granting the appellant's motion for summary judgment, and overruling US Bank's exception of no cause of action and unauthorized use of summary proceedings.

US Bank thereafter timely filed a motion for new trial (silent on the fifteen day issue), obtaining an order setting same for hearing on 23 March 2007. The appellant obtained an order resetting the motion for 9 February 2007 asserting that expedited consideration was warranted. The new trial motion was denied by judgment signed on 13 February 2007.

Thereafter, the appellant filed a supplemental petition for concursus to which US Bank filed identical exceptions. For all intent and purposes, I find these filings to be immaterial to resolution of the issue presently before the court.

The transcript of the hearing of 17 November 2006 affirmatively reflects that US Bank asked to continue the motion for summary judgment arguing that they did not have the full fifteen days allowed by law. They asserted that they had not had answer to their discovery. The trial court proceeded to decide the issues by taking the matter under advisement. I note that US Bank did not file a further opposition to the hearing of the motion for summary judgment prior to the trial court ruling upon same.

From the foregoing, I find that US Bank waived their right to the full fifteen day advance notice of the motion for summary judgment. La. C.C.P. art. 2164.