NOT DESIGNATED FOR PUBLICATION

DOMINION CREDIT, LLC	*	**NO. 2012-CA-1420**
VERSUS	*	**COURT OF APPEAL**
SAMUEL BAILEY, JR., D/B/A LOUISIANA DEMOLITION AND SAMUEL BAILEY, JR.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2011-06688, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
* * * * * *

Judge Madeleine M. Landrieu

* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Paul A. Bonin, Judge Madeleine M. Landrieu)

BELSOME,J., CONCURS IN THE RESULT

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AFFIRMED

MARCH 13, 2013

In this appeal, Samuel Bailey, Jr. d/b/a Louisiana Demolition, Inc., and Samuel Bailey, Jr. (collectively, Appellants), seek review of the trial court judgment granting the motion for summary judgment filed by Dominion Credit, L.L.C. (Dominion). For the following reasons, we affirm.

STATEMENT OF FACTS/PROCEDURAL HISTORY

On June 23, 2011, Dominion filed a petition for damages and for writ of sequestration. The petition alleged that Dominion Credit loaned Samuel Bailey, Jr. d/b/a/ Louisiana Demolition $194, 381.81 to finance the purchase of certain items of equipment. In connection with this loan, Mr. Bailey executed a promissory note and security agreement in favor of Dominion. Additionally, the petition noted that Samuel Bailey, Jr. signed an unconditional guaranty, obligating himself individually to pay the loan in monthly installments of $5,000.33. Dominion's petition alleges that despite amicable demand, Mr. Bailey is in default of the loan. After some discovery and communication between counsel, Dominion amended its petition to correct certain statements of fact. In its first supplemental and amending petition, Dominion acknowledged that it had released its security interest in one of the eight pieces of equipment prior to the filing of the original petition.

Thereafter, ten months after filing its verified petition, and a year after Mr. Bailey's last payment on the note(s), Dominion Credit moved the district court for summary judgment.

In connection with its motion, Dominion filed exhibits establishing that it was owed the total sum of $170,472.37 representing: the principal amount of $122,333.55; interest in the amount of $5,004.63 from October 27, 2010 to July 11, 2011; late charges in the amount of $16,901.80; and fees in the amount of $26,232.39, including reasonable and necessary attorneys' fees.

Mr. Bailey, through counsel, opposed the motion by asserting certain legal arguments which will be addressed later in this opinion and by contesting the amount he owed on the contracts. However, Mr. Bailey did not deny that he executed the notes, and he failed to produce any proof of payments to contradict the evidence put forth by Dominion. The trial court, after considering the legal arguments and the evidence presented, granted the motion for summary judgment and entered judgment in favor of Dominion for the amounts prayed.

The Appellants timely filed the instant appeal.

STANDARD OF REVIEW

The appellate court reviews the granting of summary judgment *de novo* under the same criteria governing the trial court's consideration of whether the summary judgment is appropriate. *Martinez v. American Steelway Industries, L.L.C.*, 2009-0339, p. 9 (La. App. 4 Cir. 9/29/09), 20 So.3d 526, 528, *citing Reynolds v. Select Props., Ltd.*, 93-1480, p. 2 (La. 4/11/94), 634 So.2d 1180, 1183. After adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law shall be granted. La. C.C.P. art. 966(C)(1). If the court finds

that a genuine issue of material fact exists, then summary judgment must be rejected. *Martinez*, 2009-0339, p. 3, 20 So.3d at 528, *citing Oakley v. Thebault*, 96-0937, p.3 (La. App. 4 Cir. 11/13/96), 684 So.2d 488, 490. "Generally, material facts are those that potentially ensure or preclude recovery, affect the litigant's ultimate success, or determine the outcome of a legal dispute." *Safeway Ins. Co. of Louisiana,* 2009-0074, pp. 203 (La. App. 4 Cir. 5/27/09), 13 So.3d 236, 238, *citing Prado v. Sloman Neptun Schiffahrts, A.C.*, 611 So.2d 691, 699 (La. App. 4 Cir. 1992).

The burden of proof does not shift to the party opposing summary judgment until the moving party presents a prima facie case that no genuine issues of material fact exist. *Martinez,* 2009-0339, p.3, 20 So.3d at 528, *citing Oakley*, 96-0937, p.3, 684 So.2d at 490. At that point, if the party opposing the motion "fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact." La. C.C.P. art. 966(C)(2). Summary judgment should then be granted. *Martinez*, 2009-0339, p. 4, 20 So.3d at 528, *citing Lomax v. Ernest Morial Convention Center,* 2007-0092, pp. 2-3 (La. App. 4 Cir. 7/11/07), 963 So.2d 463, 465.

ASSIGNMENTS OF ERROR

I. The Appellants contend that the trial court erred in granting the motion for summary judgment before they had sufficient time to conduct discovery.

II. The Appellants contend that the trial court erred in its award of attorneys' fees and contractual interest.

DISCUSSION

I. Summary Judgment

Prior to Dominion filing its motion for summary judgment, the Appellants filed certain exceptions arising from the following facts: At the time of filing of its original petition for damages and writ of sequestration, Dominion paid the sheriff's fee for service of the petition on the Appellants, but did not post the required deposit to effect the sequestration. Unbeknownst to Dominion, the sheriff did not serve any of the pleadings due to the fact that Dominion did not post the deposit for the sequestration. Immediately upon learning this, Dominion sent a supplemental request to the sheriff to serve the petition. The Appellants were served on October 26, 2011.

The Appellants filed exceptions, an answer, and a reconventional demand. In the exception of insufficiency of service of process, the Appellants argued that Dominion failed to serve the Appellants within ninety days in violation of Louisiana Code of Civil Procedure article 1201(C). After a hearing, the trial court denied the exception of insufficiency of service of process. The Appellants filed an application for supervisory writs. This Court and the Louisiana Supreme Court denied the applications for supervisory writs. *Dominion Credit, L.L.C. v. Louisiana Demolition, Inc*., (unpub.) 2012-0239 (La. App. 4 Cir. 3/22/12); *Dominion Credit, L.L.C. v. Louisiana Demolition, Inc*., 2012-0933, p.1 (La. 6/15/12), 90 So.3d 1065 (mem.).

The Appellants allege that at the time of the hearing on Dominion's motion for summary judgment, their writ application on the denial of their exception of insufficiency of service of process was pending in the Supreme Court. The Appellants maintain that they could not conduct discovery without waiving the

exception of insufficiency of service of process, contending that a defendant waives citation and service of process by making an appearance without objection to the jurisdiction of the court. La. C.C.P. art. 6(A)(3). The Appellants contend that without adequate discovery, the motion for summary judgment is premature. This argument is without merit.

Louisiana Code of Civil Procedure article 1201(C) states, in pertinent part, that "[s]ervice of the citation shall be requested on all named defendants within ninety days of commencement of the action." The Louisiana Supreme Court has noted that an individual objecting to the failure to serve within ninety days is not objecting because the service is "insufficient." *Filson v. Windsor Court Hotel*, 2004-2893, pp.4-5 (La. 6/29/05), 907 So.2d 723, 726. Rather, the objection is that the service is **untimely**. *Id.*, p.5. (Emphasis supplied.) The Court stated that the proper procedural vehicle to raise an objection to untimely service pursuant to this article is a motion for involuntary dismissal. *Id.*, p.9, 907 So.2d at 729. The *Filson* Court went on to find that the motion for involuntary dismissal is not waived by the filing of an answer or discovery requests. *Id.*, p.9, 907 So.2d at 730. Thus, we find that the Appellants' conclusion that they were prohibited from conducting discovery pending a ruling from the Louisiana Supreme Court on their exception of insufficiency of service of process is without merit.

Louisiana Code of Civil Procedure article 966(A)(1) provides that a motion for summary judgment may be filed at any time after answer. This article further provides that "[a]fter adequate discovery . . . a motion which shows that there is no genuine issue as to material fact and that the mover in entitled to judgment as a matter of law shall be granted." La. C.C.P. art. 966(C)(1). Further, "the only requirement is that the parties be given a fair opportunity to present their claim.

Unless [a party] shows a probable injustice a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact." *Smith v. City of New Orleans ex rel. Shires*, 2010-1464, p.5 (La. App. 4 Cir. 7/6/11), 71 So.3d 525, 529, *citing Simoneaux v. E.I. du Pont de Nemours & Co., Inc.*, 483 So.2d 908, 912-913 (La. 1986).

During oral argument on the motion for summary judgment, the Appellants agreed that Mr. Bailey signed the promissory note and the guarantee, but disputed the amount owed. Despite their assertion that they were unable to conduct discovery, nothing prevented the Appellants from reviewing their own records to provide support for their argument that the amount owed to Dominion was less than the amount alleged by Dominion. The Appellants failed to show that a probable injustice would without additional discovery.

While the Appellants argued that they objected to the motion for summary judgment being considered by the trial court prior to discovery, the Appellants did not take any action to seek more time to conduct such discovery. They neither filed a motion to continue the hearing nor seek a stay of the proceedings pending resolution of their writ application with the Supreme Court.

The Appellants' argument that the first supplemental and amending petition was not properly before the court is also without merit. The Appellants contend that Dominion failed to obtain leave of court or written consent of the Appellants to file the first supplemental and amending petition as required by Louisiana Code of Civil Procedure article 1151. Further, the Appellants argued that Dominion failed to request service and citation of the first supplemental and amending petition. However, the facts in this case do not support these assertions.

During negotiations between the parties, Dominion determined that the security interest in a specific piece of equipment, a trailer, was released after payment by the Appellants. In a document addressed to counsel for the Appellants, Dominion stated that it would amend its petition to address the trailer if a settlement was not reached with the Appellants. In response, counsel for the Appellants replied, in writing, that, "I express no consent that Dominion Credit may delay in correcting the information it represented to the Court. It is my opinion that Dominion Credit must correct the representations it made to the Court." The correction demanded by the Appellants concerned the representation that Dominion possessed a security interest in the trailer. The first supplemental and amending petition acknowledged that Dominion mistakenly averred that it possessed a security interest over the trailer. We find the letter by counsel for the Appellants constituted sufficient written consent to file the first supplemental and amending petition.

Regarding Dominion's failure to request the issuance of service and citation of the first supplemental and amending petition, the Appellants cited Louisiana Code of Civil Procedure article 1201. Specifically, the Appellants pointed to the provision stating that "citation and service thereof are essential in all civil actions except summary and executory proceedings, divorce actions under Civil Code Article 102, and proceedings under the Children's Code. Without them all proceedings are absolutely null." La. C.C.P. art. 1201(A).

However, that article goes on to provide that service of citation shall be requested within ninety days of the filing of a supplemental or amended petition that names an additional defendant. La. C.C.P. art. 1201(C). Otherwise, service of a pleading subsequent to the original petition may be served by sheriff or by means

of electronic transmission to counsel of record. La. C.C.P. art. 1313(A)(4). In this instance, an additional defendant was not named. Service of citation was not required for Dominion's first supplemental and amending petition. Dominion attached proof that it electronically transmitted a copy of the first supplemental or amending petition to counsel for the Appellants. Thus, this argument of the Appellants is without merit.

After conducting a *de novo* review of the record, we find that Dominion properly supported its motion for summary judgment. The Appellants failed to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden of proof at trial. As there is no genuine issue of material fact, the trial court correctly granted the motion for summary judgment filed by Dominion.

II. Attorneys' Fees and Contractual Interest

In this assignment of error, the Appellants contend that the award of attorneys' fees and interest was not properly supported by the evidence. In its original petition, Dominion requested an award of $2,000.00 for attorneys' fees. Thereafter, in its motion for summary judgment, Dominion requested an award of $26,232.39 for fees, which included attorneys' fees. The Appellants assert that proper evidence is required to establish an award of attorneys' fees, *citing Central Progressive Bank v. Bradley*, 502 So.2d 1017 (La. 1987), and *Leenerts Farms Inc. v. Rogers*, 421 So.2d 216 (La. 1982). In both of those cases, the Court noted that courts may inquire into the reasonableness of a fee fixed in a note. *Central Progressive Bank*, 502 So.2d at 1017, *Leenerts Farms, Inc.*, 421 So.2d at 219.

An attorney's fee must be reasonable. Rules of Professional Conduct, Rule 1.5. Attorneys' fees should be denied when the record lacks sufficient evidence to

support such an award. *Johnson v. Tuff-n-Rumble Mgmt., Inc.,* 2009-0739 (La. App. 4 Cir. 12/9/09), 27 So.3d 993. The Appellants contend that Dominion failed to offer any evidence to support any award of attorneys' fees.

In this case, the promissory note signed by Mr. Bailey provides that "if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs."

As evidence that an attorney was hired to collect on the note, Dominion provided the sworn testimony of Michael Wilkerson, the chief financial officer of Dominion. Mr. Wilkerson attested that Dominion had expended $26,232.39 in the prosecution of this suit. To his affidavit, Mr. Wilkerson attached a loan payoff document prepared by Dominion, addressed to Louisiana Demolition and Samuel Bailey. The loan payoff document stated that $26,232.39 was due in fees. Mr. Wilkerson attested in his affidavit that these fees included attorneys' fees.

The record contains evidence that the Appellants filed exceptions, an answer, and a reconventional demand, and writ applications to this Court and the Supreme Court. These filings required Dominion to respond and to attend hearings. Given the multiple defenses and exceptions raised by the Appellants, Dominion incurred added attorneys' fees in the prosecution of this action. The record also contains evidence that settlement negotiations were attempted by the parties, requiring Dominion's participation. When the settlement negotiations were unsuccessful, Dominion filed the first supplemental and amending petition. Thereafter, Dominion filed the motion for summary judgment.

The facts in the instant case differ from the facts presented in *Johnson*. In *Johnson*, the defendant deducted alleged attorneys' fees from money owed to the plaintiff musicians. *Johnson,* 2009-0739, p.2, 27 So.3d at 994. The plaintiff

musicians sued, and the parties conducted discovery. *Id*., p.3, 27 So.3d at 995. During discovery, the defendant produced a single half page printout with a column of legal fees which "contained no explanation as to specific dates, attorneys billing information, services rendered, or other relevant data." *Id*. After reviewing the record, this Court found the documentation insufficient to support the defendant's claim that the fees were expended on behalf of the plaintiff musicians. *Id*., p.8, 27 So.3d at 997.

In *Johnson*, the plaintiff musicians sued over the alleged attorneys' fees, and the record itself lacked evidence that the alleged attorneys' fees were owed by the plaintiff musicians. Here, Dominion filed suit alleging that the Appellants breached an obligation to pay Dominion. Dominion submitted the sworn testimony of Mr. Wilkerson as to the amount of attorneys' fees owed, which is supported by the record. Unlike *Johnson*, this record contains the original petition, the first supplemental and amending petition demanded by the Appellants, evidence of settlement negotiations, the writ applications, the motion for summary judgment, and the reply memorandum in support of the motion for summary judgment. The record amply supports the attorneys' fees awarded in this case. There is no requirement that an itemized billing statement be produced to support a request for attorneys' fees. Thus, we find this argument to be without merit.

Lastly, the Appellants argue that the evidence submitted regarding the interest rate is inadequate. To support this assertion, the Appellants rely on the loan payoff document prepared by Dominion indicating an interest rate of 0%. Mr. Wilkerson's affidavit stated that the promissory note signed by Mr. Bailey provided an interest rate of 10.750%. After the Appellants' breach of the obligation to pay, Dominion stopped charging contractual interest on the note on

July 11, 2011. This resulted in the loan payoff document prepared on April 4, 2012 reflecting an interest rate of 0%. The trial court judgment reflected interest charged through July 11, 2011. Thus, we find this argument to be without merit.

CONCLUSION

Accordingly, the trial court judgment granting the motion for summary judgment filed by Dominion is hereby affirmed.

AFFIRMED