BOURBON INVESTMENTS, LLC AND 209 REALTY, LLC	*	**NO. 2015-CA-1234**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
NEW ORLEANS EQUITY LLC, ET AL	*	**STATE OF LOUISIANA**
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LANDRIEU, J., CONCURS IN PART AND DISSENTS IN PART

I concur with the majority in its affirmation of that part of the trial court judgment finding Mr. Rodrigue to be a member of Bourbon Investments. This factual finding is amply supported by the record. I respectfully dissent, however, from the majority's affirmation of that part of the trial court's judgment which sustained the exceptions of lack of procedural capacity and no right of action. Our differing opinions as to these exceptions rest in our interpretation of Louisiana's LLC law. There appears to be no guidance by any other court on the issue before us.

I. Exception of Lack of Procedural Capacity

By this exception, the defendants asserted that Mr. Conwill and Mr. White lacked the legal authority to bring this action in the name of Bourbon Investments and 209 Realty. The defendants argued that according to Louisiana statutes governing limited liability companies ("LLCs"), a majority of the members of an LLC must vote to institute suit. They further argued that only two of the members of Bourbon Investments (which is the sole member of 209 Realty), namely, Mr. Conwill and Mr. White, were given the opportunity to vote and did vote to authorize this litigation. Mr. Rodrigue was not given the opportunity to vote prior to the suit being filed. Moreover, Mr. Bollinger and Mr. Simpson, who executed a

written assignment of their respective interests in Bourbon Investments to Mr. Conwill and Mr. White one day prior to the suit being filed, did not vote to institute this litigation. Relying upon La. R.S. 12: 1332, the defendants asserted that the assignment could not include the right to vote Mr. Bollinger's and Mr. Simpson's shares unless the unanimous written consent of all the members was obtained.[1] They argued that, because Mr. Rodrigue was not notified of the assignment nor given an opportunity to consent, Mr. Conwill and Mr. White never gained the authority to vote the shares they obtained by assignment from Mr. Bollinger and Mr. Simpson. Without that authority, Mr. Conwill and Mr. White lacked the majority necessary to approve the filing of suit on behalf of Bourbon Investments.

After hearing testimony and considering the evidence, the trial court found that Mr. Rodrigue was a member of Bourbon Investments, and that the failure to obtain Mr. Rodrigue's consent to the assignment rendered the assignment invalid insofar as the transfer of full membership rights (including the right to vote) was concerned. Therefore, the trial court concluded, Mr. Conwill and Mr. White lacked the legal capacity to authorize the filing of suit by Bourbon Investments and 209 Realty. Upon granting the exception of lack of procedural capacity, the trial court dismissed the action with prejudice.

On appeal, the plaintiffs argue that the trial court committed both factual and legal errors. First, they argue that the trial court's finding that Mr. Rodrigue was a member of Bourbon Investments is manifestly erroneous. They contend that Mr. Rodrigue never became a member entitled to vote on bringing the lawsuit because he did not satisfy the conditions precedent to his membership. Alternatively, they argue that even if Mr. Rodrigue was a member, his consent was not legally

[1] La. R.S. 12:1332 provides, in pertinent part, that "[a]n assignee of an interest in a limited liability company shall not become a member or participate in the management of the limited liability company unless the other members unanimously consent in writing." As the interpretation of this statute is a key issue in this appeal, the statute is discussed more fully *infra*.

required for the assignment by Mr. Bollinger and Mr. Simpson to transfer their full membership rights to Mr. Conwill and Mr. White because the assignees were already members of the LLC. They argue that the trial court's conclusion that Mr. Rodrigue's consent was necessary is legal error resulting from an incorrect interpretation of La. R.S. 12:1332, specifically, and of the Louisiana law governing LLCs, in general. The plaintiffs contend that under the correct interpretation of the law, Mr. Conwill and Mr. White controlled a majority of Bourbon Investments (and therefore of 209 Realty) at the time suit was filed and therefore possessed the legal capacity to institute suit on behalf of both LLCs.

I join the majority in its affirmation of the trial court's factual finding that Mr. Rodrigue was a member of Bourbon Investments. The pertinent legal question is whether the trial court erred by concluding that Mr. Conwill and Mr. White did not have the procedural capacity to authorize the filing of this lawsuit on behalf of Bourbon Investments and 209 Realty absent Mr. Rodrigue's consent. The majority affirms the trial court on this issue. I would respectfully find error and reverse.

The dilatory exception of lack of procedural capacity, provided for in Louisiana Code of Civil Procedure article 926 A(6), raises the issue of want of capacity of the plaintiff to institute and prosecute the action and/or challenges the authority of a plaintiff who appears in a purely representative capacity. *Woodard v. Upp*, 2013-0999, pp. 4-5 (La. App. 1 Cir. 2/18/14), 142 So.3d 14, 18. Procedural capacity is presumed, unless challenged by the dilatory exception. *See* La. C.C.P. art. 855. The determination of whether a party has the procedural capacity to sue or be sued involves a question of law, which is reviewed under the *de novo* standard of review to determine whether the ruling of the trial court was legally correct. 2013-0999, p. 5, 142 So.3d at 18.

In Louisiana, the general rules governing LLCs are stated in La. R.S. 12:1301, *et seq*. La. R.S. 12:1304 provides, in pertinent part, that an LLC "shall be

duly organized, and its separate existence shall begin as of the time of filing of the articles of organization with the secretary of state." La. R.S. 12:1311 states:

> **Management by members**
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> Except as otherwise provided in the articles of organization, the business of the limited liability company shall be managed by the members, subject to any provision in a written operating agreement restricting or enlarging the management rights and duties of any member or group or class of members.

La. R.S. 12:1318 provides, in pertinent part:

> **Voting rights of members**
>
> A. Unless otherwise provided in the articles of organization or a written operating agreement, each member of a limited liability company shall be entitled to cast a single vote on all matters properly brought before the members, and all decisions of the members shall be made by majority vote of the members.

In the case before us, the defendants contend that Mr. Conwill and Mr. White lacked the legal capacity to authorize the filing of suit by Bourbon Investments because the assignment by which they acquired the interests of Mr. Simpson and Mr. Bollinger did not transfer the right to vote those interests. They contend that in order to transfer voting rights, the unanimous consent of all the members of the LLC to the assignment is necessary. They argue that because Mr. Rodrigue did not consent to the assignment, Mr. Conwill and Mr. White had the right to vote only two fifths of the membership interests, which is less than a majority.

Conversely, Mr. Conwill and Mr. White argue that Mr. Rodrigue's consent to the assignment was not necessary to confer voting rights or any other membership rights upon them because they were already members of the LLC at the time of the assignment. They contend that, although the LLC law restricts the rights of an assignee, such restrictions do not apply to assignments by members to other members of the LLC, as opposed to assignments to third parties. Therefore, Mr. Conwill and Mr. White argue that once they acquired the interests of Mr.

Simpson and Mr. Bollinger, they controlled two thirds of the LLC and thus a majority of the voting rights. They therefore contend that the two of them had the authority to authorize the filing of the lawsuit without Mr. Rodrigue's vote.

Both parties' arguments are based upon two provisions of the LLC law regarding assignments, La. R.S. 12:1330 and 12:1332, which the parties (and the judges of this panel) interpret differently. These statutes provide, in pertinent part:

> **§ 1330. Assignment of membership interest**
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> A. Unless otherwise provided in the articles of organization or an operating agreement, a membership interest shall be assignable in whole or in part. An assignment of a membership interest shall not entitle the assignee to become or to exercise any rights or powers of a member until such time as he is admitted in accordance with the provisions of this Chapter. An assignment shall entitle the assignee only to receive such distribution or distributions, to share in such profits and losses, and to receive such allocation of income, gain, loss, deduction, credit, or similar item to which the assignor was entitled to the extent assigned.
> B. Unless otherwise provided in the articles of organization or an operating agreement, the pledge of or granting of a security interest, lien, or other encumbrance in or against any or all of the membership interest of a member shall not cause the member to cease to be a member or to have the power to exercise any rights or powers of a member.
> C. Unless otherwise provided in a written operating agreement and except to the extent assigned by agreement, until an assignee of a membership interest becomes a member, the assignee shall have no liability as a member solely as a result of such assignment.
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> **§ 1332. Right of assignee to become a member**
>
> A. Except as otherwise provided in the articles of organization or a written operating agreement:
> (1) An assignee of an interest in a limited liability company shall not become a member or participate in the management of the limited liability company unless the other members unanimously consent in writing.
> (2) Until the assignee of an interest in a limited liability company becomes a member, the assignor shall continue to be a member.

The parties have not cited, nor are we aware, of any jurisprudence addressing the precise issue presented here. The guidelines for statutory interpretation are found in the Louisiana Civil Code. La. C.C. art. 9 provides:

> When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

La. C.C. art. 11 provides, in pertinent part:

> The words of a law must be given their generally prevailing meaning.

La. C.C. art. 13 provides:

> Laws on the same subject matter must be interpreted in reference to each other.

We find no ambiguity in the words of either statute at issue here. La. R.S. 12:1330 states that an assignee is not entitled "**to become or to exercise any rights or powers of a member until such time as he is admitted** in accordance with the provisions of this Chapter." (Emphasis added.) Similarly, La. R.S. 12:1332 states: "**An assignee** of an interest in a limited liability company **shall not become a member** or participate in the management of the limited liability company unless the other members unanimously consent in writing. (Emphasis added.) These provisions are harmonious, and both clearly differentiate between the (greater) rights afforded to a member of an LLC and the (lesser) rights afforded to a mere assignee. The references in both statutes to an assignee "becoming a member" would not make sense if these provisions were intended to apply to assignees who already are members.

Analogously, in *Channelside Services, LLC v. Chrysochoos Group, Inc.*, 2015-0064 (La. App. 4 Cir. 5/13/16), 194 So.2d 751, we held that a judgment creditor, who had obtained a charging order and had thereby become an assignee of the interest of a member of an LLC, was entitled to share in the profits, losses and distributions of the LLC but was not entitled to inspect the books and records of the LLC, which right is reserved to members only. *See* La. R.S. 12:1319. In that case, we noted:

> According to La. R.S. 12:1330, Channelside, as an assignee of a membership interest, shall not be entitled to exercise *any* rights or powers of a member until such time as it is admitted as a member; the assignment entitles Channelside *only* to receive distributions, share in profits and losses, and to receive allocations of "income, gain, loss, deduction, credit, or similar item" to which CGI was entitled.

2015-0064, p. 16, 194 So.3d at 760–61.

In the case before us, Mr. Conwill and Mr. White were already members of Bourbon Investments at the time they became assignees of the interests of Mr. Simpson and Mr. Bollinger. As members, Mr. Conwill and Mr. White did not need a statutory provision to confer upon them rights that they already possessed. Moreover, as they were already members, there was no need for a unanimous vote to approve their membership. Considering these circumstances, I conclude that the trial court erred as a matter of law by interpreting La. R.S. 12:1330 and 12:1332 as prohibiting Mr. Conwill and Mr. White from exercising their full membership rights with regard to the shares they received by assignment from Mr. Simpson and Mr. Bollinger. The assignment of Mr. Simpson's and Mr. Bollinger's shares to Mr. Conwill and Mr. White was valid without the consent of Mr. Rodrigue. Following the assignment, Mr. Conwill and Mr. White controlled a majority interest in both Bourbon Investments and 209 Realty, and therefore had the procedural capacity to file this lawsuit on behalf of those LLC's. I would therefore reverse the granting of the defendants' exception of lack of procedural capacity and the dismissal of the plaintiffs' claims on this basis.

II. Exception of No Right of Action

Whether a party has a right of action is a question of law. *Weber v. Metro. Cmty. Hospice Found., Inc.*, 2013-0182, p. 4 (La. App. 4 Cir. 12/18/13), 131 So.3d 371, 374. An appellate court reviews questions of law by making a determination as to whether the trial court was legally correct or legally incorrect. *Id*., pp. 4-5, 131 So.3d at 374.

Lack of procedural capacity is not synonymous with no right of action. *Horrell v. Horrell*, 99-1093, p. 8 (La. App. 1 Cir. 10/6/00), 808 So.2d 363, 369. The peremptory exception of no right of action, as provided for in Louisiana Code of Civil Procedure article 927(5), questions the plaintiff's standing or interest to bring suit. *Bd. of Sup'rs of Louisiana State Univ. & Agr. & Mech. Coll. v. Guth*, 2015-0680, p. 10 (La. App. 4 Cir. 5/25/16), 195 So.3d 579, 586. The pertinent inquiry is whether the plaintiff has a real and actual interest in the action, or belongs to the class of persons to whom the law grants the cause of action asserted in the lawsuit. *See, Weber*, *supra*, 2013-0182, p. 5, 131 So.3d 371, 374 (and cases cited therein). By contrast, the dilatory exception of lack of procedural capacity questions the legal capacity of the plaintiff to institute the action and/or challenges the authority of a plaintiff who appears in a purely representative capacity. *Woodard v. Upp*, *supra*, 2013-0999, pp. 4-5, 142 So.3d at 18. The record in this case demonstrates that the trial court failed to recognize the distinction between these two exceptions.

A defendant raising the exception of no right of action has the burden of proving the exception. *City of New Orleans v. Board of Directors of Louisiana State Museum,* 98–1170, p. 9 (La. 3/2/99), 739 So.2d 748, 755. The defendants here did not introduce any evidence in support of the exception of no right of action; nor did they argue, either in the trial court or in their briefs on appeal, any legal theory in support of this exception other than the plaintiffs' alleged lack of procedural capacity. Considering the record, there is no question that Bourbon Investments and 209 Realty have standing/an interest in bringing suit for the breach of the APA and/or RPA; as parties to those agreements, they clearly are entitled to assert a cause of action alleging those agreements were breached causing damage to them. Accordingly, I conclude that the plaintiffs have a right of action, and would reverse the trial court's judgment which sustained the exception.

CONCLUSION

Accordingly, for the reasons stated, I concur in the majority's finding that Mr. Rodrigue is a member of Bourbon Investments but respectfully dissent from that part of opinion which affirms the trial court's judgment sustaining the exceptions of lack of procedural capacity and no right of action.