TARIK AHMED	*	**NO. 2017-CA-0114**
VERSUS	*	**COURT OF APPEAL**
DOWNMAN DEVELOPMENT, L.L.C., ABC CORPORATION,	*	**FOURTH CIRCUIT**
XYZ INSURANCE COMPANY, AND SCOTTSDALE INDEMNITY COMPANY	*	**STATE OF LOUISIANA**
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2012-06536, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

* * * * * *

JUDGE SANDRA CABRINA JENKINS

* * * * * *

(Court composed of Judge Edwin A. Lombard,
Judge Roland L. Belsome, Judge Sandra Cabrina Jenkins)

Stephen I. Dwyer
J. Kendall Rathburn
Kailey L. Leboeuf
DWYER CAMBRE & SUFFERN
3000 West Esplanade Avenue, Suite 200
Metairie, LA 70002

COUNSEL FOR PLAINTIFFS/APPELLANTS

Alexander R. Saunders
PELLETERI & WIEDORN, L.L.C.
636 Carondelet Street
New Orleans, LA 70130

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

DECEMBER 28, 2017

Plaintiffs, Tarik Ahmed and Miss US, Inc., appeal the trial court's September 23, 2016 judgment granting summary judgment in favor of defendants, Roofing Contractors, Inc. of Louisiana and United Fire & Indemnity Company, and dismissing plaintiffs' claims with prejudice. In rendering its judgment, the trial court found that Mr. Ahmed is not a proper party plaintiff and the amended petition, adding Miss US, Inc. as a plaintiff, did not relate back to the filing of the original petition. Based on our review of the record and applicable law, we find no error in the trial court's judgment and we affirm.

FACTS AND PROCEDURAL HISTORY

In May 2007, Tarik Ahmed entered into a lease agreement with Qaquish, L.L.C. for a commercial space located at 2001 St. Bernard Avenue, where he opened and operated St. Bernard Beauty Supply Store ("the beauty store"). That same month, Miss US, Inc. was incorporated as a Louisiana corporation with Mr. Ahmed as its sole shareholder and President. In or around May 2010, Mr. Ahmed "d/b/a Miss US, Inc.," signed an amendment to the lease agreement with Qaquish, L.L.C., extending and amending the terms of the original lease. Then, in September 2011, Qaquish, L.L.C. transferred ownership of the property at 2001 St. Bernard Avenue to Downman Development, L.L.C. ("Downman"), which became the successor in interest to the commercial lease for the beauty store.

On July 5, 2012, Mr. Ahmed, individually, instituted this suit for damages against Downman, Roofing Contractors, Inc. of Louisiana ("RCI") and United Fire & Indemnity Company.[1] According to the allegations in the petition, Downman

[1] Four defendants were named in the original petition: Downman, Scottsdale Indemnity Company, "ABC Contractor," and "XYZ Insurer." Downman and Scottsdale are not parties to this appeal and the record does not reflect whether any claims remain pending against either. In the first and second supplemental petitions, RCI and United Fire & Indemnity Company were identified as the previously unknown contractor and its general commercial liability insurer, respectively, and named as the only defendants. While the record does not reflect the withdrawal

contracted with RCI to repair and renovate the roof and ceiling above the beauty store. During the course of the repair work, at some time prior to November 15, 2011, RCI allegedly created large holes in the roof and ceiling above the beauty store but failed to seal the openings exposed by their work. Then, on or around November 15-16, 2011, heavy rain allegedly inundated the beauty store through the openings in the roof and ceiling and caused severe water damage to the stock and inventory therein. Thereafter, Mr. Ahmed, individually, filed this suit to recover damages sustained to the stock and inventory as a result of the alleged negligent acts of defendants.

In September 2015, after receiving discovery from Mr. Ahmed, RCI and United Fire & Indemnity Company (hereinafter "defendants") each filed a peremptory exception of no right of action seeking dismissal of all claims against them. Based on Mr. Ahmed's responses to discovery requests, defendants argued that the damaged stock and inventory was actually owned by Miss US, Inc., and Mr. Ahmed had no right to recover damages for property he did not personally own. In response, on October 15, 2015, Mr. Ahmed filed a motion for leave to file a third supplemental and amending petition adding Miss US, Inc. as a plaintiff;[2] he contemporaneously filed an opposition to the exception of no right of action, asserting that both he and Miss US, Inc. owned the damaged property and both are proper parties to the suit. After a hearing on the exception, the trial court rendered judgment granting Mr. Ahmed leave to amend the petition, denying defendants' exceptions of no right of action "without prejudice, as premature," and reserving to defendants the opportunity to re-urge the exception after additional discovery.

or dismissal of claims against Downman and Scottsdale, neither is named as a defendant in the first, second, and third amended and supplemental petitions.

[2] Mr. Ahmed filed the first amended and supplemental petition on September 7, 2012, and the second amended and supplemental petition on November 15, 2012.

In July 2016, defendants each filed a motion for summary judgment seeking dismissal of all claims against them. Again, defendants argued that Mr. Ahmed was not the proper party to file suit to recover damages for property he did not own; in addition, defendants argued that the third supplemental and amending petition adding the proper party plaintiff, Miss US, Inc., could not relate back to the original petition filed by Mr. Ahmed and, thus, the claims asserted by the proper party were prescribed.

Plaintiffs filed an opposition to defendants' motions for summary judgment on August 31, 2016, and the trial court set a hearing on the motions for September 16, 2016. Following the hearing, the trial court rendered judgment on September 23, 2016, granting defendants' motions for summary judgment and dismissing plaintiffs' claims with prejudice. On October 24, 2016, the trial court issued written reasons for judgment.

Plaintiffs' timely appeal follows.

STANDARD OF REVIEW

Appellate courts review a trial court's ruling granting a motion for summary judgment *de novo*, using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *FMB Development, L.L.C. v. Hibernia Nat'l Bank*, 16-1057, p. 4 (La. 7/12/17), 224 So.3d 431, 434. Pursuant to La. C.C.P. art. 966(A)(3), a court shall grant a motion for summary judgment if, after an opportunity for adequate discovery, the motion, memorandum, and supporting documents show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law.

The burden of proof on a motion for summary judgment is governed by La. C.C.P. art. 966(D)(1), which provides as follows:

> The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.

The determination of whether material facts exist in the case depends upon the applicable substantive law. *Jones v. Stewart*, 16-0329, p. 8 (La. App. 4 Cir. 10/5/16), 203 So.3d 384, 389, *citing Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751.

DISCUSSION

In this case, the trial court granted defendants' motions for summary judgment on the basis of prescription. In its reasons for judgment, the trial court made the following findings: Mr. Ahmed is not the proper party plaintiff because he has no right to recover for the alleged damage to property he did not own; the proper party plaintiff, Miss US, Inc., was not added within the one year prescriptive period; and the third supplemental and amended petition did not relate back to the filing of the original petition. Thus, the trial court found that the claims asserted by the proper party plaintiff, Miss US, Inc., were prescribed and defendants were entitled to summary judgment.

In the first assignment of error, plaintiffs argue that the trial court erred in granting summary judgment by finding that Mr. Ahmed is not a proper party plaintiff because he did not personally own the damaged stock and inventory at the beauty store. Plaintiffs assert that Mr. Ahmed has a real and actual interest in this suit and he properly instituted this litigation to recover for damage to inventory and stock that he purchased for the beauty store. Moreover, plaintiffs assert that the

evidence presented in opposition to defendants' motions for summary judgment is sufficient to establish that both Mr. Ahmed, personally, and Miss US, Inc. owned the damaged inventory and that both are proper party plaintiffs.

The threshold issue in this appeal is whether there is a genuine issue of material fact that Mr. Ahmed is a proper party plaintiff in this case. In reviewing this issue, we begin with a discussion of the applicable law regarding proper party plaintiffs and right of action.

"Generally, an action can be brought only by a person having a real and actual interest which he asserts." *Rebel Distributors Corp., Inc. v. LUBA Workers' Comp.*, 13-0749, p. 9 (La. 10/15/13), 144 So.3d 825, 832; La. C.C.P. art. 681. "When the facts alleged in the petition provide a remedy under the law to someone, but the plaintiff who seeks the relief is not the person in whose favor the law extends the remedy, the proper objection is no right of action, or want of interest in the plaintiff to institute the suit." *Howard v. Administrators of Tulane Educational Fund*, 07-2224, p. 16 (La. 7/1/08), 986 So.2d 47, 59, *citing* Harry T. Lemmon & Frank L. Maraist, 1 *Louisiana Civil Law Treatise, Civil Procedure* § 6.7, 121 (West 1999). The objection is urged through a peremptory exception of no right of action raised by the defendant or the court on its own motion, in either the trial or appellate court. *Howard*, *supra*; *see* La. C.C.P. art. 927. "The function of an exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit." *N. Clark, L.L.C. v. Chisesi*, 16-0599, p. 5 (La. App. 4 Cir. 12/7/16), 206 So.3d 1013, 1016, *quoting Hood v. Cotter*, 08-0215, p. 17 (La. 12/2/08), 5 So.3d 819, 829. In examining an exception of no right of action, the court assumes that the petition states a valid cause of action for some person but questions whether the plaintiff in the particular case is a member of the class that has a legal interest in

the subject matter of the litigation. *J-W Power Co. v. State ex rel. Department of Revenue & Taxation*, 10-1598, p. 7 (La. 3/15/11), 59 So.3d 1234, 1239. The court begins with an examination of the pleadings. *Gisclair v. Louisiana Tax Comm'n*, 10-0563, p. 2 (La. 9/24/10), 44 So.3d 272, 274. If the pleadings state a right of action in the plaintiff, then, at the trial of the exception, the parties may introduce evidence to support or controvert the exception. *Howard*, 07-2224, p. 17, 986 So.2d at 59.

Beginning with an examination of the pleadings, the original petition names Mr. Ahmed as the sole plaintiff and alleges that he sustained property damage to his inventory when the space that he leased was inundated with water through the holes in the roof and ceiling. We note that the petition avers damage to "Petitioner's inventory and other property" and "Petitioner's business," but the petition does not aver specifically that Mr. Ahmed owned and operated a business in the leased space. The original petition, nor the first and second amended petitions, does not name or reference Miss US, Inc.[3] The third amended and supplemental petition—filed more than three years after the original petition and after being granted the opportunity to amend in response to the exception of no right of action—simply added Miss US, Inc. as a plaintiff and alleged that Miss US, Inc., "along with the original Petitioner, Mr. Ahmed, sustained the damages that were caused by the named Defendants." The third amended petition does not allege any further facts, such as the relationship between the plaintiffs or the ownership interest of either party in the damaged property.

In their motion for summary judgment, defendants argued that Mr. Ahmed has no right of action to assert the claims in the original petition because, as

[3] Attached to each petition was the original lease agreement naming Mr. Ahmed as the tenant and the amendment to the commercial lease agreement which Mr. Ahmed signed above a signature block styled "Tarik O. Ahmed d/b/a Miss US Inc."

revealed by plaintiffs' discovery responses, Mr. Ahmed did not own the beauty store stock and inventory for which he personally sued to recover damages. According to defendants, the documentation and deposition testimony obtained during discovery revealed that Miss US, Inc., the corporation of which Mr. Ahmed was the sole shareholder, owned the stock and inventory at issue in this suit.

The significance of the actual ownership of the damaged property, as noted by defendants, is that shareholders cannot sue in their own name to recover damages to corporate property. Under Louisiana law, "[s]hareholders do not have a personal right to sue to recover for acts committed against, or causing damage to the corporation." *St. Bernard Optical Corp. v. Schoenberger*, 05-0548, p. 6 (La. App. 4 Cir. 1/25/06), 925 So.2d 604, 608; *see Joe Conte Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 95-1630, p. 7 (La. App. 4 Cir. 2/12/97), 689 So.2d 650, 654. "To the extent that a shareholder has a potential personal right to action, the jurisprudence requires a showing of injury that is "unique" or "special" to that shareholder." *LeBlanc v. Alfred*, 15-0397, p. 9 (La. App. 1st Cir. 12/17/15), 185 So.3d 768, 774; *see St. Bernard Optical*, *supra*. If the shareholder can show a right to recover without proof of corporate loss or injury, then the shareholder has a direct personal right of action separate from the corporation. *Id.*; *see* Morris & Holmes, 8 La. Civ. Law Treatise-Business Organizations 34.03 (1999). However, "[a] person who conducts business in corporate form and reaps the benefits of incorporation cannot sue individually for damages incurred by the corporation." *Hinchman v. Oubre*, 445 So.2d 1313, 1317 (La. App. 5th Cir. 1984). Therefore, we must determine whether there is any genuine issue of material fact regarding the ownership of the beauty store inventory and property at issue in this suit. If, as defendants argue, Mr. Ahmed cannot establish his own right to recover without

proof of a loss to Miss US, Inc., then he cannot assert a personal right of action for property owned by Miss US, Inc.

In support of the motion for summary judgment, defendants relied on plaintiffs' answers to interrogatories, insurance claim and appraisal documents provided by plaintiffs, and deposition testimony from Miss US, Inc.'s accountant and from Mr. Ahmed, as the corporate representative for Miss US, Inc. Defendants argue that the documentation and deposition testimony clearly establishes that Miss US, Inc. owned the beauty store stock and inventory at the time of the alleged damage.

The record reflects that plaintiffs provided documentation, in response to discovery, identifying Miss US, Inc. as the insured owner of the inventory at the beauty store. The insurance claim letter, provided by plaintiffs, identifies Miss US, Inc. as the insured, under a commercial general liability policy issued by Scottsdale Insurance Company in September 2011, and disclaims property damage coverage for the water damage to the inventory and property at the beauty store. Also, in response to interrogatories regarding the estimated value of the damages, plaintiffs provided an appraisal of the damaged inventory that was issued by The Appraisal Group to Miss US, Inc.

In further support, defendants rely on the deposition testimony of David Sewell, the accountant for Miss US, Inc., and of Mr. Ahmed, in his capacity as the corporate representative for Miss US, Inc. Mr. Sewell testified that he prepared the 2011 tax returns for Miss US, Inc., which covers the time period of the alleged water damage.[4] In preparing the tax returns for Miss US, Inc., Mr. Sewell testified that he was not provided with any invoices, purchase orders, receipts, or other

[4] The record reflects that the parties agreed not to attach the tax records as exhibits but that plaintiffs would not object to the exhibits not being authenticated via sworn testimony for purposes of the depositions.

financial statements showing that the inventory at the beauty store was purchased or paid for by any other person or entity other than Miss US, Inc. Based on the documentation provided to him, Mr. Sewell was not aware of any property at the beauty store that was owned by any other person or entity at the time of the water damage. In addition, Mr. Sewell confirmed that, for purposes of corporate accounting, any funds put into a corporation by a shareholder for business purposes becomes corporate funds and any inventory purchased using such funds belongs to the corporate entity.

As the corporate representative for Miss US, Inc., Mr. Ahmed testified that there was one business bank account for Miss US, Inc. at Chase Bank, which he put money into to get his business started in 2007. Although Mr. Ahmed makes a general statement that he, personally, paid for inventory for the store at times, his testimony reflects that he did not separate himself from Miss US, Inc.

> Q: […] And you said there were times when you had to buy some inventory yourself?
> A: Yes.
> Q: Were there special circumstances that would arise that it would require that?
> A: Sometime. Like when I opened the store, when we have—when we opened the store, when I start MISS, US, INC., so I have to build, I have to put money to open. Fixtures, merchandise. So, the store start running, MISS, US, INC., start taking care of itself.
> Q: Was that a loan from you to the business?
> A: It's my business, so it's just one to me. To me, MISS US, INC. or me, same thing. So I put money when the business need it and I take money when I need it from the business.
> ***
> Q: And, so, the inventory that was at the St. Bernard Beauty Supply store, was that MISS US, INC. inventory?
> A: You can say it's MISS US, INC. and me, because we both one.
> ***
> A: So, whatever merchandise MISS US, INC. buy, personally, to me, it's the same like I'm buying it, because it's the same thing.
> Q: What you're telling me is, if MISS US, INC. owns it, you do too, because you are the owner of MISS US, INC.?
> A: Yes, I'm the sole share [sic], so I don't have a partner.

> ***
>
> Q: I'm going to hand you the 2011 tax return for MISS US, INC. […] [M]y question is, on line two where it says Purchases, are those purchases made by MISS US, INC. for inventory (indicating)?
>
> A: MISS US, INC., yes, MISS US, INC.
>
> Q: And you file your own separate personal tax returns, correct?
>
> A: Yes.
>
> Q: So, if you had purchased $231,000 worth of inventory, you would claim that on your personal taxes, not on MISS US, INC., correct?
>
> A: Yes, yes.
>
> ***
>
> Q: Was the money that you deposited into the MISS US, INC. accounts reflected anywhere on the financial documents for MISS US, INC.?
>
> A: No.

Mr. Ahmed further stated, "when you own by yourself in business, you treat the business like it's yours. […] Like you and the business is the same. […] I never separate them."

Plaintiffs argue that Mr. Ahmed's testimony confirms his personal right to recover for the damaged inventory, because he stated that he purchased inventory with his own money. However, Mr. Ahmed's testimony belies that argument, because he acknowledged that he did not separate himself from Miss US, Inc. nor document any purchases made from his own personal funds.

Both parties assert that their position on Mr. Ahmed's right of action is supported by the case of *Hinchman v. Oubre*, *supra*. In that case, HECMAC, a corporation, and Hinchman, its sole shareholder, filed suit against several defendants alleging abuse of process and conspiracy to defraud through use of the procedure for seizure and sale of a judgment debtor's movable property. After service was made on all parties, defendants filed exceptions of no right and/or cause of action, arguing that Hinchman had no personal right of action because any damages inflicted were suffered solely by the corporation. The trial court granted

the exception of no right of action as to Hinchman and dismissed the claims asserted by him, individually. On appeal, this Court highlighted the distinction between corporate property and property owned by Hinchman individually. Because the debts and obligations due to a corporation are not due to the individual shareholders, Hinchman could not recover for losses to the business that he suffered as a shareholder; but Hinchman "has a right to recover those losses as to any personal property he had on the premises, if he is able to prove any of the seized property belonged to him individually rather than to the corporation." *Hinchman*, 445 So.2d at 1317. But upon review of the allegations in the petition, the Court found that "Hinchman's claims as to damages to which he is entitled personally amount to no more than an assertion of conclusions." *Id*. The Court then remanded the matter to allow Hinchman, individually, to amend his petition to state facts supporting his individual right and cause of action.

Although plaintiffs cite *Hinchman* in support of their argument that they should be allowed to prove Mr. Ahmed has a personal right of action, we find that under the facts of the instant case, the holding in *Hinchman* supports defendants argument that Mr. Ahmed cannot establish his personal right of action. Whereas in *Hinchman*, the Court noted that Hinchman had a right to recover losses of personal property that was wrongfully seized, in this case, Mr. Ahmed never asserted any claims of personal property loss.[5] Here, plaintiffs only claim losses of business property. While plaintiffs argue that Mr. Ahmed has a right to recover for inventory that he purchased for the beauty store, based on his own testimony, the

[5] We note that the trial court already provided Mr. Ahmed the opportunity to amend the petition to add the claims of Miss US, Inc., and to allege facts supporting the right of action of each plaintiff. In addition, the parties were allowed additional time for discovery, during which plaintiffs had the opportunity to present evidence supporting Mr. Ahmed's personal losses.

claims Mr. Ahmed individually asserts cannot be separated from the business losses suffered by Miss US, Inc. *See St. Bernard Optical Corp. v. Schoenberger*, 05-0548 (La. App. 4 Cir. 1/25/06), 925 So.2d 604 (holding that individual shareholders have no right of action where their recovery for claims depends on the corporate injury); *Glod v. Baker*, 02-988 (La. App. 3 Cir. 8/6/03), 851 So.2d 1255 (finding third-party plaintiffs failed to establish personal losses separate from corporate injury sufficient to survive motion for summary judgment on no right of action).

Based on our review of the record in light of the applicable law, we find no error in the trial court's finding that Mr. Ahmed has no personal right of action and, thus, was not the proper party to file this suit.

In their second assignment of error, plaintiffs argue that the trial court erred in finding that the third supplemental and amended petition adding Miss US, Inc. did not relate back to the filing of the original petition and plaintiffs' claims were prescribed. Plaintiffs argue that the claims asserted in the amended petition meet the criteria for relation back to the timely filed original petition set forth in La. C.C.P. art. 1153 and by the Louisiana Supreme Court in *Giroir v. South Louisiana Medical Center, Division of Hospitals*, 475 So.2d 1040 (La. 1985).

La. C.C.P. art. 1153 provides a mechanism by which the action or defense asserted in an amended petition can relate back to the date of filing of the original pleading, thereby avoiding dismissal by prescription. As applied by the Louisiana Supreme Court in *Giroir*, La. C.C.P. art. 1153 allows for an amendment adding a plaintiff to relate back when (1) the amended claim arises out of the conduct, transaction, or occurrence set forth in the original pleading, (2) the defendant knew or should have known of the existence and involvement of the new plaintiff, (3) the

new plaintiff is not wholly new or unrelated to the old plaintiff, as that would amount to the assertion of a new claims that would otherwise be prescribed, and (4) the defendant will not be prejudiced in preparing and conducting his defense. *Giroir*, 475 So.2d at 1041.

Under the facts of this case, we do not find that the third amended petition adding Miss US, Inc. meets the requirements set forth in *Girior*. From our review of the record, we note initially that the original petition does not provide any indication that any other person or entity other than Mr. Ahmed had claims against defendants. *See Brown v. City of New Orleans*, 580 So.2d 1093 (La. App. 4th Cir. 1991) (holding that an untimely filed amended petition adding a plaintiff and claims for property damage did not relate back to the original petition and was prescribed where there was no evidence that defendant knew or should have known of involvement or connection of new plaintiff to original plaintiff). Furthermore, despite Mr. Ahmed's stated belief or understanding, a corporate entity, even if wholly-owned by a sole shareholder, is a separate legal person and cannot be treated as one in the same as its sole shareholder. Thus, the addition of Miss US, Inc. adds a wholly new plaintiff more than three years after the original petition was filed by a party who had no right of action to file suit. In consideration that the original plaintiff, Mr. Ahmed, had no right to assert the damage claims against defendants, we find that the addition of Miss US, Inc. and its claim constitutes an untimely cause of action. *See Boone v. Conoco Phillips Co.*, 13-1196 (La. App. 3 Cir. 5/7/14), 139 So.3d 1047 ("An 'untimely filed original petition does not support the relation-back of a new cause of action[.]' Nor does an original petition filed by a party without a right of action to file it.") (citations omitted). Accordingly, we find no error in the trial court's judgment

finding plaintiffs' claims prescribed and granting defendants' motion for summary judgment.

CONCLUSION

Based on our review of the record in light of the applicable law and jurisprudence, we find no error in the trial court's September 23, 2016 judgment granting defendants' motions for summary judgment and dismissing plaintiffs' claims.

AFFIRMED