STATE OF LOUISIANA	*	**NO. 2017-KA-1014**
VERSUS	*	**COURT OF APPEAL**
FINANCIAL CASUALTY AND SURETY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

CONSOLIDATED WITH:

STATE OF LOUISIANA	**NO. 2018-KA-0242**
VERSUS	
HAROLD ALLEN	

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 2016-00945, DIVISION "D"
Honorable Kirk A. Vaughn, Judge

* * * * * *

Judge Regina Bartholomew-Woods

* * * * * *

(Court composed of Judge Terri F. Love, Judge Sandra Cabrina Jenkins, Judge Regina Bartholomew-Woods)

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JUDGMENT AFFIRMED IN PART; APPEAL DISMISSED IN PART; MOTION TO DISMISS DENIED AS MOOT
NOVEMBER 7, 2018

In these consolidated appeals, the State of Louisiana challenges the district court's judgments of January 26, 2016, and October 16, 2017, granting the motion to set aside judgment of bond forfeiture and exception of no cause of action, respectively, which were filed by Appellee—Financial Casualty and Surety, Inc. ("Appellee" or "FCS"). For the reasons that follow, we affirm the judgment of the district court granting Appellee's exception of no cause of action, and we dismiss the State's ("Appellant" or "the State") appeal of the January 26, 2016 judgment as untimely. Thus, we also deny, as moot, the separately-filed motion to dismiss filed by FCS, on May 4, 2018.

FACTUAL AND PROCEDURAL BACKGROUND

Harold Allen contracted with FCS to post a commercial surety bond to secure his release as a result of his incarceration on criminal charges in St. Bernard Parish. Despite having been released on those charges, Mr. Allen failed to appear for a scheduled criminal court proceeding on June 25, 2015, in the Thirty-Fourth

Judicial District Court, as a result of his incarceration in another jurisdiction. The district court issued a warrant and a judgment of bond forfeiture.

On January 15, 2016, FCS filed a motion to set aside the judgment of bond forfeiture pursuant to La.C.Cr.P. art. 345(D)[1], which provided:

> If during the period allowed for the surrender of the defendant, the defendant is found to be incarcerated in another parish of the state of Louisiana or a foreign jurisdiction, the judgment of bond forfeiture is deemed satisfied if all of the following conditions are met:
>
> > (1) The defendant or his sureties file a motion within the period allowed for the surrender of the defendant. The motion shall be heard summarily.
> >
> > (2) The sureties of the defendant provide the court adequate proof of incarceration of the defendant, or the officer originally charged with his detention verifies his incarceration. A letter of incarceration issued pursuant to this Article verifying that the defendant was incarcerated within the period allowed for the surrender of the defendant at the time the defendant or the surety files the motion, shall be deemed adequate proof of the incarceration of the defendant.
> >
> > (3) The defendant's sureties pay the officer originally charged with the defendant's detention, the reasonable cost of returning the defendant to the officer originally charged with the defendant's detention prior to the defendant's return.

FCS agreed to pay costs of transportation pursuant to subsection (D)(3). Months later, on June 10, 2016, the State alleges that it "discovered" that the costs required under subsection (D)(3) "had not been paid."[2] As a result, on April 20, 2017, the State filed an amended and supplemental petition to annul the judgment setting aside the bond forfeiture, pursuant to La.C.C.P. art. 2004(A), on the basis that the

[1] Louisiana Code of Criminal Procedure Article 345 has since been repealed, effective January 1, 2017.

[2] The State does not indicate how it discovered this information.

bond forfeiture judgment was procured via "fraud and ill practices."[3] On July 31, 2017, FCS responded with a peremptory exception of no cause of action, which the district court granted on October 16, 2017. The State appeals.

Based on the same facts, the State also appeals the January 26, 2016 judgment granting the motion to set aside the bond forfeiture. The State asserts that because it was never provided a notice of signing of judgment as required by La.C.C.P. art. 1913, the time in which to appeal has not commenced.[4]

STANDARD OF REVIEW

This Court has held that "[t]he interpretation and application of the [bond forfeiture and code of criminal procedure] statutes are matters of law subject to a *de novo* standard of review." *State v. Wilson*, 2015-0338, p. 3 (La.App. 4 Cir. 11/25/15), 179 So.3d 951, 953 (citing *State v. Lexington National Insurance Corp.*, 2013-1134, p. 2 (La.App. 3 Cir. 3/5/14), 134 So.3d 230, 232). Furthermore, this Court's review of a judgment granting an exception of no cause of action is subject to *de novo* review. *Koch v. Covenant House New Orleans*, 2012-0965, p. 3 (La.App. 4 Cir. 2/6/13), 109 So.3d 971, 972-73 (quoting *R-Plex Enterprises, L.L.C. v. Desvignes*, 2010-1337, p. 5 (La.App. 4 Cir. 2/9/11), 61 So.3d 37, 40).

ANALYSIS

It is undisputed that Mr. Allen failed to appear due to his incarceration in another jurisdiction. Counsel for Appellee, accordingly, filed a motion as required by La.C.Cr.P. art. 345(D)(1) with proof of Mr. Allen's incarceration, pursuant to subsection (D)(2). However, the district court granted the motion in the absence of

[3] The State filed its original petition on August 1, 2016, and amended it thereafter, rendering it timely pursuant to La.C.C.P. art. 2004(B).

[4] The State also filed a motion for new trial with respect to the January 26, 2016 judgment. However, the State does not appeal the district court's denial thereof.

proof at the time the motion was heard that Appellee had paid the costs of returning him to St. Bernard Parish as required by subsection (D)(3). The State asserts this is the result of "fraud or ill practices" on the part of Appellee.

Louisiana Code of Civil Procedure article 2004 provides that "[a] final judgment obtained by fraud or ill practices may be annulled." In discussing La.C.C.P. art. 2004, the Louisiana Supreme Court, in *Kem Search, Inc. v. Sheffield*, 434 So.2d 1067, 1070 (La.1983) (citations omitted), stated:

> Our jurisprudence sets forth two criteria to determine whether a judgment has been obtained by actionable fraud or ill practices: (1) when the circumstances under which the judgment was rendered show the deprivation of legal rights of the litigant who seeks relief, and (2) when the enforcement of the judgment would be unconscionable and inequitable. . . . [T]he article is not limited to cases of actual fraud or intentional wrongdoing, but is sufficiently broad to encompass all situations wherein a judgment is rendered through some improper practice or procedure which operates, even innocently, to deprive the party cast in judgment of some legal right, and where the enforcement of the judgment would be unconscionable and inequitable.

The Court in *Kem Search* further stated that "[c]onduct which prevents an opposing party from having an opportunity to appear or to assert a defense constitutes a deprivation of his legal rights." *Id.*

Here, in response to the petition to annul, Appellees filed an exception of no cause of action. "The exception of no cause of action 'tests the legal sufficiency of a petition by examining whether, based upon the facts alleged in the pleading, the law affords the plaintiff a remedy.'" *Koch*, 2012-0965, p. 3, 109 So.3d at 972 (quoting *Meckstroth v. Louisiana Dept. of Transp. & Dev.*, 2007-0236, p. 2 (La.App. 4 Cir. 6/27/07), 962 So.2d 490, 492. In other words, we must look to the petition, accept all well-pleaded allegations of fact as true, and determine whether Appellant was entitled to the relief sought. *Id.*

We find that the State was not deprived of its legal rights. In *Kem Search*, the Supreme Court reversed a judgment denying defendant's demand for annulment of a default judgment. The Court found that counsel for defendant failed to file responsive pleadings based on representations by opposing counsel regarding a possible settlement, with the Court even noting that defense counsel "could have more prudently protected his rights[.]"*Kem Search*, 434 So.2d at 1071. Nonetheless, the Court found that enforcement of the default judgment would be "unconscionable" given the particular facts. *Id.*, 434 So.2d at 1070-71.

Here, the State appears to be making a similar argument; that is, it failed to respond to Appellee's motion because Appellee "misrepresented its intention to pay the costs of transportation." However, this case is distinguishable from the situation in *Kem Search*. Appellant does not suggest that it did not have an opportunity to be present and heard at the hearing on the motion. Indeed, Appellant acknowledges that it "submitted the matter on the record." Furthermore, given the facts as presented in the record, Appellant possessed all the information necessary to oppose the motion at the time the matter was heard. Appellee did nothing more than represent its intention to pay costs; however, La.C.Cr.P. art. 345(D) states that a "bond forfeiture is deemed satisfied if all of the following conditions are met," including the condition to "pay" in subsection (D)(3). An agreement or promise to pay is insufficient under the plain language of subsection 345(D), yet Appellant took no action to oppose the motion. A judgment setting aside a previous judgment of bond forfeiture is a final, appealable judgment that must be reduced to writing. *State v. Jones*, 2014-1259, pp. 3-4 (La.App. 4 Cir. 5/27/15), 171 So.3d 1020, 1021–22. Thus, a surety cannot simply promise to pay costs pursuant to subsection (D)(3). Instead, it must make a showing that costs have been paid at the time the

motion is heard. To proceed otherwise would create an element of uncertainty as to the supposed "finality" of the judgment pending actual payment.

Based on the foregoing, we find that Appellant was not entitled to the relief sought in its petition to annul the January 26, 2016 judgment based on fraud or ill practices. Accordingly, upon our *de novo* review, we hold that the district court correctly granted Appellee's exception of no cause of action.

Next, we address Appellant's arguments specific to the merits of the district court's judgment granting the motion to set aside. Appellant argues that Appellee failed to submit satisfactory proof of payment of costs as required by subsection (D)(3), and that the district court should not have granted the motion absent such proof.

"[W]hile an action to forfeit a bail bond or to declare null a judgment decreeing the forfeiture of a bail bond is a civil proceeding and subject to the rules of civil procedure, it is treated as a criminal proceeding for the purpose of determining appellate jurisdiction." *State v. Wheeler*, 508 So.2d 1384, 1386 (La.1987). As a final, appealable judgment subject to the Louisiana rules of civil procedure, Appellant had sixty (60) days from "[t]he expiration of the delay for applying for a new trial or judgment notwithstanding the verdict if no application has been filed timely[,]" or from "[t]he date of the mailing of notice of the court's refusal to grant a timely application for a new trial or judgment notwithstanding the verdict, as provided under Article 1914" to file its devolutive appeal. La.C.C.P. art. 2087. "The delay for applying for a new trial shall be seven days, exclusive of legal holidays. The delay for applying for a new trial commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by Article 1913." La.C.C.P. art. 1974. "[N]otice of the signing of a final

judgment . . . is required in all contested cases, and shall be mailed by the clerk of court to the counsel of record for each party, and to each party not represented by counsel." La.C.C.P. art. 1913. In this case, there is no evidence the clerk of court mailed the notice of signing of judgment to Appellant.

The district court granted the motion to set aside and rendered a written judgment on January 26, 2016, in open court. Appellant filed a motion for new trial on August 9, 2017, well beyond the time limits set forth in La.C.C.P. art. 1974. The district court denied the motion on November 20, 2017. On November 27, 2017, Appellant filed its motion for devolutive appeal. Appellant submits that its appeal is timely because it was never provided with notice of the signing of judgment pursuant to La.C.C.P. art. 1913, and that as a result, the delay for applying for a new trial never commenced.

We find Appellant's argument to be without merit. We note that this Court has previously held that La.C.C.P. art. 1913(B) applies "to a 'contested case', not a contested *judgment.*" *Potter v. Patterson*, 1996-1172, p. 5 (La.App. 4 Cir. 3/19/97), 690 So.2d 1118, 1120–21. While the underlying criminal case may indeed have been contested, the bond forfeiture proceeding was an independent civil proceeding that stood apart, and cannot be fairly described as "contested" given the State's submission on the record.

It is well-established that appeals are favored, and this Court has held that "'[i]n the absence of the clerk's certificate showing the date of the mailing of the judgment and to whom it was mailed, doubt should be resolved in favor of the right to appeal.'" *Garco, Inc. v. Rob's Cleaning & Powerwash, Inc.*, 2008-1249, p. 3 (La. App. 4 Cir. 4/22/09), 12 So. 3d 386, 388 (quoting *Moon v. Moon*, 244 So.2d 301, 302 (La.App. 1 Cir.1970)). However, a review of the record in this matter

indicates that the January 26, 2016 judgment was signed "in open court." There is no evidence suggesting that the State was not fully aware of the proceedings and the result thereof. The judgment was signed in open court at the conclusion of the hearing, in the presence of both the State, as well as Appellee. Accordingly, we do not address the merits of Appellant's claim, as the time period in which to appeal had elapsed by the time of filing, rendering this appeal untimely.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court granting Appellee's exception of no cause of action as it relates to Appellant's petition to annul. Furthermore, we find that Appellant's appeal of the January 26, 2016 judgment was untimely filed, and therefore we are without jurisdiction to consider its merits. In light of our determination that we lack jurisdiction to consider the latter appeal, we deny Appellee's separately filed motion to dismiss as moot.

JUDGMENT AFFIRMED IN PART; APPEAL DISMISSED IN PART; MOTION TO DIMISS DENIED AS MOOT