

RICK SUTTON

*

NO. 2018-CA-0196

VERSUS

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COURT OF APPEAL

**JACK ADAMS, CHARLES
ADAMS AND POLLY POINT
IMPORTS CORP.**

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-11427, DIVISION "D-12"
Honorable Nakisha Ervin-Knott, JUDGE

**JAMES F. MCKAY III
CHIEF JUDGE**

(Court composed of Chief Judge James F. McKay III, Judge Sandra Cabrina
Jenkins, Judge Dale N. Atkins)

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AFFIRMED

DECEMBER 19, 2018

In this case involving a failed purported joint business venture, the plaintiff, Rick Sutton, appeals the trial court's judgment maintaining the exceptions of no cause of action, no right of action, and lack of personal jurisdiction in favor of the defendants, Jack Adams, Charles Adams, and Polly Point Imports Corporation, and the dismissal of his lawsuit. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

In June of 2011, Rick Sutton and Jack Adams entered into some type of business relationship regarding the operation/creation of an upscale fine jewelry and art gallery to be located at 501 Royal Street in New Orleans. At this time, Mr. Sutton was negotiating a buyout of his family's business, which had operated as the Jack Sutton Company at 501 Royal Street for over fifty years. Mr. Sutton and Mr. Adams formalized their agreement through the formation of RJANO and Maison Royale, LLC. RJANO was the entity that leased the property at 501 Royal Street and Maison Royale was the store that operated at 501 Royal and a subsidiary of RJANO. However, according to Mr. Adams, Mr. Sutton was unable to satisfy

the obligations of the agreement and in September of 2012, Mr. Sutton agreed to become a salaried employee. This point is disputed by Mr. Sutton.

By October of 2014, the relationship between Mr. Adams and Mr. Sutton had deteriorated. Mr. Adams approached Mr. Sutton and told him he was fired and threatened to have him arrested for trespassing. Mr. Adams also changed the passwords on the business's computers and removed Mr. Sutton's name from the business's bank accounts, among other things.

Since 2014, Mr. Sutton and Mr. Adams have been locked in several lawsuits in connection with their failed business venture. On November 6, 2014, Mr. Sutton filed a petition for breach of contract and damages, naming Mr. Adams, Maison Royale, and RJANO as defendants.¹ On April 14, 2015, Mr. Sutton filed a petition and rule to show cause against Mr. Adams and Maison Royale for purportedly unpaid wages.² On May 20, 2015, Mr. Sutton filed a petition for damages against Mr. Adams alleging that Mr. Adams was liable to him for defamation and intentional infliction of emotional distress.³ On December 15, 2015, the parties entered into a settlement agreement in open court, whereby Mr. Sutton would buy out Mr. Adams's share of the business for \$2.8 million. Mr. Sutton filed a motion to set aside the consent judgment, claiming that Mr. Adams did not disclose all material information, namely, that Polly Point Import Corporation, which is wholly owned by Mr. Adams, owned a one percent interest in Maison Royale.

On November 18, 2016, Mr. Sutton filed the underlying lawsuit in the instant case against Jack Adams, Charles Adams and Polly Point Imports. Charles

¹ Orleans Parish CDC Case No. 2014-10709

² Orleans Parish CDC Case No. 2015-3495

³ Orleans Parish CDC Case No. 2015-4829

Adams, a resident of New York and father of Jack Adams, operated Cellini's, a jewelry store in New York; Mr. Sutton believed that certain consignment items from Cellini's ended up at a "fire sale" at Maison Royale in December of 2015. Mr. Sutton filed an amended petition on June 26, 2017. Mr. Sutton's original and amended petitions set forth causes of action for 1) violations of the Louisiana Racketeering Act (RICO); 2) violations of the Louisiana Unfair Trade Practices Act (LUTPA); 3) fraud and misrepresentation; 4) breach of fiduciary duty; and 5) detrimental reliance. On March 20, 2017, the defendants filed exceptions of no cause of action, no right of action, vagueness, peremption and lack of personal jurisdiction. These exceptions came on for hearing on October 6, 2017. The trial court also heard brief argument on the defendants' motion to transfer and consolidate.

On October 6, 2017, after hearing argument, the trial court orally granted relief to defendants. Specifically, the trial court granted the peremptory exceptions of no cause of action and no right of action concerning plaintiff's claims under RICO.⁴ The trial court also granted the peremptory exceptions of no cause of action and no right of action concerning plaintiff's claims under LUTPA. The trial court did not rule on the defendants' exception of peremption or their request for 'reasonable attorney fees and costs' under LUTPA, La. R.S. 51:1405(A). Further, the trial court granted the peremptory exception of no cause of action concerning plaintiff's claims for fraud and misrepresentation. The trial court also granted the peremptory exceptions of no cause of action and no right of action concerning plaintiff's claims for breach of fiduciary duty. The trial court also granted the

⁴ At the conclusion of the hearing, while the court rendered its ruling, the court noted that the RICO claim against defendant Charles Adams was dismissed with prejudice. The RICO allegation appears to be the only count naming defendant Charles Adams.

preliminary exception of no cause of action concerning the plaintiff's claims for detrimental reliance. Additionally, the trial court granted the declinatory exception of lack of personal jurisdiction as to Charles Adams. The trial court denied the defendants' motion to transfer and consolidate the case with case No. 2017-0390, Division L. Finally, the trial court ordered that the plaintiff, Rick Sutton, would not be afforded an opportunity to amend his original petition and first amending and/or supplemental petition for damages against the defendants pursuant to La. C.C.P. art. 934.

On October 16, 2017, Mr. Sutton requested written reasons for judgment. The trial court issued a final written judgment and accompanying written reasons on October 25, 2017. Mr. Sutton now appeals the trial court's judgment.

DISCUSSION

On appeal, Mr. Sutton raises the following assignments of error: 1) the trial court erred in granting the defendants' peremptory exceptions of no cause of action and no right of action and thereby dismissing with prejudice Mr. Sutton's claims: (i) under the Louisiana Unfair Trade Practices Act (LUTPA); (ii) for fraud and misrepresentation; and (iii) for breach of fiduciary duty; and 2) the trial court committed reversible error when it granted defendant Charles Adams's exception of lack of personal jurisdiction. Alternatively, Mr. Sutton argues that the trial court erred in failing to give him an opportunity to amend as contemplated by the provisions of La. C.C.P. art. 934.

The peremptory exception of no cause of action is governed by articles 927 and 931 of the Louisiana Code of Civil Procedure and tests the legal sufficiency or insufficiency of a petition by determining whether a plaintiff is afforded a remedy in law based upon the facts alleged in the pleading. La. C.C.P. art. 931; Montalvo

v. Sondes, 93-2813 (La. 5/23/94), 637 So.2d 127, 131. In deciding an exception of no cause of action, a court will accept the facts as alleged in the petition and determine whether the law affords any relief to the plaintiff if those facts are proved at trial. Everything On Wheels Subaru, Inc. v. Subaru South, Inc., 616 So.2d 1234, 1235 (La. 1993). Louisiana, however, retains a system of fact pleading. *See* La. C.C.P. art. 854, official revision comment (a). Hence, the mere conclusion of the pleader, unsupported by facts, does not set forth a cause or right of action. Montalvo, 637 So.2d at 131. To the contrary, allegations purporting to be factual but which are merely self-serving conclusions must be disregarded. *See* Delta Bank & Trust Co. v. Lassiter, 383 So.2d 330, 336 (La. 1980); Wright v. Louisiana Power & Light, 06-1181, p. 15 (La. 3/9/07), 951 So.2d 1058, 1069; Milling, Benson Woodward, Hillyer, Pierson and Miller, LLP v. American Marine Holding Co., 98-1462 (La.App. 4 Cir. 3/3/99), 729 So.2d 139, 140. While generally, no evidence may be introduced to support or controvert the exception, a court may “consider evidence which is admitted without objection to enlarge the pleadings.” Pierrotti v. Johnson, 11-1317, p. 6 (La.App. 1 Cir. 3/19/12), 91 So.3d 1056, 1062; Sivils v. Mitchell, 96-2528 (La.App. 1 Cir. 11/7/97), 704 So.2d 25, 28.

A defendant may also challenge whether a plaintiff is legally entitled to the relief sought by raising the peremptory exception of no right of action. *See* La. C.C.P. art. 927(A)(6). “[A]n action can be brought only by a person having a real and actual interest which he asserts.” La. C.C.P. art. 681. An exceptor may introduce evidence when arguing an exception of no right of action. *See* Huntsman Int’l, LLC v. Praxair, Inc., 15-0975, p. 5 (La.App. 4 Cir. 9/14/16), 201 So.3d 899, 904-05.

LUTPA

The Louisiana Unfair Trade Practices Act (LUTPA) prohibits any “unfair or deceptive acts or practices in the conduct of any trade or commerce.” La. R.S. 51:1405(A). “It has been left to the courts to decide, on a case-by-case basis, what conduct falls within the statute’s prohibition.” Cheramie Services, Inc. v. Shell Deepwater Production, Inc., 09-1633, p. 10 (La. 4/23/10), 35 So.3d 1053, 1059 (citation omitted). “[T]he range of prohibited practices under LUTPA is extremely narrow,” with relief reserved for “only egregious actions involving elements of fraud, misrepresentation, deception, or other unethical conduct.” Id., 09-1633, pp.11-12, 35 So.3d at 1060. Without a showing that “the alleged conduct ‘offends established public policy and . . . is immoral, unethical, oppressive, or substantially injurious,’” a LUTPA claim is inappropriate. Id. at 1059 (quoting Moore v. Goodyear Tire & Rubber Co., 364 So.2d 630, 633 (La.App. 2 Cir. 1978)).

In the instant case, Mr. Sutton alleges that the defendants violated LUTPA when they held a “fire sale” at Maison Royale and by alleged misrepresentations during settlement negotiations in a separate lawsuit. “LUTPA does not prohibit sound business practices, the exercise of permissible business judgment, or appropriate free enterprise transactions. The statute does not forbid a business to do what everyone knows a business must do: make money.” Cheramie, 09-1633, p. 11, 35 So.3d at 1060 (quoting Turner v. Purina Mills, Inc., 989 F.2d 1419, 1422 (5th Cir. 1993)). The trial court correctly found that Mr. Sutton cannot convert the defendants’ “exercise of permissible business judgment” into an “egregious action involving elements of fraud, misrepresentation, deception, or other unethical conduct” that “offends public policy.” Id. at 1059-1060. Furthermore, LUTPA is not designed to punish parties for alleged wrongs committed during litigation. *See*

Quality Environmental Processes, Inc. v. I.P. Petroleum Co. Inc., 13-1582, p. 22 (La. 5/7/14), 144 So.3d 1011, 1026. In that case, the court held that defendant's behavior during litigation did "not fall under the protection of LUTPA's narrow goal." Id. Accordingly, the trial court properly maintained the defendants' exception of no cause of action regarding LUTPA.

Fraud and Misrepresentation

Fraud is "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other." La. C.C. art. 1953. It "may also result from silence or inaction." Id. "There are two elements necessary to prove legal fraud: an intent to defraud and a resulting damage." See Lomant v. Bennett, 14-2483, p. 12 (La. 6/30/15), 172 So.3d 620, 629. "It is well-settled that allegations of fraud must be pled with particularity." Vagelos v. Abramson, 12-1235, p. 16 (La.App. 4 Cir. 10/2/13), 126 So.3d 639, 649; La. C.C.P. art. 856. Allegations of fraud that "are merely conclusory" are "insufficient to set forth a cause of action under La. C.C. article 1953." 831 Bartholomew Investments-A, L.L.C. v. Margulis, 08-0559, p. 10 (La.App. 4 Cir. 9/2/09), 20 So.3d 532, 538.

Nowhere in the petitions does Mr. Sutton allege that Jack Adams's purported failure to disclose Polly Point's ownership was intentional for the purpose of deceiving him. The record shows that Jack Adams's tax returns dating back to 2011 – which were given to Mr. Sutton by November 19, 2014, before the parties entered into the proposed settlement agreement – clearly disclosed Polly Point's one percent interest. The trial court's dismissal of Mr. Sutton's fraud and misrepresentation claim was proper on this ground alone.

Mr. Sutton also failed to allege reasonable reliance on the alleged fraud or misrepresentation, an essential element to the claims. The petitions do not allege that had he known about Polly Point's one percent ownership interest or the "fire sale," he would not have gone forward with the settlement. The petitions also fail to state a cause of action for fraud or misrepresentation because they contain no facts regarding how plaintiff was damaged by the alleged fraud or misrepresentation. Accordingly, the trial court properly dismissed, with prejudice, Mr. Sutton's claims for fraud and misrepresentation.

Breach of Fiduciary Duty

With regards to a limited liability company, a member owes a duty only "to the limited liability company and its members." La.R.S. 12:1314(A)(1). A member is defined as "a person with a membership interest in a limited liability company with the rights and obligations specified under this Chapter." La. R.S. 12:1301(A)(13). A "[m]embership interest' or 'interest' means a member's rights in a limited liability company, collectively, including the member's share of the profits and losses of the limited liability company, the right to receive distributions of the limited liability company's assets, and any right to vote or participate in management." La. R.S. 12:1301(A)(14). "A member or manager shall not be personally liable to the limited liability company or the members thereof for monetary damages unless the member or manager acted in a grossly negligent manner... or engaged in conduct which demonstrates a greater disregard of the duty of care than gross negligence..." La. R.S. 12:1314(B). Gross negligence is defined as "a reckless disregard of or a carelessness amounting to indifference to the best interests of the limited liability company or the members thereof." La. R.S. 12:1314(C). The individual asserting breach of duty bears the burden of

proving the alleged breach and proving that the breach was the legal cause of the damage suffered by the limited liability company. La. R.S. 12:1314(E).

In the instant case, the trial court determined that the corporate documents that the defendants admitted into evidence, including the filings with the Louisiana Secretary of State and with the Internal Revenue Service, were the most clear and objective manner of determining Maison Royale's ownership. These documents plainly showed that Mr. Sutton was not a member of Maison Royale and therefore he had no right of action for breach of fiduciary duty because he was claiming an alleged duty not owed to him but to Maison Royale and its members. Likewise, the trial court also correctly determined that Mr. Sutton did not allege a valid cause of action for breach of a fiduciary duty. The petitions contain no factual allegation that Jack Adams acted with gross negligence or that Jack Adams's purported breach of duty was the legal cause of any alleged damages suffered by Mr. Sutton.

Personal Jurisdiction

The only allegation against defendant Charles Adams is plaintiff's RICO claim. Mr. Sutton has not briefed or pursued his RICO claim on appeal. As such, his RICO claim is abandoned. *See* Rule 2-12.4(B)(4), Uniform Rules-Courts of Appeal. Accordingly, Mr. Sutton's attempt to appeal the court's granting of Charles Adams's exception of lack of personal jurisdiction is legally moot and will not be considered by this Court.

Opportunity to Amend

Finally, Mr. Sutton argues alternatively that the trial court erred in failing to give him an opportunity to amend as contemplated by the provisions of La. C.C.P. art. 934. The statutory right to amend the petition in order to remove the plea of no cause of action is not so absolute as to be permitted when an amendment would

constitute a vain and useless act; for an amendment to be allowed there should be some indication that the defective position can be amended to state a lawful cause of action. Vieux Carre Property Owners, Residents and Associates, Inc. v. Decatur Hotel Corp., 99-0731 (La.App. 4 Cir. 11/10/99), 746 So.2d 806, 808. The decision to allow a plaintiff to remove grounds of objection pleaded by peremptory exception is within the discretion of the trial court and will not be disturbed on appeal absent manifest error. Fortier v. Hughes, 09-0180, p. 5 (La.App. 4 Cir. 6/17/09), 15 So.3d 1185, 1188.

In the instant case, the plaintiff has already amended his original petition once in an attempt to allege his claim “with greater detail and factual elaboration.”⁵ Furthermore, with respect to the RICO and LUTPA claims, Mr. Sutton abandoned his request for amendment in open court and is now therefore precluded from raising those issues on appeal. Other than conclusory statements, Mr. Sutton provides no arguments in his appellate brief as to what he would amend or how a second amendment would cure the deficiencies identified by the trial court. Allowing him to simply assert the same facts argued at the hearing or in this appeal would be futile. Accordingly, we find no error in the trial court’s refusal to give him an opportunity to further amend his petition.

CONCLUSION

For the above and foregoing reasons, we affirm the trial court’s ruling maintaining the defendants’ peremptory exceptions of no cause of action and no right of action and its dismissal of the plaintiff’s case.

AFFIRMED

⁵ Appellant’s original brief.