

NOT DESIGNATED FOR PUBLICATION

**PLAQUEMINES PARISH
GOVERNMENT**

*

NO. 2018-CA-0535

*

VERSUS

COURT OF APPEAL

*

W. KEITH HINKLEY, ET AL

FOURTH CIRCUIT

*

STATE OF LOUISIANA

APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 63-277, DIVISION "A"
Honorable Kevin D. Conner, Judge

Judge Roland L. Belsome

(Court composed of Chief Judge James F. McKay, III, Judge Roland L. Belsome,
Judge Paula A. Brown)

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AFFIRMED

DECEMBER 5, 2018

This appeal is taken from the trial court's rulings that resulted in the dismissal of the Plaquemines Parish Government's lawsuit against the defendants. For the reasons that follow, we affirm.

On October 25, 2016, the Plaquemines Parish Government sued W. Keith Hinkley, Westbank Roofing Co., Inc., West Bank Roofing and Sheet Metal Supply Co., Inc. and Louisiana Roofing & Sheet Metal, Inc. (collectively referred to as "Hinkley Defendants").¹ Cuzan Services, LLC ("Cuzan") was also named as a defendant in the lawsuit.² Mr. Hinkley served on the Plaquemines Parish Council from January 1, 2007 to December 31, 2014. In the petition, it is alleged that Mr. Hinkley acted in concert with the other defendants to perform roofing services for the PPG in violation of the PPG Home Rule Charter. Specific projects and monetary amounts were listed in the petition.³

Shortly after filing an Answer which denied the allegations in the petition, the Hinkley Defendants propounded discovery on the PPG. In that discovery, the

¹ Louisiana Roofing & Sheet Metal, Inc. is wholly owned by W. Keith Hinkley. The other entities are owned by family members of W. Keith Hinkley.

² Cuzan Services, LLC is owned by John Hymes.

³ There were also allegations of the misuse of public funds for personal gain and fraud.

Hinkley Defendants sought copies of any checks that had been written to any defendants on those alleged projects during the time that Mr. Hinkley was in office. The PPG did not respond causing the Hinkley Defendants to issue a Subpoena Duces Tecum to Tommy Serpas, Finance Director for the PPG, seeking the same documents.

In Mr. Serpas' response to the subpoena he confirmed that the PPG had no documents meeting the criteria. Further, Mr. Hinkley provided an affidavit and attachments that established that all but one of the projects listed in the petition were performed by one or more of the Hinkley Defendants prior to Mr. Hinkley taking office. The remaining project was a roof repair done after January 1, 2007, in fulfillment of a warranty obligation, and there was no monetary compensation.

In April of 2017, the Hinkley Defendants filed a motion for summary judgment. The PPG filed an opposition but also sought a continuance to conduct additional discovery. During this time, the PPG served Cuzan with the petition. Cuzan answered the petition denying the allegations. Subsequently, the PPG issued subpoenas to two separate banks where Cuzan maintained accounts. The subpoenas sought copies of all checks and bank statements of Cuzan. Cuzan objected to the subpoenas and the trial court eventually ordered the production of bank records from 2005-2014 to be produced for *in camera* inspection. Following the order from the trial court, the banks submitted the documents.

Later, Cuzan filed a motion for summary judgment and motion for sanctions. On April 16, 2018, the trial court heard the PPG's motion for access to financial

records, the Hinkley Defendants' motion for summary judgment and sanctions, and Cuzan's motion for summary judgment and sanctions. The trial court denied the motion for access to financial records.⁴ That ruling was based upon the trial court's review of the financial records. The trial court informed the parties that there were three checks that were made out to cash. It was determined that two of the checks were outside of the time that Mr. Hinkley was on the council and therefore of no relevance to this litigation. As for the third check in the amount of \$10,000, Cuzan supplied the trial court with an affidavit stating that it was used for business and operating expenses. Then the trial court stated that it found nothing in the financial records to connect the Hinkley Defendants to Cuzan. Further, the PPG had no evidence linking the Hinkley Defendants to the checks or to Cuzan.

After listening to the parties' arguments on the summary judgments and also allowing testimony regarding the motions for sanctions, the trial court ruled from the bench granting the motions for summary judgment as well as the motions for sanctions. This appeal followed.

On appeal, the PPG maintains that the trial court's ruling to review Cuzan's financial records *in camera* without allowing the PPG access to the records was an error. The PPG also contends that the granting of the motions for summary judgment were premature due to a lack of discovery.⁵ The Hinkley Defendants and

⁴ According to the transcript of the hearing, a copy of the three checks in question was produced to the PPG.

⁵ The PPG also claimed that the trial court erred in its granting of the motion for sanctions. However, the issue was not briefed and therefore considered abandoned pursuant to Rule 2-12.4 of the Louisiana Uniform Rules – Courts of Appeal.

Cuzan filed an answer to the appeal seeking damages, including, but not limited to attorney's fees, against the PPG for the filing of a frivolous appeal.

Financial Records

PPG argues that the trial court erred when ruling on the discovery of Cuzan's financial records in two ways. First, the trial court determined that the PPG would not have access to the records unless the trial court found the records were relevant to the litigation. Then, once the trial court found a check made out to cash, the trial court accepted Cuzan's explanation as to the purpose of the check.⁶

This Court reviews evidentiary rulings under an abuse of discretion standard.⁷ "A trial court has broad discretion in handling discovery matters and an appellate court should not upset such a ruling absent an abuse of discretion."⁸

In *Sercovich v. Sercovich*, this Court discussed a party's right to discovery, particularly financial records.⁹ *Sercovich* was a divorce proceeding. Prior to the divorce, Mr. Sercovich had sold two businesses to his sons from a previous marriage. Those businesses' financial records were sought by Ms. Sercovich who thought they were relevant to Mr. Sercovich's income and the determination of

⁶ As previously stated, there were three checks made to cash that the trial court sought an explanation for. Two of the checks were outside the relevant time of when Mr. Hinkley served on the council. The remaining check was for \$10,000. Cuzan, through an affidavit, claimed that the money was used for miscellaneous business supplies and expenses.

⁷ *Brooks v. Reimonenq*, 2010-0296, p. 4 (La.App. 4 Cir. 7/21/10), 44 So.3d 824, 827 (citing *Stewart v. Ice*, 2007-0871, p. 7 (La.App. 4 Cir. 4/9/08), 982 So.2d 928, 933).

⁸ *Sercovich v. Sercovich*, 2011-1780, p. 5 (La.App. 4 Cir. 6/13/12), 96 So.3d 600, 603 (citing *In re Marriage of Kuntz*, 2005-0172, p.4 (La.App. 4 Cir. 2/11/06), 929 So.2d 75, 78).

⁹ *Sercovich*, *supra*.

spousal support. Both businesses filed a motion to quash the subpoena. Those motions were denied by the trial court and an appeal was taken.¹⁰

This Court initiated its analysis of the issue by referring to statutes on discovery and evidence. Louisiana Code of Civil Procedure states that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.”¹¹ Further, the Louisiana Code of Evidence provides that relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹² Working within that basic framework this Court recognized the confidential and sensitive nature of financial records, while also acknowledging Ms. Sercovich’s right to discovery. Ultimately, this Court balanced those issues by ordering that the records be examined for relevance by the trial court through an *in camera* inspection.¹³

Similarly, in this case, the trial court voiced concerns about the broad scope of the discovery request. The request sought “all” of Cuzan’s bank records from two banks for a period of approximately nine years. The trial court reasoned that the records are private and sensitive and that an *in camera* inspection would protect the PPG’s right to discovery and Cuzan’s right to privacy. The purpose of the *in camera* inspection was to find checks made out to any of the Hinkley Defendants

¹⁰ *Id.*

¹¹ La. C.C.P. art. 1422.

¹² La.Code Evid. Art. 401.

¹³ *Sercovich*, 2011-1780, p. 8, 96 So.3d at 604.

during the relevant time period. None were found. The trial court clearly stated that each of the documents had been reviewed and it did not find any connection between Cuzan and the Hinkley Defendants within those documents. Accordingly, the financial records were found to be irrelevant to the litigation and access by the PPG was denied. We find that the trial court's scrutiny of the documents and its acceptance of the explanation for the one check written to cash were well within its discretion.

Motions for Summary Judgment

Appellate courts review the granting of a summary judgment under a *de novo* review using the same criteria as the trial court.¹⁴ This Court considers the evidence presented to the trial court, the admissibility of such evidence, and whether a genuine issue of material fact remains or if the mover is entitled to judgment as a matter of law.¹⁵

PPG filed the Petition in this matter on October 25, 2016. The Petition alleges that as a council member, Mr. Hinkley obtained payment and contracts from PPG for the Hinkley Defendants and Cuzan. It further accuses Mr. Hinkley of fraud, abuse of public funds, abuse of trust, personal enrichment, and self-dealing. Shortly thereafter, the Hinkley Defendants propounded discovery on PPG seeking records that established the allegations within the Petition. PPG failed to produce any documents. Through discovery issued to PPG's finance director, Mr.

¹⁴ *Schwarzenberger v. Louisiana State University Health Sciences Center New Orleans*, 2017-0024, p. 14 (La.App. 4 Cir. 8/24/17) 226 So.3d 1200, 1209; La. C.C.P. art. 966 (A)(3).

¹⁵ *Schwarzenberger*, 2017-0024, pp. 9-10, 226 So.3d at 1207.

Serpas, it was confirmed that the PPG had no documents that supported any of the allegations in the Petition.

The Hinkley Defendants filed their motion for summary judgment on April 13, 2017.¹⁶ The hearing for the motion for summary judgment was not heard until April 16, 2018. During that time, Cuzan had been served and its financial records had been produced. The trial court determined that there were no relevant documents in those records. That was the only discovery conducted by PPG. The trial court found that there were no genuine issues of material fact regarding the allegations in the Petition existed and summary judgment was granted.

PPG maintains that the trial court erred in granting the Hinkley Defendants' and Cuzan's motions for summary judgment because the PPG was unable to conduct adequate discovery.¹⁷ Citing to this Court's opinion in *Roadrunner Transportation Systems v. Brown*, the PPG complains that they were not given the opportunity for "adequate discovery".¹⁸ In *Roadrunner*, this Court identified the four relevant factors to consider when addressing an adequate discovery claim as:

- (i) whether the party was ready to go to trial,
- (ii) whether the party indicated what additional discovery was needed,
- (iii) whether the party took any steps to conduct additional discovery during the period between the filing of the motion and the hearing on it, and

¹⁶ Cuzan filed its motion for summary judgment on March 26, 2018.

¹⁷ La. C.C.P. art. 966(A)(3) provides that "[a]fter an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law."

¹⁸ 2017-0040 (La.App. 4 Cir. 5/10/17), 219 So.3d 1265.

(iv) whether the discovery issue was raised in the trial court before the entry of the summary judgment.¹⁹

In addition to those four factors, courts may also consider if discovery was hindered by a circumstance beyond a party's control.²⁰

Considering the factors individually, neither party in this case was ready to go to trial. On that issue, the defendants filed the motions for summary judgment arguing that as a matter of law, the PPG did not have and could never produce evidence to support the false allegations of the Petition. As for the PPG indicating that additional discovery was needed, the PPG's filing of a motion to gain access to Cuzan's financial records to mount a defense against the defendants' motions for summary judgment could meet that inquiry. When considering whether steps were taken for additional discovery, the only discovery that transpired while the motions were pending was for Cuzan's financial records. The PPG maintains that the delay in getting that discovery was beyond its control because Cuzan impeded the discovery process by avoiding service for an extended period. Lastly, the trial court was aware of PPG's assertions that it desired access to the financial records to further explore and develop the allegations against the defendants.

When weighing those discovery factors in the context of this case, we have to recognize that the relevant information that has been ascertained in this case was through discovery conducted by the Hinkley Defendants in an attempt to disprove the allegations of the Petition. In fact, through that discovery, the allegations of the petition regarding specific projects and monetary payments were found to be inaccurate and not applicable to the time frame relevant to this litigation.

Additionally, the only discovery conducted by the PPG resulted in an *in camera*

¹⁹ *Roadrunner*, 2017-0040, pp. 11-12, 219 So.3d at 1273 (citation omitted).

²⁰ *Roadrunner*, 2017-0040, p. 13, 219 So.3d at 1274 (citation omitted).

inspection of Cuzan's financial records. That inspection resulted in the trial court finding of no relevant evidence.

In *Roadrunner*, this Court described the circumstances presented in that case as "atypical." That case was a suit for damages due to the loss of a shipment of frozen rice product that spoiled while in transit. Anita Brown, the operator and owner of the truck transporting the frozen rice product, was an absent defendant. There was a motion filed to appoint a curator. Prior to the curator answering the suit, the trial court granted summary judgment in favor of Ms. Brown's insurer.²¹

In that case, the insurer filed its motion for summary judgment arguing the insurance policy excluded coverage for loss due to spoilage. However, the policy contained other provisions that would cover spoilage under certain conditions. Given that Ms. Brown would have been the only person that could confirm the exact cause of the loss of the frozen rice product and she had not been located, *Roadrunner* argued inadequate discovery. This Court agreed.²²

This case is distinguishable from *Roadrunner*. Here, the parties are present and have been available for discovery purposes. This Court does not find that the PPG was denied the opportunity to conduct adequate discovery. Again, the discovery that was conducted simply does not lend support to the allegations in the Petition. Based on the record before this Court, the PPG failed to establish a genuine issue of material fact to overcome the motions for summary judgment. Accordingly, the trial court's granting of the summary judgments and the dismissal of the Petition are affirmed.

²¹ *Id.*

²² *Id.*

Answer to Appeal

Pursuant to La. C.C.P. art. 2164, the Hinkley Defendants and Cuzan filed an answer to the appeal seeking damages, including, but not limited to attorney's fees, against the PPG for the filing of a frivolous appeal. Article 2164 provides:

The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

This Court has consistently held that because the statute permitting frivolous appeal damages is penal in nature it must be strictly construed in favor of the appellant. Because appeals are always favored, damages will not be granted unless the appeal is unquestionably frivolous.²³ An appeal is considered frivolous if the appellant is trying to delay the action, or if the appealing counsel does not seriously believe in the law that he or she is advocating for, or if the appeal does not present a substantial legal question.²⁴

Here we do not find any of the considerations for deeming an appeal frivolous exist. For that reason we decline to award damages under article 2164.

Conclusion

For the reasons discussed, the trial court's rulings are affirmed.

²³ *Johnson v. Johnson*, 2008-0060, pp. 5-6 (La.App. 4 Cir. 5/28/08), 986 So.2d 797, 801.

²⁴ *Sullivan*, 2016-0875, p. 5, 215 So.3d at 709.

