TERRANCE SAULNY	*	**NO. 2018-CA-1069**
VERSUS	*	
		COURT OF APPEAL
NEW ORLEANS POLICE DEPARTMENT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
TERRANCE SAULNY	**NO. 2018-CA-1070**
VERSUS	
NEW ORLEANS POLICE DEPARTMENT	

APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 8351
* * * * * *
Judge Daniel L. Dysart
* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Daniel L. Dysart, Judge Regina Bartholomew-Woods)

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APPEALS DISMISSED
MAY 22, 2019

This is a consolidated appeal by both the Civil Service Commission ("CSC") and New Orleans Police Officer Terrance Saulny of a judgment affirming the NOPD's termination of Officer Saulny's employment, but ordering that the NOPD "remit all … back pay and emoluments" to Officer Saulny for a thirty-eight day period. The judgment stems from a September 23, 2014 incident in which Officer Saulny is alleged to have engaged in behavior violative of certain NOPD internal rules with respect to his treatment of a juvenile.[1]

The NOPD has filed a Motion to Strike Officer Saulny's appeal on the basis that the record fails to contain a motion for appeal as required by La. C.C.P. art. 2121. Having reviewed the record, and for the reasons discussed below, we find that the Motion to Strike has merit. We therefore dismiss Officer Saulny's appeal. However, recognizing that "[a]n appellate court has an independent duty to consider whether it has subject matter jurisdiction over the matter, even when the issue is not raised by litigants,"[2] our review of the record also demonstrates that the

[1] Officer Saulny is alleged to have violated Rule 2: Moral Conduct, Paragraph 6, Unauthorized Force and Rule 2: Moral Conduct: Paragraph 4: Truthfulness.
[2] *Rubin v. Non-Flood Prot. Asset Mgmt. Auth*., 18-0500, p. 4 (La. App. 4 Cir. 11/14/18), 259 So.3d 1228, 1231, *writ denied*, 18-2055 (La. 2/18/19), 265 So.3d 774.

NOPD also failed to properly perfect an appeal. On this basis, we dismiss the NOPD's appeal as well.

La. C.C.P. art. 2121, governing the method by which an appeal is taken, provides as follows:

> An appeal is taken by obtaining an order therefor, within the delay allowed, from the court which rendered the judgment.
>
> An order of appeal may be granted *on oral motion in open court, on written motion, or on petition*. This order shall show the return day of the appeal in the appellate court and shall provide the amount of security to be furnished, when the law requires the determination thereof by the court.
>
> When the order is granted, the clerk of court shall mail a notice of appeal to counsel of record of all other parties, to the respective appellate court, and to other parties not represented by counsel. The failure of the clerk to mail the notice does not affect the validity of the appeal.
>
> (Emphasis added).

Our case law clearly indicates that, "perfecting an appeal of a judgment, pursuant to the requirements of La. C.C.P. art. 2121, requires (1) a petition or motion for appeal, (2) an order of appeal and (3) a notice of appeal." *Rubin v. Non-Flood Prot. Asset Mgmt. Auth*., 18-0500, p. 4 (La. App. 4 Cir. 11/14/18), 259 So.3d 1228, 1231, *writ denied*, 18-2055 (La. 2/18/19), 265 So.3d 774. *See also*, *Ratcliff v. Boydell*, 566 So.2d 197 (La. App. 4 Cir. 1990); *Belser v. St. Paul Fire & Marine*, 542 So.2d 163, 165 (La. App. 1 Cir. 1989).

In *Belser*, the appellants filed a "Notice of Appeal" which stated that "[n]otice is hereby given that [appellants] appeal to the First Circuit, Court of Appeals… from the Judgment entered herein on January 7, 1988." Approximately two months later, the appellants filed an "Order" which "[o]rdered that a

devolutive appeal be granted to the [appellants] and that the appeal of this case be returnable to the Court of Appeal, First Circuit." The Order was signed by a judge the same day on which it was filed. A little over three months later, the Clerk of Court for the 19th Judicial District Court for the Parish of East Baton Rouge issued a notice of appeal, which notified the parties that on April 27, 1988, "upon motion of [defendants] in the above numbered and entitled cause, an order of appeal was entered granting a [devolutive] ... appeal from the judgment of [January] 7, 1988 . . . ."

At that point, the plaintiff moved to dismiss the appeal as untimely, to which the defendants responded that the "Notice of Appeal" was actually a motion for appeal, as it clearly evidenced an intent to appeal the January 7, 1988 judgment. Although the court recognized that "a pleading is governed by its substance rather than its caption" and that "[p]leadings should be construed for what they really are, not for what they are erroneously designated,"[3] the Court distinguished the difference between a petition and a motion, either of which would suffice under La. C.C.P. art. 2121 for a proper appeal:

> The elements of a *petition* are set forth in La.C.C.P. art. 891 as follows:
>
> > The petition shall comply with Articles 853, 854, and 863, and, whenever applicable, with Articles 855 through 861. It shall set forth the name, surname, and domicile of the parties; shall contain a short, clear, and concise statement of the object of the demand and of the material facts upon which the cause of action is based; *and shall conclude with a prayer for judgment for the relief sought. Relief may be prayed for in the alternative.*

[3] *Id.*, 542 So.2d at 165.

* * * *

> The elements of a *written motion* are set forth in La.C.C.P. art. 962 as follows:
>
> > A written motion shall comply with Articles 853 and 863, and *shall state* the grounds therefor, *and the relief or order sought*.

Id., 542 So.2d at 166. (Emphasis supplied). The Court then noted:

> La.C.C.P. art. 2121 is clear and unambiguous in distinguishing between a *motion (petition)* for appeal, an *order* of appeal and a *notice* of appeal. The distinguishing feature of a *petition (motion)* for appeal is that it prays for (seeks) a judgment (or an order) from a judge for specified relief (an appeal). A *notice* of an appeal does not seek a judgment or order from a judge for specified relief.

Id. (Emphasis supplied). Rejecting the contention that the "Notice of Appeal" was tantamount to a motion for appeal, the Court held that it was "so clearly a notice of appeal, and. . . not a petition or motion for an appeal," commenting:

> . . . if we were to rule that the questioned pleading were a petition or motion for an appeal, we would render meaningless the distinction between a petition or motion for appeal and a notice of appeal recognized in La.C.C.P. art. 2121. Otherwise, if the questioned pleading were a petition or motion for an appeal, what would constitute a notice of appeal?

Id., 542 So.2d at 168. The "notice of appeal," to which the Court referred was the notice required by the third paragraph of La. C.C.P. art. 2121 (that is, a notice of appeal sent to the parties by the clerk of court once the order of appeal has been granted).

Cases following *Belser* have reached the same conclusion, namely, that an appeal is perfected by filing a proper motion or petition for appeal. In *Bremermann v. Bremermann*, 05-0547 (La. App. 4 Cir. 1/11/06), 923 So. 2d 187, for example, the parties reached a consent judgment as to custody and visitation of

their two children, which was signed by the trial judge. A week or so later, the mother moved for a new trial, to vacate/set aside the judgment, and to amend the consent judgment on the basis that it had been obtained without her or her attorney's prior review. The court denied the motions ex parte (the trial court found that the judgment did, in fact, memorialize what had been agreed to in open court). The mother then timely filed a "Notice of Intent to File a Devolutive Appeal." The pleading did not contain an order or prayer for an appeal. Thereafter (but more than the 60 day time period for filing a motion for devolutive appeal), she filed a "Petition for Devolutive Appeal," to which an order was attached.

This Court reiterated the "clear" rule that "'the method for 'taking' an appeal involves three procedural elements: (1) a motion or petition for appeal, (2) an order of appeal, and (3) notice of appeal." *Id*., p. 2, 923 So.2d at 188. The Court then noted that what had been filed was a "notice of intent to appeal (with no accompanying order or prayer for an appeal) filed with the sixty-day devolutive appeal delay and a petition for appeal filed sixty-three days after the signing of judgment." *Id*., p. 4, 923 So.2d at 189. The Court concluded that the appeal was not "properly 'taken' pursuant to the requirements of La. C.C.P. art. 2121." *Id*.

More recently, in *2400 Canal, L.L.C. v. Board of Supervisors of LSU*, 14-0303, p. 2 (La. App. 4 Cir. 10/8/14), --- So.3d ----, 2014 WL 5034613, the plaintiff fax-filed a "Notice of Intent to Appeal" the trial court's judgment granting various exceptions. The Notice did not have an accompanying order of appeal or any other attachments. After the sixty day time period for filing a devolutive appeal had elapsed, the defendant filed a Motion to Dismiss on the basis that Canal had not properly appealed the judgment, and the trial court granted the motion. This Court upheld the dismissal, finding that the Notice of Intent to appeal by which it was

"notifying the Court and counsel of record of its intent and wish to appeal" was insufficient to satisfy the requirements of La. C.C.P. art. 2121. *Id*., p. 1, --- So.3d ----, -----. The Court rejected Canal's argument that orders of appeal are a mere formality when dealing with a devolutive appeal, given that no security is required. The Court dismissed the appeal because the record did "not contain a written motion for appeal, and the transcripts fail[ed] to evidence any colloquy by the trial court and the parties that would indicate [that] an oral motion for appeal was raised and granted in open court." *Id*., p. 2, --- So.3d ----, ----.

By contrast, this Court has found a "Notice of Appeal" to be proper when it evidences that a party is appealing a judgment **and** there is an order of appeal attached to the notice. In *Joseph v. Wasserman*, 15-1193, p. 6 (La. App. 4 Cir. 5/4/16), 194 So.3d 720, 724-25, for example, the appellant incorrectly filed a "Notice of Appeal," which the notice "moved" for an appeal and attached a proposed order granting the appeal for the trial judge's signature. Finding that this was sufficient to properly appeal the judgment, this Court noted that, in addition "to clearly identif[ying] the judgment by which they were aggrieved," the appellants "'move[d]' for an appeal" and "filed a proposed order granting the appeal for the trial judge's signature."

Similarly, in *State v. Dennis*, 14-1258, p. 2 (La. App. 4 Cir. 4/29/15), 165 So.3d 1124, 1126, a bond forfeiture case in which the trial court ordered a bond forfeited, and the surety appealed, the State moved to dismiss the appeal on the basis that the surety failed to properly appeal the judgment. The surety had orally "noted its intent to take an appeal" and was given a "return date." *Id*., p. 2, 165 So.3d at 1126. It then followed up with a "Notice of Appeal" and a Designation of

the Record. *Id*. Even though the Notice of Appeal was accompanied by an Order of Appeal, this Court, after reviewing the foregoing case law, held:

> The instant case does not involve a timely filed motion for appeal where the order was signed after the delays had run. Instead, the record before us contains a timely filed notice of appeal—with an accompanying order that was never signed—but does not include any motion or petition for appeal, or even a signed judgment. Since [Surety's] notice of appeal does not satisfy the statutory requirements for "taking" an appeal, this Court is without jurisdiction to entertain this "appeal."

Id., p. 4, 165 So.3d at 1127.

Saulny's Appeal

There is no dispute in this matter that Saulny filed neither a motion for appeal nor a petition for appeal. There is likewise no dispute that no oral motion for appeal was made. Rather, by letter dated September 21, 2018, Saulny's counsel sent a letter to the CSC stating that her office had been retained to represent Saulny, and further stating:

> Additionally, this correspondence serves as a Notice of Appeal in the above referenced matter. . . . Plaintiff in the above-captioned matter [] hereby appeals to the Louisiana Court of Appeal for the Fourth Circuit from the decision rendered by the commission on August 21, 2018. At your earliest convenience, kindly confirm receipt of this notice and any additional procedures to be followed in this matter.

Notably, in the CSC's notice to the parties of the rendering of the August 24, 2018 decision, it is expressly stated that an appeal "shall be taken in accordance with Article 2121 et seq. of the Louisiana Code of Civil Procedure." As noted herein, Art. 2121 requires a motion for appeal, a petition for appeal or an oral motion in open court. There is nothing in the Code of Civil Procedure or our

jurisprudence which indicates that a letter will satisfy the requirements for taking an appeal.

Saulny contends that a "common sense reading of Article 2121 suggests that most any expression of a desire to appeal is acceptable" in that "[o]ral expressions suffice" and "the written variety suffices whether cast as a motion or a petition." He further suggests that "tribunals" have "broad discretion" to "grant requests for appeal." These contentions are contrary to our case law which clearly suggests that, unless an oral motion for appeal is made and granted in open court, there *must* be a motion or a petition for appeal. A letter is neither a motion nor a petition, and, in fact, is not a pleading of any sort. We therefore conclude that Saulny failed to file the requisite motion or petition for appeal, and accordingly, this court is without jurisdiction to consider this "appeal." *See Ratcliff,* 566 So.2d at 200; *Belser*, 88-1434, 542 So.2d at 168.

NOPD's Appeal

Just as Saulny's efforts to appeal this matter were deficient, our review of the record reflects that the NOPD's effort to appeal this matter, too, was insufficient and failed to comply with Article 2121 (and the CSC's directive that an appeal would have to comply with this article).

The record reflects that, like the parties appealing judgments in *Belser*, *Bremermann*, *2400 Canal,* and *Dennis,* the NOPD in the instant matter filed a "Notice of Appeal." While the NOPD indicated that it "desire[d] to appeal that portion of the Commission's ruling with [sic] granted Mr. Saulny's appeal of his 38 day suspension," the NOPD's Notice did "not seek a judgment or order from a judge for specified relief." *See Belser*, 542 So.2d at 166. Nor is it "a petition (motion*)* for appeal [which] prays for (seeks) a judgment (or an order) from a

judge for specified relief (an appeal)." *Id*. Rather, the NOPD's Notice simply prays that "the Civil Service Commission take[] the necessary steps to allow the Dept. of Police to appeal to the Fourth Circuit from the judgment. . . ."

More importantly, the record reflects that, unlike the situation in *Joseph*, not only did the NOPD fail to "move for an appeal," it failed to attach an order of appeal to its Notice. While the record does contain an order of appeal, it is clear that the order was generated by the CSC and, thus, was not one filed into the record by the NOPD. Thus, we find that the NOPD did not properly perfect an appeal and the NOPD's "appeal" is dismissed as well.

CONCLUSION

For the foregoing reasons, we grant the NOPD's motion to strike Saulny's appeal and his appeal is dismissed. We further *sua sponte* dismiss the NOPD's appeal.

APPEALS DISMISSED