

The Supreme Court of the State of Louisiana

BENNY HERNANDEZ

No.2020-C-00698

VS.

EXCEL CONTRACTORS, INC.

IN RE: Benny Hernandez - Applicant Plaintiff, Applying For Writ Of Certiorari,
Parish of Ascension, 23rd Judicial District Court Number(s) 113,957, 1st Circuit
Court of Appeal, Number(s) 2019 CA 1058;

September 29, 2020

Writ application denied.

JDH

BJJ

JLW

SJC

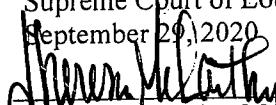
JTG

JHB

Crain, J., recused.

Supreme Court of Louisiana

September 29, 2020



Second Deputy Clerk of Court
For the Court

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2019 CA 1058

BENNY HERNANDEZ

VERSUS

EXCEL CONTRACTORS, INC.

ahp
WLS
Judgment Rendered: MAY 11 2020

* * * * *

On Appeal from the 23rd Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Trial Court No. 113,957

Honorable Jessie M. LeBlanc, Judge Presiding

* * * * *

Danial C. Vidrine
Baton Rouge, Louisiana

Attorney for Plaintiff/Appellant,
Benny Hernandez

Robert A. Dunkelman
Joshua P. Monteleone
Shreveport, Louisiana

Attorneys for Defendants/Appellees,
SPX Cooling Technologies, Inc.,
Xcel Erectors, Inc., and James Meidl

* * * * *

TWTH BEFORE: HIGGINBOTHAM, PENZATO, AND LANIER, JJ.

Higginbotham, J. dissents.

PENZATO, J.

Plaintiff, Benny Hernandez, appeals a trial court judgment granting summary judgment in favor of defendants, SPX Cooling Technologies, Inc., Excel Erectors, Inc.¹ and James Meidl, dismissing plaintiff's claims with prejudice. Defendants assert in this court an exception raising the objection of prescription. For the following reasons, we sustain the exception and dismiss the appeal.

FACTS AND PROCEDURAL HISTORY

Plaintiff has appealed the trial court's granting of summary judgment in favor of defendants on two previous occasions. Both appeals were dismissed because of this court's lack of subject matter jurisdiction. *See Hernandez v. Excel Contractors, Inc.*, 2017-0762 (La. App. 1 Cir. 12/21/17), 2017 WL 6524030 (unpublished) (*Hernandez 1*), and *Hernandez v. Excel Contractors, Inc.*, 2018-1091 (La. App. 1 Cir. 3/13/19), 275 So. 3d 278 (*Hernandez 2*). The relevant facts from *Hernandez 2* are set forth below.

Plaintiff instituted this suit on September 16, 2015 by filing a petition for damages against Excel Contractors, Inc.² as well as its insurer, alleging that plaintiff was employed by ASAP Employment Services, Inc. and that he was injured on September 16, 2014 while working at a "CF1 Industries plant." Plaintiff later filed an amended and supplemental petition, which named SPX Cooling Technologies, Inc., Xcel Erectors, Inc., CF Industries, Inc., and James Meidl as defendants.³ In response to the amended and supplemental petition, SPX Cooling Technologies, Inc., Xcel Erectors, Inc., and James Meidl ("defendants") filed a "Peremptory Exception for [sic] No Cause of Action, and in the Alternative, Motion for Summary Judgment," which sought dismissal, with prejudice, of all claims against defendants. On February 22, 2017, the trial court rendered judgment (hereinafter, the "2017 judgment"), which, in pertinent part, granted the motion for summary judgment filed by SPX Cooling Technologies, Inc., Excel Erectors, Inc., and James Meidl and

¹ Although the pleadings and transcript identified the defendant as "Xcel Erectors, Inc.," the judgment referred to Xcel Erectors, Inc. as "Excel Erectors, Inc."

² Excel Contractors, Inc. answered the petition and then filed a motion for summary judgment, which was granted on July 8, 2016, as it established that none of Excel Contractors, Inc.'s employees could have been responsible for plaintiff's injuries.

³ As noted in this court's prior opinions, plaintiff's amended petition mistakenly identified James Meidl as "James Merrill" and CF Industries Nitrogen, LLC as "CF Industries, Inc."

dismissed Hernandez's claims against these defendants with prejudice and at plaintiffs [sic] costs. The judgment further decreed that the Exception of No Cause of Action was moot as to the statutory employee issue, but was sustained, however, as to plaintiff's claims for intentional torts. The judgment further ordered plaintiff to amend his pleadings within thirty days of the signing of the judgment "to sufficiently plead any intentional torts if he so chooses."

Plaintiff appealed the 2017 judgment, but this court eventually dismissed the appeal because no portion of the 2017 judgment was a final judgment for the purpose of immediate appeal. ...

While the appeal of the 2017 judgment was pending with this court, however, defendants filed a Motion to Dismiss the **intentional tort claims** of Mr. Hernandez in the trial court on August 22, 2017, which the trial court granted. In the Motion to Dismiss, defendants averred that, despite the signing of an order of appeal from the 2017 judgment, the trial court retained jurisdiction over the intentional tort claims pursuant to LSA-C.C.P. art. 1915. Despite the pending appeal of the 2017 judgment, defendants contended that plaintiffs [sic] failure to comply with the trial court's 2017 judgment, which ordered plaintiff to amend his pleadings to sufficiently allege intentional tort claims within thirty days of the signing of the 2017 judgment, necessitated the dismissal of plaintiffs [sic] intentional tort claims. Apparently finding merit to the defendants' contention, on August 29, 2017, the trial court signed an order of dismissal, which stated as follows:

CONSIDERING THE FOREGOING, IT IS HEREBY ORDERED that, pursuant to La. CCP art 934, Defendants' Motion to Dismiss is hereby GRANTED as to the intentional tort claims of Plaintiff, BENNY HERNANDEZ, against Defendants, SPX COOLING TECHNOLOGIES, INC., XCEL ERECTORS, INC. and JAMES MEIDL, and those intentional tort claims shall be dismissed with prejudice, at Plaintiff's cost.

Four months later, on December 21, 2017, this court rendered its opinion in the then-pending appeal of the 2017 judgment, dismissing the appeal for lack of appellate jurisdiction.

After this court's dismissal of the 2017 appeal, plaintiff circulated and filed an "Amended Final Judgment" in an attempt to cure the defects in the 2017 judgment noted by this court. Notwithstanding defendants' opposition to the filing of the "Amended Final Judgment," the trial court signed the judgment as submitted by plaintiff on April 18, 2018. The "Amended Final Judgment" was substantively identical to the previous judgment, with the exception that it included the following designation at the end of the judgment: **"IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that this Judgment is a Final Judgment in accordance with LSA-C.C.P. arts 1915(A)(3) and 1915(B)(1) for the purposes of an immediate appeal and that there is 'no just reason for delay.' " However, the "Amended Final Judgment" retained the provision

allowing plaintiff thirty days to amend his pleadings to allege intentional torts, despite the fact that the trial court had previously dismissed plaintiff's intentional tort claims.

Hernandez 2, 275 So. 3d at 280-82.

In *Hernandez 2*, plaintiff appealed the "Amended Final Judgment." This court found that the trial court was divested of jurisdiction and did not have the authority to render the August 29, 2017 order dismissing the intentional tort claims (for failure to amend as previously ordered by the judgment under review by this court) while the 2017 appeal was pending. *Hernandez 2*, 275 So. 3d at 285. This court concluded that the order was a nullity and proceeded as if the order dismissing the intentional tort claims had never been rendered. *Id.* Because the plaintiff's intentional tort claims against the defendants were still pending and viable (in addition to an exception of prescription raised by defendants on appeal), this court was unable to state that there was no just reason for delay in the appeal of that portion of the "Amended Final Judgment" partially granting defendants' motion for summary judgment. Thus, this court found that the trial court incorrectly certified that portion of the judgment as final and immediately appealable. *Id.* at 286. This court further found that the portion of the judgment sustaining the exception of no cause of action and granting leave to amend likewise was improperly designated as final. *Id.* at 287. Accordingly, this court concluded that because the "Amended Final Judgment" was improperly designated as final in its entirety, this court lacked subject matter jurisdiction and dismissed the 2019 appeal.

Following *Hernandez 2*, defendants again filed a motion in the trial court to dismiss plaintiff's intentional tort claims for his failure to amend his pleadings as previously ordered by the February 22, 2017 judgment. Defendants' motion was granted by the trial court on March 25, 2019. Thereafter, a "Second Amended Final Judgment" was signed on May 1, 2019. The May 1, 2019 judgment granted

defendants' motion for summary judgment and dismissed plaintiff's claims against them. The judgment further ordered that the exception of no cause of action was moot as to the statutory employee issue. Finally, the judgment included the following designation: "**IT IS FURTHER ORDERED, ADJUDGED AND DECREED**, that this Judgment is a final judgment in accordance with the provision of LSA-C.C.P. Arts 1915(A)(3) and 1915(B)(1) for the purpose of an immediate appeal and that there is 'no just reason for delay.' "

Plaintiff now appeals the May 1, 2019 judgment, asserting the trial court erred in finding that the service agreement between ASAP and SPXCT was a "contract" and that he was a "statutory" employee within the meaning of La. R.S. 23:1032, and in not allowing him to conduct "adequate" discovery.

LAW AND DISCUSSION

In response to the pending appeal, defendants filed a peremptory exception raising the objection of prescription with this court, contending that plaintiff's claims against them are prescribed on the face of the amended petition as they were asserted more than one year after the date of the accident and the original petition filed against Excel Contractors, Inc. did not interrupt the prescriptive period. Defendants previously filed (for the first time) a peremptory exception with this court raising the objection of prescription in connection with *Hernandez 2*. *Hernandez 2*, 275 So. 3d at 282. However, because this court found in *Hernandez 2* that it lacked appellate jurisdiction, it pretermitted defendants' exception raising the objection of prescription. *Id.* Because the May 1, 2019 judgment that is the subject of this appeal is a final, appealable judgment, we address the exception prior to the merits of the appeal.

Louisiana Code of Civil Procedure article 2163 allows the appellate court to consider a peremptory exception filed for the first time on appeal when the exception is pleaded prior to submission of the case for decision and proof of the

ground of the exception appears in the record. While the plaintiff may demand a remand to the trial court for a trial of the exception when the exception pled in the appellate court is prescription, we note, as did this court in *Hernandez 2*, that plaintiff did not do so. See Hernandez 2, 275 So. 3d at 282, n.4. Thus, this court has the discretion to consider the peremptory exception of prescription in this matter. *Id.*

Delictual actions are subject to a liberative prescription of one year, which commences to run from the day injury or damage is sustained. La. C.C. art. 3492. Prescription is interrupted by the commencement of suit against the obligor in a court of competent jurisdiction and venue. La. C.C. art. 3462. The interruption of prescription by suit against one solidary obligor is effective as to all solidary obligors. La. C.C. arts. 1799 and 3503. A timely filed suit against one joint tortfeasor interrupts prescription as to the remaining joint tortfeasors. La. C.C. art. 2324(C). However, a suit timely filed against one defendant does not interrupt prescription as against other defendants not timely sued, where the timely sued defendant is ultimately found not liable to plaintiff, since no joint or solidary obligation would exist. *Renfroe v. State Dept. of Transportation and Development*, 2001-1646 (La. 2/26/02), 809 So. 2d 947, 950.

The record indicates that plaintiff filed this suit against Excel Contractors, Inc. on September 16, 2015, for injuries he allegedly sustained as the result of a September 16, 2014 accident. The timely sued defendant, Excel Contractors, Inc., was dismissed by a judgment signed on July 8, 2016. Plaintiff did not file his amended and supplemental petition against defendants until May 13, 2016, more than one year from the date of the alleged September 16, 2014 injury. His earlier filing against Excel Contractors, Inc., which was found to have no liability to plaintiff, did not interrupt the prescriptive period as to these defendants. See Renfroe, 809 So. 2d at 950. Because the record contains sufficient evidence that

plaintiff did not timely file suit against defendants, and plaintiff did not demand that the case be remanded to the trial court for trial of the exception, as provided in La. C.C.P. art. 2163, we sustain defendants' exception of prescription. Accordingly, we pretermit consideration of the merits of this appeal.

CONCLUSION

For these reasons, the exception raising the objection of prescription filed by SPX Cooling Technologies, Inc., Excel Erectors, Inc. and James Meidl in this court is sustained, and the appeal and claims of Benny Hernandez against them are dismissed with prejudice. Costs are assessed to plaintiff, Benny Hernandez.

PEREMPTORY EXCEPTION RAISING THE OBJECTION OF PRESCRIPTION SUSTAINED; APPEAL DISMISSED.

BENNY HERNANDEZ RECEIVED AND FILED
BRIDGET HANNA
CLERK OF COURT
VERSUS
23rd JUDICIAL DISTRICT COURT

2019 MAY 29 A 11:48 PARISH OF ASCENSION
EXCEL CONTRACTORS, INC. *Darla Buzun* STATE OF LOUISIANA
J.Y. MILLER & RECORDER
ASCENSION PARISH, LA.

MOTION FOR APPEAL

FAX FILED

MAY 30 2019
Darla Buzun
BY. CLERK OF COURT
ASCENSION PARISH

NOW INTO COURT, through undersigned counsel, comes Plaintiff, *Benny Hernandez*,
who respectfully moves this Court to allow them Plaintiff to take a Suspensive appeal from the
Second Amended Final Judgment rendered by this Court on the 1st day of May, 2019.

ORDER

IT IS ORDERED, Plaintiff, Benny Hernandez, is hereby allowed to take a Suspensive
appeal from the Second Amended Final Judgment rendered by this Court on the 1st day of May,
2019.

*Neopoleonville,
Gonzales, Louisiana*, this 31st day of May, 2019.

Jessie M. LeBlanc
JUDGE, 23rd JUDICIAL DISTRICT COURT

Judge Jessie M. LeBlanc
Division D, 23rd Judicial District Court

Respectfully Submitted,
Danial C. Vidrine, LLC

Danial C. Vidrine
Danial C. Vidrine, Bar Roll # 17844
12445 Parkville Ave.
Baton Rouge, La. 70816
Telephone (225) 752-4520
Fax (9225) 752-4521
Attorney for Plaintiff,
Benny Hernandez

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2019, a copy of the above and foregoing
pleading has been forwarded to counsel for all parties to this proceedings by electronic mail.

Danial C. Vidrine
DANIAL C. VIDRIN

RECEIVED AND FILED
CLERK OF COURT
ASCENSION COURT

2019 MAR 20 A 11:27

FAX FILED

MAR 14 2019

BY CLERK OF COURT
ASCENSION PARISH

U.S. CLERK & RECORDER
ASCENSION PARISH, LA.

BENNY HERNANDEZ : CASE NO. 113,957 - D
VS. : 23RD JUDICIAL DISTRICT
EXCEL CONTRACTORS, INC. : ASCENSION PARISH, LOUISIANA

ORDER OF DISMISSAL

CONSIDERING THE FOREGOING, IT IS HEREBY ORDERED that, pursuant to La. CCP art 934, Defendants' Motion to Dismiss is hereby GRANTED as to the intentional tort claims of Plaintiff, BENNY HERNANDEZ, against Defendants, SPX COOLING TECHNOLOGIES, INC., XCEL ERECTORS, INC. and JAMES MEIDL, and those intentional tort claims shall be dismissed with prejudice, at Plaintiff's cost.

Thus done and signed at Napoleonville, ~~ASCENSION PARISH~~, LOUISIANA, this the 25th day of March, 2019.

Jessie M. LeBlanc
JUDGE

Judge Jessie M. LeBlanc
Division D, 23rd Judicial District Court

PLEASE SERVE:

BENNY HERNANDEZ
Through his Attorney of Record
Danial C. Vidrine, LLC
12445 Parkville Ave.
Baton Rouge, LA 70816

CF INDUSTRIES, INC.
Through its Attorneys of Record
J. Alan Harrell
Benjamin M. Anderson
John B. Shortess
II City Plaza
400 Convention Street, Suite 1100
Baton Rouge, LA 70802-5618

RECEIVED AND FILED
BRIDGET HANNA
23rd JUDICIAL DISTRICT COURT FOR THE PARISH OF ASCENSION

STATE OF LOUISIANA

NO. 113,957

2018 MAY 15 P 12:17
BY *M. Par*
DIVISION "D"
ASCENSION PARISH, LA.

BENNY HERNANDEZ

VS.

EXCEL CONTRACTORS, ET AL

MOTION FOR APPEAL

NOW INTO COURT, through undersigned counsel, comes Plaintiff, BENNY HERNANDEZ, who respectfully moves this Court to allow him to take an appeal from the Amended Final Judgment signed by this Court on the 18th day of April, 2018.

ORDER

IT IS ORDERED, Plaintiff, Benny Hernandez, is hereby allowed to take an appeal from the Amended Final Judgment signed by this Court on the 18th day of April, 2018.

Napoleonville,
Gonzales, Louisiana, this 18th day of May, 2018.

Jessie M. LeBlanc
JESSIE M. LEBLANC

JUDGE, DIVISION, "D"
23rd JUDICIAL DISTRICT COURT

Respectfully Submitted:

Daniel C. Vidrine

DANIAL C. VIDRINE, LLC
Bar Roll # 17844
12445 Parkville Ave.
Baton Rouge, La. 70816
Telephone (225) 752-4520
Fax 9225) 752-4521
Attorney for Plaintiff, Benny Hernandez

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2018, a copy of the above and foregoing pleading has been forwarded to counsel for all parties to this proceedings by electronic mail.

Daniel C. Vidrine
DANIAL C. VIDRINE

RECEIVED AND FILED
BENNY HERNANDEZ BRIDGET HANNA NUMBER: 113957 DIVISION "D"
CLERK OF COURT
VERSUS 2017 MAR 27 P 1:57 23rd JUDICIAL DISTRICT COURT
D. Y. LEBLANC & RECORDER
PARISH OF ASCENSION
EXCEL CONTRACTORS, INC. 501 CONSTITUTION AVENUE
ANGUS PARISH, LA. STATE OF LOUISIANA

MOTION FOR APPEAL

NOW INTO COURT, through undersigned counsel, comes Plaintiff, BENNY HERNANDEZ, who respectfully moves this Court to allow him to take an appeal from the Final Judgment rendered by this Court on the 22nd day of February, 2017.

ORDER

IT IS ORDERED, Plaintiff, BENNY HERNANDEZ, is hereby allowed to take an appeal from the Final Judgment rendered by this Court on the 22nd day of February, 2017.

Gonzales, Louisiana, this 29th day of March, 2017.

Jessie M. LeBlanc
JESSIE M. LEBLANC
JUDGE, DIVISION "D"
23rd JUDICIAL DISTRICT COURT

Respectfully Submitted,

Danial C. Vidrine
Danial C. Vidrine, LLC (LSBA # 17844)
12445 Parkville Ave.
Baton Rouge, La. 70816
Telephone (225) 752-4520
Fax 9225) 752-4521
Attorney for Plaintiff, Benny Hernandez

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2017, a copy of the above and foregoing pleading has been forwarded to counsel for all parties to this proceedings by electronic mail.

Danial C. Vidrine
DANIAL C. VIDRINE

BENNY HERNANDEZ *RECEIVED AND FILED* NUMBER: 113957 DIVISION "D"
VERSUS 2016 MAY 13 P 12:11 23rd JUDICIAL DISTRICT COURT
EXCEL CONTRACTORS, INC. *N. Hernandez* PARISH OF ASCENSION
STATE OF LOUISIANA

**MOTION FOR LEAVE OF COURT TO FILE
FIRST AMENDING AND SUPPLEMENTAL PETITION FOR DAMAGES**

NOW INTO COURT, through undersigned counsel comes Plaintiff, Benny Hernandez, who respectfully moves this Honorable Court to Grant him Leave of Court to file a First Amending and Supplemental Petition for Damages.

ORDER

Considering the forgoing Motion;

IT IS ORDERED that the Plaintiff, Benny Hernandez, is hereby **GRANTED** leave of Court to file a First Amending and Supplemental Petition for Damages.

Gonzales, Louisiana, this 17th day of May, 2016.

Jessie M. Blanks

JUDGE, 23RD JUDICIAL DISTRICT COURT

Judge Jessie M. Blanks submitted:
Division D, 23rd Judicial District Court

Danial C. Vidrine

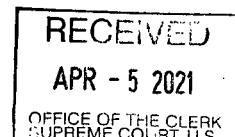
Danial C. Vidrine, LLC (LSBA 17844)
12445 Parkville Ave.
Baton Rouge, La. 70816
Telephone: (225) 752-4520
Fax: (225) 752-421

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2016, a copy of the above and foregoing pleading has been forwarded to counsel for all parties to this proceedings by electronic mail.

Danial C. Vidrine

DANIAL C. VIDRINE



RECEIVED AND FILED
BRIDGET HANNA
CLERK OF COURT JUDICIAL DISTRICT COURT
VERSUS NUMBER 113957 DIV 2016 APR 25 PARISH OF ASCENSION
EXCEL CONTRACTORS, INC. BY *Opie Foster* STATE OF LOUISIANA
D.Y. CLERK & RECORDER
ASCENSION ORDER L.A.

CONSIDERING THE ABOVE AND FOREGOING:

IT IS HEREBY ORDERED, that the plaintiff, Benny Hernandez, appear and show cause on the 24th day of June, 2016 at 9:00 o'clock a.m. at Gonzales, Louisiana, why this Motion for Summary Judgment should not be granted and why all claims against Excel Contractors, Inc., should not be dismissed, with prejudice at his costs.

THUS DONE AND SIGNED this 26th day of April, 2016 at
LeBlanc
Napoleonville,
Gonzales, Louisiana.

Jessie M. LeBlanc
HONORABLE JESSIE LEBLANC
JUDGE, 23RD JUDICIAL DISTRICT COURT

PLEASE SERVE

Benny Hernandez
Through his attorney of record:
Danial C. Vidrine
12445 Parkville Ave.
Baton Rouge, La. 70816

PLEASE NOTIFY

Excel Contractors, Inc.
Through its attorney of record:
Timothy E. Pujol
12320 Highway 44
Building 4, Suite C
Gonzales, Louisiana 70737

BENNY HERNANDEZ
VERSUS NUMBER 113957 DIV D.
EXCEL CONTRACTORS, INC.

23RD JUDICIAL DISTRICT COURT
PARISH OF ASCENSION
STATE OF LOUISIANA
J. Y. CLERK & RECORDER
ASCENSION PARISH, L.A.
[Signature]

MOTION AND ORDER FOR EXTENSION OF TIME

On motion of EXCEL CONTRACTORS, INC., defendant herein, and upon suggesting to the Court through their undersigned counsel of record that an extension of time of fifteen (15) days be granted through October 23, 2015, which is needed within which to answer or otherwise plead to the allegations of the petition. No previous extensions of time have been obtained by the adverse party or granted by this Court.

It is hereby ORDERED that the time within which defendant, EXCEL CONTRACTORS, INC., may answer or otherwise plead to the allegations of the petition be, and it is hereby, extended through October 23, 2015.

THUS DONE, ORDERED AND SIGNED in Napoleonville, Louisiana, this 14th day of October, 2015.

Jessie M. LeBlanc
HONORABLE JESSIE LEBLANC
JUDGE, 23RD JUDICIAL DISTRICT COURT

Respectfully Submitted:

PUJOL, PRYOR & IRWIN, LLC

[Signature]
Timothy E. Pujol (#19117)
Matthew W. Pryor (#23903)
Barbara Lane Irwin (#28091)
12320 Highway 44
Building 4, Suite C
Gonzales, Louisiana 70737
Telephone: (225) 644-0607
Facsimile: (225) 644-1688

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading was forwarded to all counsel of record by placing same in the United States Mail, postage prepaid and properly addressed this 8th day of October, 2015, at Gonzales, Louisiana.

[Signature]
Timothy E. Pujol