

Judgment rendered May 23, 2018.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 52,034-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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JOANN BILBERRY AND
KATECIA JONETTE BILBERRY

Plaintiffs-Appellants

versus

BILLIE J. TENSLEY

Defendant-Appellee

* * * * *

Appealed from the
Third Judicial District Court for the
Parish of Union, Louisiana
Trial Court No. 47,321

Honorable Cynthia T. Woodard, Judge

* * * * *

BRIAN G. SMITH

Counsel for Appellants

JOSEPH A. CUSIMANO, JR.

Counsel for Appellee

* * * * *

Before WILLIAMS, PITMAN, and GARRETT, JJ.

NOT DESIGNATED FOR PUBLICATION
Rule 2-16.3, Uniform Rules, Courts of Appeal

GARRETT, J.

The plaintiffs, JoAnn Bilberry and Katecia Jonette Bilberry, appeal from a trial court judgment sustaining an exception of insufficiency of service of process on the defendant, Billie J. Tinsley.¹ For the following reasons, we convert the appeal to an application for supervisory writ of review, grant the writ application, deny relief, and remand to the trial court for further proceedings.

FACTS

JoAnn Bilberry was married to Edd Bilberry, and their daughter is Katecia Bilberry. The family lived at 700 Salem Church Road in Farmerville. At some point, while Mr. and Mrs. Bilberry were married, ownership of the house was transferred to Mr. Bilberry's sister, Ms. Tinsley, who lives in Union City, California.

On May 22, 2014, Mr. Bilberry died. The plaintiffs continued to live in the house in Farmerville. In August 2016, the plaintiffs filed a wrongful eviction suit against Ms. Tinsley, claiming that she unlawfully evicted them from the property by disconnecting the electricity and changing the locks on the doors and the gate while they were absent. The petition did not specify when this allegedly occurred.

In September 2016, the plaintiffs' attorney forwarded to the clerk of court the "Certified Mailing Receipt/Green Card" and requested that it be filed in the record. The receipt showed that someone at the defendant's address in California signed for the mailing on September 6, 2016.

¹ The plaintiffs incorrectly spelled the defendant's last name "Tensley." The correct spelling, "Tinsley," will be used herein.

Ms. Tinsley filed exceptions of lack of personal jurisdiction and insufficiency of service of process, contending that the plaintiffs failed to establish personal jurisdiction over her because she was not domiciled in Louisiana and was not served in Louisiana. According to Ms. Tinsley, the plaintiffs attempted to use the Louisiana Long Arm Statute to acquire personal jurisdiction and make service of process on her, but they did not file the affidavit required by La. R.S. 13:3205, certifying that service was correctly made under the Long Arm Statute.²

After a hearing, the trial court signed a judgment on October 19, 2016, sustaining the exception of lack of personal jurisdiction and ordering the plaintiffs to amend their petition within 30 days to allege facts of ownership to establish the basis of personal jurisdiction. The court also sustained the exception of insufficiency of service of process and ordered the plaintiffs to properly serve the defendant and file the proper affidavit, as required by La. R.S. 13:3205, to show proof of proper service.

On December 5, 2016, more than 30 days after the trial court judgment, the plaintiffs filed an amended petition alleging that Ms. Tinsley is the present owner of the property in dispute and was the owner at the time

² La. R.S. 13:3205 provides, in pertinent part:

No preliminary default or final default judgment may be rendered against the defendant and no hearing may be held on a contradictory motion, rule to show cause, or other summary proceeding, except for actions pursuant to R.S. 46:2131 et seq., until thirty days after the filing in the record of the affidavit of the individual who has done any of the following:

(1) Mailed the process to the defendant, showing that it was enclosed in an envelope properly addressed to the defendant, with sufficient postage affixed, and the date it was deposited in the United States mail, to which shall be attached the return receipt of the defendant.

of the wrongful eviction. The plaintiffs' lawyer later filed the following affidavit:

I, Brian Smith, show that Defendant, Billie J. [Tinsley], in the above styled case of Joann Bilberry and Katecia Jonette Bilbery [sic], Case No. 47,321, has been served through Long Arm Citation with Summons and Petition. The Defendant, Billie J. [Tinsley], [sic] was served upon Defendant on December 29, 2016, at the address of 4852 Carrie Court, Union City, California 94587.

The Plaintiff now files this Affidavit of filing with the Union Parish Clerk of Court, along with the green card, with the Office of the Clerk of Court.

After filing this Affidavit, both the original green card and Affidavit will complete the requirement of Long Arm Service.

In January 2017, Ms. Tinsley again filed exceptions of lack of personal jurisdiction and insufficiency of service of process, as well as a motion to dismiss the suit for failure to timely amend. She argued that the affidavit did not contain the required certifications; therefore, the service of process was insufficient and the trial court did not have personal jurisdiction over her. She also asserted that the plaintiffs failed to amend the petition within the time ordered by the court and it should be dismissed.

A hearing was held on April 20, 2017. The trial court declined to dismiss the petition due to the late filing of the amendment. The trial court sustained the exception of insufficiency of service of process, finding that the Long Arm Statute must be strictly complied with and the affidavit filed by the plaintiffs did not comply with the requirements of La. R.S. 13:3205. The court observed that the affidavit did not state who mailed the process or how it was mailed. In evaluating the plaintiffs' affidavit, the trial court said:

Although it hits all around it, it's not strictly complied with the statute, therefore, I'm sustaining his exception of insufficiency [of] service of process and you can attempt to serve him again. It's [13:3205]. Track that language.

The plaintiffs objected to the trial court's ruling, but did not state the grounds for the objection. In the judgment signed on May 11, 2017, the action was not dismissed, but the trial court did not order the plaintiffs to correct the deficits in the affidavit within a specified time.

On April 24, 2017, four days after the hearing, the plaintiffs filed into the suit record another affidavit which appears to satisfy the statutory requirements. This affidavit, of course, was not before the court on April 20, 2017, when it made its ruling which the plaintiffs seek to appeal.

In June 2017, the plaintiffs appealed the trial court judgment of May 11, 2017. They contend that the trial court erred in finding that Ms. Tinsley was not properly served under the Long Arm Statute.³

DISCUSSION

After a thorough review of the record before us, we find that this matter is not an appealable judgment. La. C.C.P. art. 1841 provides:

A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.

A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.

A judgment that determines the merits in whole or in part is a final judgment.

Insufficiency of service of process and lack of jurisdiction are raised by declinatory exceptions. La. C.C.P. art. 925. The effect of sustaining a declinatory exception is set forth in La. C.C.P. art. 932:

³ The plaintiffs originally sought a suspensive appeal which was later converted to a devolutive appeal. The plaintiffs did not pay the costs of the appeal, causing some delay in moving the matter forward. In October 2017, the court granted a motion to allow JoAnn Bilberry to proceed in forma pauperis.

A. When the grounds of the objections pleaded in the declinatory exception may be removed by amendment of the petition or other action of plaintiff, the judgment sustaining the exception shall order the plaintiff to remove them within the delay allowed by the court.

B. If the grounds of the objection cannot be so removed, or if the plaintiff fails to comply with an order requiring such removal, the action, claim, demand, issue, or theory subject to the exception shall be dismissed; except that if an action has been brought in a court of improper jurisdiction or venue, the court may transfer the action to a proper court in the interest of justice.

La. C.C.P. art. 2083 provides that a final judgment is appealable in all causes in which appeals are given by law and an interlocutory judgment is appealable only when expressly provided by law. Generally, the proper procedural vehicle to contest a nonappealable interlocutory judgment is an application for supervisory writs. *See Kelly v. Kelly*, 2016-0206 (La. App. 1 Cir. 10/31/16), 233 So. 3d 620; *Succession of Shaw v. Alexandria Inv. Grp., LLC*, 2017-582 (La. App. 3 Cir. 7/26/17), ___ So. 3d ___, 2017 WL 5997264; *In re L. D. B.*, 17-373 (La. App. 5 Cir. 10/4/17), 228 So. 3d 296.

La. C.C.P. art. 2201 provides:

Supervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction.

The Louisiana Supreme Court in *Stelluto v. Stelluto*, 2005-0074 (La. 6/29/05), 914 So. 2d 34, stated as follows:

The Louisiana Constitution confers appellate jurisdiction upon the courts of appeal over “all civil matters” and “all matters appealed from family and juvenile courts” and supervisory jurisdiction over “cases which arise within its circuit.” La. Const. art. V, § 10(A). Moreover, the jurisprudence indicates that the decision to convert an appeal to an application for supervisory writs is within the discretion of the appellate courts. *See In re Medical Review Panel of Freed*, 05-28 (La. App. 5 Cir. 4/26/05), 902 So. 2d 472, at 473 (“[C]onverting appeals to writs will be left to the discretion of the panel.”).

Appellate courts may exercise their discretion to convert improper appeals to applications for supervisory writs. *Stelluto v. Stelluto, supra*. See also *Kelly v. Kelly, supra*; *Monterrey Ctr., LLC v. Education Partners, Inc.*, 2008-0734 (La. App. 1 Cir. 12/23/08), 5 So. 3d 225; *Best Fishing, Inc. v. Rancatore*, 96-2254 (La. App. 1 Cir. 12/29/97), 706 So. 2d 161; *Ducote v. Union Pac. R. Co.*, 2008-1208 (La. App. 3 Cir. 2/4/09), 4 So. 3d 240, writ denied, 09-0940 (La. 6/5/09), 9 So. 3d 877; *Rousse v. United Tugs, Inc.*, 2017-0585 (La. App. 4 Cir. 12/20/17), 234 So. 3d 1179; *Tomlinson v. Landmark Am. Ins. Co.*, 2015-0276 (La. App. 4 Cir. 3/23/16), 192 So. 3d 153.

The judgment at issue here sustained the defendant's declinatory exception of insufficiency of service of process, but did not dismiss the claim. Because the judgment did not determine the merits, in whole or in part, but merely determined a preliminary matter in the course of the action, it was an interlocutory judgment. Our law does not provide for an appeal of this interlocutory judgment. For purposes of judicial economy, we exercise our discretion to convert this matter to an application for supervisory writs.

We grant the writ, but deny relief. We find no error in the trial court ruling which sustained the exception of insufficiency of service of process. However, the plaintiffs' case was not dismissed. It appears that the plaintiffs have now complied with the requirements of the Long Arm Statute in their affidavit filed on April 24, 2017, after the trial court hearing. The plaintiffs have failed to show that they are prejudiced in any way by the trial court ruling that they seek to appeal. We remand the matter to the trial court for further proceedings.

CONCLUSION

For the reasons stated above, we convert the appeal to an application for supervisory writs, grant the writ, deny relief, and remand to the trial court for further proceedings. Costs in this court are assessed to the plaintiffs, JoAnn Bilberry and Katecia Jonette Bilberry.

APPEAL CONVERTED TO WRIT; WRIT GRANTED; RELIEF DENIED; REMANDED.