NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 CA 0175

DEAN ESPOSITO

VERSUS

STEPHANIE ESPOSITO

Judgment Rendered: November 2, 2007.

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On Appeal from the
19th Judicial District Family Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 154,692

Honorable Toni Higginbotham, Judge Presiding

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Edna Ayliffe Latchem Baton Rouge, LA and James D. Thomas, II Baton Rouge, LA	Attorneys for Appellant, Stephanie Esposito
Brian Prendergast Baton Rouge, LA	Attorney for Appellee, Dean Esposito

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BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

JJP Pettigrew, J. Concurs

CARTER, C. J.

Stephanie Esposito appeals a judgment granting her husband Dean Esposito a divorce. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

On May 25, 2005, Dean Esposito filed a petition seeking a divorce from his wife, Stephanie, pursuant to LSA-C.C. art. 102. In the petition, he alleged that the parties physically separated on May 17, 2005. The trial court's order setting the matter for hearing was marked "Hold Service." Subsequently, Dean filed a "Motion to Re-Fix Rule Nisi" stating that Stephanie (who is undisputedly a Louisiana resident) was admitted into an inpatient treatment facility on June 20, 2005, and was not duly served with the petition for divorce. Dean requested that the trial court re-issue service of the original divorce petition and reset the rule to show cause. The motion specifically requests service on Stephanie in Texas via Louisiana's Long Arm statute.[1]

Stephanie answered the petition and denied the date of physical separation. Stephanie's answer included a reconventional demand alleging that the parties physically separated on August 28, 2005, and requesting a divorce pursuant to Article 102. No exceptions were pled in the answer. Dean answered the reconventional demand, again averring that the parties physically separated on May 17, 2005.

On February 13, 2006, Dean filed a rule to show cause why a divorce should not be granted based upon his petition. Therein he alleged that Stephanie was served via Louisiana's Long Arm statute on July 29, 2005,

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[1] Louisiana's Long Arm Statute, LSA-R.S. 13:3201, provides for service on non-residents.

and that the time delays required by Article 102 had elapsed. Stephanie excepted to the rule on the basis that it was premature since 180 days had not elapsed since their physical separation on August 28, 2005, and the service of the petition. The trial court held a hearing then issued written reasons finding no reconciliation of the parties after May 17, 2005 (the date of physical separation alleged by Dean). The trial court reset the rule to show cause, noting that "[a]ny issues regarding the validity of service of process of the Petition for Divorce shall be discussed at that hearing of the rule as such matters were not before this Court at the present hearing." A judgment overruling Stephanie's exception raising the objection of prematurity and resetting the rule to show cause was signed in accordance with those reasons on June 14, 2006.

Also on June 14, 2006, Stephanie filed a rule to show cause why a divorce judgment should not be rendered pursuant to *her* reconventional demand. Therein, she averred that 180 days had elapsed from the date the parties physically separated and also from the date Dean was served with her reconventional demand. Shortly thereafter, Stephanie filed a motion for new trial, seeking reconsideration of the trial court's ruling on her exception of prematurity. Dean filed a motion to strike Stephanie's rule for divorce pursuant to LSA-C.C.P. art. 964, alleging the motion was redundant and immaterial since he had already filed a rule to show cause why divorce should not be granted.

A hearing was held on Stephanie's motion for new trial, Dean's motion to strike Stephanie's rule to show cause, and rules to show cause for

divorce filed by both parties.[2] The trial court assigned written reasons on August 9, 2006, in which the trial court: denied the motion for new trial; declined to consider the merits of Stephanie's arguments that she was improperly served with Dean's petition for divorce because Stephanie did not file a declinatory exception raising the objection of improper service and waived her objections regarding service by filing an answer; granted Dean's petition for divorce; and struck Stephanie's rule to show cause. A judgment in conformity therewith was signed on September 12, 2006. Stephanie now appeals.

DISCUSSION

The judgment before us granted Dean a divorce pursuant to Article 102. The version of Article 102 applicable to these proceedings provided:[3]

> Except in the case of a covenant marriage, a divorce shall be granted upon motion of a spouse when either spouse has filed a petition for divorce and upon proof that one hundred eighty days have elapsed from the service of the petition, or from the execution of written waiver of the service, and that the spouses have lived separate and apart continuously for at least one hundred eighty days prior to the filing of the rule to show cause.
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> The motion shall be a rule to show cause filed after all such delays have elapsed.

The requirements of the rule to show cause are set forth in LSA-C.C.P. art. 3952, the applicable version of which provided:[4]

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[2] After the hearing and the deadline for filing post-trial memoranda, Stephanie filed a motion to dismiss Dean's petition with prejudice for failure to request service on her within ninety days, citing LSA-C.C.P. arts. 1201 and 1672(c). After the judgment of divorce that is the subject of this appeal was rendered, Dean excepted to Stephanie's motion to dismiss on the basis of res judicata. The trial court rendered a judgment sustaining the peremptory exception raising the objection of res judicata. That judgment is the subject of the companion appeal, **Esposito v. Esposito**, 07-0176 (La. App. 1 Cir. 11/2/07)(unpublished).

[3] Louisiana Civil Code article 102 was revised by Acts 2006, No. 743, §1. The revised article specifically applies only to actions filed on or after its effective date of January 1, 2007. There is no dispute that the proceedings before us are governed by the pre-revision text of the article.

The requirements of the rule to show cause are set forth in LSA-C.C.P. art. 3952, the applicable version of which provided: [4]

> The rule to show cause provided under Civil Code Article 102 shall allege proper service of the initial petition for divorce, that one hundred eighty days or more have elapsed since that service, and that the spouses have lived separate and apart continuously for the previous one hundred eighty days. The rule to show cause shall be verified by the affidavit of the mover and must be served on the defendant, the defendant's attorney of record, or the duly appointed curator for the defendant prior to the granting of the divorce, unless service is waived by the defendant.

Herein, Dean served Stephanie with the petition for divorce via Louisiana's Long Arm Statute while she was receiving inpatient medical treatment in Texas. The trial court determined that Stephanie waived any objection she may have to that service when she filed an answer that did not include a declinatory exception raising the objection of insufficiency of service of process. We agree that by filing her answer without pleading the declinatory exception, Stephanie submitted herself to the jurisdiction of the court. LSA-C.C.P. art. 6. However, the issue here is not whether the trial court properly exercised personal jurisdiction over Stephanie.

For a divorce to be granted pursuant to Article 102, Dean was required to prove that one hundred eighty days elapsed between the date Stephanie was served with the petition and the date he filed his rule to show cause. The fact that Stephanie answered the petition without filing a declinatory exception raising the objection of insufficiency of service of process did not relieve Dean of his burden of proving the elements set forth in Article 102. Although the requirements of service are procedural, in the case of a divorce, Louisiana law makes them absolutely mandatory.

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[4] Louisiana Code of Civil Procedure article 3952 was also revised by Acts 2006, No. 743, with revisions effective January 1, 2007.

Compare **Cobb v. Cobb**, 96-436 (La. App. 5 Cir. 11/26/96), 685 So.2d 342, 344-345.

It is mandatory that the rule to show cause alleges "proper service of the original petition for divorce." LSA-C.C.P. art. 3952. Herein, the rule alleges that Stephanie, who is undisputedly a Louisiana resident, was served via Louisiana's Long Arm statute. The Long Arm statute applies to service on *non-residents*. LSA-R.S. 13:3201. Thus, the rule is defective in that it does not allege "proper" service on Stephanie. Cf. **McFarland v. Dippel**, 99-0584 (La. App. 1 Cir. 3/31/00), 756 So.2d 618, 622, writ denied, 00-1794 (La. 9/29/00), 770 So.2d 349 (recognizing that personal jurisdiction over a Louisiana resident cannot be maintained without valid personal or domiciliary service as required by law).

Moreover, Article 102 requires proof that one hundred eighty days elapsed from the date the defendant was served with the petition. The proof of service contained in this record is in the form of an affidavit executed by a Dawn Marie Gaspard (later corrected by a second affidavit), with an attached exhibit. In the original affidavit, Ms. Gaspard attests:

> That affiant is the person who enclosed a Citation and Petition for Divorce in an envelope and mailed such on the 10th day of November, 2005, postage prepaid, by certified mail, article number 7004 2510 0007 4480 3357, addressed to Stephanie Esposito c/o Menninger Hope Unit, 2801 Gessner Drive, Houston, Texas 77080 and that the said envelope containing the Citation and Petition for Divorce, as shown on the printed Internet receipt, copy of which is attached hereto [sic]. The receipt clearly states the date and time of delivery of said envelope. The printed receipt regarding the envelope containing the citation and certified copy of the Citation and Petition for Divorce was obtained via Internet in the office of Prendergast Law Firm, Attorney, on the 16th day of January, 2005.

Some six months after executing the original affidavit, Ms. Gaspard executed a second affidavit in which she attested that the mailing date of November 10, 2005, set forth in the original affidavit, was incorrect and a typographical error, and that the mailing date was July 25, 2005.

Accompanying the original affidavit is a printout from the United State Postal Services website giving "track and confirm" results showing that label/receipt number 7004 2510 0007 4480 3357 was delivered. The receipt states, "Your item was delivered at 10:41 am on July 29, 2005 in HOUSTON, TX 77080. The item was signed for by E STEWART. A proof of delivery record may be available through your local Post Office for a fee."

We first note that Ms. Gaspard did not attest that she mailed the notice required by LSA-R.S. 13:3491 and LSA-R.S. 13:3204. Further, Ms. Gaspard did not specify that she mailed the citation and petition in these proceedings. Finally, Ms. Gaspard did not state the date of delivery, but instead refers to the printed internet receipt.

The printed internet receipt proves only that something bearing the same number given in the affidavit was delivered somewhere in Houston with the same zip code as the Menninger Hope Unit and was signed by someone named E. Stewart. Without detailing the numerous defects, we find that the track and confirm result printed from the internet is wholly insufficient to establish a date of service for purposes of Dean's burden of proving that one hundred eighty days had elapsed from the date of service.

Considering the foregoing, we find that Dean's rule to show cause why a divorce should not be granted failed to meet the requirements of Article 3952. Moreover, even if the rule to show cause was timely and met

the mandatory requirements of Louisiana's divorce law, we find that Dean failed to meet his burden of proof under Article 102.

Based on our conclusions herein, Stephanie's rule to show cause why a divorce should not be granted pursuant to her reconventional demand was neither redundant nor immaterial and should not have been stricken from the record.

CONCLUSION

For the foregoing reasons, the judgment appealed from is reversed. This matter is remanded to the trial court for further proceedings. Costs of this appeal are assessed to Dean Esposito.

REVERSED AND REMANDED.