NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1294

HARVEY A. KELLEY, JR.

VERSUS

STEVEN G. HALLER AND FLASH GAS & OIL SOUTHWEST, INC.

Judgment Rendered: March 23, 2012

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 2006-14395

The Honorable Peter J. Garcia, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal of a trial court judgment dismissing an action on the basis of abandonment. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

In 2004 Suit Number 2004-14606 was filed in the 22nd Judicial District Court, St. Tammany Parish, by Steven G. Haller against CTI Custom Finishes, LLC ("CTI"), Harvey A. Kelley, Jr., and Lisa P. Kelley (referenced herein as the "Haller suit"). In that suit, Mr. Haller alleged that the defendants were indebted to him in the amount of $23,834.84, along with interest, attorney fees, and all costs of the litigation. The Haller suit was based on two promissory notes executed in 1999 by CTI and guaranteed by the Kelleys. The Kelleys filed an answer and reconventional demand on November 19, 2004, asserting certain exceptions, alleging the obligations under the promissory notes were extinguished, and seeking a monetary judgment in their favor. The reconventional demand was based on contractual compensation allegedly due Mr. Kelley on services rendered to Mr. Haller (d/b/a Flash Gas & Oil Southwest Inc.) relative to several oil and/or gas wells (named therein as the "SL7260 No. 1 Well," the "Roche Well No. 3," and the "Good Hope GATX No. 4 Well"). A third party demand was later filed by the Kelleys, along with CTI, which further asserted that Mr. Haller also owed the third party plaintiffs additional sums related to the prior allegations and also with respect to the "GATX No. 3 Well" and the "Meadows Mill Field/Wayne County well."

On August 31, 2006 Harvey A. Kelley, Jr. filed the instant suit (Suit Number 2006-14395), also in the 22nd Judicial District Court, St. Tammany Parish, against Steven G. Haller and Flash Gas & Oil Southwest, Inc. (herein referred to jointly as "Haller/Flash"), alleging that the Haller/Flash

defendants owed him contractual compensation related to his efforts leading to the development of the following wells: S/N 229775 Pennington Well No. 1, S/N 232228 Pennington Well No. 2, and S/N 232471 Pennington Well No. 3 (referenced herein as the "Kelley suit"). The Haller/Flash defendants filed an answer and reconventional demand on October 5, 2006, denying the alleged debt, contending that Mr. Kelley's suit was frivolous, and seeking LSA-C.C.P. art. 863 penalties.

In order to secure a privilege on the wells at issue in the Kelley suit, on September 13, 2006 Mr. Kelley filed a "Statement of Privilege" in the public records for East Baton Rouge Parish, under the Oil Well Lien Act (LSA-R.S. 9:4861 et seq.). Thereafter, on February 23, 2007 Steven G. Haller and Flash Gas & Oil Southwest, Inc. filed suit in East Baton Rouge Parish against Mr. Kelley to have the lien dissolved (referenced herein as the "EBRP suit").[1]

In the Kelley suit, Mr. Kelley's deposition was taken on January 10, 2007,[2] and on September 25, 2009 a motion to substitute counsel was filed by the Haller/Flash defendants.[3] Thereafter, no further action was taken until March 19, 2010, when the Haller/Flash defendants filed an *ex parte* motion to dismiss the action on grounds of abandonment, which was granted by the trial court. On March 24, 2010 Mr. Kelley filed a motion to set aside the dismissal and, in the alternative, for new trial. Following a hearing on December 13, 2010, the trial court ruled that the prior order of dismissal was "well-founded," and Mr. Kelley's motion was denied. Mr. Kelley then filed

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[1] The EBRP suit is also currently on appeal before this court. See **Flash Gas & Oil Southwest, Inc. v. Kelley**, 2011 CA 1066.

[2] We note that Mr. Kelley's January 10, 2007 deposition would not have prevented the dismissal of the Kelley action for abandonment, since more three years passed from the time of its taking to the time the Haller/Flash defendants filed their March 19, 2010 motion to dismiss.

[3] Mr. Kelley does not contend the filing of the defendants' motion to substitute counsel constituted a step in the prosecution of the suit sufficient to prevent abandonment under LSA-C.C.P. art. 561.

the instant appeal, asserting the trial court erred: (1) in finding the parties intended to, and in fact did, abandon this case; (2) in finding no steps had been taken in the prosecution or defense of the case; (3) in failing to find that the Haller/Flash defendants had waived the right to assert abandonment "by representing to other courts that all the litigation between the parties was interconnected and that discovery obtained in one captioned matter could be used in another;" (4) in failing to find that the method by which the Haller/Flash defendants obtained the order of dismissal was a nullity and/or that the form of the order was null for improper form; and (5) in failing to apply the jurisprudential tenet of favoring the maintenance of an action over dismissal for abandonment.

LAW AND ANALYSIS

Generally, an action is abandoned when the parties fail to take any "step" in its prosecution or defense in the trial court for a period of three years. LSA-C.C.P. art. 561(A)(1). Article 561 abandonment is operative without formal order, but a trial court must enter a formal order of dismissal, as of the date of the abandonment, on the filing of an *ex parte* motion by any party or other interested person, who verifies by affidavit that no step has been timely taken in the prosecution or defense of the action. See LSA-C.C.P. art. 561(A)(3). Any formal discovery, as authorized by the Code of Civil Procedure, and served on all parties whether or not filed of record, including the taking of a deposition with or without formal notice, shall be deemed to be a "step" in the prosecution or defense of an action. LSA-

C.C.P. art. 561(B).[4]

A "step" is defined as taking formal action before the court, which is intended to hasten the suit toward judgment, or the taking of a deposition with or without formal notice. The step must be taken in the proceeding and, with the exception of formal discovery, must appear in the record of the suit. Lastly, the step must be taken within the legislatively prescribed time period of the last step taken by either party; sufficient action by *either* plaintiff or defendant will be deemed a step. **Clark v. State Farm Mutual Automobile Insurance Company**, 2000-3010, p. 6 (La. 5/15/01), 785 So.2d 779, 784. Whether or not a step in the prosecution of a case *has been taken* in the trial court for a period of three years is a question of fact subject to a manifest error analysis on appeal. On the other hand, whether a

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[4] Louisiana Code of Civil Procedure Article 561 provides:

> A. (1) An action, except as provided in Subparagraph (2) of this Paragraph, is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years, unless it is a succession proceeding:
> (a) Which has been opened;
> (b) In which an administrator or executor has been appointed; or
> (c) In which a testament has been probated.
>
> (2) Terminated by Acts 2007, No. 361, § 1, eff. Aug. 26, 2010.
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> (3) This provision shall be operative without formal order, but, on ex parte motion of any party or other interested person by affidavit which provides that no step has been timely taken in the prosecution or defense of the action, the trial court shall enter a formal order of dismissal as of the date of its abandonment. The sheriff shall serve the order in the manner provided in Article 1314, and shall execute a return pursuant to Article 1292.
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> (4) A motion to set aside a dismissal may be made only within thirty days of the date of the sheriff's service of the order of dismissal. If the trial court denies a timely motion to set aside the dismissal, the clerk of court shall give notice of the order of denial pursuant to Article 1913(A) and shall file a certificate pursuant to Article 1913(D).
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> (5) An appeal of an order of dismissal may be taken only within sixty days of the date of the sheriff's service of the order of dismissal. An appeal of an order of denial may be taken only within sixty days of the date of the clerk's mailing of the order of denial.
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> (6) The provisions of Subparagraph (2) of this Paragraph shall become null and void on August 26, 2010.
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> B. Any formal discovery as authorized by this Code and served on all parties whether or not filed of record, including the taking of a deposition with or without formal notice, shall be deemed to be a step in the prosecution or defense of an action.
>
> C. An appeal is abandoned when the parties fail to take any step in its prosecution or disposition for the period provided in the rules of the appellate court.

particular act, if proven, *precludes* abandonment, is a question of law that we review by determining whether the trial court's interpretative decision is correct. **Brown v. Kidney and Hypertension Associates, L.L.P.**, 2008-0919, p. 7 (La. App. 1 Cir. 1/12/09), 5 So.3d 258, 264.

In the instant case the facts are not in dispute; the dispositive question is whether as a matter of law a deposition taken in one action can serve as a "step" in the prosecution of a separate action filed in another judicial district. In accord with prior jurisprudence of this court, we hold that it does not. See **Id.**, 2008-0919 at pp. 11-12, 5 So.3d at 267; **Lemlem v. Adams**, 2004-0281, pp. 4-5 (La. App. 1 Cir. 2/11/05), 906 So.2d 481, 484. While a formal discovery notice served on all parties constitutes a step in the prosecution or defense of an action, the factual circumstances of the cases so stating all involved a single suit or judicially-consolidated suits, in contrast to the instant case where the discovery notice at issue was filed in a separate judicial district court from the one allegedly abandoned. See **Louisiana Department of Transportation and Development v. Oilfield Heavy Haulers, L.L.C.**, 2011-0912, p. 6 (La. 12/6/11), ___ So.3d ___ (2011 WL 6091272); **DeGruy v. Jenkins**, 2003-1797, pp. 5-6 (La. App. 4 Cir. 12/17/03), 863 So.2d 693, 696; **Brister v. Manville Forest Products,** 32,386, p. 3 (La. App. 2 Cir. 12/15/99), 749 So.2d 881, 883.

If the deposition at issue in this case had been intended for use in more than one case, the caption on the deposition notice and on the deposition itself could easily have contained a reference to both cases, but it did not. The deposition notice for Mr. Haller, as well as the *proces verbal* recording Mr. Haller's failure to appear for the deposition, contained only the caption of the 19th JDC EBRP suit, not the 22nd JDC Kelley suit.

Therefore, we find that the EBRP suit deposition notice did not prevent the running of the abandonment period for the 22nd JDC Kelley suit.

Nor do we find merit in Mr. Kelley's remaining arguments on appeal. We reject his contention that because a copy of his deposition, taken in connection with the instant suit, was filed as an attachment to a motion for summary judgment in the EBRP suit or that because the Haller/Flash litigants in the EBRP suit pled *lis pendens* citing the instant suit, his taking of a deposition in the EBRP suit prevented abandonment in this case. There is a distinction between the introduction of a deposition taken in one suit being introduced into evidence as a statement against interest, admission, *et cetera*, in another suit, and the denomination of a deposition as a step in an action for which it was neither noticed nor captioned. We further reject Mr. Kelly's assertion that Haller/Flash's actions constituted a waiver of abandonment, as all relevant events took place prior the accrual of abandonment; moreover, Mr. Kelly failed to prove his allegation that "Haller/Flash's plan all along was to hold plaintiff off until after the perceived date of abandonment." Lastly, we agree with Haller/Flash that, even if the signing of the initial dismissal order in this case by a duty judge, rather than the judge to whom this case had been randomly allotted, was not specifically authorized by LSA-C.C.P. art. 253.3 (which enumerates the orders or judgments a duty judge may sign), the issue became moot when the randomly allotted judge subsequently held a contradictory hearing on the matter, upon the filing of a motion for new trial by Mr. Kelly, and upheld the abandonment ruling. Accordingly, we find no error in dismissal of the Kelley suit on the basis of abandonment.

CONCLUSION

For the reasons stated herein, the judgment of the trial court is affirmed. All costs of this appeal are to be borne by appellant, Harvey A. Kelley, Jr.

AFFIRMED.