NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 1699

KAREN SUE FRAYCHINEAUD

VS.

SEAL, DAIGLE, & ROSS, L.L.C.

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JUDGMENT RENDERED: APR 16 2008

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ON APPEAL FROM THE
TWENTY-SECOND JUDICIAL DISTRICT COURT
DOCKET NUMBER 2005-12349, DIVISION E
PARISH OF ST. TAMMANY, STATE OF LOUISIANA

THE HONORABLE WILLIAM J. BURRIS, JUDGE

****

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SEALE, DAIGLE, & ROSS, L.L.C.

BEFORE: GAIDRY, MCDONALD AND MCCLENDON, JJ

McClendon, J. dissents and assigns reasons. (by JMM)

MCDONALD, J.

This is an employment discrimination suit brought by a legal secretary against a law firm under the provisions of La. R.S. 23:301, et seq., the Louisiana Employment Discrimination Law, particularly La. R.S. 23:303(C) and (D). The record before us indicates that the plaintiff's alleged injury occurred on November 15, 2002, and suit was filed on May 17, 2005. The defendants filed an exception of prescription. After a hearing, the trial court sustained the exception of prescription.

The Louisiana Employment Discrimination Law provides for a one-year prescriptive period; thus the suit was prescribed on its face. Therefore, the burden shifts to the plaintiff to prove that it has not prescribed. **Sadler v. Midboe**, 97-2120 (La. App. 1 Cir. 12/28/98), 723 So.2d 1076, 1082.

The plaintiff argues that she filed a timely petition, docket number 2003-15377,[1] on November 13, 2003 against these same defendants in the same court. That suit was dismissed on May 18, 2004 without prejudice when a dilatory exception of prematurity was sustained.[2] Plaintiff asserts that the filing of this first suit interrupted prescription, and therefore, the May 17, 2005, filing of the present suit was timely. A hearing on the exception of prescription was held on December 14, 2006. Each party argued its interpretation of the relevant statutes. The court sustained the exception of prescription with written reasons dated January 8, 2007, and a judgment dated February 15, 2007. The plaintiff appeals that judgment and makes two assignments of error:

1. The trial court erred in maintaining the defendant's exception of prescription based on an analogy to the Medical Malpractice Statute.

[1] The present suit has docket number 2005-12349.
[2] There is no indication that there was an appeal of the dismissal of this suit.

2. The trial court erred in misapplying the suspensive provisions in Subsection (D) to the provisions in Subsection (C) of La. R.S. 23:303.

Each of the parties makes arguments interpreting the provisions of the Louisiana Employment Discrimination Law in support of their position relative to the filing of the first suit. In its written reasons the court also interpreted these statutes. Subsection (C) and Subsection (D) are somewhat inconsistent. Subsection (D) sets a prescriptive period of one year, but provides for up to a six month suspension if there is an administrative review or investigation of the claim by the Equal Employment Opportunity Commission or the Louisiana Commission on Human Rights. Subsection (C) requires the aggrieved employee to give written notice to the employer at least 30 days prior to filing a suit in order for each side to make a good faith attempt to resolve the dispute. This creates a conundrum for the employee. If the employee waits more than eleven months after the alleged injury to send the letter to the employer, the claim will have prescribed during the 30 days. If the employee files suit prior to sending the letter, the suit is premature. Subsection (C) does not provide a period of suspension similar to that found in Subsection (D). It can be argued that following the requirements of Subsection (C) effectively reduces the prescriptive period from one year down to eleven months. However, it is not necessary for us to attempt to interpret and reconcile these subsections because of an evidentiary error in the present case.

The record before us contains no evidence of a first suit. There is no copy of a petition or judgment of dismissal and there are no minute entries concerning another suit. The trial court, in its written reasons, mentions the filing of a prior suit, but it is unclear what evidence the trial court relied upon to make its decision. The plaintiff filed a motion to supplement the

appeal record with a transcript of the hearing held on December 14, 2006. This motion was granted and a copy of the transcript is a part of the appellate record. This transcript, however, contains only the arguments of the attorneys for each side. There is no record of the introduction of any evidence. Assuming it could do so, there is also no indication that the trial court took judicial notice of any other records or suits filed with the Twenty-Second Judicial District Court.

Therefore, it was error for the court to consider any prior suit since there was no evidence in the record for the court to consider. The record before us indicates that this suit has prescribed on its face and the plaintiff has failed to offer proof that it has not prescribed. Although the trial court should not have considered facts not in evidence, the trial court reached the correct decision.

For these reasons the judgment of the trial court is affirmed. Costs are assessed against the plaintiff. This memorandum opinion is issued in compliance with the Uniform Rules - Courts of Appeal, Rule 2-16.1.B.

AFFIRMED.

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VERSUS

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****

McCLENDON, J., dissents, and assigns reasons.

The record here does not contain the first suit record or the 2004 judgment in that suit, which allegedly granted an exception of prematurity. In the interest of justice, I would remand for a hearing to determine whether the first suit record was accepted into evidence. If so, the record on appeal should be so supplemented. However, regardless of the outcome of the hearing, this appeal cannot be fairly decided until the record here is supplemented with a copy of the 2004 judgment, of which we can take judicial notice. See LSA-C.E. art. 202 and comments. For these reasons, I respectfully dissent.