

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0940

PRESTON PAYTON

VERSUS

REPUBLIC VANGUARD INSURANCE COMPANY,  
TEXAS GENERAL AGENCY, AND RANDY ANNY

Judgment rendered

FEB 03 2012

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Appealed from the  
23rd Judicial District Court  
in and for the Parish of Ascension, Louisiana  
Trial Court No. 96505  
Honorable Ralph Tureau, Judge

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DANIEL FRAZIER, JR.  
BATON ROUGE, LA

ATTORNEY FOR  
PLAINTIFF-APPELLANT  
PRESTON PAYTON

BRADLEY J. LUMINAIS, JR.  
METAIRIE, LA

ATTORNEY FOR  
DEFFENDANTS-APPELLEES  
REPUBLIC VANGUARD  
INSURANCE COMPANY, TEXAS  
GENERAL AGENCY, AND JOHN  
WILLIAMS, SR.

RANDY ANNY  
SORRENTO, LA

DEFENDANT-APPELLEE  
IN PROPER PERSON

\*\*\*\*\*

**BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.**

J.E.W.  
by 2/20

Welch, J. Concurs with the Results

**PETTIGREW, J.**

The primary issue in this case is whether any cause of action is stated in the "Petition To Enforce Settlement Agreement/For Damages For Breach Of Agreement/And For [Statutory] Penalties" filed by plaintiff-appellant, Preston Payton. The trial court concluded there was not and sustained the exceptions raising the objections of no cause of action, no right of action, and prescription filed by defendants-appellees, Republic Vanguard Insurance Company, Texas General Agency, and John Williams, Sr. ("defendants"), dismissing plaintiff's claims against defendants with prejudice. Mr. Payton has appealed. For the reasons that follow, we affirm in part but remand for further proceedings.

The objection that a petition fails to state a cause of action is properly raised by the peremptory exception. La. Code Civ. P. art. 927(A)(5). The purpose of the peremptory exception raising the objection of no cause of action is to test the legal sufficiency of a pleading by determining whether the law affords a remedy on the facts alleged in the pleading. **Ourso v. Wal-Mart Stores, Inc.**, 2008-0780, pp. 3-4 (La. App. 1 Cir. 11/14/08), 998 So.2d 295, 298, writ denied, 2008-2885 (La. 2/6/09), 999 So.2d 785.

Generally, no evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La. Code Civ. P. art. 931. However, as set forth in **City Nat. Bank of Baton Rouge v. Brown**, 599 So.2d 787, 789 (La. App. 1 Cir.), writ denied, 604 So.2d 999 (La. 1992), the jurisprudence recognizes an exception to this rule, which allows the court to consider evidence which is admitted without objection to enlarge the pleadings. **Treasure Chest Casino, L.L.C. v. Parish of Jefferson**, 96-1010, p. 5 (La. App. 1 Cir. 3/27/97), 691 So.2d 751, 754, writ denied, 97-1066 (La. 6/13/97), 695 So.2d 982. Otherwise, the exception is triable on the face of the pleadings, and, for the purposes of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. **Ourso**, 2008-0780 at 4, 998 So.2d at 298. The court must determine if the law affords plaintiff a remedy under those facts. **Stroscher v. Stroscher**, 2001-2769, p. 3 (La. App. 1 Cir.

2/14/03), 845 So.2d 518, 523. Any doubts are resolved in favor of the sufficiency of the petition. *Id.*

An exception of no cause of action is likely to be granted only in the unusual case in which the plaintiff includes allegations that show on the face of the petition that there is some insurmountable bar to relief. Thus, dismissal is justified only when the allegations of the petition itself clearly show that the plaintiff does not have a cause of action or when its allegations show the existence of an affirmative defense that appears clearly on the face of the pleadings. **Lyons v. Terrebonne Parish Consol. Government**, 2010-2258, p. 6 (La. App. 1 Cir. 6/10/11), 68 So.3d 1180, 1183.

The burden of demonstrating that a petition fails to state a cause of action is upon the mover. **Foti v. Holliday**, 2009-0093, p. 6 (La. 10/30/09), 27 So.3d 813, 817. In reviewing a district court's ruling sustaining an exception of no cause of action, appellate courts conduct a *de novo* review, because the exception raises a question of law, and the district court's decision is based only on the sufficiency of the petition. **Torbert Land Co., L.L.C. v. Montgomery**, 2009-1955, p. 4 (La. App. 1 Cir. 7/9/10), 42 So.3d 1132, 1135, writ denied, 2010-2009 (La. 12/17/10), 51 So.3d 16.

In the present case, Mr. Payton argues that his petition states a valid cause of action based on the settlement agreement entered into between him and defendants. Mr. Payton's petition contains the following pertinent factual allegations:

#### **VI.**

That on March 29, 2006, all defendants entered into a settlement agreement with petitioner wherein all defendants agreed to pay petitioner the full sum of Two Hundred Fifty Six Thousand, Seven Hundred Fourteen and 86/100 (\$256,714.86) as replacement payment for petitioner's drilling dredge and equipment that was destroyed by defendants or employees of defendants.

#### **VII.**

That instead of paying your petitioner directly, defendants, Republic Vanguard Insurance Company and Texas General Insurance Agency, Inc. made the settlement check payable to defendant, Randy Anny, who was allegedly obligated to pay your petitioner.<sup>[1]</sup>

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<sup>1</sup> Although Randy Anny made a general appearance in the form of an answer in this matter, he did not join with the other defendants in filing the exceptions that are at issue herein. Thus, he is not a party to the instant appeal. Moreover, according to the record, Mr. Payton's claims against Randy Anny remain outstanding.

### VIII.

That the check defendant, Randy Anny, used to pay your petitioner was drawn on an account ... that did not have sufficient funds to pay the amount of the check and has never had sufficient funds to pay the check given to petitioner in settlement of his claims.

In response to Mr. Payton's petition, defendants filed peremptory exceptions raising the objections of no cause of action, no right of action, and prescription. Defendants argued that there was no contractual relationship between them and Mr. Payton and that Mr. Payton simply had no cause or right of action for breach of contract or to enforce a contract against them. Defendants also maintained that Mr. Payton's only potential cause of action against defendants was delictual in nature and, as such, was prescribed as it was filed well over four years after the date of the accident in question.

Following a hearing on defendants' exceptions, the trial court rendered judgment on November 16, 2010, sustaining all three exceptions and dismissing, with prejudice, Mr. Payton's claims against defendants. It is from this judgment that Mr. Payton has appealed, assigning the following specifications of error:

1. The [L]ower Court erred in its failure to [recognize] that a settlement receipt and release agreement executed only by appellant and settlement check signed by defendant and appellees along with other written documents constitute a settlement agreement that is subject to court enforcement.
2. The Lower Court erred when it dismissed Appellant's lawsuit, with prejudice, and without allowing appellant an opportunity to amend his petition and cure all defects set forth in the exceptions filed by defendants/appellees.

At the hearing on the exceptions, various documents were introduced into evidence, including a copy of the settlement agreement.<sup>2</sup> On appeal, Mr. Payton argues that the documents submitted to the trial court, including the settlement agreement, Randy Anny's check in the amount of \$256,714.86, the check from Texas General Agency in the same amount, the letter from Texas General Agency to its insured, John Williams,

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<sup>2</sup> We note that when the documents were offered into evidence by Mr. Payton's attorney, the attorney for defendants objected to one document in particular, the affidavit of John Williams, arguing that Mr. Williams did not have personal knowledge of the information contained therein. The trial court overruled the objection, stating that it would "give the affidavit of Mr. Williams whatever credit it deserves."

indicating the claim had been settled, and the affidavit of John Williams establish an enforceable settlement agreement. In the alternative, Mr. Payton argues he should have been allowed to amend his petition to allege specific facts supporting the agency relationship between defendants and Randy Anny.

In response, defendants argue Mr. Payton has no cause of action as it is clear from the record that there was no contract or settlement agreement between them and Mr. Payton. Defendants maintain they did not sign the release, were not part of the negotiations leading up to the release, and did not issue any funds to Mr. Payton in connection with the release. Moreover, defendants assert that Randy Anny was not acting as their agent when he negotiated with Mr. Payton and that Mr. Payton should be precluded from raising the agency argument on appeal because he failed to make the allegation at the trial court level.<sup>3</sup>

There is no dispute between the parties that only Mr. Payton signed the settlement agreement in question. However, it is unclear from the record exactly what took place with regard to the investigation of the accident and the negotiations that led to the settlement agreement. Nonetheless, we agree with defendants that based on the well-pleaded facts in the petition, along with the evidence introduced at the hearing before the trial court, Mr. Payton has failed to state a cause of action against them for breach of contract or settlement agreement. Thus, the trial court properly sustained the peremptory exception raising the objections of no cause of action and no right of action as to Mr. Payton's claim. However, when the grounds of an objection pleaded by peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection raised through the exception cannot be so removed, the action shall be dismissed. La. Code Civ. P. art. 934. The decision to allow

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<sup>3</sup> We note that in defendants' appellate brief, they assign error to the trial court's failure to tax trial court costs against Mr. Payton. As defendants neither appealed from the trial court's judgment nor answered the instant appeal, this issue is not properly before us for review. La. Code Civ. P. art. 2133; **Augustus v. St. Mary Parish School Bd.**, 95-2498, p. 16 (La. App. 1 Cir. 6/28/96), 676 So.2d 1144, 1156.

amendment of a pleading to cure the grounds for a peremptory exception is within the discretion of the trial court. **Pearl River Basin Land and Development Co., L.L.C. v. State ex rel. Governor's Office of Homeland Sec. and Emergency Preparedness**, 2009-0084, p. 7 (La. App. 1 Cir. 10/27/09), 29 So.3d 589, 594.

At the hearing on the exceptions before the trial court, Mr. Payton's attorney argued that during the settlement negotiations with Mr. Payton, Randy Anny was acting as defendants' agent. Because it is possible that the grounds for defendants' no cause of action and no right of action objections may be removed by amendment, we must remand this matter to the trial court to permit Mr. Payton an opportunity to amend his petition, if he can, to set forth the necessary factual allegations concerning the agency relationship between defendants and Randy Anny so as to state a cause of action against defendants.

For the above and foregoing reasons, we affirm the trial court's judgment insofar as it sustained the peremptory exceptions pleading the objections of no cause of action and no right of action. Further, we order that this case be remanded to the trial court to allow Mr. Payton fifteen (15) days from the date this opinion becomes final in which to amend his petition so as to remove the grounds for the no cause of action and no right of action objections pursuant to Article 934, in default of which Mr. Payton's claims against defendants shall be dismissed.<sup>4</sup> All costs associated with this appeal are assessed to Mr. Payton. We issue this memorandum opinion in accordance with Uniform Rules--Courts of Appeal, Rule 2-16.1B.

**AFFIRMED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.**

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<sup>4</sup> Because we have concluded that the trial court was correct in sustaining the peremptory exceptions pleading the objections of no cause of action and no right of action and are remanding the matter to the trial court to allow Mr. Payton an opportunity to amend his petition, we preterm consideration of the prescription issue.