**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1575

STIRLING PROPERTIES, INC.

VERSUS

FBF #1, L.L.C.

Judgment Rendered: March 25, 2011

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2002-14756

Honorable William J. Burris, Judge

* * * * * * *

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

WELCH, J.

Carey L. "Bucky" Meredith, Jr. ("Meredith") appeals both a trial court judgment sustaining a dilatory exception raising the objection of unauthorized use of a summary proceeding and dismissing, without prejudice, his petition for garnishment and a subsequent rule to show cause against the garnishees, Raymond Fontaine, Jr. ("Fontaine"), Richard L. Blossman, Jr. ("Blossman"), and Brandon Faciane ("Faciane"), and a trial court judgment denying Meredith's motion for new trial and dismissing his action based on abandonment. Also before us is a motion to dismiss suspensive appeal, a peremptory exception raising the objections of no cause of action and no right of action, and an answer to appeal filed by FBF#1, L.L.C. ("FBF"). For reasons that follow, we deny the motion to dismiss suspensive appeal and answer to appeal, we affirm the judgment of the trial court sustaining the dilatory exception of unauthorized use of a summary proceeding and dismissing Meredith's petition and rule to show cause without prejudice, we affirm the judgment of the trial court denying the motion for new trial, and we decline to consider the peremptory exception.

## FACTUAL AND PROCEDURAL HISTORY

The factual and procedural history of this case is set forth in this court's previous opinion in this matter, **Stirling Properties, Inc. v. FBF #1, L.L.C.**, 2005-1744 (La. App. 1st Cir. 9/15/06) (*unpublished opinion*). In sum, this suit was initially instituted as one for the payment of a real estate commission by Stirling Properties, Inc. ("Stirling"), the real estate agent, against FBF, the property owner, arising out of the sale of approximately twenty-three acres of commercial property in St. Tammany Parish. The matter was tried and a judgment was rendered on August 31, 2004, in favor of Stirling, awarding it a commission in the amount of $59,250.00, attorney fees in the amount of $8,887.00, and legal interest from the date of demand until paid. FBF

devolutively appealed the judgment on the issue of whether Stirling was entitled to a real estate commission pursuant to the exclusive listing agreement with FBF. The resolution of that issue hinged on the factual determination of whether Meredith, the designated exclusive broker on behalf of Stirling, submitted the property to the buyers during the effective term of the listing agreement, thus activating an extension clause in the agreement and entitling Stirling to a commission. This court found the trial court's conclusion that Stirling was entitled to a commission was based on sufficient evidence and affirmed the August 31, 2004 judgment of the trial court. **Stirling Properties, Inc.**, 2005-1744 at p. 6.

Prior to FBF's motion to appeal the August 31, 2004 judgment, on October 15, 2004, Stirling filed a motion to examine judgment debtor. Thereafter, FBF devolutively appealed the judgment. While the appeal of the August 31, 2004 judgment was pending, on November 3, 2005, Stirling and Meredith filed, and the trial court subsequently granted, an *ex parte* motion to substitute Meredith as the party plaintiff.[1] This motion to substitute was based on an assignment of the judgment from Stirling to Meredith dated October 26, 2004.[2]

On June 3, 2005, Meredith filed a petition for garnishment. In this petition, Meredith alleged that he had requested that a writ of *fieri facias* be

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[1] In **Stirling Properties, Inc.**, 2005-1744, FBF assigned error to the trial court's action in granting the motion to substitute Meredith as the party plaintiff after final judgment had been rendered. This court pretermitted discussion of the issue since the trial court's post-appeal action had no bearing on the final judgment that was before us. *Id.* at p. 6.

[2] On December 23, 2004, in a separate proceeding and based on the previous assignment of interest from Stirling to Meredith, FBF filed a petition seeking the annulment of the August 31, 2004 judgment or alternatively petition for redemption of litigious right, based on the allegation that Stirling did not appear to have been a party in interest at the time of trial and that this was deliberately withheld from both the trial court and FBF. No issues with regard to that suit are before us in this appeal.

issued to enforce the August 31, 2004 judgment against FBF,[3] that Fontaine, Blossman, and Faciane were the sole owners and managers of FBF and that Fontaine, Blossman, and Faciane were "indebted to FBF as a result of their having received unauthorized and illegal distributions from FBF." Meredith requested that Fontaine, Blossman, and Faciane be cited as garnishees and ordered to answer under oath and in writing the attached interrogatories. The garnishment interrogatories propounded to the garnishees pertained to the garnishees' membership in FBF and distributions or payments made by FBF to each garnishee.

In response to the petition for garnishment and its accompanying interrogatories, on July 8, 2005, Fontaine, Blossman, and Faciane filed an answer, objection, exception, and motion for protective order on the basis that the interrogatories exceeded the scope of proper garnishment interrogatories, were harassing, and were an improper attempt to accomplish a judgment debtor examination of them, when they were not the judgment debtor or otherwise parties to the litigation. Nevertheless, Fontaine, Blossman, and Faciane answered that they did not have in their possession any assets belonging to FBF and requested that a protective order be issued against Stirling and Meredith prohibiting further action on the garnishment interrogatories.

On August 16, 2005, Meredith filed a rule to show cause making the following allegations:

> A judgment was signed in these proceedings in favor of [Stirling] against the defendant [FBF] signed on August 31, 2004 in the principal amount of $59,250.00. Subsequently, on October 26, 2004, Stirling transferred and assigned the judgment to Meredith.
>
> 2.
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> Defendant FBF has not requested or perfected a suspensive

[3] A writ of *fieri facias* was issued to the Sheriff of St. Tammany Parish on June 3, 2005, which directed the seizure and sale of property of FBF for the amount of the August 31, 2004 judgment.

appeal of said judgments and the judgment has become executory.

3.

By letter addressed to the Clerk of Court for the 22nd JDC counsel for Meredith requested the Clerk to issue a Writ of [Fieri] Facias to be served with garnishment interrogatories on three named individuals, namely, [Faciane], [Fontaine], and [Blossman] ("Garnishees").

4.

On July 8, 2004[,[4]] Garnishees filed herein a pleading entitled Answer, Objection, Exception, and Motion for Protective Order and Incorporated Memorandum in Support. ("Garnishee's Pleadings" [*sic*])

5.

The Garnishees' Pleading does not provide answer's [*sic*] to the propounded interrogatories. Instead[,] the Garnishees Pleadings [*sic*] raises several unfounded, inaccurate[,] and irrelevant objections to the Interrogatories. The Garnishees Pleadings [*sic*] also asks that a protective order be issued to prevent "further action" pursuant to the Interrogatories.

6.

Under the provisions of [La. C.C.P. art.] 2413, Mover, Meredith, as the judgment creditor is now entitled to proceed by contradictory motion against the Garnishees for the amount of the unpaid judgment, with interest and costs, and attorney fees for having to file this motion.

WHEREFORE, mover, [Meredith] prays that [Faciane], [Fontaine], and [Blossman] show cause why judgment should not be rendered herein against them, in solido, for the full amount of the judgment rendered herein against [FBF] together with interest, costs[,] and attorney fees.

A hearing on the rule to show cause was eventually scheduled for November 9, 2005. Prior to that hearing, on November 7, 2005, Fontaine, Blossman, and Faciane, each filed supplemental answers to the garnishment interrogatories. Thereafter, the hearing on the rule to show cause was continued to December 21, 2005.

On December 2, 2005, Fontaine, Blossman, and Faciane filed a

[4] We note that this pleading was actually filed on July 8, 2005.

peremptory exception raising the objections of no cause of action and no right of action and a dilatory exception raising the objection of unauthorized use of a summary proceeding. In the exceptions, Fontaine, Blossman, and Faciane asserted that Meredith was attempting to obtain a judgment against them through the rule to show cause, which was in effect a motion to traverse their answers to interrogatories that were filed in this matter. They further asserted that the attempted use of a motion to traverse was not authorized under Louisiana law, thereby asserting their objections of unauthorized use of a summary proceeding, no cause of action and no right of action. On January 25, 2006, Meredith filed a traversal to the November 7, 2005 supplemental answers to the garnishment interrogatories.

Although a hearing on both the exceptions and the rule to show cause was scheduled several times, on May 16, 2006, those matters were continued without date. On February 21, 2008, Fontaine, Blossman, and Faciane filed answers to supplemental and amending garnishment interrogatories.

On October 13, 2009, Meredith filed a motion to reset his rule to show cause and Fontaine, Blossman, and Faciane's exceptions. Fontaine, Blossman, and Faciane responded by filing a motion to dismiss the garnishment action on the grounds of abandonment under La. C.C.P. art. 561, alleging that Meredith's last step taken in the prosecution of the garnishment action was taken on December 21, 2005.

After a hearing on February 18, 2010, the trial court sustained the dilatory exception of unauthorized use of a summary proceeding and dismissed, without prejudice, Meredith's garnishment proceeding and his rule to show cause. The trial court did not consider Fontaine, Blossman, Faciane's motion to dismiss on the grounds of abandonment or their peremptory exception raising the objections of no cause of action and no right of on the basis that it considered those

pleadings moot. A written judgment in conformity with the trial court's ruling was signed on March 19, 2010.

On April 1, 2010, Meredith filed a motion for new trial, which the trial court denied on May 19, 2010. In its reasons for judgment, the trial court denied the motion for new trial for the same reason it previously sustained the dilatory exception raising the objection of unauthorized use of a summary proceeding; however, at the end of the "order" or judgment denying the motion for new trial, the trial court stated that the petition for garnishment was dismissed without prejudice "on the grounds of abandonment."[5] Meredith has suspensively appealed both the March 19, 2010 and the May 19, 2010 judgments.

On appeal, Meredith asserts that the trial court erred in sustaining the dilatory exception of unauthorized use of a summary proceeding, in failing to allow him the opportunity to amend his pleading prior to dismissal, and in denying his motion for new trial. FBF has filed with this court a motion to dismiss the suspensive appeal and a peremptory exception raising the objections of no cause of action and no right of action. Additionally, FBF has filed an answer to appeal, seeking only the same relief sought in its motion to dismiss suspensive appeal.[6]

**MOTION TO DISMISS APPEAL AND ANSWER TO APPEAL**

FBF has filed with this court a motion to dismiss this appeal by Meredith and an answer to appeal, that seeks the same relief as the motion to dismiss.

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[5] We do not know if this was inadvertent (as the trial court initially declined to address the motion to dismiss on the grounds of abandonment because it was moot) or if it was an additional basis for the dismissal without prejudice (as the motion for new trial was submitted on memoranda and FBF, Fontaine, Blossman, and Faciane again raised the issue of abandonment in their memorandum in opposition to the motion for new trial). As Meredith has appealed and assigned error to the trial court's denial of the motion for new trial and FBF has filed a motion to dismiss the suspensive appeal based, among other things, on abandonment, we will address this issue herein.

[6] We note that the pleading filed in this court was actually entitled "Answer and Cross Appeal" and that FBF refers to itself in its briefs with this court as "cross appellant." However, the record before us does not reflect that FBF has perfected an appeal or cross appeal of the judgment. Rather, they simply answered the appeal.

FBF seeks to dismiss the appeal on the basis that the garnishment proceeding was abandoned under La. C.C.P. art. 561. FBF also seeks to dismiss the appeal on the basis that: (1) "there is no right to appeal the judgment or the order," (2) "the history of this case shows the appeal should be dismissed," and (3) "a new suit cannot be filed after a final judgment in a record where the proceedings have been abandoned."

*Abandonment*

As previously noted, although the trial court in the March 19, 2010 judgment declined to address the issue of abandonment because it was moot, in the May 19, 2010 judgment denying the motion for new trial, the trial court dismissed the garnishment proceeding and rule to show cause based on abandonment. FBF has raised the issue of abandonment in a motion to dismiss "to obtain [a] formal ruling recognizing" the purported abandonment of Meredith's action. Essentially, FBF contends that there was no step taken in the prosecution of the garnishment for three years after Fontaine, Blossman, and Faciane filed supplemental answers to the garnishment interrogatories. Thus, FBF contends when Meredith filed his October 13, 2009 motion to reset the pending rule to show cause and dilatory and peremptory exceptions, his action was abandoned.

Abandonment of an action is governed by La. C.C.P. art. 561, which provides, in pertinent part:

> A. (1) 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, unless it is a succession proceeding[.]

Louisiana Code of Civil Procedure article 561 has been construed as imposing three requirements on plaintiffs. First, plaintiffs must take some "step" towards prosecution of their lawsuit. In this context, 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.[7] **Clark v. State Farm Mutual Automobile Insurance Company**, 2000-3010, pp. 5-6 (La. 5/15/01), 785 So.2d 779, 784. Second, the step must be taken in the proceeding and, with the exception of formal discovery, must appear in the record of the suit. Third, 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**, 2000-3010 at p. 6, 785 So.2d at 784.

In this case, prior to Meredith's October 13, 2009 motion to reset the pending rule to show cause and dilatory and peremptory exceptions, the last action in the record was the February 21, 2008 answers to supplemental and amending garnishment interrogatories filed by Fontaine, Blossman, and Faciane, and a February 7, 2008 motion by Meredith to enroll additional counsel of record. Prior to that, the last action in the record was a January 25, 2006 traversal to the November 7, 2005 answers to supplemental interrogatories.[8] Thus, because Meredith's October 13, 2009 motion to reset was taken within three years of the last step taken by Fontaine, Blossman, and Faciane, Meredith's garnishment action was not abandoned. Accordingly, we deny FBF's motion to dismiss suspensive appeal on the basis of abandonment.

*Remaining Issues in Motion to Dismiss*

With regard to FBF's first contention that Meredith does not have the right to appeal the judgment, FBF essentially argues that the appeal should be

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7 See La. C.C.P. art. 1446(D) and 1474(C)(4).

8 We note however, that there are several unopposed motions to continue, the last of which was a joint motion to continue without date. We do not consider these joint motions to continue as steps in the prosecution of the case for purposes of abandonment. See **Hutchison v. Seariver Maritime, Inc.**, 2009-0410, p. 6 (La. App. 1st Cir. 9/11/09), 22 So.3d 989, 994, writ denied, 2009-2216 (La. 12/18/09), 23 So.3d 946 (a joint motion to continue without date or indefinitely is not considered a step in the prosecution of a case, since by its very nature, an *indefinite* continuance is not intended to hasten the matter to judgment).

dismissed because the ruling at issue—a judgment of dismissal without prejudice—is not a final, appealable judgment or is an interlocutory ruling.[9]

Generally, a judgment of dismissal with or without prejudice terminates the subject lawsuit. When the dismissal is entered without prejudice, the cause of action is unaffected. See La. C.C.P. art. 1673. A judgment of dismissal without prejudice is appealable if it involves an involuntary dismissal without prejudice. **Yamaha Motor Corporation, U.S.A. v. Bonfanti Industries, Inc.**, 589 So.2d 575, 579 n.7 (La. App. 1st Cir. 1991); see also **Dusenbery v. McMoRan Exploration Co.**, 425 So.2d 249, 251 (La. App. 1st Cir. 1982) (noting that a judgment of dismissal without prejudice is a final judgment and therefore is appealable; the exception to this rule occurs when a party voluntarily obtains a judgment of dismissal without prejudice, then there is no right to an appeal because the party acquiesced in the judgment).

The March 19, 2010 judgment at issue sustained a dilatory exception of unauthorized use of a summary proceeding and dismissed the garnishment proceedings and rule to show cause without prejudice. The trial court's reasons for judgment reflect that Meredith was not granted the opportunity to amend his petition, but rather had to file a new proceeding. Thus, the judgment was an involuntary judgment of dismissal without prejudice. It is therefore, a final appealable judgment, which Meredith has the right to appeal.

FBF's remaining bases for its motion to dismiss appeal (and answer to appeal) are that the history of the case shows that the appeal should be dismissed

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[9] FBF asserts that "[t]he trial court in this matter has twice opined that the 'rule to show cause' filed August 16, 2005, in the garnishment action asserted new causes of action in a new suit against new defendants ... although in some limited instances, a writ application may be taken to, and considered by the court of appeal, there is no irreparable injury in this case by finding that a new suit must be brought to assert the claims which Meredith asserted on August 16, 2005. ... The [t]rial [c]ourt found that a new suit should be filed to assert the claims of Meredith ... in a new venue, on these new causes of action against the new defendants. ... However, that is not good grounds to find irreparable injury exists or that a suspensive appeal should be granted."

and that a new suit cannot be filed after final judgment in a record where the proceedings have been abandoned. However, we find that these issues pertain to the merits of Meredith's appeal, as well as the peremptory exceptions previously filed in the trial court (and in this court) and therefore, are not properly raised in a motion to dismiss appeal. To the extent that those issues pertain to the motion to dismiss on grounds of abandonment, we have already addressed those issues and concluded that Meredith's action for garnishment was not abandoned. Accordingly, we deny FBF's motion to dismiss the suspensive appeal and deny its answer to appeal seeking the same relief.

**MERITS OF MEREDITH'S APPEAL**

On appeal, Meredith asserts that the trial court erred in sustaining the dilatory exception raising the objection of unauthorized use of a summary proceeding and in dismissing his petition and rule to show cause (without prejudice), as the trial court was required, under La. C.C.P. art. 933, to allow him to amend his action to clarify that he was proceeding *via ordinaria.* Meredith also asserts that the trial court's refusal to grant his motion for new trial was erroneous because it appeared, through the trial court's reasons for judgment, that a new trial was denied based on the fact that his petition had been filed in the same proceeding as the underlying suit for the real estate commission, and to the extent he (Meredith) may have failed to comply with La. C.C.P. art. 853 by designating an incorrect number and title to his action, that nonconformity was waived by FBF's failure to object.

First and foremost, we note that Meredith's entire argument on appeal is premised on his contention that his original petition for garnishment and/or the subsequent rule to show cause, actually asserts a "revocatory" or "oblique" action against FBF, Faciane, Blossman, and Fontaine for allegedly illegal distributions in violation of La. R.S. 12:1328, and citing the well established

principal that a pleading is governed by its substance, not its caption.[10]

The oblique action is set forth in La. C.C. art. 2044, and provides:

> If an obligor causes or increases his insolvency by failing to exercise a right, the obligee may exercise it himself, unless the right is strictly personal to the obligor.
>
> For that purpose, the obligee must join in the suit his obligor and the third person against whom that right is asserted.

In this oblique action, the creditor exercises a right belonging to the debtor in the debtor's name. **Louisiana Lift & Equipment, Inc. v. Eizel**, 33,747, p. 7 (La. App. 2nd Cir. 11/1/00), 770 So.2d 859, 864.

The revocatory action derives from La. C.C. art. 2036, which provides that "[a]n obligee has a right to annul an act of the obligor, or the result of a failure to act of the obligor, made or effected after the right of the obligee arose, that causes or increases the obligor's insolvency." "An obligor is insolvent when the total of his liabilities exceeds the total of his fairly appraised assets." La. C.C. art. 2037. See also **Parish National Bank v. Wilks**, 2004-1439, p. 7 (La. App. 1st Cir 8/3/05), 923 So.2d 8, 13.

In accordance with the clear language of La. C.C. art. 2036, in order for an obligee to annul an act of the obligor, he must show: (1) an act (or failure to act) of the obligor that causes or increases the obligor's insolvency; and (2)that the act must occur after the obligee's rights arose. **Parish National Bank**, 2004-1439 at p. 10, 923 So.2d at 15. Additionally, the jurisprudence requires that the obligee must prove prejudice, injury, or damage to the obligee as a result of the act. *Id.*

We have carefully reviewed the allegations set forth in Meredith's

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[10] See **Warner v. Warner**, 2002-1380, p. 4 (La. App. 1st Cir. 8/13/03), 859 So.2d 146, 149 (the title on a pleading is not controlling as our courts look through the caption, style, and form of pleadings to determine, from the substance of the pleading, the nature of the proceeding) and **Rochon v. Young**, 2008-1349, p. 3 (La. App. 1st Cir. 2/13/09), 6 So.3d 890, 892, writ denied, 2009-0745 (La. 1/29/10), 25 So.3d 824, cert. dismissed, 130 S.Ct. 3325, 176 L.Ed.2d 1216 (2010) (a pleading is construed for what it really is, not for what it is erroneously called).

petition for garnishment and the subsequent rule to show cause and simply cannot conclude that the substance of either of those pleadings sets forth either an oblique action or a revocatory action. Instead, based on our review, we find that the relief requested is the same as suggested by the caption of the petition—an action for garnishment.

Louisiana Code of Civil Procedure article 2411, providing for garnishment under a writ of *fieri facias*, provides that the "judgment creditor, by petition and after the issuance of a writ of fieri facias, may cause a third person to be cited as a garnishee to declare under oath what property he has in his possession or under his control belonging to the judgment debtor and in what amount he is indebted to him" and to "require the third person to answer categorically and under oath the interrogatories annexed to the petition...."

In the petition for garnishment, Meredith asserted that he requested that a writ of *fieri facias* be issued to enforce the August 31, 2004 judgment against FBF; he cited Fontaine, Blossman, and Faciane—third parties as they were not parties to the original proceeding—as garnishees on the basis that they were "indebted" to FBF because they received illegal distributions, and requested that Fontaine, Blossman, and Faciane answer to garnishment interrogatories annexed to the petition. Thus, all of these allegations pertain to garnishment under a writ of *fieri facias*, not a revocatory or oblique action. In the subsequent rule to show cause, Meredith requested judgment against Fontaine, Blossman, and Faciane under La. C.C.P. art. 2413, which addresses the effects of the garnishee's failure to answer to annexed interrogatories.

Furthermore, Meredith did not assert in either pleading that there was an act, failure to act, or failure to exercise a right that caused or increased FBF's insolvency (or even that FBF was insolvent)—a necessary element to either an

oblique action or a revocatory action.[11] Also, Meredith did not assert that he wished to revoke an act (or failure to act)—a necessary element of a revocatory action—or that he wished to exercise a right of FBF—a necessary element to an oblique action. Lastly, Meredith did not allege that he was prejudiced, injured, or damaged as a result of the act or failure to act—again a necessary element of a revocatory action.

Additionally, we note under the provisions of La. C.C. art. 2036 and 2044 that FBF, as the "obligor" judgment debtor would be a necessary party to any oblique or revocatory action, and FBF was not named as a defendant in either the petition for garnishment or the subsequent rule to show cause. Instead, Meredith cited only Fontaine, Blossman, and Faciane individually as third party garnishees.

Hence, Meredith's petition is properly treated as a petition for garnishment, and the issues raised in this case are governed by La. C.C.P. arts. 2411, *et seq*., pertaining to garnishment under a writ of *fieri facias*.

A garnishment proceeding is nothing more than a streamlined legal process for obtaining the seizure of property of a judgment debtor in the hands of a third party. **All Star Floor Covering, Inc. v. Stitt**, 2000-2049, p. 4 (La. App. 1st Cir. 11/14/01), 804 So.2d 705, 708, writs denied, 2002-0406, 2002-0421 (La. 4/19/02), 813 So.2d 1085 and 1088. The test of a garnishee's liability to the judgment creditor is whether he has in his possession the principal debtor's property, funds, or credits for the recovery of which the debtor has a

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[11] We note that in Meredith's "Memorandum in Support of Rule to Show Cause and in Opposition to Pleadings Filed by Garnishees," he asserted that the deposition of Blossman, taken on November 23, 2004, "disclosed" that Fontaine, Blossman, and Faciane "are all the owners of FBF and that Garnishees have caused FBF to make distribution of its assets (cash) to the Garnishees to the extent that FBF has been rendered incapable of satisfying the judgment in favor of Stirling which is now owned by Meredith." However, a memorandum, opposition, or brief is not a pleading. **Vallo v. Gayle Oil Company, Inc.**, 94-1238 (La. 11/30/94), 646 So.2d 859, 865. To the extent that this statement can be construed as an allegation that FBF is insolvent, it was raised in a memorandum and not a pleading. Accordingly, we conclude that FBF's purported insolvency was not raised in any pleading filed by Meredith.

present subsisting cause of action. *Id.* It is the garnishee's duty to answer all proper interrogatories and to make all proper disclosures concerning property of the debtor in his possession. *Id.* The garnishee shall file his sworn answers to interrogatories within fifteen days from the date of the service of the petition for garnishment and interrogatories. La. C.C.P. art. 2412(D).

If the garnishee fails to answer within the delay provided by La. C.C.P. art. 2412, the judgment creditor may proceed by contradictory motion against the garnishee for the amount of the unpaid judgment. La. C.C.P. art. 2413. In other words, the failure of the garnishee to file an answer within the delay provided by law results in the plaintiff being entitled to seek a judgment *pro confesso* against the garnishee. **All Star Floor Covering, Inc.**, 2000-2049 at p. 4, 804 So.2d 705 at 708.

Once the judgment creditor receives written notice that the garnishee's answers have been filed, unless the creditor files a contradictory motion traversing the answer of the garnishee within fifteen days after service, any property of the judgment debtor in the possession of the garnishee and any indebtedness to the judgment debtor which the garnishee has not admitted holding or owing shall be released from seizure. La. C.C.P. art. 2414.

As previously noted in this case, Meredith filed a petition for garnishment on June 3, 2005, and on July 8, 2005,[12] Fontaine, Blossman, and Faciane filed objections to the garnishment interrogatories, but answered, in general, that they did not have possession of any assets belonging to FBF. Nevertheless, on August 16, 2005, Meredith filed a rule to show cause seeking relief under La. C.C.P. art. 2413, *i.e.*, judgment *pro confesso*. Fontaine, Blossman, and Faciane, responded by filing, among other things, a dilatory exception raising the

[12] The record does not disclose the date of service of the petition for garnishment and its annexed interrogatories on Fontaine, Blossman, and Faciane. Therefore, we do not know if this objection and answer was timely filed. However, the answer was filed before Meredith's rule to show cause (motion for judgment *pro confesso*).

objection of unauthorized use of a summary proceeding, which the trial court sustained and dismissed Meredith's petition for garnishment and rule to show cause, without prejudice. Meredith asserts that the trial court erred in sustaining the exception and in not allowing him the opportunity to amend his petition.

Louisiana Code of Civil Procedure article 926(A)(3) provides for the dilatory exception raising the objection of unauthorized use of a summary proceeding. Louisiana Code of Civil Procedure article 933(B) sets forth the effect of sustaining a dilatory exception, such as one raising the objection of unauthorized use of a summary proceeding, as follows:

> B. When the grounds of the other objections pleaded in the dilatory exception may be removed by amendment of the petition or other action by plaintiff, the judgment sustaining the exception shall order plaintiff to remove them within the delay allowed by the court; and the action, claim, demand, issue or theory subject to the exception shall be dismissed only for a noncompliance with this order.

In this case, we find that the trial court properly sustained the dilatory exception raising the objection of unauthorized use of a summary proceeding. Meredith commenced a very limited legal proceeding seeking the seizure of property of FBF in the possession of Fontaine, Blossman, and Faciane. Fontaine, Blossman, and Faciane answered that they did not have possession of any property belonging to FBF. Since Fontaine, Blossman, and Faciane filed an answer, Meredith's subsequent rule to show cause, essentially seeking judgment *pro confesso* against them under La. C.C.P. art. 2413, was not authorized. To the extent that Meredith's subsequent rule to show cause could be construed as a traversal to Fontaine, Blossman, and Faciane's answer, we likewise find that it was not authorized because it was not filed within the delays provided for in La. C.C.P. art. 2414. Furthermore, because Meredith did not timely traverse those answers, any property that might have been subject to seizure was released.

We also find no error in the trial court's decision to dismiss the petition

for garnishisment and rule to show cause without prejudice, rather than allowing Meredith the opportunity to amend his petition. The relief requested by Meredith in the rule to show cause was not authorized and there was no further relief available to Meredith under the petition for garnishment. Thus, the grounds for the objection of unauthorized use of a summary proceeding could not be removed by amendment of the pleadings. Lastly, because we find the trial court properly sustained the exception and dismissed the petition for garnishment and rule to show cause without prejudice, we find no abuse of the trial court's discretion in denying Meredith's motion for new trial.[13]

Accordingly, both the March 19, 2010 judgment of the trial court (sustaining the exception and dismissing the action without prejudice) and the May 19, 2010 judgment denying Meredith's motion for new trial are affirmed.

**PEREMPTORY EXCEPTION**

In the peremptory exceptions raising the objections of no cause of action and no right of action filed with this court, FBF asks this court to also address the peremptory exceptions raising the objections of no cause of action and no right of action filed in the trial court. The exceptions were not considered by the trial court on the basis that they were moot.

Louisiana Code of Civil Procedure article 2163 provides that "[t]he appellate court *may* consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record." In light of our decision herein

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[13] As previously noted, the May 19, 2010 judgment denied the motion for new trial and dismissed the garnishment action and rule to show cause based on abandonment. However, we have determined hereinabove that the action was not abandoned. Nevertheless, it is well settled that appeals are taken from the judgment of the trial court, not its reasons for judgment, and if the trial court reached the proper result, the judgment should be affirmed. **Elliott v. Elliott**, 2010-0755, p. 14 (La. App. 1st Cir. 9/10/10), 49 So.3d 407, 416 n.3, writ denied, 2010-2260 (La. 10/27/10), 48 So.3d 1088. Thus, because the trial court reached the proper result by denying the motion for new trial, the judgment is affirmed regardless of the reasons for judgment.

affirming the judgments of the trial court, we decline to consider FBF's peremptory exception raising the objections of no cause of action and no right of action.

## CONCLUSION

For all of the above and foregoing reasons, we deny the motion to dismiss suspensive appeal and the answer to appeal seeking the same relief. The March 19, 2010 and May 19, 2010 judgments of the trial court are affirmed. Lastly, we also decline to consider FBF's peremptory exception raising the objections of no cause of action and no right of action.

All costs of this appeal are assessed to the plaintiff/appellant, Carey L. "Bucky" Meredith, Jr.

**MOTION TO DISMISS SUSPENSIVE APPEAL DENIED; ANSWER TO APPEAL DENIED; PEREMPTORY EXCEPTION RAISING THE OBJECTIONS OF NO CAUSE AND NO RIGHT OF ACTION NOT CONSIDERED; MARCH 19, 2010 JUDGMENT AFFIRMED; MAY 19, 2010 JUDGMENT AFFIRMED.**