

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0602

SUCCESSION OF ARMOND JAY KEEN

Judgment Rendered: MAR 23 2007

On Appeal from the Twenty-First Judicial District Court
In and For the Parish of Tangipahoa
State of Louisiana
Docket No. 2000-030363

Honorable Ernest G. Drake, Jr., Judge Presiding

Linda R. Keen
Loranger, LA

Appellant
In Proper Person

Brenda Braud
Hammond, LA

Intervenor/Appellee
In Proper Person

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

*PMC
Gaud
RHS*

McCLENDON, J.

In this succession matter, the wife of the deceased appeals the judgment of the trial court, which ruled on several motions. For the following reasons, we dismiss the appeal in part. Additionally, due to the trial court's failure to rule on outstanding motions to recuse prior to ruling on a motion for new trial and a motion to nullify, we must vacate the denial of the motions and remand.

FACTS AND PROCEDURAL HISTORY

Linda R. Keen, the wife of the deceased and the appellant in this matter, retained the legal services of Brenda Braud of Braud & Braud (Braud) in several domestic matters. Braud's legal services for these matters were billed on an hourly basis. Later, Keen signed a contingency fee contract with Braud for representation in her marital portion claim against the Succession of Armond Jay Keen. The representation of Keen by Braud ultimately resulted in Braud intervening in the succession proceeding to obtain payment for her legal services. As a result, Braud obtained a \$7,140.43 judgment against Keen for services billed on an hourly basis, and a \$20,000.00 judgment against Keen based on the contingency contract and resulting from an arbitration award.

With regard to the hourly fee judgment, trial on the merits was held on March 24, 2003, resulting in a judgment for \$7,140.43, which was signed on March 28, 2003. Thereafter, a timely motion for new trial was filed by Braud, and was granted. Following a hearing on May 19, 2003, the motion was taken under advisement. At a subsequent hearing on August 18, 2003, judgment was rendered and signed for \$7,140.43, and additionally, the court awarded court costs and legal interest. The record contains no notice of this judgment having been sent to the parties until August 11, 2004. However,

on August 6, 2004, Keen filed a “motion to annul” said August 18, 2003 judgment; on August 16, 2004, Keen filed a motion for new trial; and on August 19, 2004, Keen filed a supplemental motion to “nullify the judgment,” which included a request that the trial judge be recused. All of Keen’s motions were heard and denied in open court on October 6, 2004. Judgment was signed on October 28, 2004.

With regard to the judgment based on the contingency fee contract, the matter had been submitted for arbitration to the Louisiana State Bar Association at Keen’s request. Following arbitration, a remand, and a supplemental arbitration hearing, an amended arbitration award of \$20,000.00 was rendered on October 30, 2003.¹ On July 26, 2004, following a hearing, the award was made a judgment of the 21st Judicial District Court. On August 6, 2004, Keen filed a motion for new trial from the July 26, 2004 judgment, which included a request for the recusal of the trial judge. The motions were heard and denied on October 6, 2004, and judgment was signed on October 28, 2004.

Keen has appealed the October 28, 2004 judgment denying her motions. In her “Motion for Suspensive Appeal, (or Alternatively a Devolutive Appeal),” filed on November 30, 2004, Keen desires “to appeal from the Judgment that dismissed all her claims, on the 28th of October, 2004.”

In her pro se appellate brief, Keen assigns several errors of the trial court. Essentially, she asserts that the trial court erred in finding a valid

¹ In its original arbitration award rendered on December 14, 2001, the arbitrator had determined that the contingency fee contract entered into between Keen and Braud was valid and enforceable, but because Mr. Keen’s succession was still open and Keen’s marital portion was not yet determined, the arbitration remained open for a later quantification of the amount. On February 10, 2003, the arbitrator quantified the award in the amount of \$20,000.00. Thereafter, the arbitrator amended the award on October 30, 2003, to include 12% interest, as provided in the contingency fee contract.

arbitration award and making the arbitration award a judgment of the court. Generally, Keen also asserts unfairness, prejudice, and a lack of due process in the rulings of the trial court.

DISCUSSION

Outstanding Motions

Initially, we address the pending motions before this court. Both Keen and Braud filed motions to supplement the record on appeal. Keen filed a motion to supplement the record with the transcripts from the August 18, 2003 and July 12, 2004 hearings of the trial court. We hereby grant Keen's motion and supplement the record with the transcripts. Braud filed a motion to supplement the record with a copy of the March 28, 2003 judgment and a copy of the February 11, 2005 letter from the Clerk of Court of the 21st Judicial District Court, notifying the parties of the setting of a suspensive appeal bond. We also grant Braud's motion and supplement the record with these documents.

Braud additionally filed a motion to dismiss Keen's suspensive appeal for the failure to timely post a suspensive appeal bond and to dismiss Keen's appeal from the August 18, 2003 judgment awarding hourly fees, as being untimely altogether. We need not address the motion as it pertains to the suspensive appeal. A review of the record reflects that the suspensive appeal has already been dismissed, and the appeal has been converted to a devolutive appeal.

With regard to Braud's motion to dismiss the appeal from the August 18, 2003 judgment as being untimely, the trial court's judgment regarding hourly fees was rendered in open court on August 18, 2003, and signed that same date. However, the record contains no evidence of the mailing of the

notice of this judgment until August 11, 2004. On August 16, 2004, Keen filed a motion for new trial.

Louisiana Code of Civil Procedure article 1974 requires that a motion for a new trial be filed within seven days, exclusive of holidays, of the mailing of the notice of the judgment.² Thus, despite argument that pages from the record are missing, the record before us is devoid of any evidence of the mailing of the notice of the signing of the judgment until August 11, 2004. Therefore, on August 16, 2004, when Keen filed her motion for a new trial of the August 18, 2003 judgment, the delays for applying for a new trial had not yet commenced. See LSA-C.C.P. art. 1974. Accordingly, the delays for taking an appeal had not begun to run. See LSA-C.C.P. arts. 2087, 2123. For reasons that will be more fully explained herein, the new trial and appeal delays have still not commenced and we, therefore, deny Braud's motion to dismiss Keen's appeal from the August 18, 2003 judgment as being untimely altogether.

² Article 1974 provides:

The delay for applying for a new trial shall be seven days, exclusive of legal holidays. The delay for applying for a new trial commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by Article 1913.

Article 1913 provides, in pertinent part:

A. Except as otherwise provided by law, notice of the signing of a final judgment, including a partial final judgment under Article 1915, is required in all contested cases, and shall be mailed by the clerk of court to the counsel of record for each party, and to each party not represented by counsel.

* * *

D. The clerk shall file a certificate in the record showing the date on which, and the counsel and parties to whom, notice of the signing of the judgment was mailed.

Although not applicable here, we note that 2006 La. Acts, No. 337, § 1, added paragraph E to Article 1913, permitting, under certain conditions, waiver of the notice of signing of the judgment on contested matters.

The Appeal

We now examine what has been appealed by Keen. The October 28, 2004 judgment disposed of Keen's pending motions, which were as follows:

- 1) Motion for New Trial (regarding the July 26, 2004 arbitration award judgment), filed on August 6, 2004;
- 2) Motion to Annul Judgment of August 18, 2003 Pertaining to Hourly Fees, filed on August 6, 2004;
- 3) Motion for Reasons and New Trial (regarding the August 18, 2003 judgment), filed on August 16, 2004; and
- 4) Motion to Recuse and to Supplement New Trial Motions Filed 8/6/04 and 8/16/04, filed on August 19, 2004.

With regard to the arbitration award judgment, the judgment making it a judgment of the 21st Judicial District Court was signed on July 26, 2004, and notice was sent that date. Keen had until August 4, 2004, to file a motion for new trial and until October 4, 2004, to file a devolutive appeal, if no motion for new trial was filed timely. Keen did not file a motion for new trial until August 6, 2004, and, therefore, Keen's motion for new trial was untimely. Further, since an untimely motion for new trial does not suspend appeal delays, and since Keen did not file her appeal until November 30, 2004, well after all delays had run, this court is without jurisdiction to review the July 26, 2004 arbitration award judgment. Therefore, that portion of Keen's appeal is dismissed.

On August 6, 2004, Keen filed a motion to recuse the trial judge.³ On that same date, she also filed a Motion to Annul Judgment of August 18,

³ This motion to recuse was included in Keen's Motion for New Trial regarding the July 26, 2004 judgment. We make no comment as to the timeliness of this motion to recuse, said fact not being relevant to our discussion.

2003 Pertaining to Hourly Fees.⁴ On August 16, 2004, Keen filed a Motion for Reasons and New Trial, regarding the August 18, 2003 hourly fee judgment, and on August 19, 2004, Keen filed her Motion to Recuse and to Supplement New Trial Motions Filed 8/6/04 and 8/16/04.⁵ In her motions to recuse, Keen asserted that the trial judge was biased and prejudiced, and that he consistently ruled against her. She alleged no specific facts other than the trial court's failure to grant a continuance of the July 26, 2004 hearing, when she had a doctor's excuse.

Louisiana Code of Civil Procedure article 151B(5) provides that a judge may be recused when he "[i]s biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings." The bias or prejudice is required to be of a substantial nature and based on more than conclusory allegations. **Augman v. City of Morgan City**, 03-0396, p. 3 (La.App. 1 Cir. 12/31/03), 864 So.2d 248, 249.

The provisions of LSA-C.C.P. art. 154 state, in relevant part: "If a valid ground for recusation is set forth in the motion, the judge shall either recuse himself, or refer the motion to another judge or a judge ad hoc... for a hearing." Where the motion to recuse fails to enunciate valid grounds for recusation, the trial judge may overrule the motion without referring the

⁴ While we make no comment on the validity of this motion, we note that the annulment of a judgment is not a proceeding which may be disposed of summarily under the provisions of law. See LSA-C.C.P. art. 2592. An action for nullity must be instituted as an ordinary proceeding and requires citation and service. See **Bonaventure v. Pourciau**, 577 So.2d 742, 746 (La.App. 1 Cir. 1991). See also **Veillon v. Veillon**, 517 So.2d 936, 941 (La.App. 3 Cir.), writ denied, 519 So.2d 105 (La. 1987); **Dowl v. Redi Care Home Health Ass'n**, 04-1182, p. 3 (La.App. 4 Cir. 12/22/04), 917 So.2d 434, 438 (on rehearing), writ denied, 05-1187 (La. 11/28/05), 916 So.2d 146.

⁵ In this last motion filed on August 19, 2004, besides seeking recusal of the trial judge, Keen asked that all previous judgments presented to the court by Braud be set aside and that the court render reasons for the July 26, 2004 arbitration award judgment and a July 14, 2004 judgment, which is not part of this appeal.

matter to another judge. **Augman**, 03-0396 at pp. 3-4, 864 So.2d at 250. Furthermore, “[u]ntil a judge has recused himself, or a motion for his recusation has been filed, he has full power and authority to act in the cause.” LSA-C.C.P. art. 153.

In this matter, the minutes of October 6, 2004, clearly reflect that the trial judge denied Keen’s motion for new trial and motion to annul judgment before he denied the motions to recuse. Thus, regardless of the merits of Keen’s motions, the trial court was required to take some responsive action on the motions to recuse prior to proceeding further with substantive issues in the case. See LSA-C.C.P. art. 153; **Augman**, 03-0396 at p. 4, 864 So.2d at 250. In other words, the trial judge had no power or authority to act on the Motion to Annul Judgment of August 18, 2003 Pertaining to Hourly Fees, filed on August 6, 2004; the Motion for Reasons and New Trial, filed on August 16, 2004; or the Supplemental New Trial Motion, filed on August 19, 2004, as the outstanding motions to recuse had not yet been decided. Accordingly, this court has no alternative but to vacate the trial judge’s denial of Keen’s motion for new trial and motion to annul judgment, and to remand the matter to the trial court to address these motions.⁶

CONCLUSION

For the above reasons, we grant the motion of appellant, Linda R. Keen, to supplement the record. Additionally, we grant the motion of appellee, Brenda Braud, to supplement the record. Braud’s motion to dismiss Keen’s suspensive appeal is denied as moot. Braud’s motion to dismiss the appeal from the August 18, 2003 judgment as untimely is denied. Further, based on the reasons set forth herein, Keen’s appeal of the arbitration award judgment of July 26, 2004, is dismissed, due to the

⁶ We note that the trial judge recused himself from this matter on December 7, 2004. Therefore, there is no necessity to act on the motions to recuse, since those are moot.

untimeliness of the appeal. We further vacate the judgment insofar as it denied Keen's (1) Motion to Annul Judgment of August 18, 2003 Pertaining to Hourly Fees, (2) Motion for Reasons and New Trial, and (3) Motion to Supplement New Trial Motions Filed 8/6/04 and 8/16/04. We remand this matter to the trial court to rule on said motions. Lastly, because the trial judge has already voluntarily recused himself from this matter, any issue regarding the denial of the motions to recuse is moot. Costs of this appeal are assessed equally between the appellant, Linda R. Keen, and the appellee, Brenda Braud.

MOTION TO SUPPLEMENT RECORD FILED BY KEEN IS GRANTED; MOTION TO SUPPLEMENT RECORD FILED BY BRAUD IS GRANTED; MOTION TO DISMISS SUSPENSIVE APPEAL IS DENIED AS MOOT; MOTION TO DISMISS APPEAL OF AUGUST 18, 2003 JUDGMENT IS DENIED; APPEAL DISMISSED IN PART; JUDGMENT VACATED IN PART; AND REMANDED WITH INSTRUCTIONS.