

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 2035

THEODORE PHILLIPS

VERSUS

CONRAD INDUSTRIES, INC., ET AL.



**On Appeal from the 16th Judicial District Court
Parish of St. Mary, Louisiana
Docket No. 109379, Division "E"
Honorable Keith R.J. Comeaux, Judge Presiding**

**Theodore Phillips
Angola, LA**

**Plaintiff-Appellant
In Proper Person**

**Richard A. Cozad
Emma A. Mekinda
McAlpine & Cozad
New Orleans, LA**

**Attorneys for
Defendants-Appellees
Conrad Industries, Inc. and
Conrad Shipyard, L.L.C.**

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Downing, J. concurs.

Judgment rendered June 6, 2008

PARRO, J.

Theodore Phillips appeals the dismissal of his personal injury suit on the grounds of abandonment. In accordance with Uniform Court of Appeal Rules 2-16.2(A)(2), (4), and (6), we affirm the trial court's judgment.

On June 21, 2002, Phillips filed suit against Conrad Industries, Inc., Conrad Shipyard, L.L.C. (collectively, Conrad), and Conrad Holdings, L.L.C.,¹ alleging he had been injured on June 27, 2001, due to the failure of a hydraulic jack allegedly owned by Conrad. Conrad filed an exception raising the objection of no cause of action, and on August 22, 2002, Phillips filed an opposition memorandum. The exception was set for hearing on August 27, 2002, but because neither the parties nor their attorneys appeared, the court continued the hearing without date. There were no further entries in the record until July 2004, when Phillips' attorney moved to withdraw from the case, and the motion was granted. In September 2004, Phillips moved to have an attorney appointed to represent him, because he was incarcerated and could not afford counsel; this motion was denied. In October 2006, counsel for Conrad filed a notice of change of address. Phillips filed another motion for an appointed attorney in December 2006, which was again denied. On December 28, 2006, Phillips filed a request for notice. In March 2007, he filed discovery documents and a motion to set a hearing on the defendants' exception of no cause of action, and in May 2007, he moved to compel discovery. The defendants opposed the motion to compel, and a hearing was set for June 18, 2007.

At the hearing, Conrad's counsel pointed out to the court that the record showed no activity during the three years following August 22, 2002, and moved to dismiss the suit. The court dismissed the matter on the grounds of abandonment. The judgment of dismissal was signed July 3, 2007, and Phillips appealed.

The sole issue is whether the trial court erred in dismissing this action on the ground of abandonment under LSA-C.C.P. art. 561. With certain exceptions not applicable to this case, Article 561(A) states that an action is abandoned when the

¹ Conrad Holdings, L.L.C. was dismissed July 22, 2002, in response to a joint motion for dismissal filed by Phillips and the defendants.

parties fail to take any step in its prosecution or defense in the trial court for a period of three years. This provision is operative without formal order, but on ex parte motion of any party, the trial court must enter a formal order of dismissal. See LSA-C.C.P. art. 561(A)(3).

The key time period in this case is between August 22, 2002, when Phillips filed his opposition to Conrad's exception, and August 22, 2005, three years later. The record shows that the only actions taken by either party during that time were the withdrawal of Phillips' attorney and Phillips' motion for appointed counsel. These actions were in the nature of attempting to enroll or substitute counsel, which is not a step in the prosecution of an action that will interrupt the abandonment period. See Satterthwaite v. Byais, 05-0010 (La. App. 1st Cir. 7/26/06), 943 So.2d 390, 392 n.2, and cases cited therein. Based on our review of the record, we conclude that the trial court was correct in finding three years had elapsed without a step in the prosecution of this action sufficient to interrupt the abandonment period.

However, certain post-abandonment actions by a defendant may serve to waive its right to plead abandonment. See Clark v. State Farm Mut. Auto. Ins. Co., 00-3010 (La. 5/15/01), 785 So.2d 779, 789 n.15; cf. Satterthwaite, 943 So.2d at 393-94; Slaughter v. Arco Chem. Co., 05-0657 (La. App. 4th Cir. 4/26/06), 931 So.2d 387. These actions, however, must be steps that facilitated the judicial resolution of the dispute on the merits and were an expression of the defendant's willingness or consent to achieve judicial resolution of the dispute. Satterthwaite, 943 So.2d at 393. The only actions taken by Conrad after August 22, 2005, were filing a change of address and opposing Phillips' motion to compel discovery. We conclude that neither of these actions constituted the type of steps that would suffice to waive the defendants' right to plead abandonment. Therefore, we find no error in the court's dismissal of Phillips' lawsuit on the grounds of abandonment.

The judgment of July 3, 2007, is affirmed. All costs of this appeal are assessed to Phillips.

AFFIRMED.