

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0028

PERCY DARDAR, SR.

VERSUS

BARRY G. FANGUY

**Judgment Rendered:** FEB 20 2008

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Appealed from the  
Thirty-second Judicial District Court  
In and for the Parish of Terrebonne  
State of Louisiana  
Docket Number 132,232

Honorable Randall L. Bethancourt, Judge

\* \* \* \* \*

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BEFORE: GUIDRY, PETTIGREW, AND HUGHES, JJ.

*J. Pettigrew, J. Concur + assigns Reasons*

GUIDRY, J.

This litigation arises out of a dispute between two fishermen from South Terrebonne Parish over their claimed possessory rights to certain immovable property described in plaintiff's petition as "located near the North and South bank of the Cut Off Canal near its intersection with Bayou Pointe-Aux-Chene." For the reasons that follow, we vacate the judgment rendered, finding that the State of Louisiana is an indispensable party, and remand this matter to the trial court for further proceedings consistent herewith.

### **PROCEDURAL HISTORY**

The plaintiff, Percy Dardar, Sr., instituted proceedings with a petition alleging that he had been in peaceable possession of the property for a period of time in excess of one year without interruption. In November 2000, the defendant, Barry G. Fanguy, began disturbing his possession by "tampering with, damaging, and removing without permission or authority plaintiff's shrimp platforms" located thereon. Dardar sought injunctions prohibiting Fanguy from interfering with his possession of the property and to be restored to his peaceable possession thereof.

Fanguy answered the petition asserting that in 1994, he and his brother purchased "a certain tract of land containing approximately seventeen acres lying on the right descending bank of Bayou Point[e]-Aux-Chene and the right descending bank of Cut Off Canal." Fanguy also asserted that he owned and operated a marina and dock along the bank, and reconvened against Dardar, alleging that Dardar had anchored numerous barges directly in front of and even to the marina and loading dock, interfering with Fanguy's peaceful possession of his property and ability to earn a livelihood. Fanguy sought injunctions against Dardar ordering him to refrain from interfering with Fanguy's or his customers' possession and peaceful use of the loading dock and marina. Fanguy also sought

monetary damages for damage to his property and loss of income allegedly suffered as a result of Dardar's interference.

### CONVERSION OF POSSESSORY ACTION INTO PETITORY ACTION?

In his first assignment of error, Fanguy asserts the trial court erred in finding that his pleadings converted Dardar's possessory action into a petitory action, thereby judicially confessing possession to Dardar. The resolution of this issue has significant impact in this case. As this court noted in **Chevron U.S.A. Inc. v. Bergeron**, 551 So.2d 746, 749 (La. App. 1<sup>st</sup> Cir.), *writ denied*, 553 So.2d 465 (La. 1989):

Articles 3651 through 3671 of the Louisiana Code of Civil Procedure govern two types of 'real actions': the action to protect possession (possessory action) and the action to assert ownership (petitory action). Where the ownership of immovable property is ultimately at issue, the codal provisions treat possession as a preliminary matter to be resolved prior to trial on the issue of ownership. Possession plays a crucial role in determining who bears the burden of proof in the action to assert ownership, and determines what type of proof is sufficient to prevail in that action. Thus, if one party is found to be in possession in the possessory action, the loser must assert an ownership claim within sixty days after the judgment becomes executory, or is barred from thereafter asserting an ownership claim. La.Code Civ.P. art. 3662. The party found out of possession bears the burden of proof in the petitory action. La. Code Civ.P. art. 3653. Against a party in possession, a party claiming ownership must prove title good against the world to prevail. Additionally, *an attempt to assert ownership in a possessory action carries a serious consequence: the person claiming ownership converts the action to a petitory action, judicially confesses the opponent's possession, and must prove title good against the world in order to prevail.* La. Code Civ.P. art. 3657. (Emphasis added; case citation omitted).

This issue of conversion of the action is governed by La. C.C.P. art. 3657 which provides, in pertinent part:

The plaintiff may not cumulate the petitory and the possessory actions in the same suit or plead them in the alternative, and when he does so he waives the possessory action. If the plaintiff brings the possessory action, and without dismissing it and prior to judgment therein institutes the petitory action, the possessory action is abated.

When, except as provided in Article 3661(1)-(3), the *defendant* in a possessory action asserts title in himself, in the alternative or

otherwise, *he thereby converts the suit into a petitory action, and judicially confesses the possession of the plaintiff in the possessory action.*

\* \* \*

(Emphasis added).

The possessory action is defined in the Code of Civil Procedure as “one brought by the possessor of immovable property or of a real right therein to be maintained in his possession of the property or enjoyment of the right when he has been disturbed, or to be restored to the possession or enjoyment thereof when he has been evicted.” La. C.C.P. art. 3655.

It is clear and there is no dispute that the petition filed by Dardar in this case instituted a possessory action. The issue is whether Fanguy, in his answer and reconventional demand, “asserted title in himself” within the scope of La. C.C.P. art. 3657, thereby converting the action to a petitory action.

Our supreme court addressed this issue in **Union Bank v. Roy**, 248 La. 801, 182 So.2d 319 (1965), where the plaintiff also asserted that the defendant, by averring ownership in his responsive pleadings, had converted the suit into a petitory action. The court rejected the plaintiffs’ contention, finding that, although the averments of ownership were made, they were permitted under an exception to the general rule (La. C.C.P. art. 3661)<sup>1</sup> when they were made by the defendant to show that he possessed as owner, as well as the extent and time of that possession.

In so concluding, the court held:

[I]t takes more than an allegation of ownership in defendant’s answer to convert that action into a petitory action. There must be a prayer by defendant for an adjudication of ownership. In the absence of such a prayer the action is not converted.

248 La. at 805, 182 So.2d at 320. We note that although the court subsequently granted a rehearing to revisit its conclusions regarding possession, it expressly

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<sup>1</sup> Louisiana Code of Civil Procedure Article 3661 provides that the ownership or title to immovable property is not at issue in a possessory action, thus, evidence of ownership or title is disallowed, except to prove (1) the possession thereof by a party as owner, (2) the extent of possession, or (3) the length of time of possession by a party or his ancestors in title.

reiterated its earlier ruling regarding the nature of the action notwithstanding the claims and evidence of ownership:

As stated in our original opinion this is a possessory action involving a strip of ground approximately three and one-half (3 ½) feet in width, but in order to determine which of the instant parties is entitled to possession, a consideration of ownership is imperative. Louisiana Code Civil Procedure Art. 3661.

*Id.*, (on rehearing), 248 La. at 831-32, 182 So.2d at 330 (1966). Shortly thereafter, this court was called on to decide the issue. In **Voison v. Luke**, 234 So.2d 862, 863 (La. App. 1<sup>st</sup> Cir. 1970), in answer to the plaintiffs' possessory action, the defendants filed a general answer and prayed they be granted a "decree recognizing [their] possession as owners and denying plaintiffs' demand at their cost." In determining whether that answer converted the action to a petitory action, this court rejected the contention that the language and assertions in the defendants' *prayer* are the controlling factors, finding rather that "the entire answer of the defendant in a possessory action must be taken into consideration." *Id.*, at p. 864. This court then affirmed the trial court's failure to find the matter had been converted notwithstanding defendants' prayer to be recognized as possessing as owners. *Id.* See also **Hirschfeld v. St. Pierre**, 577 So.2d 747 (La. App. 1<sup>st</sup> Cir. 1991) (where this court found that the defendants' assertions of title in themselves through the introduction of evidence of title to and ownership of the property at issue was introduced to show the extent and duration of possession, *without* converting the action to a petitory action, citing La. C.C.P. art. 3661 and **Chevron, U.S.A. Inc. v. Bergeron**, 551 So.2d 746, 749 (La. App. 1<sup>st</sup> Cir.), *writ denied*, 553 So.2d 465 (La. 1989); **Gaulter v. Gennaro**, 345 So.2d 92 (La. App. 1<sup>st</sup> Cir. 1977) (where this court also found that a simple allegation in answer by the defendant that she had constructed a fence "on *her* property" did not constitute the formal claim of title contemplated by La. C.C.P. art. 3657 sufficient to convert possessory action to a petitory action.)

In contrast, in cases where a defendant, in a reconventional demand, expressly asserts ownership and requests that he be declared the owner of the disputed property, the jurisprudence consistently reflects that such a claim goes beyond a showing of possession allowed by the exception in La. C.C.P. art. 3661 and raises or interjects the issue of ownership sufficient to convert the action to a petitory action. See **McCurley v. Burton**, 2003-1001 (La. App. 1<sup>st</sup> Cir. 4/21/04), 879 So.2d 186; (where the defendant specifically prayed to be declared the titled owners of the property at issue); see also **Lowery v. Herbert**, 2004-1399 (La. App. 3<sup>rd</sup> Cir. 7/20/05), 909 So.2d 648.

The trial court in this case found that the action was converted by the allegations in Fanguy's reconventional demand, and gave the following detailed oral reasons for its ruling:

Then after the plaintiff files this possessory petition, the defendant, Mr. Fanguy, ... files an answer essentially denying the allegations, but answering in what we call reconventional demand ... against Mr. Dardar.

Now the [c]ourt read the reconventional demand very carefully, because as the attorneys know, the law is, by virtue of Code of Civil Procedure Article 3657, ... [reading the text of the article in pertinent part] 'When ... the defendant ... asserts title in himself ... he thereby converts the suit into a petitory action, and judicially confesses the possession of the plaintiff in a possessory action.' That's the law.

Did the defendant do that? Careful reading of the reconventional demand, specifically paragraph 11, [']Barry G. Fanguy owns and maintains a marina and loading dock along the right descending bank of Bayou Pointe Au Chene and Cut Off Canal.[']

Paragraph 12. 'During the year 2000, the early part of 2001, and therefore and after, the defendant in reconvention, Percy Dardar, Sr., has anchored numerous barges directly in front of [Fanguy's] loading dock and marina, and has in fact tied barges to [Fanguy's] marina and loading dock.'

Paragraph 13. '[Dardar] has continually interfered with [Fanguy's] peaceful possession of his property – of his property – loading dock, and marina, and has interfered with [Fanguy's] ability to earn a livelihood.'

Paragraph 14. '[Dardar] has continually caused physical disturbances and fights on [Fanguy's] premises, causing [Fanguy's] loss of income and customers by preventing [Fanguy's] customers access to his marina and loading dock.' Emphasis by the [c]ourt, and loading dock.

And the prayer also asks for a remedy in pertinent part. It says that his property, his business, and his customers have further ordered [Dardar] to move his barges or vessels away from [Fanguy's] loading dock and marina...

The [c]ourt has no alternative other than to find that his possessory action turned into a petitory action by virtue of Article 3657 in the answer by Mr. Fanguy. ... [T]hus, the ownership of the area in question, which wasn't an issue initially by Mr. Dardar, became the issue of the suit.

Although we agree with the trial court's review of the factual assertions made by Fanguy in his reconventional demand, we find the trial court erred as a matter of law in concluding that these factual allegations constituted a sufficient claim of ownership to convert the action to a petitory one. When applied to the pertinent jurisprudence, it becomes clear that the allegations of ownership by Fanguy, which were permissible under La. C.C.P. art. 3661 to show possession and the extent thereof, together with the lack of a prayer to be declared owner, are more akin to the cases cited above consistently holding that such assertions are insufficient to convert the action to a petitory one and changing the burden and nature of proof required. Specifically, references in Fanguy's pleading to the property (the marina and dock) being "his" property, which he "owns and maintains," are insufficient to insert the issue of ownership into the case. See Union Bank, Voison, Chevron, and Gaulter, supra. Furthermore, the prayer is wholly lacking in requesting any declaration of ownership in favor of Fanguy; in fact, it succinctly seeks only that Dardar be ordered to cease his alleged interruption of Fanguy's possession of the dock, marina, and water bottoms in question.

Accordingly, we find the trial court erred in finding the action had been converted. However, our review of the trial court's additional rulings in this case must end here, because we find error in proceeding in this case without the inclusion of an indispensable party, the State of Louisiana.

We note the absence of any evidence in the record that the waterbottoms under the Cut Off Canal are susceptible to private ownership. Although counsel for both parties seemed to, at times, concede that the canal was man-made, this alone does not end the inquiry of ownership of the waterbottoms. There is no evidence in the record regarding who owned the land through which the canal was dug, who dug it, or who funded it. Further, there is no dispute that the canal is a navigable waterway, which would give the public the right to those waters, *even if* the underlying waterbottoms are privately owned.

Based on the lack of evidence in the record establishing the waterbottoms at issue are susceptible to private ownership and that pursuant to La. C.C. art. 450, the ownership of public waterways is vested in the State, we are constrained to find, on our own motion pursuant to our authority under La. C.C.P. art. 645 and La. C.C.P. art. 927(B), that the State of Louisiana is an indispensable party whose joinder is needed for a just adjudication of the issues presented. La. C.C.P. art. 641, 642.

Accordingly, the judgment of the trial court is vacated, and this matter is remanded for further proceedings consistent herewith. Costs of this appeal are assessed equally to the parties.

**VACATED AND REMANDED.**



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STATE OF LOUISIANA

BEFORE: GUIDRY, PETTIGREW, AND HUGHES, JJ.

PETTIGREW, J., CONCURS, AND ASSIGNS REASONS.

PETTIGREW, J., concurring.

 I agree with the majority that the trial court's judgment should be vacated and the matter should be remanded to include an indispensable party.

Further, I note that both parties to this litigation describe the area in dispute as being at the intersection of Bayou Pointe-Aux-Chene and the Cut Off Canal. Both parties' contentions at the trial and in their briefs to this court appear to concede that Bayou Pointe-Aux-Chene is a natural, navigable stream or river. As such, the State owns the water bottoms of Bayou Pointe-Aux-Chene. La. Civ. Code art. 450. The description of the disputed area given by the parties and the map attached to the trial court's judgment appear to indicate that the disputed area covers part of the water bottoms of Bayou Pointe-Aux-Chene, which being State-owned is not susceptible of adverse possession. La. Const. art. XII, §13.