

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 2218

SCARLETT SHORT

VERSUS

JOHN D. CHAIN, STARBURST ELECTRIC D/B/A MORGAN'S
MECHANICAL SERVICES, L.L.C. & TRINITY UNIVERSAL INSURANCE
COMPANY

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Judgment Rendered: JUN 17 2011

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Suit number 2008-003099

Honorable Zorraine M. Waguespack, Judge

* * * * *

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Scarlett Short

and

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L.L.C., and Trinity Universal
Insurance Company

* * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Hughes, J-1, dissents.

GUIDRY, J.

In this personal injury action, plaintiff, Scarlett Short, appeals from a judgment of the trial court denying her petition to annul judgment.¹ For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On October 5, 2007, Scarlett Short was involved in a motor vehicle accident with a vehicle driven by John Chain and owned by Starburst Electric d/b/a Morgan's Mechanical Services, L.L.C. (Starburst). Thereafter, on October 2, 2008, Ms. Short filed a petition for damages, naming John Chain, Starburst, and Starburst's insurer, Trinity Universal Insurance Company, as defendants. However, Ms. Short requested that service on the named defendants be withheld.

On May 19, 2009, the defendants filed a declinatory exception raising the objection of insufficiency of service of process and a motion for involuntary dismissal, asserting that approximately 225 days had lapsed since the filing of Ms. Short's petition, and that she still had not requested service on any of the named defendants. Defendants requested that Ms. Short's petition be dismissed without prejudice. A hearing on defendants' exception and motion was scheduled for July 6, 2009. However, the minute entry for that date indicates that the rule for involuntary dismissal was dismissed, because neither party made an appearance.

Thereafter, counsel for Ms. Short submitted a motion and order for voluntary dismissal, requesting that Ms. Short's claim be dismissed *with prejudice*. The trial court signed the order on August 3, 2009.

¹ Plaintiff filed a motion to appeal from the trial court's July 26, 2010 judgment denying a motion for new trial. The denial of a motion for new trial is an interlocutory and non-appealable judgment. However, because it is clear from Ms. Short's brief that the appeal was intended to be an appeal from the judgment on the merits, we consider the appeal of the denial of the motion for new trial as an appeal of the judgment on the merits, denying her petition to annul judgment. See Carpenter v. Hannan, 01-0467, p. 4 (La. App. 1st Cir. 3/28/02), 818 So. 2d 226, 228-229, writ denied, 02-1707 (La. 10/25/02), 827 So. 2d 1153.

On April 1, 2010, new counsel for Ms. Short filed a petition to annul the August 3, 2009 judgment, asserting that the judgment was obtained through fraud and ill practices under La. C.C.P. art. 2004. In the petition, Ms. Short asserted that defendants prepared the motion and order for voluntary dismissal, but changed the language to request a dismissal *with prejudice*, which was contrary to their previous orders submitted to the court with regard to their exception and motion for involuntary dismissal, which requested a dismissal *without prejudice*. Following a hearing, the trial court signed a judgment denying Ms. Short's petition to annul judgment. Ms. Short timely filed a motion for new trial, which was also denied. Ms. Short now appeals from the trial court's judgment.

DISCUSSION

Louisiana Code of Civil Procedure article 2004 provides that a final judgment obtained by fraud or ill practices may be annulled. This article is not limited to cases of actual fraud or ill practices, but is sufficiently broad to encompass all situations wherein a judgment is rendered through some improper practice or procedure. Courts must review petitions for nullity closely, as actions for nullity based on fraud or ill practices are not intended as substitutes for appeals or second chances to prove claims previously denied for failure of proof. The purpose of an action for nullity is to prevent injustice that cannot be corrected through new trials and appeals. Belle Pass Terminal, Inc. v. Jolin, Inc., 01-0149, p. 5 (La. 10/16/01), 800 So. 2d 762, 766.

The two criteria for determining whether a judgment has been rendered through fraud or ill practices and is subject to nullification are: (1) whether circumstances under which the judgment was rendered showed the deprivation of legal rights of the litigant seeking relief; and (2) whether enforcement of the judgment would be unconscionable or inequitable. Belle Pass Terminal, Inc., 01-

0149 at p. 6, 800 So. 2d at 767. “Ill practice” is any improper practice or procedure which operates, even innocently, to deprive a litigant of some legal right. The “legal right” of which a litigant must be deprived to have a judgment annulled includes the right to appear and assert a defense and the right to a fair and impartial trial. Morton Building, Inc. v. Redeeming Word of Life Church, 01-1837, p. 7 (La. App. 1st Cir. 10/16/02), 835 So. 2d 685, 689, writ denied, 02-2733 (La. 1/24/03), 836 So. 2d 46.

In the instant case, Ms. Short submitted an affidavit from the attorney who was representing her at the time the motion and order for voluntary dismissal with prejudice was submitted and signed. The attorney stated that she initially did not request service on the named defendants, because she was attempting to negotiate a settlement. However, due to her newborn daughter’s serious medical conditions, she was out of the office for extended periods of time and due to oversight and distraction, she failed to request service within ninety days. The attorney admitted that after receiving the defendants’ exception raising the objection of insufficiency of service of process and motion for involuntary dismissal without prejudice, she agreed that no valid basis existed to oppose the exception and motion. Therefore, she agreed to voluntarily dismiss Ms. Short’s suit. The attorney states that the defendants prepared the motion and order for voluntary dismissal and forwarded same to her. However, she “did not recognize the significance” of the fact that the motion drafted by the defendants sought a dismissal different than that requested by the defendants in their exception and motion and “assumed improperly” that the motion presented to her matched the relief to which the defendants were entitled pursuant to their earlier exception and motion.

The law is clear that one who signs a document is presumed to have done so with knowledge of its contents, regardless of whether he or she actually read it.

Tillman v. USAgencies Casualty Insurance Company, 46,173, p. 5 (La. App. 2nd Cir. 3/2/11), 58 So. 3d 1009, 1012. Further, improper representations or misconduct on the part of the moving party's attorney is not a legally recognized basis for granting an action in nullity. Stroscher v. Stroscher, 01-2769, p. 5 (La. App. 1st Cir. 2/14/03), 845 So. 2d 518, 524. Accordingly, Ms. Short cannot rely on her attorney's failure to read the voluntary motion and order, which her attorney signed and submitted to the court, as a basis for having that order annulled. Therefore, we find no error in the trial court's judgment denying Ms. Short's petition to annul judgment.²

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to the plaintiff, Scarlett Short.

AFFIRMED.

² We also note that whether the voluntary dismissal filed by Ms. Short's attorney is with or without prejudice is of no moment under the circumstances of the instant case, because La. C.C. art. 3463 provides:

An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue ... continues as long as the suit is pending. *Interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses the action at any time* either before the defendant has made any appearance of record or thereafter, or fails to prosecute the suit at the trial. [Emphasis added.]