

BETTY JO STORY

DOCKET NUMBER 633073 SEC. 24

VERSUS

19TH JUDICIAL DISTRICT COURT

LOUISIANA AUCTIONEER'S LICENSING BOARD

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

STATE

OCT 23 2014

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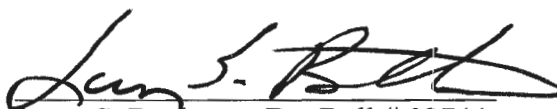
EXCEPTION OF PRESCRIPTION AND, ALTERNATIVELY, EXCEPTION OF NO CAUSE OF ACTION

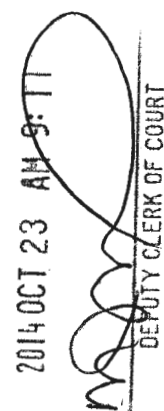
NOW INTO COURT, through undersigned counsel, comes purported Defendant/Exceptor, **LOUISIANA AUCTIONEERS LICENSING BOARD**, appearing solely for the purpose of excepting to the claims asserted by the plaintiff in her Petition for Damages with this Peremptory Exception of Prescription and, alternatively, Exception of No Cause of Action. For reasons more fully outlined in the attached and accompanying Memorandum in Support, Exceptor submits that Plaintiff's alleged claims against Louisiana Auctioneer's Licensing Board are prescribed. Additionally, Plaintiff has failed to state a justiciable cause of action against Exceptor/Defendant for which relief may be granted.

WHEREFORE, Exceptor, Louisiana Auctioneer's Licensing Board, prays that this exception be maintained, and that there be judgment rendered in favor of the Exceptor, dismissing Plaintiff's Demand with prejudice on the basis that Plaintiff's action against Louisiana Auctioneer's Licensing Board has prescribed or, alternatively, on the basis that Plaintiff's Petition fails to state a cause of action against Defendant.

Respectfully submitted:

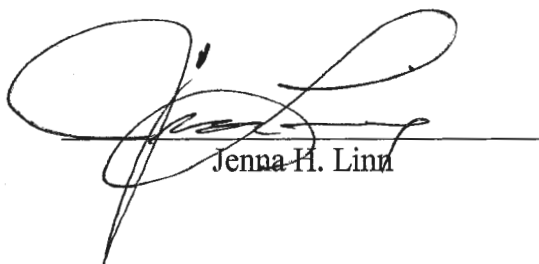
Bankston & Associates, L.L.C.
8708 Jefferson Hwy, Suite A
Baton Rouge, LA 70809
Telephone No.: (225) 766-3800
Fax: (225) 766-7800


Larry S. Bankston, Bar Roll # 02744
Jenna H. Linn, Bar Roll # 33246

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EAST BATON ROUGE PARISH, LA
2014 OCT 23 AM 9:11

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served on all counsel of record by placing same in the United States Mail, properly addressed and postage paid on this 21st day of October, 2014.


Jenna H. Linn

REC'D C.P.

OCT 24 2014

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19TH JUDICIAL DISTRICT COURT

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LICENSING BOARD

PARISH OF EAST BATON ROUGE

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ORDER

Considering the foregoing exception:

IT IS ORDERED that the Plaintiff, Betty Jo Story, show cause on the 26th day of January 2015 at 9:30 o'clock A.m. why the Court should not grant Defendant's Exceptions of Prescription and No Cause of Action, and dismiss Plaintiff's action against Defendant with prejudice.

Order signed at Baton Rouge, Louisiana on the 27th day of October, 2014.



JUDGE

19th Judicial District Court

CLERK, ONCE SIGNED, PLEASE SERVE:

Betty Jo Story
209 Broad Street
DeRidder, LA 70634

FILED
EAST BATON ROUGE PARISH, LA

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VERSUS

19TH JUDICIAL DISTRICT COURT

LOUISIANA AUCTIONEER'S
LICENSING BOARD

PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

**MEMORANDUM IN SUPPORT OF EXECPTION OF PRESCRIPTION AND,
ALTERNATIVELY, EXCEPTION OF NO CAUSE OF ACTION**

MAY IT PLEASE THE COURT;

Exceptor, Louisiana Auctioneers Licensing Board (hereinafter referred to as "LALB"), respectfully submits this Memorandum in Support of its Peremptory Exception of Prescription and Exception of No Cause of Action.

BACKGROUND

This litigation arises out of an administrative hearing that took place on September 10, 2013. On or about May 13, 2013, Plaintiff, Betty Jo Story, filed an Auctioneer Consumer Complaint with the Louisiana Auctioneers Licensing Board against a licensed auctioneer, Marlo Schmidt, alleging that Mr. Schmidt mishandled the auction of her personal items. Following such complaint, and in accordance the Louisiana Administrative Procedures Act, on September 10, 2013, the LALB held an administrative adjudicatory hearing. After considering the evidence, law, and arguments of counsel, the LALB found Mr. Schmidt not liable under the complaint.. More specifically, on September 18, 2013, the hearing officer signed the Findings of Fact and Conclusions of Law, providing that the board issued the following findings:

Respondent, Marlo Schmidt is not guilty of violating Louisiana Revised Statute 37:3121 (A)(4).

The Board further found respondent, Marlo Schmidt is not guilty of violating Louisiana Revised Statute 37:2121 (A)(5).

The findings of fact and conclusions of law were approved by the Board in open hearing on the 10th day September, 2013 at Baton Rouge, Louisiana.¹

After such findings were executed, Plaintiff made no additional request to the LALB; no request for rehearing was made. Plaintiff did file a lawsuit against Mr. Schmidt in small claims court in DeRidder, and on August 27, 2014, Plaintiff filed the above captioned lawsuit against LALB.

¹ Findings of Fact and Conclusions of Law, attached hereto as Exhibit "A".



LAW & ARGUMENT

A. Plaintiff's claims have prescribed.

In accordance with La. R.S. 49:964, Plaintiff's right for judicial review of the aforementioned adjudication has prescribed. La R.S. 49:964, provides, in pertinent part:

A. (1) Except as provided in R.S. 15:1171 through 1177, a person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review under this Chapter whether or not he has applied to the agency for rehearing, without limiting, however, utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy and would inflict irreparable injury.

B. Proceedings for review may be instituted by filing a petition in the district court of the parish in which the agency is located **within thirty days after the transmittal of notice of the final decision by the agency** or, if a rehearing is requested, within thirty days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record.²

Pursuant to La. R.S. 49:958, "a final decision or order adverse to a party in an adjudication proceeding shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law. Parties shall be notified personally, by mail, or by electronic means of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record." In this case, Plaintiff was present at the hearing on September 10, 2013 and was present when the LALB announced its decision. Additionally, on September 25, 2013, a copy of the Findings of Fact and Conclusions of Law were mailed to the Plaintiff via certified mail.³ Plaintiff received the written Findings on September 26, 2014.⁴ It was not until August 27, 2014, almost one year after the final decision of the LALB, that this lawsuit was filed. Accordingly, Plaintiff's claims have prescribed.

B. Plaintiff's Petition fails to state a Cause of Action against the LALB.

LALB contends that Plaintiff's claims have prescribed; however, even if this Court finds that the claims have not prescribed, which is at all times denied, the Plaintiff's Petition should be dismissed as it fails to state a cause of action against LALB. La. C.C.P. art. 891 and the related articles require that the plaintiff's petition "contain a short, clear and concise statement of all causes of action arising out of, and other material facts of, the transaction, or occurrence that is the subject matter of the litigation." With a peremptory exception of no cause of action, the defendant claims that the plaintiff's petition fails to state a cause of action against it, which claim

² La. Rev. Stat. Ann. § 49:964, emphasis added.

³ See certified mail to Plaintiff, attached hereto as Exhibit "B".

⁴ *Id.*

challenges the legal sufficiency of the petition. The term “cause of action” when used in the context of the peremptory exception has been defined as “the operative facts which give rise to the plaintiff’s right to judicially assert the action against the defendant.”⁵

The function of the peremptory exception of no cause of action is to test the legal sufficiency of the plaintiff’s petition by determining whether the law affords a remedy on the facts alleged in the pleading.⁶ Thus, the exception tests whether, as a matter of law, the plaintiff has stated a justiciable cause of action against the defendant.⁷ Generally, when a court considers a peremptory exception of no cause of action, it should confine itself to the four corners of the petition and documents attached thereto and made a part thereof.⁸ Facts may not be disputed on the trial of the exception.⁹ A peremptory exception of no cause of action is therefore triable on the face of the petition.¹⁰ A plaintiff is not required to plead the theory of the case; however, conclusions of law or conclusions of fact are not considered as true for purposes of the exception.¹¹

Additionally, under La. C.C.P. art. 1915, relative to partial judgments, partial exceptions, and partial summary judgments, a court is allowed to “sustain ... an exception in part, as to one or more but less than all of the claims, demands, issues, theories, or parties.”

In this case the Plaintiff’s Petition fails to state a justiciable cause of action against the defendant. The first thirteen paragraphs of Plaintiff’s fifteen paragraph Petition contain allegations against the auctioneer, Mr. Schmidt. However, Plaintiff has not sued Mr. Schmidt herein. It is not until Paragraph 14 that Plaintiff alleges that due to LALB’s “reckless disregard” to find Mr. Schmidt guilty, Plaintiff is unable to file a bond claim against Mr. Schmidt’s bond. In accordance with state statute, the bond is issued in favor of LALB. It is only after there is a finding by LALB that the auctioneer has violated the law, will a claim be made against the bond.

⁵ *Ramey v. DeCaire*, 869 So. 2d 114 (La. 2004); *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So. 2d 1234, 1238 (La. 1993)

⁶ *Peters v. Allen Parish School Bd.*, 996 So. 2d 1230 (La. Ct. App. 3d Cir. 2008); *Bell v. Patterson Ins. Co.*, 999 So. 2d 117 (La. Ct. App. 2d Cir. 2008); *Poole v. Poole*, 7 So. 3d 806 (La. Ct. App. 3d Cir. 2009); *Ramey v. DeCaire*, 869 So. 2d 114 (La. 2004); *City of New Orleans v. Board of Directors of Louisiana State Museum*, 739 So. 2d 748 (La. 1999); *Roberts v. Sewerage and Water Bd. of New Orleans*, 634 So. 2d 341 (La. 1994); *Broussard v. F.A. Richard & Associates, Inc.*, 740 So. 2d 156 (La. Ct. App. 3d Cir. 1999).

⁷ *Willis v. State ex rel. Louisiana Dept. of Highways*, 212 So. 2d 555 (La. Ct. App. 1st Cir. 1968).

⁸ *Cahill v. Schultz*, 521 So. 2d 442 (La. Ct. App. 4th Cir. 1988).

⁹ *Vanguard Homes, Inc. v. Home Builders Ass’n of Greater New Orleans*, 219 So. 2d 567 (La. Ct. App. 4th Cir. 1969).

¹⁰ *City of New Orleans v. Board of Directors of Louisiana State Museum*, 739 So. 2d 748 (La. 1999); *McCoy v. City of Monroe*, 747 So. 2d 1234 (La. Ct. App. 2d Cir. 1999); *Darville v. Texaco, Inc.*, 447 So. 2d 473 (La. 1984); *Goodwin v. Agrilite of Louisiana*, 643 So. 2d 249 (La. Ct. App. 2d Cir. 1994); *Doe v. Entergy Services, Inc.*, 608 So. 2d 684 (La. Ct. App. 4th Cir. 1992); *Sevarg Co., Inc. v. Energy Drilling Co.*, 591 So. 2d 1278 (La. Ct. App. 3d Cir. 1991); *Ventura v. Cox Cable Jefferson Parish, Inc.*, 583 So. 2d 1237 (La. Ct. App. 5th Cir. 1991); *Johnson v. Edmonston*, 383 So. 2d 1277 (La. Ct. App. 1st Cir. 1980).

¹¹ *Leatherman v. East Baton Rouge Parish*, App. 1 Cir. 1972, 275 So.2d 806; *Southern Chemical & Fertilizing Co. v. Wolf*, Sup. 1896, 48 La. Ann. 631, 19 So. 558; LA-C.C.P. Art. 927

La. R.S. 37:3118 requires a bond payable to the board for the use benefit and indemnity of those who have suffered any loss in violation of the auctioneer statutes. In the next and last paragraph Plaintiff's Petition, Plaintiff alleges that "as a result of Defendant's reckless disregard of its obligation...to find Mr. Schmidt guilty and thereby enable Petitioner to recover on Mr. Schmidt's bond, Petitioner asserts that Defendant LALB is liable for the full amount of the otherwise-recoverable bond face value of \$10,000."¹² Plaintiff fails to state any law that would allow her to recover the amount of Mr. Schmidt's bond from the LALB. This is likely because no such law exists.

In accordance with La. R.S. 49:964, a person aggrieved by a final decision or order in an adjudication is entitled to judicial review. However, such judicial review does not allow for the damages sought by Plaintiff herein. La. R.S. 49:964 provides that "the review shall be conducted by the court without a jury and shall be confined to the record. La. R.S. 49:964 (G) outlines the actions the court may take in connection with its review of the agency's decision:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.¹³

Plaintiff's original complaint was against the auctioneer, Mr. Schmidt. While a court may reverse or modify the decision made by LALB, finding Mr. Schmidt not guilty, if substantial rights of the appellant have been prejudiced, such a reversal or modification would not include the damages sought by Plaintiff herein, i.e. assessing penalties against the board for its decision.

Simply, the law does not provide for the relief sought by Plaintiff herein. Plaintiff has failed to cite any law that would allow her to recover a \$10,000 penalty and court costs from the Board, even if the Board's administrative conclusion is determined to be unwarranted, which is

¹² Plaintiff's Petition for Damages, Paragraph 15.

¹³ La. Rev. Stat. Ann. § 49:964 (G)

at all times denied. As a matter of law, the Plaintiff has failed to state a justiciable cause of action against the LALB.

CONCLUSION

This lawsuit arises from an administrative decision made by the LALB on September 10, 2013 and memorialized in written Findings of Fact and Conclusions of Law signed on September 18, 2013. Pursuant to La. R.S. 49:964, Plaintiff has thirty days to file a petition for judicial review of adjudication, and the Plaintiff failed to do so. Plaintiff far exceeded the allowable time for filing, and the Plaintiff's claims herein are prescribed.

If this Court finds that Plaintiff's claims have not prescribed, which is denied, Plaintiff has failed to state a justiciable cause of action against LALB. Plaintiff's lawsuit should be dismissed with prejudice at the cost of the Plaintiff.

Respectfully submitted:

Bankston & Associates, L.L.C.
8708 Jefferson Hwy, Suite A
Baton Rouge, LA 70809
Telephone No.: (225) 766-3800
Fax: (225) 766-7800

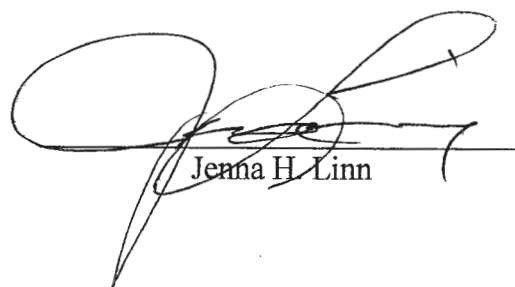


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CERTIFICATE

I hereby certify that the above and foregoing has been served on all counsel of record by placing same in the United States Mail, properly addressed and postage paid on this 21st day of October, 2014.

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