

Judgment rendered February 27, 2002.
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 35,710-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

CATFISH CABIN OF MONROE, INC.,
JAMES HEARN, RUSSELL HEARN and H.
DAVID HEARN

Plaintiffs-Appellants

versus

STATE FARM FIRE AND CASUALTY
COMPANY and ANTHONY SIMS

Defendants-Appellees

* * * * *

Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 00-4731

Honorable Carl Van Sharp, Judge

* * * * *

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Anthony Sims

* * * * *

Before NORRIS, STEWART & PEATROSS, JJ.

PEATROSS, J.

Plaintiffs, Catfish Cabin of Monroe, Inc. (“Catfish Cabin”) and its three shareholders, James Hearn, Russell Hearn and H. David Hearn (“the Hearn’s”), appeal the judgment of the trial court sustaining Defendant’s, State Farm Fire and Casualty (“State Farm”), peremptory exception of no right of action. For the reasons stated herein, we affirm.

FACTS

On December 13, 1999, a group of employees of State Farm ate at Catfish Cabin of Monroe, Inc., a seafood restaurant. Thereafter, some of the employees allegedly became ill and Anthony Sims (“Sims”),¹ an employee of State Farm, sent an e-mail message on that day which stated:

Hey guys,

Got word today that a particular unit from State Farm went to the ‘Catfish Cabin’ on Louisville for a unit lunch. By the time they got back to work they were all vomiting and one passed out. An ambulance had to come pick up several of them and take them to the ER.

A manager of one of the divisions told us that it takes at the very least two to three hours for the very worst food poisoning to take that kind of effect.

They think someone intentionally poisoned the food. Just wanted to make you guys aware. If you’ve heard anything else let me know!!

Thanks
Anthony

A report was made to the local health department which inspected the restaurant later that day and again on the following day. No contaminants were found.

¹ Although Mr. Sims is a named defendant in this suit, he is not a party to this appeal. He did not file a brief in this court and there is no evidence in the record showing that he filed an answer to the suit.

On November 16, 2000, Plaintiffs filed suit against State Farm and Sims for defamation. Catfish Cabin claimed that it lost business and the Hearn, as shareholders of Catfish Cabin, claimed that they suffered mental anguish and embarrassment as a result of the alleged defamatory e-mail.

State Farm filed peremptory exceptions of no cause of action and no right of action against the Hearn. The trial court overruled the exception of no cause of action, but sustained the exception of no right of action.

ARGUMENT

The Hearn's sole argument on appeal is that they personally have a right of action against State Farm for allegedly publishing the alleged defamatory statement. "A statement is defamatory when it tends to expose a person to contempt, hatred, ridicule or obloquy; or which causes a person to be shunned or avoided; or which has a tendency to deprive him of the benefits of public confidence or injure him in his occupation" *McConathy v. Ungar*, 33,368 (La. App. 2d Cir. 8/23/00), 765 So. 2d 1214, writ denied, 00-2678 (La. 11/17/00), 774 So. 2d 982. The Hearn claimed that they suffered mental anguish and embarrassment, but State Farm filed a peremptory exception of no right of action.

A peremptory exception of no right of action tests whether the plaintiff has the capacity or legal interest in judicially enforcing the right asserted. La. C.C.P. art. 927A(5); *In Re Ewing*, 34,413 (La. App. 2d Cir. 3/2/01), 781 So. 2d 885; *Babineaux v. Pernie-Bailey Drilling Co.*, 261 La. 1080, 262 So. 2d 328 (1972). The essential function of that exception is to provide a threshold device which terminates suits brought by one who has no interest in enforcing judicially the right asserted and it tests whether the plaintiff, as a matter of

law, has an interest in and the capacity to judicially enforce the claim. *In Re Ewing, supra*. We, therefore, must determine whether or not the Hearn have a right of action under the factual circumstances of this case.²

The petition alleges that Sims' e-mail stated that "someone" intentionally poisoned the food and that the Hearn suffered mental anguish and embarrassment as a result of that statement. We also consider the evidence adduced at the hearing of the peremptory exception of no right of action because "evidence may be introduced to support or controvert any of the objections pleaded . . ." La. C.C.P. art. 931.

Catfish Cabin of Monroe, Inc. is a closely held corporation and the Hearn are its shareholders. "The personality of a [corporation] is distinct from that of its members." La. C.C. art. 24. The rights of a corporation belong exclusively to the corporation, and only the corporation, not its members, may sue to recover any damages that it has sustained. See *Yarbrough v. Federal Land Bank*, 31,831 (La. App. 2d Cir. 5/5/99), 732 So. 2d 1244. Accordingly, "[s]hareholders and officers of a corporation . . . do not have a personal right to sue in Louisiana to recover for acts committed against . . . the corporation." *Joe Conte Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 95-1630 (La. App. 4th Cir. 2/12/97), 689 So. 2d 650, writ denied, 97-0659 (La. 4/25/97), 692 So. 2d 1090. Since the Hearn are shareholders of Catfish Cabin, they consequently have no right to sue for its alleged damages.

² Plaintiffs did not allege in their petition, but argued, at the hearing of the peremptory exception of no right of action, that they are Catfish Cabin. We find no merit in that argument.

We note again that the e-mail stated that “someone intentionally poisoned the food.” The Hearn, however, only argue that they are Catfish Cabin, without alleging that “someone” refers to them personally or as shareholders. Assuming, *arguendo*, that “someone” refers to an *employee*, *shareholder* or *other person* at Catfish Cabin, the person to whom the word “someone” is directed would have to be the plaintiff.

The Hearn argue that Louisiana recognizes group defamation; that is, “when a small group is defamed, an individual member may establish a cause of action for defamation even though he is not specifically named or identified.” *McConathy, supra, citing Levert v. Daily States Pub. Co.*, 123 La. 594, 49 So. 206 (1909). In *Levert, supra*, however, the court found that defamatory statements referred to every member of the group and that every member of the group had a right of action.

In order to maintain a right of action, the word “someone” must refer to James Hearn, Russell Hearn and David Hearn. “[T]o be actionable defamatory words must be ‘of and concerning’ the plaintiff or, directly or indirectly, cast a personal reflection on the plaintiff.” *Gugliuzza, et al. v. K.C.M.C., Inc., et al.*, 606 So. 2d 790 (La. 1992). “The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff.” *McConathy, supra*. Furthermore, “[i]f the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory . . .” *McConathy, supra*.

The testimony in this case reveals that approximately 12 to 15 employees were present at Catfish Cabin during lunch on December 13, 1999, and that 35 to 38 employees were employed by Catfish Cabin at that time.

The testimony further reveals that all employees had access to the food. Since the word “someone” is singular, and only refers to one person in a group ranging from 35 to 38 people, as opposed to *Lever*, *supra*, where every member of the group had been defamed, we conclude that the individual or group allegedly defamed is not ascertainable; and, therefore, the Hearn have no right of action in this case. The e-mail was not “of and concerning” the Hearn and it did not directly or indirectly cast a personal reflection on them.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court sustaining the peremptory exception of no right of action against James Hearn, Russell Hearn and H. David Hearn. Costs are assessed to James Hearn, Russell Hearn and H. David Hearn.

AFFIRMED.