

FILED FEB 26 2002



Peter J. Fitzgerald  
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NATIONS CREDIT FINANCIAL  
SERVICES CORPORATION  
OF ALABAMA

NO. 01-CA-1152

FIFTH CIRCUIT

VERSUS

COURT OF APPEAL

RICHARD D. KENNEDY AND  
SALLY SIDES KENNEDY

STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
FOR THE PARISH OF JEFFERSON, NO. 474-049, DIVISION "D",  
HONORABLE ROBERT M. MURPHY, JUDGE

: : :

**EDWARD A. DUFRESNE, JR.**  
**CHIEF JUDGE**

**FEBRUARY 26, 2002**

: : :

(Panel composed of Judges Edward A. Dufresne, Jr., Sol Gothard and  
Walter J. Rothschild)

ROBERT A. MATHIS, For Plaintiff-Appellee  
MARK C. LANDRY  
212 Veterans Blvd., Suite 100  
Metairie, LA 70006

PHILIP H. KENNEDY, For Defendants-Appellants  
2132 Danny Park  
Metairie, LA 70001

**AFFIRMED**

EWK  
SJ  
WJR

This is an appeal by Richard and Sally Kennedy from a judgment sustaining an exception of prescription as to their claims relating to alleged fraud and violation of the Louisiana Fair Trade Practices Act in the confectio[n] of a note and mortgage executed by them. The exception was urged by Del Norte, Inc., the eventual holder of the note and mortgage. For the following reasons we affirm the judgment.

The pertinent facts are clear. On December 18, 1985, the Kennedys signed a promissory note and mortgage on their house. The amount borrowed was \$38,600, at 18% interest, payable in 119 monthly installments of \$595.72, with a balloon payment at the end of \$33,656.58. The total payout over the term came to \$104,547.26. Shortly after the note and mortgage were recorded it was discovered that the date for the balloon payment at the end of 119 months had mistakenly been stated as December 23, 2005, instead of December 23, 1995. The Kennedys were informed of this problem and on February 13, 1986, they returned to the

notary and executed a second note exactly like the first one except for the correction as to the date due of the balloon payment, which was December 23, 1995. They also executed at this time an act of correction of the mortgage showing the corrected date. These documents were duly recorded.

Nine years later the Kennedys were delinquent in paying on this note as of July 23, 1994, and on February 1, 1995, National Financial Services Corporation of Alabama, the then alleged holder, instituted executory proceedings to enforce the mortgage. The Kennedys responded by filing a petition for injunctive relief to stop the seizure and sale asserting numerous alleged defects in the proceedings. National agreed not to go forward with the seizure and sale and eventually transferred the note to Del Norte, Inc.

Del Norte revived the executory proceedings on October 19, 1998, and the Kennedys again sought injunctive relief. In their amended petition for injunction they raised their previous allegations and also added violation of the Fair Trade Practices Act, La. R.S. 51:1401 *et seq.*, and fraud in the confection of the original and amended note and mortgage which would be grounds for rescission of the contract.

On July 13, 2000, the trial judge denied injunctive relief and in reasons for judgment recited that he was dismissing all of the claims which had been asserted in their original petition for injunction. The reasons for judgment were silent as to the unfair trade practices and rescission claims. The Kennedys sought review of the July 13, 2000, judgment in this court and the Louisiana Supreme Court, both of which denied any relief. That judgment thus became a final judgment.

The Kennedys paid the note before the property was sold by the

sheriff, thus concluding the executory proceedings. They then moved to set the matter for trial on their claims for damages for wrongful seizure. Del Norte urged a motion for summary judgment asserting that all of the claims had been adjudicated by the final judgment of July 13, 2000, and alternatively that because the mortgage had been paid the entire proceeding was moot. By summary judgment of February 2, 2001, the trial judge dismissed all of the Kennedys' claims for relief except those alleging unfair trade practices and rescission for fraud. Del Norte then urged exceptions of prescription as to these latter two claims, and these exceptions were sustained by the trial court. The Kennedys now appeal.

As best we can determine, the Kennedys' theory in support of its last two claims is that the first note contained a mis-representation that the interest rate of the loan was 18%. They assert that if the interest were calculated over the 119 payment period to December 23, 1995, and the extra ten year period between that date and the December 23, 2005, date for the balloon payment, then the actual interest was about 15%. They then aver that when they signed the second note they were told that the interest would be the same as that of the first note, *i.e.* 18%. They conclude from this that they were intentionally misled as to the true interest on the first note as an inducement to sign the second note. It is these acts on the part of the original mortgage company which they contend were unfair trade practices and fraudulent.

We note initially that it is not contested that the figures on both notes for the total payments, if they were to be made in a ten year term, are correct at an interest rate of 18%. It is not contested that the Kennedys signed an authentic act of correction which recites that the December 23,

2005, date in the original note and mortgage was an error, and that the agreed upon term was for ten years with the balloon payment due on December 23, 1995. Neither is it contended that the executory proceedings were commenced because the balloon payment was not made timely; rather they were commenced because payments were not made in accordance with the 119 regular payment schedule which was the same under the clear terms of both notes. Finally, the Kennedys do not assert that they became aware of any new information as to the original and amended papers after February, 1986.

The rule as to the peremptory exception of prescription is that where an action has prescribed on the face of the petition, it is incumbent on the party opposing the motion to show a suspension or interruption of prescription, *Tauzon v. Eisenhardt*, 98-666 (La. App. 5<sup>th</sup> Cir. 12/16/98), 725 So.2d 553. The prescriptive period for actions asserting unfair trade practices is one year from the date of the occurrence, La. R.S. 51:1409E, and that for rescission of contracts for fraud is five years from the date of discovery of the fraud, La. Civ. Code, Art. 2032. Thus, on the face of the Kennedys' papers these claims were prescribed.

It was thus the Kennedys' burden to show some facts which would have prevented prescription from running or interrupted or suspended it. There is no such showing here. All of the facts related about the alleged unfair practices or fraud occurred in 1986 and were known to the Kennedys then. There is no allegation that any new facts were discovered or came to light at a later date. In these circumstances both actions have clearly prescribed, and the judgment so ruling was correct.

The Kennedys also argue that the partial summary judgment of

February 2, 2001, was improperly granted. The basis of that judgment was that all of the theories advanced in support of the injunction had been resolved by the final judgment of July 13, 2000, and their rejection constituted the "law of the case," thus precluding re-litigation. We agree with this result, but rely instead on the Kennedys' failure to state a cause of action for damages for wrongful seizure based on these previously litigated grounds. Once the July 13, 2000, judgment denying injunctive relief became final, that judgment constituted a conclusive determination that the seizure was not wrongful. Therefore, there was no longer any extant right of action for wrongful seizure, see *Henry Ins. Agency, Inc. v. Desadier*, 94-39 (La. App. 3<sup>rd</sup> Cir. 10/5/94), 643 So.2d 374.

For the foregoing reasons the judgment of the district court is hereby affirmed.

**AFFIRMED**



EDWARD A. DUFRESNE, JR.  
CHIEF JUDGE

SOL GOTHARD  
JAMES L. CANNELLA  
THOMAS F. DALEY  
MARION F. EDWARDS  
SUSAN M. CHEARDY  
CLARENCE E. MCMANUS  
WALTER J. ROTHSCHILD

JUDGES

# Court of Appeal

FIFTH CIRCUIT  
STATE OF LOUISIANA

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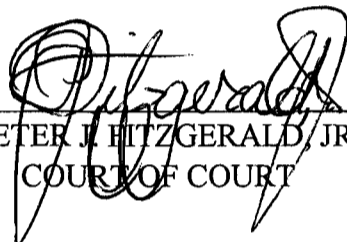
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## CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY FEBRUARY 26, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

  
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