STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2003 CA 0691

H.R. 10 PROFIT SHARING PLAN ACCOUNT NO. 2656-3314, INDIVIDUALLY, AND ON BEHALF OF ALL OTHER COMMON STOCK SHAREHOLDERS OF ETHYL CORPORATION

VERSUS

JAMES MAYEUX, BARBARA RICHARD MAYEUX, AND ETHYL CORPORATION

Judgment Rendered: September 17, 2004

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 468,033

Honorable Kay Bates, Presiding

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* * * * * *

BEFORE: GUIDRY, GAIDRY, AND McCLENDON, JJ.

McClendon, J. concurs and assigns reasons.

GUIDRY, J.

In this shareholder derivative action, plaintiffs, Robert H. Wesson and H.R. 10 Profit Sharing Plan Account No. 2656-3314, individually and on behalf of all other common stock shareholders of Ethyl Corporation, appeal judgments of the trial court sustaining James and Barbara Mayeux's peremptory exception raising the objection of no cause of action and granting Ethyl Corporation's motion to dismiss the action.[1] For the reasons that follow, we affirm the trial court's judgment sustaining the exception raising the objection of no cause of action and dismiss the appeal to the extent it seeks review of the trial court's granting of the motion to dismiss.

FACTS AND PROCEDURAL HISTORY

Plaintiffs are shareholders of Ethyl Corporation (Ethyl). On March 6, 1998, Ethyl sold contiguous parcels of land in Iberville Parish, Louisiana, totaling approximately 2,913 acres, to James and Barbara Mayeux (Mayeuxs) for 5.5 million dollars. The act of sale was recorded in the conveyance records of Iberville Parish on March 10, 1998. An act of correction was subsequently performed on April 14, 1998, to amend and correct the legal description of property, which had omitted certain strips of land totaling approximately 11 acres.

On March 8, 1999, plaintiffs filed a shareholder derivative action in the Eighteenth Judicial District Court in and for the Parish of Iberville,[2] naming the Mayeuxs and Ethyl as defendants[3] and alleging that the sale to the Mayeuxs was lesionary under La. C.C. arts. 2589-2600. The Mayeuxs and Ethyl thereafter filed

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[1] Plaintiffs also appeal a judgment of the trial court sustaining the Mayeuxs' and Ethyl's declinatory exceptions raising the objection of improper venue. However, as discussed infra, the appeal from this judgment has been dismissed.

[2] H.R. 10 Profit Sharing Plan Account No. 2656-3314 filed the original petition; however, through an amended petition Robert H. Wesson was added as a plaintiff.

[3] Alternatively, plaintiffs named Henry C. Page, Jr. as a defendant, alleging gross mismanagement of corporate assets and breach of fiduciary duty owed to the corporation and shareholders. However, Mr. Page was subsequently dismissed from the action.

declinatory exceptions raising the objection of improper venue, asserting that the proper venue for plaintiffs' action was East Baton Rouge Parish. Following a hearing on these exceptions, a judgment was signed on October 8, 1999, sustaining the exceptions raising the objection of improper venue and transferring the matter to the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge.

Thereafter, the Mayeuxs answered plaintiffs' petition and filed a peremptory exception raising the objection of no cause of action, asserting that the plaintiffs' action had perempted because it was not filed in a proper venue or served within one year of the sale. Following a hearing on the exception, the trial court signed a judgment on May 25, 2000, sustaining the Mayeuxs' exception and dismissing the plaintiffs' action with prejudice. Plaintiffs thereafter filed a suspensive appeal with this court on September 13, 2000, seeking review of both the October 8, 1999 and May 25, 2000 judgments. On June 4, 2001, this court dismissed plaintiffs' appeal, finding that the October 8, 1999 judgment was not timely appealed and that the May 25, 2000 partial judgment was not a final judgment. Wesson v. Mayeaux, 2000 CA 2636 (La. App. 1st Cir. 6/4/01) (unpublished opinion). Plaintiffs thereafter filed a motion and order in the trial court seeking certification of the May 25, 2000 judgment as final. Following the trial court's subsequent certification , plaintiffs filed a motion to supplement the record on appeal and filed an application for rehearing. This court denied plaintiffs' request for rehearing and plaintiffs thereafter filed an application for a writ of certiori in the supreme court, which was also denied.

On May 30, 2002, Ethyl filed a motion to dismiss plaintiffs' action in the trial court, asserting that there were no longer any viable defendants against whom Ethyl and the shareholder plaintiffs could obtain relief. Following a hearing on the motion, the trial court signed a judgment on August 20, 2002, dismissing plaintiffs' claims without prejudice. Plaintiffs thereafter filed a motion for appeal on October

15, 2002, seeking review of the October 8, 1999, May 25, 2000, and August 20, 2002 judgments. This court, *ex proprio motu*, issued a rule to show cause why the appeal should not be dismissed. In particular, this court was concerned with the following issues: the October 8, 1999 judgment previously addressed by this court; the timeliness of appeal from the May 25, 2000 judgment; and the August 20, 2002 judgment not being signed by the trial judge.

On July 1, 2003, this court issued its decision on the rule to show cause as follows: dismissed the appeal to the extent it sought review of the October 8, 1999 judgment because said judgment was previously addressed by this court in Wesson v. Mayeux, 2000 CA 2636; recalled the rule to show cause and maintained the appeal to the extent that it sought review of the May 25, 2000 judgment, because the appeal delays had not begun to run; and annulled the August 20, 2002[4] judgment, remanded to the trial court for the limited purpose of having the trial judge who heard and decided the matter sign a proper judgment, and directed the trial court to supplement the appellate record with certified copies of the judgment. In accordance with this court's ruling, the trial judge signed a proper judgment on July 14, 2003, and this court subsequently maintained the appeal to the extent it seeks review of the July 14, 2003 judgment. Therefore, only the May 25, 2002 and July 14, 2003 judgments are before this court for review.

DISCUSSION

No Cause of Action

Plaintiffs first assert that the trial court erred in its May 25, 2000 judgment by improperly sustaining the Mayeuxs' exception raising the objection of no cause of action and dismissing their suit as to the Mayeuxs. As stated previously, plaintiffs filed a shareholder's derivative action for lesion beyond moiety in

[4] The ruling erroneously refers to the August 20, 2002, judgment as August 8, 2002.

accordance with La. C.C. art. 2589.[5] However, La. C.C. art. 2595 provides that an action for lesion must be brought within a peremptive period of one year from the time of the sale. In the instant case, the sale of the Iberville Parish property took place on March 6, 1998, and plaintiffs filed their action on March 8, 1999. The parties do not dispute that the action was timely filed in the Eighteenth Judicial District Court.[6] However, the Eighteenth Judicial District Court was subsequently found to be a court of improper venue for the action.[7]

Louisiana Civil Code article 3462 provides:

> Prescription is interrupted when the owner commences an action against the possessor ... in a court of competent jurisdiction and venue. *If the action is commenced in an incompetent court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period.* (Emphasis added.)

Although La. C.C. art. 3461 provides that unlike prescription, peremption may not be renounced, interrupted, or suspended, 1982 revision comment c explains that "when an action asserting a right subject to peremption has been commenced or served as provided in La. C.C. art. 3462, the right has been exercised and so long as the action is pending the lapse of the period of peremption does not extinguish the right." Accordingly, in order to avoid peremption of their action, plaintiffs had to serve the Mayeuxs by process within the one-year peremptive period mandated by La. C.C. art. 2595. However, from our review of the record before us, the

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[5] La. C.C. art. 2589 provides in part:

> The sale of an immovable may be rescinded for lesion when the price is less than one half of the fair market value of the immovable. Lesion can be claimed only by the seller and only in sales of corporeal immovables. It cannot be alleged in a sale made by order of the court.

[6] The parties assert that the action was timely filed because March 6, 1999, was a holiday and the next available day for filing was March 8, 1999. See La. C.C. art. 3454.

[7] Plaintiffs focus the majority of their argument on the issue of venue. However, because the October 8, 1999 judgment regarding venue is final, having been previously addressed by this court and the supreme court, the trial court's decision on that issue is res judicata for purposes of the instant appeal.

Mayeuxs were not served by process until March 11, 1999, which falls outside the one-year peremptive period.

The plaintiffs, however, assert that despite their failure to serve the Mayeuxs until March 11, 1999, their action is still timely. First, plaintiffs assert that the sale was not perfected until April 14, 1998, when the act of correction was executed, because the act of correction did not correct a clerical error but altered the substance of the sale and as such, had no retroactive effect. Alternatively, plaintiffs assert that if the act of correction did correct a clerical error and is given retroactive effect, it is retroactive to the date of recordation, and not the date of the original sale.

As stated previously, following the sale an act of correction was executed between Ethyl and the Mayeuxs. Louisiana Revised Statute 35:2.1, relating to affidavits of correction, provides in part:

> A. A clerical error in a notarial act affecting movable or immovable property or any other rights, corporeal or incorporeal, may be corrected by an act of correction executed by the notary or one of the notaries before whom the act was passed, or by the notary who actually prepared the act containing the error. The act of correction shall be executed by the notary before two witnesses and another notary public.
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> B. The act of correction executed in compliance with this Section shall be given retroactive effect to the date of recordation of the original act. However, the act of correction shall not prejudice the rights acquired by any third person before the act of correction is recorded where the third person reasonably relied on the original act. The act of correction shall not alter the true agreement and intent of the parties.

The plaintiffs assert that the act of correction executed in this case, adding four additional tracts of land totaling approximately 11 acres, did no more than simply correct a clerical error in the original sale and as such, the sale was not completed until this act was executed on April 14, 1998. However, from our review of the record, we do not find that the trial court erred in rejecting this argument. First, both Ethyl and the Mayeuxs demonstrated that it was their intent

that these four tracts of property be conveyed in the original sale, but that they were inadvertently omitted from the lengthy property description. The Mayeauxs, subsequent to the March 6, 1998 sale, even acted under the belief that the four tracts had already been conveyed in trying to convey a servitude to Exxon. Further, upon the execution of the act of correction, no additional consideration was paid for the four tracts of land. As such, we find no error in the trial court's determination that the act of correction reflected that the additional four tracts were bargained for and merely omitted from the sale, rather than reflecting that the date of the sale for the additional tracts was April 14, 1998.

Plaintiffs, however, further contend that if the act of correction is considered to have corrected a clerical error and is to be given retroactive effect, according to La. R.S. 35:2.1 (B) it can only be retroactive to the date of recordation, or March 10, 1998, and not to the date of sale, which was March 6, 1998. According to plaintiffs, if the act of correction is retroactive to March 10, 1998, their action is still timely because the Mayeuxs were served on March 11, 1999. However, this interpretation of the prescriptive articles rejects their plain and unambiguous meaning.

At the outset, we reiterate that according to La. C.C. art. 3459, the provisions on prescription governing computation of time also apply to peremption. Louisiana Civil Code article 3454 provides:

> In computing a prescriptive period, the day that marks commencement of prescription is not counted. Prescription accrues upon the expiration of the last day of the prescriptive period, and if that day is a legal holiday, prescription accrues upon the expiration of the next day that is not a legal holiday.

Additionally, La. C.C. art. 3456 provides that if a prescriptive period consists of one or more years, prescription accrues upon the expiration of the day of the last year *that corresponds with the date of the commencement* of prescription. (Emphasis added.) A plain reading of these codal articles reveals that the date

marking commencement, assuming in this case the recordation date of March 10, 1998, is not counted in computing the prescriptive period. However, because the peremptive period in this case is one year, peremption accrues upon the expiration of the day of the last year *that corresponds with the date of commencement*, which would be March 10, 1999. Therefore, the date to which the act of correction is retroactive is of no moment, as plaintiffs' action is still perempted under either scenario, the petition not having been served on the Mayeuxs until March 11, 1999.

Therefore, based on our review of the record and our analysis as outlined above, we find no error in the trial court's judgment sustaining the Mayeuxs' exception raising the objection of no cause of action[8] and dismissing the plaintiffs' action as to the Mayeuxs.

Motion to Dismiss

In addition to the May 25, 2000 judgment, plaintiffs also appeal from the July 14, 2003 judgment, dismissing the remainder of their suit. Plaintiffs assert that in rendering this judgment, the trial court improperly dismissed Ethyl as a party. However, in their brief before this court, plaintiffs failed to address this issue in their argument. Therefore, in accordance with U.R.C.A. Rule 2-12.4 and La. C.C.P. art. 2162, we consider plaintiffs' appeal of the July 14, 2003 judgment to have been abandoned and dismiss their appeal to the extent that it seeks review of that judgment.

CONCLUSION

For the foregoing reasons, the judgment of the trial court, sustaining the Mayeuxs' peremptory exception of no cause of action is affirmed. To the extent that plaintiffs appeal from the judgment of the trial court granting Ethyl's motion

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[8] The peremptory exception raising the objection of no cause of action is the proper procedural device for pleading prescription. Dowell v. Hollingsworth, 94-0171, p. 4 n. 6 (La. App. 1st Cir. 12/22/94), 649 So. 2d 65, 68 n. 6, writ denied, 95-0573 (La. 4/21/95), 653 So. 2d 572.

to dismiss, the appeal is dismissed. All costs of this appeal are to be borne by the appellants, Robert H. Wesson and H.R. 10 Profit Sharing Plan Account No. 2656-3314, individually and on behalf of all other common stock shareholders of Ethyl Corporation.

MAY 25, 2000 JUDGMENT AFFIRMED; APPEAL OF JULY 14, 2003 JUDGMENT DISMISSED.

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McClendon, J., concurs.

Although I agree with the majority that the issue of proper venue is res judicata, I note that LSA-R.S. 13:4232 specifically provides an exception to the general rule "[w]hen exceptional circumstances justify relief from the res judicata effect of a judgment." See also **Phillips v. Patterson Ins. Co.**, 98-1849 (La.App. 3 Cir. 5/19/99), 734 So.2d 1285, writ denied, 99-1826 (La. 10/8/99), 750 So.2d 970. However, as I do not find that such exceptional circumstances are present in the case at bar, I respectfully concur.