

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0108

COREY COOPER, ET AL

VERSUS

LOUISIANA CITIZENS PROPERTY INSURANCE COMPANY

Judgment Rendered: SEP 21 2012

APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 2010-15824

THE HONORABLE MARTIN E. COADY, JUDGE

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

*Pettigrew, I concur and assigns Reasons
Kuhn, I concur & assigns Reasons*

McDONALD, J.

On September 17, 2010, Ms. Corey Cooper filed suit for damages against Louisiana Citizens Property Insurance Company (Citizens) for a Hurricane Katrina claim. Ms. Cooper asserted that she owned immovable property with improvements and personal property located in St. Tammany, that she had purchased homeowner's insurance policies from Citizens, and that after Hurricane Katrina she presented her claims for damage in a timely fashion but that Citizens failed to pay the amount due under her policy and violated its duties of good faith and fair dealing. Ms. Cooper asserted that Citizens was a defendant in eight putative class actions, and, as a result of those filings, prescription had been interrupted as to Citizens. Ms. Cooper noted further that as no notice had been published pursuant to La. C.C.P. art. 596 regarding rulings on the issue of class certification, prescription had been suspended on her claims.

Citizens filed an answer to the petition and a peremptory exception raising the objection of prescription, asserting that Ms. Cooper's claims were prescribed. After a hearing, the district court ruled in favor of Citizens, granting the prescription exception and dismissing Ms. Cooper's claims with prejudice. The district court found that Ms. Cooper's petition was prescribed on its face; that she failed to prove she was a member of any of the class actions; that she could not show that prescription was suspended because of her membership in a class action; found that she opted out of pending class actions by filing an individual lawsuit before class certification was determined.

Ms. Cooper has appealed the judgment and, on appeal, makes three assignments of error.

1. Whether the trial court erred as a matter of law in finding that Defendant had met its burden of proof on the issue of prescription, as the face of Plaintiff's petition did not show the claim was prescribed but instead alleged various class actions that served to toll prescription with regard to Plaintiff's claims.

2. Whether the trial court erred as a matter of law in granting Defendant's Exception of Prescription dismissing, with prejudice, Plaintiff's Hurricane Katrina claim although Plaintiff's suit was not prescribed as she had established that she was a putative class member of one or more timely filed class actions, which served to suspend prescription pursuant to [La. C.C.P. art. 596].
3. Whether the trial court erred as a matter of law in finding that filing of an individual suit results in the forfeiture of the suspension of prescription afforded by the filing of a class action pursuant to [La. C.C.P. art. 596] and that Plaintiff's filing of the instant suit served to "opt out" of the class actions of which she is a member.

THE STANDARD OF REVIEW

In reviewing a peremptory exception raising the objection of prescription, the standard of review requires an appellate court to determine whether the trial court's finding of fact was manifestly erroneous. Jurisprudence provides that statutes involving prescription are strictly construed against prescription and in favor of the obligation sought to be extinguished. On the issue of prescription, the mover bears the burden of proving prescription. However, if the petition is prescribed on its face, then the burden of proof shifts to the plaintiff to negate the presumption by establishing a suspension or interruption. **Taranto v. Louisiana Citizens Property Ins. Corp.**, 2010-0105 (La. 3/15/11), 62 So.3d 721, 726.

ANALYSIS

Ms. Cooper asserts that the district court erred by finding that Citizens met its burden of proof on the issue of prescription, as her petition listed several class actions of which she was a member, which served to suspend prescription with regard to her claims, therefore, the face of the petition did not show that her claim had prescribed; erred by granting the exception of prescription, as she had established that she was a putative class member of one or more timely filed class actions, which served to suspend prescription pursuant to La. C.C.P. art. 596; and,

erred by finding that her filing of the instant suit served to opt out of the class actions of which she was a member.

Act 802 of the 2006 Regular Session of the Louisiana Legislature allowed the filing of Hurricane Katrina-related claims for damages on or before August 30, 2007, effectively extending the regular prescriptive period to file such claims. Ms. Cooper's petition was filed more than three years after the legislative prescriptive period of Act 802 had run. Thus, the burden shifted to Ms. Cooper to negate the presumption of prescription by establishing a suspension or interruption.

Louisiana Code of Civil Procedure article 596 provides in part:

A. Liberative prescription on the claims arising out of the transactions or occurrences described in a petition brought on behalf of a class is suspended on the filing of the petition as to all members of the class as defined or described therein. Prescription which has been suspended as provided herein, begins to run again:

(1) As to any person electing to be excluded from the class, thirty days from the submission of that person's election form;

(2) As to any person excluded from the class pursuant to Article 592, thirty days after mailing or other delivery or publication of a notice to such person that the class has been restricted or otherwise redefined so as to exclude him; or

(3) As to all members, thirty days after mailing or other delivery or publication of a notice to the class that the action has been dismissed, that the demand for class relief has been stricken pursuant to Article 592, or that the court has denied a motion to certify the class or has vacated a previous order certifying the class.

Although Ms. Cooper claimed to be a putative member of eight different class actions, she presented no evidence of the class actions or her class membership. Louisiana Code of Civil Procedure article 596A provides that the class action petition determines what claims are suspended. Ms. Cooper failed to introduce any class action petition to show that her claims fell within the defined membership class.

Further, Ms. Cooper asserted in her petition that no notice had been published, pursuant to La. C.C.P. art. 596, regarding rulings on the issue of class

certification, thus prescription was suspended and had not begun to run again. Ms. Cooper relies upon **Taranto**, 2010-0105 (La. 3/15/11) 62 So.3d 721, to show that Article 596 suspends prescription for parties fitting the definition of a putative class member. However, the difference between this case and **Taranto** is that the plaintiffs in **Taranto** never filed petitions of their own until after the trial court ruled on their motions to certify the class actions, whereas the appellant in this case did. That action by Ms. Cooper takes this case out of the realm of **Taranto's** analysis. See **Wilkienson v. Louisiana Farm Bureau Mutual Ins. Co.**, 2011-1421 (La. App. 1 Cir. 3/23/12) (unpublished).

This court in **Wilkienson** followed the jurisprudence in **Lester v. Exxon Mobil Corp.**, 2009-1105 (La. App. 5 Cir. 6/29/10), 42 So.3d 1071, writ denied, 2010-2244 (La. 12/17/10), 51 So.3d 14 and **Katz v. Allstate Ins. Co.**, 2004-1133 (La. App. 4 Cir. 2/2/05), 917 So.2d 443, writ denied, 2005-0526 (La. 4/29/05), 901 So.2d 1069, to find that the filing of an individual lawsuit is an effective opt out of a class action and prevents the plaintiff from taking advantage of Article 596's suspension of prescription.

For these reasons, we cannot say that the district court was manifestly erroneous in finding that Ms. Cooper's case was prescribed and dismissing her suit. Thus, the district court judgment, granting a peremptory exception raising the objection of prescription in favor of Louisiana Citizens Property Insurance Company and against Ms. Cooper and dismissing Ms. Cooper's claims with prejudice, is affirmed. Ms. Cooper is cast with costs.

AFFIRMED.

COREY COOPER

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JP BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

PETTIGREW, J., CONCURS WITH THE RESULT, AND ASSIGNS REASONS.

I note after a review of the pleadings in this matter, the appellant did not allege in her petition that she was a putative member of the eight enumerated class actions referred to in her petition. Because of this, I agree with the trial court that the appellant's petition was prescribed on its face, and it was her burden at the hearing on the prescription exception to negate the presumption by establishing a suspension of prescription. **Taranto v. Louisiana Citizens Property Ins. Corp.**, 2010-0105 (La. 3/15/11), 62 So.3d 721, 726. The appellant failed to carry this burden. Therefore, I concur with the results reached by the majority.

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KUHN, J., concurring.

I have serious reservations about the propriety of this court's holdings in *Wilkienson v. Louisiana Farm Bureau Mut. Ins. Co.*, 2011-1421 (La. App. 1st Cir. 3/23/12) (unpublished opinion) as well as *Acevedo v. Louisiana Farm Bureau Mut. Ins. Co.*, 2011-2176 (La. App. 1st Cir. 7/2/12) and believe the issues raised in other cases like the one presently before us should be examined by the Louisiana Supreme court to reconcile the jurisprudence and the provisions of La. C.C.P. art. 596. See *Duckworth v. Louisiana Farm Bureau Mut Ins. Co.*, 2011-0837 (La. App. 4th Cir. 11/23/11), 78 So.3d 835, writ granted, 2011-2835 (La. 3/30/12), --- So.3d ----. But in conformity with the law of this circuit, I agree with the result reached by the majority. Accordingly, I concur.