NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1833, 2013 CW 0915,
and 2013 CW 1116

CLIPPER ESTATES MASTER HOMEOWNERS' ASSOCIATION, INC.

VERSUS

JOHN B. HARKINS, JR. AND DEBORAH KUBRICHT HARKINS,
ABC COMPANY(IES) AND ABC INSURANCE COMPANY

Judgment Rendered: SEP 30 2014

* * * * *

On Appeal from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 2007-10186

The Honorable Reginald T. Badeaux, III, Judge Presiding

* * * * *

Glenn B. Adams
Denia S. Aiyegbusi
New Orleans, Louisiana

Attorneys for Appellant,
Clipper Estates Master
Homeowners' Association, Inc.

Judith Otero
Mandeville, Louisiana

Allen H. Borne, Jr.
Ryan P. Reece
New Orleans, Louisiana

Attorneys for Appellees,
John B. Harkins, Jr. and
Deborah Kubricht Harkins

Lloyd T. Bourgeois
Thibodaux, Louisiana

John E. McAuliffe, Jr.
Metairie, Louisiana

Attorney for Appellee,
State Farm Fire and Casualty
Company

* * * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Parro, J. concurs

DRAKE, J.

This appeal arises from the granting of a partial summary judgment, which issued a mandatory permanent injunction in favor of plaintiff-in-reconvention, John B. Harkins, Jr., and denied certain exceptions filed by defendant-in-reconvention, Clipper Estates Master Homeowners' Association, Inc. (CEMHOA). It is from this judgment that CEMHOA appeals.

FACTS AND PROCEDURAL HISTORY

On January 12, 2007, CEMHOA originally filed a petition against Harkins and his wife, Deborah Kubricht Harkins,[1] for damages to a bulkhead that is adjacent to the property owned by the Harkinses. CEMHOA also sought an injunction against the Harkinses to have the property owners cease any activity which would continue to damage the bulkhead. The Harkinses' property is located in the Clipper Estates Subdivision, St. Tammany Parish, Louisiana, and is subject to the Declaration of Covenants, Conditions and Restrictions (Declaration) and Supplementary Declaration of Covenants, Conditions and Restrictions (Supplementary Declaration) (collectively referred to as "Restrictive Covenants"). The property owned by the Harkinses does not directly abut a waterway passage used by the residents of Clipper Estates Subdivision to get to Lake Ponchartrain, but is very near the water's edge. CEMHOA owns the waterway passage. A bulkhead and a strip of land owned by CEMHOA separates the waterway passage from the property of the Harkinses. CEMHOA claimed that on January 20, 2006, the bulkhead failed, causing some of it to fall into the waterway passage due to the activity of the Harkinses or contractors performing work, repair, or maintenance on their property. CEMHOA alleged that the Harkinses violated the Restrictive Covenants by the construction and activity on their property. CEMHOA filed First

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[1] Although Deborah Kubricht Harkins is a defendant in the original petition, she is not a party to the reconventional demand.

and Second Supplemental and Amending Petitions, adding facts and details as to their claim for an injunction and damages and claiming that the remainder of the bulkhead failed on or about August 25, 2008, as a result of actions or omissions by the Harkinses or those for whom they were responsible. On June 22, 2012, CEMHOA filed a Third Supplemental and Amending Petition, asserting that a pool installation company had contacted it regarding the Harkinses' property and that exterior landscape and maintenance work was being performed on the lot which violated the Restrictive Covenants. CEMHOA also sought a temporary restraining order (TRO) against the Harkinses preventing any further construction or installation activity. The trial court issued the TRO on June 29, 2012.[2]

On August 23, 2012, John Harkins filed a Reconventional Demand for Mandatory Injunction claiming that CEMHOA owned the land and the bulkhead thereon, adjacent to the home of the Harkinses. Harkins claimed that the bulkhead failed "years ago" and has caused damage and erosion to his property. Harkins alleged that CEMHOA was in violation of the Restrictive Covenants because it failed to repair or replace the bulkhead. Harkins requested a mandatory permanent injunction requiring CEMHOA to repair or replace the failed bulkhead, as well as attorney's fees and other equitable relief.

CEMHOA filed an exception of vagueness to the reconventional demand that the trial court denied following a hearing. CEMHOA answered the reconventional demand on January 18, 2013. On March 13, 2013, Harkins filed a motion for partial summary judgment, claiming that there was no genuine issue of material fact that CEMHOA owned, and was responsible to repair, the failed bulkhead and requesting the issuance of a mandatory permanent injunction requiring CEMHOA to repair or replace the bulkhead. CEMHOA responded to

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[2] While the TRO is not a part of this record, this court notes that it was issued and was the subject of an unrelated appeal in *Clipper Estates Master Homeowners' Assn. v. Harkins,* 13-0429 (La. App. 1 Cir. 11/4/13), 2013WL5925762 (unpublished opinion).

the motion for partial summary judgment by filing exceptions of unauthorized use of a summary proceeding and prescription. CEMHOA also filed a motion to strike Harkins's motion for partial summary judgment for failing to comply with Rule 9.10(b) of the Louisiana District Court Rules that requires certain contents be present in a memorandum in support of a motion for summary judgment. On April 16, 2013, the trial court held a hearing on the motion for partial summary judgment and the exceptions of unauthorized use of summary proceedings and of prescription. The trial court denied both exceptions, granted the motion for partial summary judgment, and signed a judgment in accordance therewith on April 29, 2013.

CEMHOA filed writ applications to this court seeking review of the trial court's judgment granting Harkins's motion for partial summary judgment and the issuance of a mandatory permanent injunction, as well as denying CEMHO's exceptions as to the unauthorized use of summary proceedings and of prescription. CEMHOA also filed an appeal of the April 29, 2013 judgment rendered in this matter. This court addresses both the granting of the partial summary judgment and the denial of the exceptions in this appeal, together with the writ application.

ASSIGNMENT OF ERRORS

CEMHOA assigns as error that the trial court erred in granting the motion for partial summary judgment that issued a permanent mandatory injunction when genuine issues of material fact remain in dispute. CEMHOA also claims that the trial court erred in issuing the permanent mandatory injunction that required CEMHOA to immediately repair the failed bulkhead without a full trial on the merits. CEMHOA finally claims that the trial court erred in denying the exceptions of unauthorized use of summary proceedings and prescription.

UNAUTHORIZED USE OF SUMMARY PROCEEDINGS

CEMHOA filed an exception of unauthorized use of summary proceedings after the motion for partial summary judgment was filed. CEMHOA claimed that a permanent injunction is not a summary proceeding pursuant to La. C.C.P. arts. 2592 or 3602 and that summary proceedings are only allowed for preliminary injunctions. Summary proceedings may be used for issues "which may be raised properly by an exception, contradictory motion, or rule to show cause." La. C.C.P. art. 2592(3). Harkins opposed the exception on the basis that CEMHOA's exception was a dilatory exception that must be filed prior to the answer pursuant to La. C.C.P. arts. 926(A)(3) and 928(A). Harkins claimed that CEMHOA waived its right to file the exception, since the exception was filed after CEMHOA's answer, and that the demand for a mandatory permanent injunction was brought by ordinary process, not summary process. He argues that La. C.C.P. art. 966(A)(1) permits a summary judgment motion to be filed in "the principal or any incidental action, with or without supporting affidavits."

Louisiana Code of Civil Procedure article 851, entitled "Three modes of procedure; Book II governs ordinary proceedings," provides:

> Three different modes of procedure are used in civil matters in the trial courts of this state: ordinary, summary, and executory.
>
> The articles in this Book govern ordinary proceedings, which are to be used in the district courts in all cases, except as otherwise provided by law.
>
> Summary and executory proceedings are regulated by the provisions of Book V.

Summary proceedings are those which are conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all the formalities required in ordinary proceedings. La. C.C.P.art. 2591. Exceptions to such proceedings must be filed prior to the time assigned for the **trial**. La. C.C.P. art. 2593; *Kyle v. Johnson,* 01-2482 (La. 1 Cir. 5/10/02), 818 So. 2d 979, 982;

Folsom Road Civic Ass'n v. Parish of St. Tammany, 425 So. 2d 1318 (La. App. 1 Cir. 1983). Therefore, the exception of unauthorized use of summary proceedings, that was filed prior to the **trial**, was timely filed and was not waived by CEMHOA.

In order to determine if the trial court correctly denied the exception of unauthorized use of summary proceedings, this court must determine if a summary proceeding may be conducted for a mandatory permanent injunction.

There is a distinction between a "summary proceeding" pursuant to Book V of the Louisiana Code of Civil Procedure and a "motion for summary judgment" in an ordinary proceeding. *See Richard v. Garber Bros., Inc.,* 90-1421 (La. App. 1 Cir. 10/7/94), 644 So. 2d 682, 683. A motion for summary judgment is only tried in an ordinary proceeding, wherein the mover argues that there is no genuine issue of material fact and thus, the mover is entitled to judgment as a matter of law. *See* La. C.C.P. arts. 966-69; *Howard v. Louisiana Citizens Property Ins. Corp.,* 10-1302 (La. App. 4 Cir. 4/27/11), 65 So. 3d 697, 700.

CEMHOA relies upon *Freeman v. Treen,* 442 So. 2d 757, 761 (La. App. 1 Cir. 1983), which stated:

> It is well-settled that a party may obtain permanent injunctive relief in an ordinary proceeding upon a showing of irreparable injury, loss or harm unless some specific provision of law otherwise provides such relief.

Harkins did seek permanent injunctive relief through an ordinary proceeding, a reconventional demand. Ordinary proceedings permit the filing of a motion for summary judgment pursuant to La. C.C.P. arts. 966 and 967. CEMHOA argues that a preliminary injunction may be decided by summary proceedings but that a permanent injunction may only issue after a determination on the merits following a full trial under ordinary process. *See Jurisich v. Jenkins,* 97-1870 (La. App. 1

Cir. 9/25/98), 722 So. 2d 1008, 1013, *rev'd on other grounds,* 99-0076 (La. 10/19/99), 749 So. 2d 597.

This court has granted a summary judgment requesting a permanent injunction where there are no genuine issues of material fact. *See Carrollton Presbyterian Church v. Presbytery of South Louisiana of the Presbyterian Church (USA),* 11-0205 (La. App. 1 Cir. 9/14/11), 77 So. 3d 975, 982, *writ denied,* 11-2590 (La. 2/17/12), *cert. denied,* 133 S.Ct. 150 (2012); *Moonraker Island Phase III Architectural Committee, Inc. v. Mars Lake, Inc.,* 07-2479 (La. App. 1 Cir. (9/9/08) 2008WL4148205 (unpublished opinion); *see also, Vanguard Environmental, LLC v. Terrebonne Parish Consolidated Government,* 12-1998 (La. App. 1 Cir. 6/11/13) 2013WL4426508 (unpublished opinion).

An injunction in its mandatory form, which commands the doing of something, cannot be issued without a hearing on the merits. *Kliebert Educational Trust v. Watson Marines Services, Inc.,* 454 So. 2d 855, 860 (La. App. 5 Cir. 1984), *writ denied,* 457 So. 2d 682 (La. 1984). A party seeking a mandatory injunction must show by a preponderance of the evidence at an evidentiary hearing that he is entitled to the injunction. *City of Baton Rouge/Parish of East Baton Rouge v. 200 Government Street, LLC,* 08-0510 (La. App. 1 Cir. 9/23/08), 995 So. 2d 32, 36, *writ denied,* 08-2554 (La. 1/9/09), 998 So. 2d 726. However, an injunction in mandatory form may be properly issued in summary proceedings where all parties had an opportunity to present their case in an evidentiary hearing. *Bollinger Machine Shop and Shipyard, Inc. v. U.S. Marine, Inc.,* 595 So. 2d 756, 758-59 (La. App. 4 Cir.), *writ denied,* 600 So. 2d 643 (La. 1992)(citing *Dore v. Jefferson Guar. Bank,* 543 So. 2d 560 (La. App. 4 Cir. 1989)); *Kliebert,* 454 So. 2d at 860. Further, the standard of proof to show entitlement to relief sought at such an evidentiary hearing is by preponderance of the evidence, rather than a prima

facie showing used at a preliminary injunction hearing. *Bollinger,* 595 So. 2d at 759.

In the present case, the trial court issued a mandatory permanent injunction because the Restrictive Covenants require CEMHOA to maintain and repair the bulkhead. However, at the hearing held by the trial court, which was" purported" to be a summary judgment hearing, testimony was allowed by both parties, namely, Harold Flint, a former member of the Architectural Review Committee of CEMHOA, and Shelly Ditta Doucett, chairwoman of the Architectural Review Committee (ARC), presented in the form of a transcript from a previous hearing. Therefore, the evidence was not limited to pleadings, depositions, answers to interrogatories, admissions, and affidavits as is required for hearings on motions for summary judgment pursuant to La. C.C.P. art. 966(C). Accordingly, we find that CEMHOA has not been prejudiced by the procedural method employed, and the trial court committed no error in denying the exception of unauthorized use of summary proceedings. *See Kliebert,* 454 So. 2d at 860. Therefore, this case is properly before this court on appeal, and this court reviews the trial court's grant of partial summary judgment.

JUDGMENT GRANTING PERMANENT INJUNCTION IS FINAL AND APPEALABLE

The judgment at issue granted mandatory permanent injunctive relief. "An appeal may be taken as a matter of right from an order or judgment relating to a preliminary or final injunction, but such an order or judgment shall not be suspended during the pendency of an appeal unless the court in its discretion so orders." La. C.C.P. art. 3612(B); s*ee Vanguard Environmental, LLC v. Terrebonne Parish Consolidated Government*, 12-1998 (La. App. 1 Cir. 6/11/13) 2013WL4426508 (unpublished opinion); *Louisiana State Bar Ass'n v. Carr and Associates, Inc.*, 08-2114 (La. App. 1 Cir. 5/08/09), 15 So. 3d 158, 164, *writ*

denied, 09-1627 (La. 10/30/09), 21 So. 3d 292. The appellate jurisdiction of this court extends to "final judgments." La. C.C.P. art. 2083. A final judgment pursuant to Louisiana law is one which determines the merits of the controversy, in whole or in part. La. C.C.P. art. 1841.

CEMHOA attempted to have the partial summary judgment certified as final even thought it did not dispose of all the issues of the reconventional demand. The trial court denied the motion to certify the judgment as a final partial judgment. However, as pointed out by both the trial court and Harkins, CEMHOA had a right of appeal from the issuance of a final injunction. *See* La. C.C.P. art. 3612. Therefore, this court maintains the appeal and dismisses the supervisory writ.

STANDARD OF REVIEW

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. *All Crane Rental of Georgia, Inc. v. Vincent,* 10-0116 (La. App. 1 Cir. 9/10/10), 47 So. 3d 1024, 1027, *writ denied,* 10-2227 (La. 11/19/10), 49 So. 3d 387. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2). Summary judgment is favored and designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2).

Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. *All Crane,* 47 So.3d at 1027. On a motion for summary judgment, the burden of proof is on the mover. La. C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial on the matter that is before the court on the motion, the mover's burden does not require that all essential elements

of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment as a matter of law. La. C.C.P. art. 966(C)(2); *All Crane,* 47 So.3d at 1027.

DISCUSSION

In order to support his motion for summary judgment, Harkins relied upon his own affidavit, photographs of the failed bulkhead, a portion of the Restrictive Covenants, and sworn testimony, taken at a preliminary injunction hearing initiated by CEMHOA, of Harold Flint and Shelly Ditta Doucett. The evidence submitted by Harkins was that the failed bulkhead was never repaired or replaced and has continually caused erosion to Harkins's property. Harkins also submitted a portion of the Restrictive Covenants and relies on Article IV, Section 4(c) which states that it is the duty and obligation of CEMHOA to manage and administer the "Common Areas" and specifically provides that the CEMHOA "shall be responsible for the exclusive management and control of the benefit of the Members of the Common Area conveyed to it and all improvements on the Common Area .... The Association shall keep the same in good, clean, attractive and sanitary condition, order and repair in compliance with standards set by the Association." Article I, Section 11 defines "Common Areas" as "all real property, and the improvements or excavations thereon, owned or leased by the Association...." Therefore, Harkins argues that CEMHOA cannot refrain from repairing broken or damaged common areas. Harkins also claims that the reasons

for the bulkhead's failure are irrelevant to the issue of whether CEMHOA must repair or replace the bulkhead.

In its opposition to the motion for partial summary judgment, CEMHOA provided evidence that when Harkins first submitted his application for the construction of his residence, the ARC did not initially approve the plans because the plans did not address the required 4 to 1 slope required of property adjacent to a waterway. Harkins eventually submitted plans and built the home, but was required by the ARC to build a retaining wall on his property. In January 2006, a portion of the bulkhead failed. A second bulkhead failure occurred on or about August 25, 2008, after which CEMHOA filed a second supplemental and amending petition. CEMHOA disputed that the failed bulkhead caused the erosion to Harkins's property, that it was responsible for the failed bulkhead, that the erosion proposes a long-term threat to Harkins's property or guests, and that CEMHOA has refused to repair or replace the failed bulkhead.

CEMHOA supported its opposition to the motion for partial summary judgment with affidavits of Shelly Ditta Doucet and Ludy Pittman, the office manager, member of the ARC, and former secretary/treasurer of CEMHOA. Both affiants testified that Harkins was required to maintain a 4 to 1 slope on his lot, but constructed his with a 1 to 1 slope. Both affiants also testified that Harkins agreed to construct a retaining wall on his side of the property. In October 2006, Harkins began constructing the retaining wall, installing fill material, and building a fence, all without submission to the ARC for approval. The ARC requested that Harkins cease all activity until stamped engineering drawings were received. After the first bulkhead failure, CEMHOA braced the area with horizontal pilings. After the second bulkhead failure on August 25, 2008, CEMHOA removed the horizontal bracing and replaced it with vertical bracing. CEMHOA asserted in affidavit evidence that additional acts of Harkins caused the second bulkhead failure and

damages to CEMHOA. CEMHOA claimed that since the bulkhead was braced, no additional failure has taken place. CEMHOA also claimed that as of April 5, 2013, Harkins had not submitted any engineering plans as to the retaining wall. At a hearing on July 16, 2012, of the preliminary injunction filed by CEMHOA, Doucet testified that the retaining wall shown in photographs was built without the ARC approval and does not contain any footing and pilings.

CEMHOA also attached the entire Restrictive Covenants and relied upon Article X, Section 1 that refers to the common areas and damage by members as follows, in pertinent part:

> Each Member shall be liable to the Association for any damage to Common Areas that may be sustained by reason of the negligence or willful misconduct of said Member, or of his/her ... contractors, builders, subcontractors, or their licensees, invitees, contractors, subcontractors, or employees.

Furthermore, Article X, Section 2 provides, in pertinent part:

> Subject to the regulations set forth in Section 2.0905 of St. Tammany Parish Land Use Regulation Zoning Ordinance No. 523, the Association may but shall not be required to repair and restore any Common Area or Improvement thereon, including any Improvement made of the Association, in the event of damage to or destruction of such Common Area or Improvements as the result of damage by fire or other casualty.

Article VIII creates the ARC and requires owners constructing improvements on their lots to submit the plans and specifications to the ARC for approval of construction prior to the construction. The Supplementary Declarations require the owner of a lot that abuts a waterway to construct a bulkhead in accordance with specifications provided and absolves CEMHOA of any liability for erosion of any lots caused by waterways. The Restrictive Covenants place responsibilities not only on CEMHOA, but also on homeowners.

Harkins's property does not abut the waterway passage but is separated by a strip of land that was originally retained by the developer, Clipper Island, L.L.C. and later transferred to CEMHOA. After originally having his plans to construct

his home rejected, Harkins resubmitted plans which included a retaining wall. Harkins was given approval to build his residence but he did not construct the retaining wall at the same time. CEMHOA claimed that the initial bulkhead failure in 2006 was a result of Harkins's failure to construct the retaining wall, which resulted in the original petition in this suit being filed by CEMHOA, claiming that Harkins damaged its property.

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Guardia v. Lakeview Regional Medical Center,* 08-1369 (La. App. 1 Cir. 5/8/09), 13 So. 3d 625, 628. A trial court cannot make credibility decisions on a motion for summary judgment. *Monterrey Center, LLC v. Ed.ucation Partners, Inc.,* 08-0734 (La. App. 1 Cir. 12/23/08), 5 So. 3d 225, 232. In deciding a motion for summary judgment, the trial court must assume that all of the witnesses are credible. *Independent Fire Ins. Co. v. Sunbeam Corp.,* 99-2181 (La. 2/29/00), 755 So. 2d 226, 236. Furthermore, summary judgment is seldom appropriate for determinations based on subjective facts of motive, intent, good faith, knowledge, or malice and should only be granted on such subjective issues when no genuine issue of material fact exists concerning that issue. *Rager v. Bourgeois,* 06-0322 (La. App. 1 Cir. 12/28/06), 951 So. 2d 330, 333, *writ denied,* 07-0189 (La. 3/23/07), 951 So. 2d 1105. Issues that require the determination of reasonableness and conduct of parties under all facts and circumstances of the case cannot ordinarily be disposed of by summary judgment. *Granda v. State Farm Mutual Ins. Co.,* 04-1722 (La. App. 1 Cir. 2/10/06), 935 So. 2d 703, 707, *writ denied,* 06-0589 (La. 5/5/06), 927 So. 2d 326.

The applicant seeking an injunction must establish that the conduct sought to be enjoined will cause him "irreparable injury, loss, or damage." La. C.C.P. art.

3601. Generally, irreparable injury means that the party seeking the preliminary injunction cannot be adequately compensated in money damages for its injury or suffers injuries which cannot be measured by pecuniary standards. *Vartech Sys., Inc. v. Hayden*, 05-2499 (La. App. 1 Cir. 12/20/06), 951 So. 2d 247, 255 (citing *Shaw v. Hingle,* 94-1579 (La. 1/17/95), 648 So. 2d 903, 905). The trial court's decision regarding the issuance of a permanent injunction is reviewed under the manifest error standard. *Parish of East Feliciana ex rel. East Feliciana Parish Police Jury v. Guidry,* 04-1197 (La. App. 1 Cir. 8/10/05), 923 So. 2d 45, 53, *writ denied,* 05-2288 (La. 3/10/06), 925 So. 2d 515.

Based on our *de novo* review of the evidence, we conclude that genuine issues of material fact remain as to whether Harkins has proven irreparable injury. This court finds that Harkins did not support his motion for partial summary judgment as required by La. C.C.P. arts. 966(C) and 967(B). All Harkins provided was his affidavit, pictures of the failed bulkhead, a portion of the Restrictive Covenants, and the transcribed testimony of two individuals, who were either on the ARC or who had served on the ARC, and who admitted that CEMHOA owned the bulkhead and the property on which it sits.

There still remains genuine issues of material fact as to the following: (1) whether Harkins has shown any irreparable injury;[3] (2) whether CEMHOA is responsible for repairing the bulkhead given the entirety of the Restrictive

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[3] An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant. La. C.C.P. art. 3601(A). At oral argument, Harkins argued that the showing of irreparable injury was not necessary in contractual cases. Our review of the cases provides otherwise. Injunctions are issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant. *Dalke v. Armantono*, 09-1954 (La. App. 1 Cir. 5/7/10), 40 So. 3d 981, 986-87 (citing La. C.C.P. art. 3601(A)). Normally, a party seeking the issuance of a preliminary injunction must show that he will suffer irreparable injury, loss, or damage if the injunction does not issue and must show entitlement to the relief sought; this must be done by a *prima facie* showing that the party will prevail on the merits of the case. *Dalke,* 40 So. 3d at 986. The writ of injunction—a harsh, drastic, and extraordinary remedy—should only issue in those instances where the moving party is threatened with irreparable loss or injury and is without an adequate remedy at law. Irreparable injury has been interpreted to mean a loss that cannot be adequately compensated in money damages or measured by a pecuniary standard. *Id.* at 986-87.

Covenants; (3) whether CEMHOA adequately repaired the bulkhead already; (4) what standards are required to determine what constitutes a sufficient repair of the bulkhead; and (5) whether Harkins damaged the bulkhead by his own activities or omissions.

This court finds nothing in the record evidencing irreparable injury to Harkins. The evidence presented by Harkins is that the failed bulkhead has caused erosion to his property. There is no evidence that this alleged damage is not compensable monetarily or that there is irreparable injury. With the evidence before this court, a determination cannot be made that there is no genuine issue of material facts regarding CEMHOA's responsibility to repair the bulkhead such that a mandatory permanent injunction may issue. Accordingly, we reverse that portion of the partial summary judgment that ordered the issuance of a mandatory permanent injunction.

EXCEPTION OF PRESCRIPTION

CEMHOA argues that Harkins's property is subject to restrictive covenants, which it characterizes as building restrictions. CEMHOA contends that because Harkins relies on La. C.C. art. 778 for its alleged duty to repair the bulkhead, the two-year prescriptive period of Article 781 controls. Louisiana Civil Code article 781 states,

> No action for injunction or for damages on account of the violation of a building restriction may be brought after two years from the commencement of a noticeable violation. After the lapse of this period, the immovable on which the violation occurred is freed of the restriction that has been violated.

Harkins contends that the Louisiana Homeowners' Association Act, La. R.S. 9:1141.1, et seq., has no prescriptive period and that the liberative prescriptive period of ten years set forth in La. C.C. art. 3499 applies to personal obligations.[4]

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[4] Louisiana Civil Code article 3499 states, "Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years."

CEMHOA asserts that building restrictions are incorporeal immovable and real rights to which the ten-year period does not apply.[5]

To support its prescription exception, CEMHOA relied on Harkins's allegations in his reconventional demand and his affidavit supporting his motion for summary judgment, wherein he stated that the bulkhead failed "years ago." It also relied on the allegations in its own petition and supplemental and amending petitions that the bulkhead failed in 2006 and again in 2008. The reconventional demand was filed on September 4, 2012. While CEMHOA claims that Harkins's reconventional demand is prescribed on its face, Harkins disagrees. In his reconventional demand, he actually alleged that the bulkhead "began failing years ago and recently, completely failed," and as such, on its face, the reconventional demand is not prescribed.

Where a plaintiff's petition does not contain specific dates associated with the acts of which he complains in his petition, the petition is not prescribed on its face. *Perret v. Louisiana Dept. of Public Safety and Correction,* 01-2837 (La. App. 1 Cir. 9/27/02), 835 So. 2d 602. Generally, the burden of proving an action is prescribed lies with the party pleading prescription. *Hogg v. Chevron USA, Inc.,* 09-2632 (La. 7/6/10), 45 So. 3d 991, 998. If an action is not prescribed on its face, the defendant (or exceptor) has the burden of proving it is prescribed. *Younger v. Marshall Industries Inc.,* 618 So. 2d 866 (La. 1993). The introduction of evidence to support or controvert the objection of prescription is permitted when the grounds do not appear on the face of the petition. *Pal v. Stranco, Inc.,* 10-1507 (La. App. 1 Cir. 8/3/11), 76 So. 3d 477, 485, *writ denied,* 11-1834 (La. 11/4/11), 75 So. 3d 925. When evidence is received, the trial court's factual findings are

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[5] As this Court noted in the unpublished case of *Cosby v. Holcomb Trucking, Inc.*, 03-2423R (La. App. 1 Cir. 5/04/07), 2007WL1300810 (unpublished opinion), although the parties utilize the term prescription, as do the heading and comments to La. C.C. art. 781, the article actually establishes a peremptive period for instituting suits for relief arising out of a violation of building restrictions. Once the peremptive period passes, the cause of action no longer exists.

generally reviewed under the traditional rules governing appellate review of facts, meaning that the trial court's factual determinations regarding prescription should not be reversed in the absence of manifest error. *Naquin v. Bollinger Shipyards, Inc.,* 11-1217 (La. App. 1 Cir. 9/7/12), 102 So. 3d 875, 878, *writs denied,* 12-2676 (La. 2/8/13), 108 So. 3d 87, and 12-2754 (La. 2/8/13), 108 So. 3d 93. The standard of review if evidence is introduced on the prescription exception is manifest error. *London Towne Condominium Homeowner's Ass'n. v. London Towne Co.,* 06-401 (La. 10/17/06), 939 So. 2d 1227. Constructive knowledge of damage commences upon "whatever notice is enough to excite attention and put the injured party on guard or call for inquiry." *Hogg,* 45 So. 3d at 997. When immovable property has been damaged, "knowledge sufficient to start the running of prescription 'is the acquisition of sufficient information, which, if pursued, will lead to the true condition of things.'" *Marin v. Exxon Mobil Corp.,* 09-2368 (La. 10/19/10), 48 So. 3d 234, 246. This date has been found to be the date the damage becomes apparent. *Marin,* 48 So. 3d at 246. The analysis is the same as the discovery rule of the jurisprudential doctrine of *contra non valentem. See Marin,* 48 So. 3d at 245. A plaintiff is deemed to know what he could have learned through the exercise of reasonable diligence and cannot rely on ignorance attributable to his own willfulness or neglect. *Marin,* 48 So. 3d at 246.

Whether the obligation of CEMHOA to maintain and repair the bulkhead is considered a building restriction or a personal obligation, CEMHOA bears the burden of proving that prescription applies. Even if a building restriction is at issue, the party who files the exception bears the burden of proof, unless the matter is facially barred. *Rando v. Anco Insulations, Inc.,* 08-1163 (La. 5/22/09), 16 So. 3d 1065, 1082. CEMHOA put on evidence that the bulkhead failures were in 2006 and 2008, but that the reconventional demand was not filed until 2012, more than two years after the last failure. Attached to CEMHOA's exceptions were letters

dated October 11, 2006, and October 18, 2006, from Shelly Ditta Doucet ordering Harkins to cease construction on his property immediately because the construction was jeopardizing the bulkhead. The October 11, 2006 letter does state that the Association "is also moving forward with an engineered solution to the bulkhead failure," which also entailed a solution to his side yard adjacent to the waterway property. The other letter states that there is engineering "currently on going to resolve the bulkhead failure."

There are no dates or facts in the record as to whether or when an engineered solution took place. However, from the affidavit of Ludy Pittman, it is evident that the solution of horizontal bracing took place after the first bulkhead failure. After the second bulkhead failure in 2008, CEMHOA used vertical bracing on the failed bulkhead. There is no indication from any of the evidence before this court that the reconventional demand was filed only because of the second bulkhead failure and not as a result of the failed vertical bracing. There are no dates when the vertical bracing was placed. Harkins alleged that the bulkhead "began failing years ago" and "recently, completely failed." From the allegations of the reconventional demand, Harkins seeks damages for continual erosion. There is no evidence that the damages are not a result of the failed vertical bracing, which would have occurred after the August 25, 2008 date that CEMHOA relies upon for its exception of prescription. Harkins claimed continual erosion and that the bulkhead completely failed "recently." There is no deposition testimony of Harkins as to when he noticed the failure of the bulkhead. There are several pictures attached to the exception for prescription. However, only one of the pictures contains a date, and it is dated June 22, 2012, approximately two months before the reconventional demand was filed.

CEMHOA put on evidence that after the second bulkhead failure, it removed horizontal bracing that it had placed there after the first failure and

replaced it with vertical bracing. However, CEMHOA does not provide any dates when the vertical bracing was placed on the bulkhead. There is no evidence in the record as to when Harkins had notice of the bulkhead failure. Furthermore, in all of the answers filed by Harkins, he denied all the allegations of CEMHOA including those as to the dates of the bulkhead failures. This court finds nothing in the record which refers to any specific date to which notice was given to Harkins so that prescription commenced. CEMHOA did not carry its burden of proving prescription. Therefore, the trial court did not commit manifest error in denying the exception of prescription.[6]

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[6] This court does not decide whether the obligation of CEMHOA to maintain and repair the bulkhead is either a building restriction or a personal obligation. However, all of the cases relied upon by CEMHOA involve a homeowner's association enforcing a building restriction against a homeowner for a violation. CEMHOA cites no cases, and this court found none, in which prescription is an issue when a homeowner seeks injunctive relief against the association.

This court found many cases in which notice to a homeowner is required for a building restriction to be prescribed. In *Bayou Terrace Estates Home Owners Association, Inc. v. Stuntz*, 11-1886 (La. App. 1 Cir. 7/10/12), 97 So.3d 589, a homeowners' association sought injunctive relief against a homeowner to enforce a building restriction prohibiting commercial use of subdivision lots. This Court found the action had not prescribed under La. C.C. art. 781 due to the homeowner's advertising that she gave art lessons and parties in her home. In *Barker v. Blanchard*, 10-0801 (La. App. 1 Cir. 10/29/10), 2010WL4273266 (unpublished), this Court held that the trial court did not err in finding an action by property owners against another property owner for violating their subdivision's restrictive covenants had not prescribed because the two-year period of Article 781 applied to each noticeable violation. In *Distefano v. Wilkerson*, 12-1012 (La. App. 1 Cir. 6/19/13), 2013WL3155010 (unpublished), this Court affirmed in part the trial judge's dismissal of a homeowner's petition based on prescription. The Court found that the homeowners' metal fence, bushes and other structures in alleged violation of building restrictions concerning a maintenance servitude were noticeable for a period longer than two years before suit was filed. In *Cosby v. Holcomb Trucking, Inc.*, 05-0470 (La. 9/06/06), 942 So.2d 471, the Supreme Court found no manifest error in trial court's finding that a noticeable violation of the building restrictions did not occur until less than two years before suit was filed. A homeowner's association filed suit against a homeowner for failing to keep his property "reasonably neat and clean", and the trial court held the homeowner to be bound by the restrictions. *Hidden Hills Community, Inc. v. Rogers,* 03-1447 (La. App. 3 Cir. 3/31/04), 869 So. 2d 984, 985, *writ denied,* 04-1082 (La. 5/18/04), 874 So.2d 158. In *Oak Harbor Property Owners' Ass'n, Inc. v. Millennium Group I, L.L.C.*, 05-0802 (La. App. 1 Cir. 5/5/06), 934 So.2d 814, this Court found that the action was not prescribed because the cause of action did not accrue until residents began to report a massive accumulation of objects in the homeowner's yard. In *Proctor's Landing Property Owners Association, Inc. v. Leopold*, 11-0668 (La. App. 4 Cir. 1/30/12), 83 So.3d 1199, the Fourth Circuit found that a homeowners' association's action for injunctive relief against a homeowner for violating building restrictions was not prescribed.

CONCLUSION

For the foregoing reasons, the April 29, 2013 judgment of the trial court is reversed in part as to the motion for partial summary judgment, and affirmed in part as to the exceptions of unauthorized use of summary proceedings and prescription. We remand this matter to the trial court for further proceedings. Costs of the appeal are assessed equally to both parties.

WRIT DENIED AS TO EXCEPTIONS (WRIT APPLICATION NUMBERED 2014 CW 0915); WRIT DISMISSED AS TO SUPERVISORY REVIEW (WRIT APPLICATION NUMBERED 2014 CW 1116); JUDGMENT REVERSED IN PART AS TO MOTION FOR PARTIAL SUMMARY JUDGMENT AND AFFIRMED IN PART AS TO EXCEPTIONS; CASE REMANDED.

The court found that the association properly protested the presence of a shed that was governed by the building restrictions since it was the principal building on the site.