NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0978

2016 CW 0281

JEW

LEISURE RECREATION & ENTERTAINMENT, INC

VERSUS

FIRST GUARANTY BANK

Judgment rendered AUG 17 2017

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C625171 Sec. 26

The Honorable Donald Johnson, Judge Presiding

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Robert W. Barton
Ryan K. French
Baton Rouge, LA

Attorneys for Plaintiff/Appellant
Leisure Recreation & Entertainment
Inc.

Andre G. Coudrain
Jamie P. Gomez
Hammond, LA

Attorneys for Defendant/Appellee
First Guaranty Bank

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

Crain, J. concurs and assigns reasons

HOLDRIDGE, J.

This appeal involves cross-motions for summary judgment and peremptory exceptions raising the objections of no cause of action and prescription in a suit for declaratory judgment involving the interpretation of the terms of a promissory note regarding an option as to the interest rate to be charged for the eleventh through thirtieth years of the note. Finding error, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On December 31, 1991, Louisiana Recreation & Entertainment, Inc. entered into a Borrowing Agreement with First Guaranty Bank (the Bank) for a revolving line of credit, which was secured by a Promissory Note (the Note) in the amount of $1,600,000.00, executed on the same date. Also on the same date, the Bank advanced Leisure Recreation & Entertainment, Inc. (Leisure)[1] $1,370,000.00, which was to be repaid monthly over a 30-year period with the contracted interest rate varying as follows:

> Years 1-5, the simple interest rate shall be fixed at 6.5% per annum; years 6-10, the simple interest rate shall be fixed at 7.5% per annum, and years 11-30, the simple interest rate shall be at the Citibank Prime, floating for minimum of one year or fixed for a period of not less than one year, nor more than five years at option of Borrower with floor and ceiling as shown above.

The floor and ceiling were 4.00% and 12.00% per year, respectively. Leisure made the fixed monthly payments identified in the Note with the interest rate at 6.5% for years 1-5 and at 7.5% for years 6-10. On December 31, 2001, the beginning of year 11, the Bank continued to charge Leisure a 7.5% interest rate.

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[1] Leisure was incorporated on December 16, 1991 and was originally incorporated as Louisiana Recreation and Entertainment, according to the 1992, 1993, and 1994 combined financial statements for Leisure and LaPlace Bowling, Inc. Louisiana Recreation and Entertainment, Inc.'s name change to Leisure was effective in December of 1993.

On October 7, 2013, Leisure filed a petition for declaratory judgment against the Bank, alleging that the Note required the Bank to calculate interest at the prime rate for years 11 through 30. Leisure further alleged that after notifying the Bank that it was improperly using a 7.5% interest rate, the Bank refused to correct the alleged error. Leisure sought a judgment declaring that in year 11 of the loan and thereafter, the Bank was required to calculate interest using the prime rate, which it contends was 4.75% in January of 2002. Leisure sought to have the court declare that the Bank erroneously computed the unpaid principal balance of its loan by approximately $425,000.00 and requested that the correct balance be computed in accordance with the Note's terms. Alternatively, Leisure sought a declaration that, to the extent the Bank miscalculated interest and the unpaid principal balance, Leisure was entitled to assert a defense to the Note's payment.

In response, the Bank filed exceptions of no cause of action and prescription. The Bank contended that Leisure failed to state a cause of action because Leisure did not allege that it had ever exercised its option to have the Bank apply the prime rate. The Bank also alleged that there was no requirement that it adjust the interest rate without Leisure's consent and that the option to adjust the interest rate expired after a reasonable time. The Bank also contended that the action was prescribed on its face because actions arising under a promissory note are subject to a five-year prescriptive period pursuant to La. C.C. art. 3498, and Leisure failed to file suit until eleven years after it had the option to choose the prime rate.

Before the exceptions were heard, the Bank answered the suit, raising prescription and its no cause of action exception as defenses in its answer. Leisure filed a motion for summary judgment declaring that the Bank was required to calculate the Note's current outstanding principal balance by using the prime rate from January 2002 forward. Leisure admitted that an option was in the loan

documents, which required it to make an affirmative election as to the interest rate, and that it did not exercise the option. The Bank filed its own motion for summary judgment, seeking a declaration that Leisure failed to exercise its option to choose the floating interest rate and, therefore, the Bank's calculation of the interest rate was proper and Leisure's suit should be dismissed.

The exceptions and cross-motions for summary judgment were heard, and the trial court overruled the Bank's exceptions of no cause of action and prescription. The Bank gave notice of its intent to seek supervisory review of the ruling on its exceptions. The trial court then rendered judgment on the cross-motions for summary judgment, granting the Bank's motion, denying Leisure's motion, and dismissing Leisure's suit.[2] The Bank filed an application for supervisory writs challenging the trial court's rulings on its exceptions. On June 17, 2016, this court issued an interim order referring the writ to the same panel assigned to the instant appeal. Leisure Recreation & Entm't, Inc. v. First Guaranty Bank, 2016 CW 0281 (La. App. 1 Cir. 6/17/16).

ANALYSIS

In its sole assignment of error, Leisure contends that the trial court erred in concluding that the Note did not mandate use of the prime rate to calculate interest

[2] We note that the record contains a pleading entitled "JUDGMENT" signed on May 16, 2016, which lacks decretal language in that it does not state the relief granted. See Adair Asset Mgmt. LLC/US Bank v. Honey Bear Lodge, Inc., 2012-1690 (La. App. 1 Cir. 2/13/14), 138 So.3d 6, 16. However, Leisure filed its motion to appeal from a judgment signed on March 1, 2016. On that date, the trial court signed a "RULING" wherein it overruled the exceptions filed by the Bank and granted the Bank's motion for summary judgment and denied Leisure's motion for summary judgment. The "RULING" concluded with the statement, "Accordingly, Leisure['s] claim is hereby dismissed, with prejudice, at Leisure['s] cost." The ruling also includes three statements explaining the basis of the court's ruling. La. C.C.P. art. 1918 states that when written reasons are assigned, "they shall be set out in an opinion separate from the judgment." However, in this case, the ruling which contains both the judgment and the reasons determines the rights of the parties and awards the relief to which they are entitled. See Conley v. Plantation Mgmt. Co., L.L.C., 2012-1510 (La. App. 1 Cir. 5/6/13), 117 So.3d 542, 547, writ denied, 2013-1300 (La. 9/20/3), 123 So.3d 178. Therefore, the March 1, 2016 ruling suffices as a final judgment and this appeal is proper.

in years 11-30, while providing it with the option of a floating prime rate or a fixed term prime rate. The Bank disagrees, contending that the Note's language establishes a fixed 7.5% interest rate in years 6-30; it claims that the option is the right to opt out of the 7.5% interest rate and into the prime rate. The Bank argues that since the option was not exercised, the interest rate remained unchanged. The Bank further asserted in its exception of no cause of action that because Leisure did not exercise the option, it had no cause of action.

The trial court determined that the interest provision:

> gave [Leisure] the option to (1) have its interest rate calculated according to the Citibank Prime Rate **floating for a minimum of one year OR** (2**) have its interest rate fixed for a period of not less than one year[,] nor more than five years** with floor and ceiling of 4% and 12%, respectively. Prior to filing the instant action, [Leisure,] by its own admission, never exercised the option included in the Note. [The Bank] was not obligated to unilaterally adjust the interest rate when [Leisure] failed to exercise the option provided.

The interpretation of the interest provision in the Note is a matter of contract interpretation raised by both parties on cross-motions for summary judgment. The proper interpretation of a contract is a question of law subject to de novo review on appeal. Montz v. Theard, 2001-0768 (La. App. 1 Cir. 2/27/02), 818 So.2d 181, 185. This court also applies a de novo standard of review in considering the trial court's rulings on summary judgment motions. Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC, 2012-2055 (La. 3/19/13), 112 So.3d 187, 192. Thus, we use the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Id. A court must grant a motion for summary judgment "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B)(2).[3]

"Contracts have the effect of law for the parties" and the "[i]nterpretation of a contract is the determination of the common intent of the parties." La. C.C. arts. 1983 and 2045. The reasonable intention of the parties to a contract is to be sought by examining the words of the contract itself, and is not assumed. Clovelly Oil Co., 112 So.3d at 192. "When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. C.C. art. 2046. Common intent is determined, therefore, in accordance with the general, ordinary, plain, and popular meaning of the words used in the contract. Clovelly Oil Co., 112 So.3d at 192. See also La. C.C. art. 2047. Moreover, a contract provision that is susceptible to different meanings must be interpreted with a meaning that renders the provision effective, and not with one that renders it ineffective. La. C.C. art. 2049. Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. La. C.C. art. 2050. "In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text." La. C.C. art. 2056.

Leisure contends that by using the word "shall" in the interest provision, the Note indicates that use of the prime rate is mandatory in year 11, referring to Borel v. Young, 2007-0419 (La. 11/27/07), 989 So.2d 42, 58. Moreover, the Note does not provide for an alternative interest rate in years 11-30 if the prime rate is not

[3] The motion for summary judgment was filed on September 21, 2015 and the judgment was signed on March 1, 2016. Louisiana Code of Civil Procedure article 966 was amended by 2015 La. Acts 422, § 1; however, the new version of article 966 does not apply to this case as the amendment did not become effective until January 1, 2016 and does not apply to any motion for summary judgment pending adjudication or appeal on the effective date of the Act. Accordingly, we apply the prior version of article 966 to the instant matter.

elected; therefore, Leisure asserts, the prime rate is not simply an option or option contract that may or may not be exercised.

The mandatory application of the prime rate is supported by other provisions of the Note, which contemplate the automatic adjustment of the Note's interest rate to the prime rate in year 11. The pertinent repayment provision in the Note states:

> X Option 5: OTHER (specify) 360 monthly payments as follows:
> 12 equal monthly payments of $8,817.35 beginning 1/31/92, then 48 equal monthly payments of $10,127.73 beginning 1/31/93, then 60 equal monthly payments of $11,075.28 beginning 1/31/97, then 239 monthly payments beginning Jan. 31, 2002 on a 20 year amortization **in accordance with the prevailing interest rates as described in Section 3 in the Borrowing Agreement,** then one final payment of unpaid principal & accrued interest due Dec. 31, 2021.

(emphasis added).

Section 3 of the Borrowing Agreement states:

> INTEREST RATE
>
> 301. Citibank Prime fixed at 6.5% in years one through five, 7.5% fixed in years six through ten, then Citibank Prime, floating for a minimum of one year or fixed for a period for not less than one year nor more than five years at option of borrower with a floor of 4% and ceiling of 12%.

The Note expressly states that the 7.5% interest rate terminates after the Note's tenth year. Moreover, the Note contains a stipulation in the repayment provision that contemplates that the Bank will automatically adjust the interest rate to match the prime rate. The Note states:

> If this Note provides for a variable interest rate, I agree that increases and/or decreases in the simple interest rate under this Note as a result of corresponding increases and/or decreases in the Index Rate checked above may result in increases and/or decreases in the amount of payments due under this Note, the number of payments under this Note, and/or the amount of the final payment due at maturity of this Note.... **I agree that you may alter the Repayment Provisions under this Note from time to time, one or more times, to correspond with increases and/or decreases in the above Index Rate.** I further agree to make principal and simple interest payments under this Note in accordance **with periodic adjustments in the Repayment Provisions** as provided above.

(emphasis added).

Additionally, Leisure's interpretation of the interest provision comports with rules of grammar. Leisure asserts that because it is not set off with a comma, the phrase "at option of Borrower" modifies the immediately preceding language, which is whether the prime rate will be "floating for a minimum of one year or fixed for a period of not less than one year, nor more than five years[,]" citing Louisiana Associated Gen. Contractors, Inc. v. Louisiana Dep't of Agric. & Forestry, 2005-0131 (La. 2/22/06), 924 So.2d 90, 98-99. The Bank contends that "at option of Borrower" modifies the phrase "shall be at Citibank Prime." While the Bank cites several cases to support the principle that punctuation is subordinate to the text and should not be used to disregard the true intent of a contractual provision, in this case, the interpretation of the Note based upon the punctuation does not disregard the parties' intent. See Weingart v. Delgado, 204 La. 752, 16 So.2d 254 (1943); Hous. Author. of New Orleans v. Henry Ericsson Co., 197 La. 732, 2 So.2d 195, 201 (1941).

Based upon the text of the Note, the context of the interest provision, grammatical rules, and canons of interpretation, we construe the Note's interest provision to mean that after year 10, Leisure had the option to have its interest rate calculated according to the prime rate floating for a minimum of one year or to have its interest rate fixed at the prime rate at the date the option is exercised for a period of not less than one year, nor more than five years, with a floor and ceiling.

In this case we must determine whether the failure to affirmatively exercise a choice as to the applicable interest rate nullifies the provision. The Note clearly does not provide that the interest rate would continue to be 7.5%, but it also does not state what would happen if Leisure failed to choose between the fixed or floating interest rate for a defined term. Additionally, the Note does not set forth

how or when Leisure is to choose which interest rate and what term should be applied. Moreover, if Leisure were to choose a fixed prime rate for five years, for example, the Note does not specify what happens after that time period. Similarly, if Leisure were to choose a floating interest rate for one year, the Note does not set forth what happens afterwards. The Note is unclear as to whether the fixed or floating prime rate is a one-time selection in year 11.

Louisiana Civil Code article 1778 provides that if the term for performance of an obligation is not determinable, the obligation must be performed within a reasonable time. Pursuant to La. C.C. art. 1779, a term is presumed to benefit the obligor unless the agreement or circumstances show that it was intended to benefit the obligee or both parties. Because La. C.C. art. 2056 states that in case of doubt that cannot be otherwise resolved, a contractual provision must be interpreted against the party who furnished its text, we must construe the provision against the Bank.[4]

The trial court found that when Leisure did not exercise the option, the Bank was not obligated to unilaterally adjust the interest rate. Leisure challenges the trial court's conclusion that by failing to exercise the option, it forfeited it and the interest rate remained at 7.5% for the remainder of the loan. Leisure contends that the option is an alternative obligation pursuant to La. C.C. art. 1808, which states, "[a]n obligation is alternative when an obligor is bound to render only one of two or more items of performance." Louisiana Civil Code article 1810 provides, "[w]hen the party who has the choice does not exercise it after a demand to do so,

[4] The Bank contends that it owed no duty to notify Leisure of the option or to exercise the option for Leisure's benefit, relying on La. R.S. 6:1124, which concerns a financial institution's fiduciary duty to its customers. We are not basing our interpretation of the option provision in the Note on La. R.S. 6:1124, but instead on the principle of contractual interpretation that an ambiguous provision should be construed against the Bank because it provided the Note's text. See La. C.C. art. 2056.

the other party may choose the item of performance." Leisure argues that when it failed to choose between the floating or fixed rate in year 11, the Bank had to demand that it make a choice, and only following an unanswered demand could the Bank choose which interest rate to apply.

The Bank disputes the characterization of the option as an alternative obligation and contends that the Note is an option contract pursuant to La. C.C. art. 1933. Louisiana Civil Code article 1933 states, "An option is a contract whereby the parties agree that the offeror is bound by his offer for a specified period of time and that the offeree may accept within that time." The Bank contends it had no obligation or duty to provide Leisure with notice of the option to select the interest rate because the Note contained no language obligating it to do so. The Bank contends that pursuant to La. C.C. art. 1928, because a time to accept or reject the option was not specified in the contract, the option lapsed after a reasonable time. Relying on Schulingkamp v. Aicklen, 534 So.2d 1327, 1331 (La. App. 4 Cir. 1988), the Bank alleges that the determination of a reasonable time is based on the facts and circumstances of a particular case.

The Note's interest provision is not an option contract because it is not an offer for which the Bank is bound for a specified period of time and which Leisure may accept within that time. The Bank has not cited any cases holding that a provision in a note allowing a choice of a period of time to fix an interest rate is an option contract. The Note's interest provision is more similar to an alternative obligation because for years 11-30, Leisure could choose to pay interest at a floating rate or at a fixed rate for a definite period of time. Leisure relies on La. C.C. art. 1810 allowing the other party to choose the item of performance if the party with the choice does not exercise it after a demand to do so.

Attached to the Bank's motion for summary judgment is the affidavit of Donna Hodges, the Bank's file room manager; attached to her affidavit as an exhibit was a May 24, 2013 letter from the Bank's representative to Lorie Sentell with Collins Music Company, Inc., an affiliate of Leisure, which stated:

> The Prime Rate is currently 3.25% and, accordingly, should you make an election, under the terms of the note, the rate today would be the stated floor of 4%; then, under the note's terms, you may elect "Citibank Prime, floating for a minimum of one year, or fixed for a period of not less than one year, not more than five years...."
>
> Please notify us in writing of an election, if any, as to rate and term, as described in the preceding paragraph.

The Bank also attached to Ms. Hodges' affidavit a July 8, 2013 letter from Leisure's former attorney to the Bank, wherein he stated he was asked to review the May 2013 correspondence, and he believed the Bank had been overcharging interest to Leisure since 2002 because the prime rate at that time was 4.75%. Attached to Ms. Hodges' affidavit for the Bank and to the affidavit of Bonnie J. Bush, Leisure's Chief Financial Officer, in support of Leisure's motion for summary judgment, is a July 15, 2013 letter from the Bank's representative to then-counsel for Leisure. The letter stated that the Bank had no obligation to provide notice to the borrower:

> in connection with the refinance option, as there is no language in the respected agreements obligating the bank to do so. The borrower has the option to request the rate and term changes per the agreements and has failed to exercise it.
>
> Accordingly, failing such an election, for the years 11-30, the 7.5% rate has remained as previously extant, and which is within the contract floor and ceiling imposed.

If the Bank's May 24, 2013 letter is considered a demand that Leisure choose the interest rate and term, then because Leisure failed to choose, the Bank would have the option of choosing between a floating prime rate for a minimum of one year or a fixed prime rate for a period of not less than one year nor more than

five years pursuant to La. C.C. art. 1810. However, there is an issue of fact as to whether the May 24, 2013 letter constitutes a demand because it is contradicted by the letter the Bank sent about six weeks later, which stated that, due to the failure of the borrower to choose the interest rate and term, the interest rate would remain at 7.5%. But, even if the Bank is considered not to have made a demand on Leisure to choose an interest rate, such that La. C.C. art. 1810 is inapplicable, the interest rate for years 11 through 30 should be the prime rate because the Note provides that in "years 11-30," the simple interest rate "shall be at the Citibank Prime ... with floor and ceiling as shown above." In support of its motion for summary judgment, Leisure offered an affidavit from Ms. Bush containing an amortization based upon a one-year fixed Citibank prime rate to show that the Note was paid in full. However, based upon our finding that there are genuine issues of material fact as to whether the Bank demanded that Leisure exercise its choice and the potential right of the Bank to choose the interest rate and term, Bush's amortization based upon Leisure's choice of prime rate cannot be used to establish that the loan was paid in full.

Leisure contends that La. R.S. 9:3509 requires the Bank to automatically apply any available decrease in interest to the loan. The Note states that it would be governed under Louisiana law and that the loan was entered into primarily for business or commercial purposes "subject to La. R.S. sec. 9:3509."[5] Louisiana Revised Statutes 9:3509.1 states:

> A. Notwithstanding any other provisions of law to the contrary, any person borrowing funds for commercial, business, or agricultural purposes . . . may agree that the interest rate that is charged on the indebtedness may vary from time to time in accordance with the

[5] Additionally, the Borrowing Agreement states that the money was to be used to purchase a bowling center known as Bowling USA in Slidell, and the main heading of the Note summarized the instrument as "Simple Interest—Commercial—PROMISSORY NOTE."

> provisions of either the promissory note or other evidence of the indebtedness. . . .
>
> B. All debts created pursuant to the provisions of this Section shall comply with the provisions of R.S. 9:3504(D)(3) through (7) and (9), and the provisions contained therein shall be applicable to all transactions created pursuant to this Section.

La. R.S. 9:3504(D)(3) states, in pertinent part:

> Adjustments in the interest rate shall be based upon changes in the contractual index formula or other basis agreed upon as set forth in either the promissory note. . . . **While the parties may agree that the increases in the interest rate caused by increases in the contractual index formula will be made at the option of the lender, notwithstanding any agreement to the contrary, decreases in the interest rate caused by decreases in the contractual index formula shall be implemented at the succeeding adjustment date;** provided that no increase or decrease shall be made which would affect any contractual limitations on interest rate adjustments including maximum or minimum interest rates to which the parties have agreed. The parties may agree to use as an index any measurement of interest rates described in . . . the promissory note ..., including, but not limited to, the prime or base lending rate of any national or state bank as fixed from time to time by its board of directors or management . . . .

(emphasis added.) Leisure argues that under these statutes, the borrower and lender may agree to permit the lender to automatically increase an adjustable interest rate when the relevant index rate rises, but regardless of what the parties have agreed to, the lender must automatically decrease an adjustable interest rate when the relevant rate falls. The Bank contends that Leisure did not exercise the option to use an adjustable or floating interest rate, so the statutes do not apply. In this case, because Leisure did not choose an adjustable or floating interest rate, La. R.S. 9:3509.1 and 9:3504(D)(3) are not applicable.

Based on the language in the Note and its references to the Borrowing Agreement and the correspondence between the Bank and Leisure's representatives, the trial court erred in granting the Bank's motion for summary judgment based upon its finding that there were no genuine issues as to material

fact and that as a matter of law, the Bank was not required to calculate interest at the prime rate for years 11 through 30. The Note did not provide that if Leisure failed to exercise the option to choose a fixed or floating interest rate for a specific time period, the Bank could continue to use the 7.5% interest rate, but it did provide for the use of the prime rate as the interest rate for years 11-30 regardless of whether Leisure exercised the option. However, we also find the trial court did not err in denying Leisure's motion for summary judgment based on our finding that a genuine issue of material fact exists as to whether the Bank made a demand upon Leisure to exercise its choice of interest rate pursuant to La. C.C. art. 1810, and, if so, upon Leisure's failure to exercise the choice, which interest rate and for what term the Bank would choose to apply. Additionally, based on our resolution of the trial court's action on the motions for summary judgment, we find that the trial court did not err in denying the exception of no cause of action raised by the Bank.

The Bank contends that the trial court erred in denying its exception of prescription because Leisure did not file suit within five years from the date the first disputed installment payment came due, in 2002, when it argues the option in the Note matured.[6] The Bank also alternatively argues that the suit is prescribed because the option was not exercised within a reasonable time. Leisure asserts that its interest recalculation claim is not prescribed because the Bank acknowledged the Note by demanding payments from Leisure each month, thereby interrupting prescription. Leisure also contends that it was not damaged and could not sue the Bank until June of 2015, when the Bank refused to recognize the Note as paid in

[6] The Bank contends that the petition is prescribed on its face, such that the burden shifts to Leisure to show that prescription is interrupted or suspended. See Younger v. Marshall Indus., Inc., 618 So.2d 866, 869 (La. 1993).

full. Alternatively, Leisure contends that even a prescribed claim can be used as an affirmative defense to a demand for continued payment of a promissory note.

Although evidence may be introduced to support or controvert any objection pleaded by the peremptory exception, such as prescription, in the absence of evidence, an objection of prescription must be decided upon facts alleged in the petition with all allegations accepted as true. La. C.C.P. arts. 927(A)(1), 931; Guidry v. USAgencies Cas. Ins. Co., Inc., 2016-0562 (La. App. 1 Cir. 2/16/17), 213 So.3d 406, 420, writ denied, 2017-0601 (La. 5/26/17), ___ So.3d ___. When prescription is raised with evidence being introduced at the hearing on the exception, the trial court's findings of fact on the issue of prescription are subject to the manifest error-clearly wrong standard of review. Guidry, 213 So.3d at 420-21. But, in a case involving no dispute regarding material facts—only the determination of a legal issue—a reviewing court must review the issue de novo, according the trial court's legal conclusions no deference. Id. at 421. Generally, the burden of proving an action is prescribed lies with the party pleading prescription. Id. An exception to this general rule exists when the face of the petition shows that the cause of action is prescribed, in which case the burden shifts to the plaintiff to prove that prescription was interrupted or suspended. Id.

The right to seek a declaratory judgment does not itself prescribe. However, the nature of the basic underlying action determines the appropriate prescriptive period. This is because prescription is an issue regarding a plaintiff's standing to seek the declaratory judgment. Church Point Wholesale Beverage Co., Inc. v. Tarver, 92-2658 (La. 2/22/93), 614 So.2d 697, 708; Knox v. W. Baton Rouge Credit, Inc., 2008-1818 (La. App. 1 Cir. 3/27/09), 9 So.3d 1020, 1023. Louisiana Civil Code article 3498 provides, "Actions on instruments, whether negotiable or not, and on promissory notes, whether negotiable or not, are subject to a liberative

prescription of five years. This prescription commences to run from the day payment is exigible."[7] When a promissory note is payable in installments, as opposed to on demand, the five-year prescriptive period commences separately for each installment on its due date. See JP Morgan Chase Bank, N.A. v. Boohaker, 2014-0594 (La. App. 1 Cir. 11/20/14), 168 So.3d 421, 428; Harrison v. Smith, 2001-0458 (La. App. 1 Cir. 3/28/02), 814 So.2d 42, 45; Home Finance Corp. v. Fisher, 361 So.2d 463, 465 (La. App. 1 Cir. 1978); Anthon v. Knox, 155 So.2d 53, 55 (La. App. 1 Cir. 1963). However, if the installments are accelerated based upon a default, prescription for the entire accelerated amount commences on the day of acceleration. JP Morgan Chase Bank, N.A. v. Boohaker, 168 So.3d at 428.

The Bank asserts that La. C.C. art. 3498 applies whether the maker or the holder seeks to enforce a provision of a note, relying on Barrois v. Colonial Mortg. & Loan Corp. 2012-0053 (La. App. 4 Cir. 9/19/12), 100 So.3d 958, 960. In Barrois, the maker of a promissory note filed suit against the lender and the holder of the note to recover funds he was not paid in connection with the execution of the promissory note, which was subject to a collateral mortgage; the lender filed an exception of prescription. The Fourth Circuit reasoned that there was nothing in La. C.C. art. 3498 to suggest that its benefits and applications flow only one way, explaining that

> the parties to the promissory note each have obligations to the other party. Both parties have a duty of performance. One party receives funds from the loan, while the other receives a larger return amount as a result of payments made over time based on the terms of the note. Also, the lender must return or cancel the debt instrument once the obligation of the borrower is extinguished.

Id.

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[7] Similarly, Louisiana Revised Statute 10:3–118(a) provides, in pertinent part, that an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within five years after the due date or dates stated in the note or, if a due date is accelerated, within five years after the accelerated due date.

Louisiana Civil Code article 3466 states, "If prescription is interrupted, the time that has run is not counted. Prescription commences to run anew from the last day of interruption." Acknowledgement of a debt or obligation interrupts prescription and erases the time that has accrued, with prescription commencing anew from the date of interruption. See La. C.C. art. 3464; see also Lucky Coin Mach. Co. v. J.O.D., Inc., 2014-562 (La. App. 5 Cir. 12/23/14), 166 So.3d 998, 1001. Interruption of prescription by acknowledgement results from any act or fact that contains or implies the admission of the existence of the right. It can be express or tacit. When express, it is not subject to any particular form. It can be verbal or in writing. Demma v. Auto. Club Inter-Ins. Exch., 2008-2810 (La. 6/26/09), 15 So.3d 95, 99.

In this case, the Note was payable in installments and there was no acceleration because there had been no default.[8] Suit was filed on October 7, 2013. Those installments affected by the interest provision in dispute were those due for years 11-30, with the first installment due on December 31, 2001. As to the installments due between December 31, 2001 and October 31, 2008, if La. C.C. art. 3498 applies, the five-year prescriptive period would run from the date each installment was due, unless Leisure can show an interruption or suspension.

As earlier discussed, a genuine issue of fact exists as to whether the Bank demanded that Leisure choose the fixed or floating prime rate for a specific time, and, if it did not, then the Bank should have applied the prime rate for varying periods of time at its option in accordance with the Note. Yet, it is unclear from

[8] In support of the exception of prescription, the Bank attached the Note and Borrowing Agreement, which the petition stated were also attached to it. In opposition to the exception of prescription, Leisure submitted a transaction history statement covering 1991 through April of 2013, which showed payments on the loan, and notices of payment due from May of 2002 through October of 2013. The exception was heard at the hearing on the motions for summary judgment, before they were argued; no evidence was introduced.

the Note specifically when the choice had to be made, and, depending on what choice was made, whether it had to be made again. From the face of the petition, the Note, and the Borrowing Agreement, which is what the trial court could consider in ruling on the exception of prescription at the point in time it was raised, it is unclear when a prescriptive period commenced, if at all. Therefore, the burden was on the Bank to show that Leisure's action was prescribed and it failed to meet this burden. The trial court did not provide reasons for its ruling denying the exception of prescription, and in its reasons supporting its ruling on the motions for summary judgment, it found that Leisure never exercised the option and the Bank was not required to unilaterally adjust the interest rate. This reasoning appears to indicate that Leisure had one opportunity to exercise the option, but as discussed above, the Note is vague on this issue. If prescription ran on each monthly payment from the date payment was due, was interrupted when Leisure made payment on the Note, and began running again after payment was made, arguably prescription would have run as to some of the installments and not as to the others. See Home Fin. Corp. v. Fisher, 361 So.2d 463, 465 (La. App. 1 Cir. 1978).

Therefore, as to Leisure's assignment of error, we find that the trial court erred in granting the Bank's motion for summary judgment and dismissing the suit because the Note did not establish that if Leisure failed to exercise the option to choose a fixed or floating interest rate for a specific time, the Bank could continue to use the 7.5% interest rate. The Note did provide for the use of the prime rate as the interest rate for years 11-30 regardless of whether Leisure exercised the option. However, we find the trial court did not err in denying Leisure's motion for summary judgment based on our finding that a genuine issue of material fact exists as to whether the Bank made a demand upon Leisure to exercise its choice

pursuant to La. C.C. art. 1810, and, if so, because Leisure failed to choose, which interest rate and term the Bank would choose to apply.

As to the Bank's exception of no cause of action, for the reasons pertaining to the motions for summary judgment, we deny the writ as to the trial court's denial of the exception. As to the exception of prescription, on the showing made, we find no error in the trial court's denial of the exception.

CONCLUSION

For the above reasons, First Guaranty Bank's application for supervisory writ of review (2016 CW 0281) is denied. The trial court erred in granting the motion for summary judgment filed by First Guaranty Bank and dismissing the suit and that part of the judgment is reversed. That part of the trial court judgment denying the motion for summary judgment filed by Leisure Recreation & Entertainment, Inc., is affirmed. The matter is remanded to the trial court for further proceedings. Costs of this appeal are to be equally divided between Leisure Recreation & Entertainment, Inc., and First Guaranty Bank.

WRIT DENIED; MARCH 1, 2016 JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LEISURE RECREATION & ENTERTAINMENT, INC.

VERSUS

FIRST GUARANTY BANK

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2016 CA 0978

CRAIN, J., concurring.

For years 11-30, I interpret the note to provide interest at the applicable prime rate, floating for at least one year, with Leisure having the option at each year end to fix the rate for a period of not less than one year, nor more than five years. However, there remain unresolved, mixed issues of fact and law preventing summary judgment. *See New Orleans & N.E.R. Co. v. Louisiana Const. and Imp. Co.*, 109 La. 13, 33 So. 51, 55 (La. 1902); *Bickham v. Washington Bank & Trust Co.*, 515 So. 2d 457, 458-60 (La. App. 1 Cir.), *writ denied*, 515 So. 2d 1112 (La. 1987); *see also Coleman v. Jim Walter Homes, Inc.*, 08-1221 (La. 3/17/09), 6 So. 3d 179, 183; *and see* La. Civ. Code art. 2299; *Johnson v. State Through Div. of Admin.*, 510 So. 2d 87, 89 (La. App. 1 Cir. 1987).

Because Leisure has standing to seek a declaration of its rights under the note, the writ application is properly denied.