

NOT DESIGNATED FOR PUBLICATION

PATRICIA R. WILLIAMS * **NO. 2010-CA-1173**
VERSUS *
LEXINGTON INSURANCE * **COURT OF APPEAL**
COMPANY * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2010-1476, DIVISION "L-6"
Honorable Kern A. Reese, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

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(Court composed of Chief Judge Joan Bernard Armstrong,
Judge Dennis R. Bagneris, Sr., and Judge Max N. Tobias, Jr.)

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REMANDED

JANUARY 26, 2011

Patricia R. Williams appeals the judgment of the district court granting Lexington Insurance Company's peremptory exception of prescription thereby dismissing Ms. Williams' claims with prejudice. For the reasons stated below, we remand this matter to the district court.

On February 12, 2010, Ms. Williams filed suit in the Civil District Court for the Parish of Orleans alleging that she sustained damage to her property located at 2615 Valence Street in New Orleans as a result of hurricanes Katrina, Rita and Gustav. Due to proximity of hurricanes Katrina and Rita, Ms. Williams' claims were not differentiated by Lexington. Ms. Williams alleged in the district court that she attempted to mitigate her damages by making her own repairs, however in late 2008 her property was again damaged by hurricane Gustav. On March 24, 2010, Lexington filed a peremptory exception of no right of action as to Ms. Williams' Gustav claim and a peremptory exception of prescription as to Ms. Williams' hurricanes Katrina, Rita and Gustav claims. In the judgment from which Ms. Williams appeals, the district court on May 28, 2010, denied Lexington's exception of no right of action as to Ms. Williams' Gustav claim, and granted

Lexington's exception of prescription. The judgment fails to specifically indicate what claims the district court dismissed under the legal theory of prescription.

Ms. Williams argues on appeal that the trial court, erred in (1) dismissing, with prejudice, plaintiff's Hurricane Katrina, Rita and Gustav claims on the basis of contractual prescription; (2) dismissing, with prejudice, plaintiff's hurricanes Katrina, Rita and Gustav claims prior to a ruling being issued in *Taranto v. Louisiana Citizens Prop. Ins. Corp.*, 2009- 0413 (La. App. 4 Cir. 12/16/09), 28 So. 3d 543, which will specifically deal with the issue of "contractual prescription"; (3) imposing stricter requirements of La C. Civ. Pro. Article 596 than the article itself by requiring plaintiff to specifically identify a class to which she may be a member; and (4) failing to consider that plaintiff had not actively opted out of any class, whereby prescription had not begun to run; all of which, if duly considered, would have yielded judgment in favor of the plaintiff.

Standard of Review

A defendant may raise a peremptory exception of prescription at any time. When such an exception is pled before trial, the exception is tried and disposed of in advance of or on the trial of the case. La. C.C.P. art. 929. In the trial of the peremptory exception pleaded at or before the trial of the case, "evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition." La. C.C.P. art. 931. The trial court is not bound to accept as true the allegations of plaintiff's petition in its trial of the peremptory exception. When evidence is introduced and evaluated at the trial of a peremptory exception, an appellate court must review the entire record to determine whether the trial court manifestly erred with its factual conclusions. "Although the party pleading prescription ordinarily has the burden of proof, the burden is shifted to the plaintiff when the petition on its face reveals that prescription has run." *Jambon v. State Farm Fire and Cas. Co.*, 07-925, p. 4 (La.App. 5 Cir. 3/11/08), 982 So.2d 131, 133; *see also Carter v. Haygood*, 04-0646, p. 9 (La.1/19/05), 892 So.2d 1261, 1267. Furthermore, if the plaintiff's basis for claiming interruption of prescription is solidary liability between two or more parties, the plaintiff bears the burden of proving that solidary relationship *Younger v. Marshall Industries, Inc.*, 618 So.2d 866, 869 (La.1993).

Ferrara v. Starmed Staffing, LP, 2010-0589 (La. App. 4 Cir. 10/6/10)
___So.3d___, 2010 WL 3911322.

Legal Analysis

First, we address whether the district court erred in finding that Ms. Williams' Katrina and Rita claims had prescribed. Ms. Williams filed her claim against Lexington on February 12, 2010. Hurricane Katrina made landfall on August 29, 2005 and Hurricane Rita made landfall on September 27, 2005. Louisiana.

Between 2005 and 2007, the hurricane destruction was both novel and devastating to Louisiana and as a result the legislature saw to it that special laws were enacted to protect the interests of those who suffered property damage. Ms. Williams relies on LSA-R.S. 22:1894, to support her contention that her suit against Lexington was timely filed. LSA-R.S. 22:1894 reads as follows:

A. Notwithstanding any other provision of this Title to the contrary, any person or entity having a claim for damages pursuant to a homeowners' insurance policy, personal property insurance policy, tenant homeowners' insurance policy, condominium owners' insurance policy, or commercial property insurance policy, and resulting from Hurricane Katrina **shall have through September 1, 2007**, within which to file a claim with their insurer for damages, unless a greater time period to file such claim is otherwise provided by law or by contract.

B. Notwithstanding any other provision of this Title to the contrary, any person or entity having a claim for damages pursuant to a homeowners' insurance policy, personal property insurance policy, tenant homeowners' insurance policy, condominium owners' insurance policy, or commercial property insurance policy, and resulting from Hurricane Rita **shall have through October 1, 2007**, within which to file a claim with their insurer for damages, unless a greater time period to file such claim is otherwise provided by law or by contract.

(emphasis added).

Further, Ms. Williams maintains that La. C. Civ. Pro. Art. 596¹ interrupted her prescriptive period and therefore her suit was timely filed. Article 596 specifically suspends prescription when a petition is brought on behalf of a class and a person elects to be excluded from that class. A review of the record reveals that Ms. Williams offered as evidence to the district court, a copy of a case filed in the United States Eastern District entitled: *In Re: Katrina Canal Breaches Consolidated Litigation, Civil Action No. 05-4182"K"(2)*, to support her contention that La. C. Civ. Pro. Art. 596 applied to her claims. However, Ms. Williams is not listed on the petition as a plaintiff nor did she offer any additional evidence that the listed plaintiffs represented her in a class action. There is no evidence in the record whereby Ms. Williams proved that she opted out of a class, thereby suspending prescription. Ms. Williams' argument that prescription was interrupted is unfounded. Further, Ms. Williams' reliance on *Taranto v. Louisiana Citizens Property Ins. Corp.*, 2010-0413 (La.App. 4 Cir. 12/16/09), 28 So.3d 543, *writ granted*, 2010-0105 (La. 4/16/10), 31 So.3d 1036, wherein this court reasoned that the district court erred in granting LCPIIC's exception of prescription because the filing of a class action interrupts prescription for all putative members, is

¹ **Art. 596. Prescription; suspension** 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. B. The time periods in Subparagraphs (A)(2) and (3) of this Article commence upon the expiration of the delay for taking an appeal if there is no appeal, or when an appeal becomes final and definitive. The notice required by Subparagraphs (A)(2) and (3) of this Article shall contain a statement of the delay periods provided herein.

misplaced. Ms. Williams' Katrina and Rita claims were indeed prescribed on their face at the time she filed her petition for damages in Civil District Court for the Parish of Orleans. The district court did not err in its finding².

The judgment of the district court granting Lexington' peremptory exception of prescription fails to specify the hurricane claims that are dismissed with prejudice. It reads:

Considering the arguments of counsel, the law, and the evidence;
IT IS ORDERED, ADJUDGED, AND DECREED that Lexington Insurance Company's Peremptory Exception of No Right of Action concerning plaintiff's Hurricane Gustav claim is DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Lexington Insurance Company's Peremptory Exception of Prescription is GRANTED. Accordingly, plaintiff's claims in the above-captioned matter are hereby dismissed, with prejudice.

In the district court, Lexington maintained that it did not ensure Ms. Williams at the time of Gustav; however, the district court found that there is a question as to who was responsible for the lapse in insurance when Ms. Williams claimed that she tendered her policy renewal money to Swanson Insurance Agency who was supposed to pass payment onto Lexington. On appeal Lexington maintains that Ms. Williams' Gustav claim is also prescribed on its face.

Since the district court specified in the first paragraph of its judgment the claim to which the preemptory exception of no right of action applies, we find that specificity is needed in the second paragraph as well. Therefore, we remand this matter for clarification purposes only as to which of Ms. Williams' claims are to be dismissed with prejudice under the theory of prescription. We pretermitt any further discussion as to Ms. Williams' Gustav claim.

² We pretermitt discussion of contractual prescription raised by the appellant and briefly addressed by the district court while ruling. In light of the legal analysis above, we find that this argument is misplaced.

Decree

For the reasons stated herein, we remand this matter to the district court for clarification of judgment in accordance with this opinion.

REMANDED