UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO, individually and on behalf of all others similarly situated,	)	Civil Action No. 08-03535
Plaintiffs,	)	Sec. R JUDGE SARAH S. VANCE
v.	)	Mag. 3 MAGISTRATE JUDGE DANIEL E. KNOWLES, III
JACKSON HEWITT TAX SERVICE INC.; JACKSON HEWITT INC.; and, CRESCENT CITY TAX SERVICE, INC. d/b/a JACKSON HEWITT TAX SERVICE,	)	
Defendants.	)	

REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE THIRD AMENDED CLASS ACTION COMPLAINT

Defendants' prescription argument is based upon cases that are no longer good law.

Defendants primarily rely upon *Fidelity & Deposit Co. of Maryland v. Smith*, 730 F.2d 1026 (5th Cir. 1984). In *Fidelity*, the Fifth Circuit noted:

> The Louisiana Supreme Court has stated that "the marked distinction between a *quasi* contract and an offense or *quasi* offense is that the act which gives rise to a *quasi* contract is a lawful act, and therefore is permitted; while the act which gives rise to an offense or *quasi* offense is unlawful, and therefore is forbidden."

Fidelity, 730 F.2d at 1031. Defendants "hang their hat" on this quote, but fail to discuss what precedes this quote in the Fifth Circuit's decision, where the court explains *the basis* for the

lawful/unlawful dichotomy. Defendants "forgot" to quote this part of the Fifth Circuit's analysis:

> Article 2293 of the Louisiana Civil Code defines a quasi-contract as the "*lawful* and purely voluntary act of a man, from which there results any obligation whatever to a third person." [Plaintiff] contends that [defendant] has a quasi-contractual "obligation to make restitution to his employer of any funds which he caused it [to] lose in acting intentionally to create an improper advantage for his client." Whether this obligation is quasi-contractual, however, depends in the first instance on whether the action giving rise to it was "lawful" within the meaning of article 2293.

Id. (citations omitted and emphasis in original).

Most importantly, defendants "forgot" to mention in their brief that Article 2293 is no longer in the code.[1] Whether the underlying act was lawful or unlawful is no longer relevant to whether a plaintiff has a cause of action under La. Civ. Code art. 2298 for enrichment without cause, or La. Civ. Code art. 2299 for payment of a thing not owed. In other words, the lawful/unlawful dichotomy is no longer pertinent for determining whether a claim sounds in quasi contract.[2]

Moreover, even if the Court were to apply the lawful/unlawful dichotomy, the underlying act at issue is plaintiff's payment of fees, interest, and/or other charges to defendants. Plaintiff's act in paying defendants was lawful. Plaintiff is entitled to return of these fees, interest, and

[1] La. Civ. Code art. 2293 formerly provided: "Quasi contracts are the lawful and purely voluntary act of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties." The article was removed from the Civil Code per 1995 La. Acts 1041.

[2] Even when Article 2293 was in the Code, the courts did *not* adhere to the lawful/unlawful dichotomy. This fact was noted by the Fifth Circuit in *Fidelity*. *See Fidelity*, 730 F.2d at 1031-32 ("The Louisiana intermediate appellate courts have not adhered strictly to the lawfulness-unlawfulness dichotomy that separates quasi-contract from quasi-offense. . . . Although the Louisiana intermediate appellate courts disagree on the issue, we find that the better view-based on the clear language of the civil code . . . is that quasi-contracts can arise only from lawful acts.") (citations omitted).

other charges under the LA Loan Broker statute **and** Article 2299 for payment of a thing not owed.[3]

Defendants also mislead the Court in quoting Saul Litvinoff. *See* Docket No. 105, at p. 6. Defendants argue "the distinction between *ex contractu* and *ex delicto* has been described" by Professor Litvinoff as "when the wrong results from a breach of a promise the claim is *ex contractu*, but if the wrong springs from a breach of a duty growing either from the relationship of the parties or imposed by law then the claim is *ex delicto*." Contrary to defendants' misleading argument, Professor Litvinoff was *not* discussing Louisiana law, ***but instead the common law***. This is what Professor Litvinoff said:

> In their efforts to draw a line of distinction whenever a wrongful act may be categorized as either a breach of contract or a tort, ***common law courts*** have expressed different formulations where the drawing of such a line is attempted, Thus, in some cases, and with relative simplicity, they have said that the distinction between a claim *ex contractu* and one *ex delicto* is found in the nature of the grievance, so that when the wrong results from a breach of a promise the claim is *ex contractu*, but if the wrong springs from a breach of a duty growing either from the relationship of the parties or imposed by law then the claim is *ex delicto*. [Footnote citing common law cases.] That formulation states a principle that is no doubt correct but does not furnish sufficient help to decide the difficult or unusual case.

6 La. Civ. L. Treatise, Law of Obligations § 16.13 (emphasis added).

In summary, there is a contractual relationship between plaintiff and the defendants. Indeed, if plaintiff did not have such a contractual relationship, she would *not* have a claim against defendants under the LA Loan Broker statute. Plaintiff's proposed claims are most similar to contract or quasi contractual claims, which are both subject to the 10-year prescriptive period set forth in La. Civ. Code art. 3499. *See Dean v. Hercules, Inc.*, 328 So.2d 69, 72 (La. 1976) ("[I]n order to determine the . . . applicable prescriptive period in [a] case, [the court must]

[3] Comment (c) to Article 2299 states: "The remedy that Article 2299 provides is not subsidiary; this remedy is available even if other remedies are also available but there can be no double recovery." La. Civ. Code art. 2299, Comment (c).

look to the closest analogous situation provided for in the Code."). In light of this fact, the 10-year prescriptive period set forth in La. Civ. Code art. 3499 applies to plaintiff's proposed claims under the LA Loan Broker Statute.[4]

Even if the Court were to rule the 1-year prescriptive period set forth in Article 3492 applied, however, as explained in plaintiff's supplemental memorandum, plaintiff's proposed claims would *not* be barred based upon the ancient civilian doctrine of *contra non valentem agere nulla currit praescriptio*. *See* Docket No. 101. Plaintiff was unaware of defendants' failure to be licensed. Contrary to defendants' argument, plaintiff's knowledge that she paid defendants would *not* give her any reason to suspect defendants were not properly licensed. Plaintiff was without "sufficient facts to call for inquiry." If requested, plaintiff will submit additional record evidence relating to this issue.

CONCLUSION

For the foregoing reasons, the Court should grant plaintiff's leave motion and permit plaintiff to file the Third Amended Class Action Complaint.

[4] Plaintiff explained in her reply memorandum why the 60-day prescriptive period set forth in La. Rev. Stat. § 9:3552 does *not* apply. *See* Docket No. 96. Defendants continue to argue § 3552 applies to plaintiff's proposed claims, but does not explain how this is possible. *See* Docket No. 105, at pp. 3-5. Defendants are not "extenders of credit"—the statute does not apply.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record ✓ by ECF; __ by email; __ by hand; __ by fax; __ by FedEx; __ by placing a copy of same in the U.S. Mail, postage prepaid this 9th day of April 2009.

/s/ Bryan C. Shartle
Bryan C. Shartle

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