

NORDIC KITCHENS & BATH, INC.

NO. 09-CA-258

VERSUS

FIFTH CIRCUIT

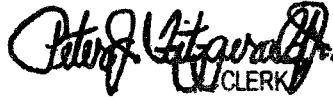
DON AND STACY LUDLOW

**COURT OF APPEAL
FIFTH CIRCUIT**

COURT OF APPEAL

FILED OCT 27 2009

STATE OF LOUISIANA



Peter J. Fitzgerald
CLERK

ON APPEAL FROM THE FIRST PARISH COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 146-639, DIVISION "B"
HONORABLE GEORGE W. GIACOBBE, JUDGE PRESIDING

October 27, 2009


**EDWARD A. DUFRESNE, JR.
CHIEF JUDGE**

Panel composed of Judges Edward A. Dufresne, Jr., Clarence E. McManus,
and Jude G. Gravois

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REMANDED



This is an appeal by Don and Stacy Ludlow, defendants-appellants, from a default judgment in favor of Nordic Kitchens & Baths, Inc, plaintiff-appellee, in this suit on open account. For the following reasons we remand the matter to First Parish Court for a hearing on the peremptory exception of prescription which was raised for the first time in this court.

The pertinent facts are these. Plaintiff sold to defendants a dishwasher and a stove cook top and hood. Invoices show that the sales were on March 19, 2004, and September 25, 2004, respectively. Plaintiff filed suit on open account on January 7, 2008, more than three years after the sales. A default judgment was entered on February 5, 2009. Defendants appealed this judgment and urged in this court a peremptory exception of prescription.

Article 3494(4) of the Civil Code provides that actions on open account prescribe in three years. It is further the law that although the exceptor bears the burden of proof on trial of the exception, where prescription is evident on the face of the pleading the burden shifts to the plaintiff to show that the action has not prescribed. *Carter v. Haygood*, 2004-0646 (La. 1/19/05), 892 So.2d 1261.

Finally, La. Code Civ. Pro. Art. 2163 provides that when an exception of prescription is urged for the first time in the appellate court, the plaintiff may demand that the matter be remanded for trial of the exception.

Here, the three year prescription is evident on the face of the pleadings. Plaintiff asserts in brief that prescription has not run, and has requested that the matter be remanded for trial of the exception. We hereby grant that request.

For the foregoing reasons the matter is remanded to First Parish Court for the Parish of Jefferson for trial of the exception of prescription.

REMANDED

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. McMANUS
WALTER J. ROTHSCHILD
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CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

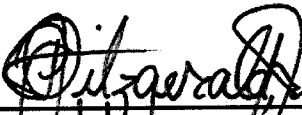
MARY E. LEGNON
FIRST DEPUTY CLERK

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**NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **OCTOBER 27, 2009** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:



PETER J. FITZGERALD, JR.
CLERK OF COURT

09-CA-258

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