CORDELL HULL, SR.	NO. 16-CA-483
VERSUS	FIFTH CIRCUIT
JEFFERSON PARISH HOSPITAL DISTRICT # 1 D/B/A WEST JEFFERSON MEDICAL CENTER	COURT OF APPEAL STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 710-214, DIVISION "B"
HONORABLE CORNELIUS E. REGAN, JUDGE PRESIDING

April 26, 2017

STEPHEN J. WINDHORST
JUDGE

Panel composed of Robert M. Murphy,
Stephen J. Windhorst, and Hans J. Liljeberg

AFFIRMED

SJW
RMM
HJL

COUNSEL FOR PLAINTIFF/APPELLANT,
CORDELL HULL, SR.

Michael J. Begoun
Mark R. Wolfe
T. Daniel Pick
Nancy S. Silbert

COUNSEL FOR DEFENDANT/APPELLEE,
REHAB CARE GROUP MANAGEMENT SERVICES, INC.

Jon A. Van Steenis
Paul R. Trapani, III

WINDHORST, J.

Appellant, Cordell Hull, seeks review of the trial court's judgment granting appellee, RehabCare Group Management Services, Inc.'s ("RehabCare"), exception of prescription. For the reasons that follow, we affirm.

Facts and Procedural History

On February 3, 2011, appellant was receiving physical therapy treatment at WJMC for injuries sustained from an automobile accident in 2010. While under the supervision of his physical therapist, appellant was instructed to get on a hand cycle after it was adjusted by the physical therapist. The hand cycle collapsed and appellant sustained injuries.

On January 12, 2012, appellant filed a petition for damages against WJMC contending that the physical therapist did not properly adjust the hand cycle and, as a result, the hand cycle collapsed and he sustained injuries. Appellant claimed that WJMC was liable for its own negligence pursuant to La. C.C. art. 2315 and was strictly liable pursuant to La. C.C. art. 2317 for the hand cycle in its custody and control. WJMC filed motion for summary judgment arguing that appellant could not show that WJMC had actual or constructive notice of the defect in the hand cycle; that it failed to take corrective action within a reasonable amount of time pursuant to La. R.S. 9:2800; and that the physical therapist was employed by RehabCare, not WJMC. On February 2, 2016, the trial court granted WJMC's motion for summary judgment and dismissed appellant's claims against WJMC.[1]

On June 1, 2015, appellant filed a first supplemental and amending petition naming RehabCare as an additional defendant. Appellant contended that RehabCare, who was an independent contractor providing physical therapy services in a space it leased from WJMC, was the employer of the physical therapist, Terese Joseph. Appellant claimed that RehabCare was liable for its own

[1] Appellant appealed and this Court affirmed the trial court's February 2, 2016 judgment. See Hull v. Jefferson Parish Hospital District No. 1, 16-273 (La. App. 5 Cir. 04/26/17), — So.3d —.

negligence pursuant to La. C.C. art. 2315 and was strictly liable pursuant to La. C.C. art. 2317 for the hand cycle in its custody and control.

On December 8, 2015, RehabCare filed an exception of prescription contending that as a qualified health care provider under the Louisiana Medical Malpractice Act ("LMMA"), appellant's cause of action against RehabCare was prescribed pursuant to La. R.S. 9:5628. RehabCare argued that the first supplemental and amending petition naming RehabCare as a defendant was filed more than three years after the accident, and the petition was therefore prescribed on its face. RehabCare also argued that prescription was not interrupted or suspended. No evidence was submitted by the parties to support or controvert the exception of prescription. The trial court granted RehabCare's exception of prescription and dismissed appellant's claims on May 25, 2016. This appeal followed.

Discussion

In his sole assignment of error, appellant contends that the trial court erred in granting RehabCare's exception of prescription. Appellant argues that this is not a malpractice claim subject to the LMMA, but rather is a general negligence claim pursuant to La. C.C. art. 2315 and strict liability claim pursuant to La. C.C. art. 2317. Appellant claims that while he does not dispute that the petition is prescribed on its face as to RehabCare, WJMC intentionally withheld information concerning a contract existing between it and RehabCare, and this failure to produce the contract was detrimental to appellant's case.

Appellant contends that his claim is not prescribed against RehabCare for several reasons: (1) it is unclear whether Ms. Joseph was an employee of WJMC and/or RehabCare; (2) WJMC and RehabCare are solidary and/or joint obligors; (3) WJMC did not affirmatively plead the existence of the contract as a defense in its answer; and (4) WJMC intentionally withheld the contract, invoking the

doctrine of *contra non valentem*. Appellant also claims that under the terms of the contract, the negligence of Ms. Joseph was known to WJMC, and that therefore, WJMC should have put RehabCare on notice on the first day this suit was filed based on the potential liability/indemnity clause.

This is not a medical malpractice case subject to the LMMA. Appellant's first supplemental and amending petition sufficiently set forth a cause of action against RehabCare pursuant to La. C.C. art. 2315, general negligence, and was strictly liable under La. C.C. art. 2317 for the hand cycle in its custody and control. Appellant's claims are delictual actions subject to a liberative prescriptive period of one year, which commences to run from the date the injury is sustained. La. C.C. art. 3492.

The burden of proving prescription ordinarily lies with the party raising the exception, but when prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show that the action has not prescribed. Maestri v. Pazos, 15-9 (La. App. 5 Cir. 05/28/15), 171 So.3d 369, 371 (citing In re Noe, 05-2275 (La. 05/22/07), 958 So.2d 617, 621-622). Evidence may be introduced to support or controvert an exception of prescription. La. C.C.P. art. 931; Id. at 622. When evidence is introduced at a hearing on an exception of prescription, the trial court's findings of fact are reviewed under the manifest error standard. Tenorio v. Exxon Mobil Corp., 14-814 (La. App. 5 Cir. 04/15/15), 170 So.3d 269, 273. However, in the absence of evidence, the exception of prescription must be decided on the facts alleged in the petition, and all allegations thereof are accepted as true. Id.

No evidence was submitted by the parties to support or controvert the exception. The first supplemental and amending petition naming RehabCare as a defendant was filed on June 1, 2015. Appellant contended he sustained injuries from the collapse of the hand cycle on February 3, 2011, due to the actions or inactions of the physical therapist in adjusting the hand cycle. On the face of the

petition, appellant's cause of action against RehabCare was prescribed; thus, the burden shifted to appellant to show that the action was not prescribed.

Appellant argued that prescription was interrupted because he timely sued WJMC. Prescription is interrupted by the commencement of suit against the obligor in a court of competent jurisdiction and venue. La. C.C. art. 3462. The interruption of prescription by suit against one solidary obligor is effective as to all solidary obligors. La. C.C. arts. 1799 and 3503. The same principle is applicable to joint tortfeasors. La. C.C. art. 2324 C. However, a suit timely filed against one defendant does not interrupt prescription against other defendants not timely sued, where the timely sued defendant is ultimately found not liable to plaintiff, since no joint or solidary obligation would exist. Renfroe v. State, 01-1646 (La. 02/26/02), 809 So.2d 947, 950; Spott v. Otis Elevator Co., 601 So.2d 1355 (La. 1992).

WJMC was timely sued by appellant, but WJMC was dismissed from this suit based on its lack of liability prior to the hearing on RehabCare's exception of prescription.[2] Consequently, WJMC was neither a joint nor solidary obligor and therefore, the timely filed suit against WJMC did not serve to interrupt prescription as to RehabCare.

Plaintiff further argued that WJMC's intentional withholding of the contract showing that Ms. Joseph was employed by RehabCare invoked the doctrine of *contra non valentem* and suspended the running of prescription.

Contra non valentem operates as a means of suspending the running of prescription when the circumstances of a case fall within one of four categories. Wells v. Zadeck, 11-1232 (La. 03/30/12), 89 So.3d 1145, 1150. The four categories that prevent the running of prescription are: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with

[2] See Hull, supra.

the contract or connected with the proceedings which prevented the creditor from suing or action; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though this ignorance is not induced by the defendant. Wells, 89 So.3d at 1150.

The fourth category, also known as the discovery rule, "prevents the running of liberative prescription where the cause of action is not known or reasonably knowable by the plaintiff." Cole v. Celotex Corp., 620 So.2d 1154, 1156 (La. 1993). Under this category, prescription begins to run when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he is the victim of a tort. Campo v. Correa, 01-2707 (La. 06/21/02), 828 So.2d 502, 510. Constructive knowledge is "whatever notice is enough to excite attention and put the injured party on guard and call for inquiry." Id. at 510-511. A critical issue in determining whether a plaintiff had constructive knowledge sufficient to commence a prescriptive period is the reasonableness of the plaintiff's action or inaction in light of his education, intelligence, and the nature of the defendant's conduct. Marin v. Exxon Mobil Corp., 09-2368 (La. 10/19/10), 48 So.3d 234, 246. A plaintiff is deemed to know what he could have learned with reasonable diligence. Tenorio, 170 So.3d at 274. *Contra non valentem* will not protect a plaintiff's claim from the running of prescription when his own willfulness or neglect caused his ignorance. Id. at 275.

To establish that his claim was suspended by *contra non valentem*, appellant only made conclusory allegations that WJMC intentionally withheld the contract between it and RehabCare. Appellant put forth no evidence demonstrating his reasonable and diligent efforts to obtain any discovery from WJMC to discern if Ms. Joseph was an employee of WJMC. Additionally, appellant did not establish that he requested any discovery from WJMC confirming that Ms. Joseph was an

employee of WJMC, which WJMC denied. It is also undisputed that appellant did not request any discovery from RehabCare regarding Ms. Joseph's status as an employee. However, accepting the allegations of the petition as true, Ms. Joseph was an employee of RehabCare. Furthermore, RehabCare cannot be held responsible for the action or inaction of the appellant in requesting or obtaining discovery from WJMC in an attempt to reasonably and diligently investigate appellant's claim. Accordingly, appellant failed to sustain his burden.

Conclusion

For the reasons stated above, the trial court's judgment granting RehabCare's exception of prescription and dismissing appellant's claims against RehabCare with prejudice is affirmed.

AFFIRMED

FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

(504) 376-1400
(504) 376-1498 FAX

NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **APRIL 26, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

16-CA-483

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE CORNELIUS E. REGAN (DISTRICT JUDGE)
JON A. VAN STEENIS (APPELLEE)
T. DANIEL PICK (APPELLANT)
PAUL R. TRAPANI, III (APPELLEE)

MAILED
MICHAEL J. BEGOUN (APPELLANT)
MARK R. WOLFE (APPELLANT)
NANCY S. SILBERT (APPELLANT)
ATTORNEYS AT LAW
2200 TULANE AVENUE
SUITE 200
NEW ORLEANS, LA 70119