

JOSEPH P. LOPINTO, III, SHERIFF OF THE
PARISH OF JEFFERSON (AS SUCCESSOR IN
OFFICE TO HARRY LEE) AND JEFFERSON
LAW ENFORCEMENT DISTRICT
VERSUS
PROFESSIONAL CONSTRUCTION SERVICES,
INC. AND SWAGER COMMUNICATIONS, INC.

NO. 18-C-361
FIFTH CIRCUIT
COURT OF APPEAL
STATE OF LOUISIANA

July 13, 2018

Mary E. Legnon
Chief Deputy Clerk

IN RE SWAGER COMMUNICATIONS, INC. AND PROFESSIONAL CONSTRUCTION SERVICES, INC.

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE GLENN B.
ANSARDI, DIVISION "H", NUMBER 635-664

Panel composed of Judges Fredericka Homberg Wicker,
Stephen J. Windhorst, and Marion F. Edwards, Judge Pro Tempore

**WRIT GRANTED; EXCEPTION OF PEREMPTION SUSTAINED;
MATTER REMANDED**

The judgment on review in this writ application is a ruling by the trial court denying an exception of peremption. For the following reasons, we find the trial court erred as a matter of law in that ruling.

The matter arises from protracted litigation beginning in August of 2006, when Harry Lee, the former sheriff of Jefferson Parish, filed suit against several defendants for damages sustained when a radio communications tower in Gretna collapsed during Hurricane Katrina on August 29, 2005.

Acceptance of the work on the tower by the owner was filed in the registry of the mortgage office on October 15, 1998. Several of the defendants have been dismissed from the lawsuit pursuant to peremption and summary judgment.¹ The only two remaining defendants (relators herein) are PCS, which served as the general contractor for the construction of the tower, and Swager, a sub-contractor which fabricated and erected the tower.

Relators filed a motion for summary judgment and an exception of peremption. Both the motion and the exception were denied by the trial court. However, relators filed this writ application seeking review of the denial of the peremption exception only.

¹See *Lee v. Prof'l Constr. Servs.*, 07-865 (La.App. 5 Cir. 03/11/08), 982 So.2d 837.

In a prior decision in this matter, this Court established that, because the plaintiffs did not acquire the right to sue until they discovered the damage in 2005, their rights had not vested before the 2003 enactment of La. R.S.9:5607.²

The applicable version of La. R.S. 9:2772 established the preemptive period for “actions involving deficiencies in surveying, design, supervision, or construction of immovables or improvements thereon.” It read in pertinent part as follows:

A. No action, whether ex contractu, ex delicto, or otherwise, including but not limited to an action for failure to warn, to recover on a contract, or to recover damages, or otherwise arising out of an engagement of planning, construction, design, or building immovable or movable property which may include, without limitation, consultation, planning, designs, drawings, specification, investigation, evaluation, measuring, or administration related to any building, construction, demolition, or work, shall be brought against any person performing or furnishing land surveying services, as such term is defined in R.S. 37:682, including but not limited to those services preparatory to construction, or against any person performing or furnishing the design, planning, supervision, inspection, or observation of construction or the construction of immovables, or improvement to immovable property, including but not limited to a residential building contractor as defined in R.S. 37:2150.1(9):

(1)(a) More than five years after the date of registry in the mortgage office of acceptance of the work by owner.

Peremption is a period of time fixed by law for the existence of a right.³ Unless timely exercised, the right is extinguished upon the expiration of the preemptive period.⁴ When the preemptive period has run, the cause of action itself is extinguished unless timely exercised.⁵ Peremption may be pleaded or it may be supplied by a court on its own motion at any time prior to final judgment.⁶ Peremption may not be renounced, interrupted, or suspended.⁷

The date peremption began to run was October 15, 1998, the date of acceptance by the owner, and the date plaintiffs’ cause of action accrued was August 29, 2005. Suit was filed on August 28, 2006, well beyond the five-year preemptive period. Thus, the action is preempted on the face of the petition.

Relators argue the trial court erred in denying the exception of peremption since both are contractors. Thus, plaintiffs’ action is preempted pursuant to La. R.S. 9:2772.

Respondents counter that La. R.S. 9:5607 superseded R.S. 9:2772 leaving relators without the benefit of peremption under that statute. In the alternative, respondents argue that if La. R.S. 9:5607 only superseded R.S. 9:2772 in part, leaving peremption available for contractors, relators are designers not contractors

² *Id.* 982 So.2d at 842.

³La. C.C.P. art. 3458.

⁴ *Id.*

⁵ *State Through Div. of Admin. v. McInnis Bros. Const.*, 97-0742 (La. 10/21/97), 701 So.2d 937, 939.

⁶ La. C.C.P. art. 3460.

⁷ La. C.C. art. 3461.

of the tower. Respondents assert that, because relators are not licensed professionals, the preemptive period in La. R.S. 9:5607 is inapplicable.⁸

La. R.S. 9:5607D provides that; “(t)he provisions of this Section shall take precedence over and supersede the provisions of R.S. 9:2772 and Civil Code Articles 2762 and 3545.” Act 919 of the 2003 Louisiana Legislative Session which made the changes states; “AN ACT to amend and reenact R.S. 9:2772(A) and (C), relative to preemptive periods for filing actions involving deficiencies in surveying, design, supervision, or construction of immovables; to provide for periods within which to file certain actions; and to provide for related matters.”

We are not persuaded by respondents’ argument that R.S. 9:5607 superseded R.S. 9:2772 to the extent that it removed the preemptive period for actions against contractors. It is clear from the legislative intent, and the fact that R.S. 9:2772 was not repealed, that that statute is still in force. Moreover, R.S. 9:5607 does not apply to contractors. Acceptance of respondents’ theory that R.S. 9:5607 replaced R.S. 9:2772 would result in the abolishment of a preemptive period for actions against contractors. The likely purpose of the changes in the law was to bring uniformity to the preemptive and prescriptive periods in design, engineering and construction of immovables, not to eliminate a preemptive period for actions brought against contractors.

Nor do we accept respondents’ alternative argument that relators are designers subject to La. R.S. 9:5607. Allegations in the petition show that both PCS and Swagar are contractors.

We find relators are contractors to which the preemptive period of La. R.S. 9:2772 applies. Accordingly, we find the action is preempted on the face of the petition and the trial court erred as a matter of law in denying the exception of preemption.

We hereby grant the writ, overrule the decision of the trial court and grant relators’ exception of preemption. This matter is remanded to the trial court.

Gretna, Louisiana, this 13th day of July, 2018.

MFE
FHW
SJW

⁸ R.S. 9:5607. Actions against a professional engineer, surveyor, professional interior designer, and architect; preemptive periods

A. No action for damages against any professional engineer, surveyor, engineer intern, surveyor intern, or licensee as defined in R.S. 37:682 or any professional architect, landscape architect, architect intern, or agent as defined in R.S. 37:141, or professional interior designer, or licensee as defined in R.S. 37:3171,¹ or other similar licensee licensed under the laws of this state, whether based upon tort, or breach of contract, or otherwise arising out of an engagement to provide any manner of movable or immovable planning, construction, design, or building, which may include but is not limited to consultation, planning, designs, drawings, specifications, investigation, evaluation, measuring, or administration related to any building, construction, demolition, or work, shall be brought unless filed in a court of competent jurisdiction and proper venue at the latest within five years from:

(1) The date of registry in the mortgage office of acceptance of the work by owner;...

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
ROBERT M. MURPHY
STEPHEN J. WINDHORST
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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **07/13/2018** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY

CHERYL Q. LANDRIEU
CLERK OF COURT

18-C-361

E-NOTIFIED

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