NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 1572

GAIL UNGLESBY

VERSUS

WENCO OF OHIO

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 496,399, Division "M"
Honorable Kay Bates, Judge Presiding

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and

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered September 20, 2006

McClendon, J. concurs and assigns reasons.

PARRO, J.

Defendant, Wenco of Ohio (Wenco), appeals a judgment in favor of the plaintiff, Gail Unglesby, for damages she sustained as a result of her use of certain products manufactured by Wenco. On appeal, Wenco has filed a peremptory exception pleading the objection of prescription. For the reasons that follow, we vacate the judgment of the trial court and render judgment in favor of Wenco, dismissing the plaintiff's claim against it on the ground that it has prescribed.

FACTUAL AND PROCEDURAL HISTORY

In 1996, Mrs. Unglesby and her husband, Lewis,[1] began an extensive renovation of their home. As part of the renovation, the Unglesbys installed wooden windows manufactured by Wenco. The renovation project took approximately thirteen months to complete and was finished by early 1997.

Shortly after the renovation was completed, Mrs. Unglesby noticed that many of the newly installed windows appeared to be rotting. She contacted Milton Ourso, the general contractor who had worked on the project, to advise him of the problem. Mr. Ourso went to the Unglesby home to inspect the windows and confirmed that the windows had begun to rot. He then advised the Unglesbys to contact a window specialist to address the issue. Both Mrs. Unglesby and Mr. Ourso testified that Mrs. Unglesby had noticed the rotting windows and called Mr. Ourso within one or two years from the time the renovation had been completed.

In October of 2001, Michael Stout, a representative of Wenco's parent company, went to the Unglesby home to inspect the windows. Mr. Stout subsequently issued a report based on this inspection, essentially denying that Wenco had any responsibility for the problems with the windows. Instead, Mr. Stout opined that the rotting of the windows was due to: (1) a lack of exterior finish maintenance; (2) water spray from the sprinkler heads surrounding the

[1] Although Lewis Unglesby, an attorney, testified at the trial of the matter, he did not join in the petition as a plaintiff.

home; and (3) the home's EIFS wall system. Shortly after receiving this report, the Unglesbys contacted two additional window specialists to perform an inspection of the home. Both specialists reported that the windows had extensive rot due to the failure of the Wenco products.

On June 17, 2002, Mrs. Unglesby filed a petition for damages against Wenco, contending that the windows were defective in that they were improperly designed and constructed of defective material. Mrs. Unglesby further alleged that Wenco knew or should have known that the windows were defective and would be unable to withstand the humidity in Louisiana. According to the petition, the rotting of the windows caused water leaks into the home, which required that the windows and surrounding wall structures be replaced. Mrs. Unglesby sought damages for the cost of removing and replacing the windows, as well as for inconvenience.

The matter was tried without a jury on September 24, 2004. At the conclusion of the plaintiff's case, Wenco orally moved for a directed verdict on the ground that Mrs. Unglesby had failed to introduce a copy of any written warranty into evidence at trial.[2] Wenco further argued that Mrs. Unglesby's claim was prescribed to the extent that she had stated a claim in redhibition. Counsel for Mrs. Unglesby then stipulated that the claim was not a redhibition claim, contending instead that the claim was based in negligence and warranty. The trial court requested post-trial briefs from the parties and took the matter under advisement. In her post-trial brief, Mrs. Unglesby denied that the claim was based on a written warranty and reiterated her stance that the claim was grounded in tort.

[2] At the trial, counsel for Wenco moved for a directed verdict; however, as the matter was tried without a jury, counsel should have moved for an involuntary dismissal. See LSA-C.C.P. art. 1672(B).

On December 29, 2004, the trial court issued written reasons for judgment in favor of Mrs. Unglesby, awarding her $50,000 in general and special damages.[3] The trial court found that Mrs. Unglesby's claim was properly rooted in tort and was governed by the Louisiana Products Liability Act, LSA-R.S. 9:2800.51, *et seq.* A judgment in accordance with these reasons was signed on January 20, 2005. It is from this judgment that Wenco appeals. In addition to its appeal of the trial court's decision on the merits, Wenco also has filed a peremptory exception pleading the objection of prescription before this court.

PRESCRIPTION

The appellate court may consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record.[4] LSA-C.C.P. art. 2163. The claim before this court is governed by a one-year liberative prescriptive period.[5] At the trial of this matter, the witnesses testified that the renovation project was completed by early 1997. Mrs. Unglesby testified that she had noticed the damage to the windows and had contacted Mr. Ourso to report the problem within two years of the completion of the project. However, Mrs. Unglesby did not

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[3] The trial court specifically found that Mrs. Unglesby's damages exceeded $50,000; however, Mrs. Unglesby had stipulated in her petition that her damages were less than $50,000, and the matter was tried without a jury.

[4] The objection of prescription must be specially pleaded; the court may not supply the objection. See LSA-C.C.P. art. 927(B). Because Wenco raised the issue only by brief or oral argument, the issue of prescription was not properly before the trial court. See **Union Planters Bank v. Commercial Capital Holding Corporation**, 04-1521 (La. App. 1st Cir. 3/24/05), 907 So.2d 134, 136. Therefore, the trial court did not rule on the issue.

[5] The nature of the plaintiff's claim is in dispute. The trial court found that the plaintiff's claim was grounded in tort and governed by the Louisiana Products Liability Act. Such a claim is governed by a one-year liberative prescriptive period that commences from the day injury or damage is sustained. LSA-C.C. art. 3492. In contrast, Wenco contends that the plaintiff's claim is grounded in redhibition. An action for redhibition against a seller who knew, or is presumed to have known, of the existence of a defect in the thing sold prescribes in one year from the day the defect was discovered by the buyer. LSA-C.C. art. 2534(B). At trial, Mrs. Unglesby stipulated that she was not stating a redhibition claim; however, on appeal she contends in the alternative that her claim is based in redhibition or that her claim is governed by the one-year liberative prescriptive period found in LSA-C.C. art. 3493. According to that article, when damage is caused to immovable property, the one-year prescriptive period begins to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage. Because there is no difference in the lengths of the prescriptive periods, we make no determination regarding the nature of the claim.

file suit until June 17, 2002, more than three years after she had discovered that the windows were rotting.

In response to Wenco's peremptory exception, Mrs. Unglesby appears to argue that pursuant to the doctrine of *contra non valentem*, the prescriptive period did not begin to run until after Mr. Stout had submitted his report concluding that the damage to the windows was due to a maintenance problem. According to Mrs. Unglesby, she was not aware that Wenco would deny responsibility for the defective windows until she received the report in October of 2001. She further contends that her suit was timely, because she filed suit within one year of the date of the report.

The plaintiff bears the burden of establishing facts to support a *contra non valentem* plea. **K & M Enterprises of Slaughter, Inc. v. Richland Equipment Co., Inc.**, 96-2292 (La. App. 1st Cir. 9/19/97), 700 So.2d 921, 924-25. It is well settled that the principle of *contra non valentem* will not exempt the plaintiff's claim from the running of prescription if his ignorance of the claim is attributable to his own willfulness, neglect, or unreasonableness. **Babineaux v. State ex rel. Dept. of Transp. and Development**, 04-2649 (La. App. 1st Cir. 12/22/05), 927 So.2d 1121, 1124. A plaintiff will be deemed to know what he could have learned through reasonable diligence. **Id**. As a general rule, prescription begins to run from the time there is sufficient notice as to call for inquiry about a claim, not from the time when the inquiry reveals facts or evidence sufficient to prove the claim. **David v. Meek**, 97-0523 (La. App. 1st Cir. 4/8/98), 710 So.2d 1160, 1163.

The record is clear that Mrs. Unglesby had sufficient notice as to call for inquiry about the claim once Mr. Ourso confirmed that the windows were rotting and advised her to contact a window specialist. Nevertheless, there is no evidence in the record to demonstrate that Mrs. Unglesby took any legal action

concerning the windows until 2002.[6] Plaintiff's apparent failure to take any action for more than three years after discovering the problems with the windows is not reasonable under the circumstances.

CONCLUSION

For the foregoing reasons, we conclude that the plaintiff's suit, which was filed more than three years after she obtained notice sufficient to incite an inquiry into the claim, is prescribed. Accordingly, we vacate the judgment of the trial court and render judgment in favor of the defendant, Wenco of Ohio, dismissing plaintiff's claim against it with prejudice.[7] All costs of this appeal are assessed to Gail Unglesby.

JUDGMENT VACATED AND RENDERED.

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[6] In her brief to this court, Mrs. Unglesby contends that she contacted Wenco shortly after Mr. Ourso told her to contact a window specialist, but no Wenco representative responded to her inquiries until Mr. Stout came in 2001. Therefore, she contends that any delay was attributable to Wenco. There is no evidence in the record to support this assertion; however, even if such evidence were in the record, it would not serve to mitigate Mrs. Unglesby's failure to act for more than three years. If Mrs. Unglesby had inquired into Wenco's potential responsibility for the rotting windows and had not received a satisfactory response, she could have filed suit against Wenco and compelled Wenco to take some action concerning the windows.

[7] In light of this decision, we pretermit discussion of the other issues raised in the appeal.

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McCLENDON, J., concurring.

Finding that plaintiff did not demand a remand for a trial on the prescription exception, I respectfully concur with the majority opinion. See LSA-C.C.P. art. 2163.