

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 2139

THE TRAILER OUTLET, INC., ESTHER LAYERLE, AND
ROBERT R. LAYERLE

VERSUS

WILLIAM J. DUTEL AND DUTEL & TRANCHINA, LLC

Judgment Rendered: June 11, 2010

Appealed from the
Twenty-second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit number 2006-11350

Honorable William J. Crain, Presiding

Lisa Brener
New Orleans, LA

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Esther Layerle and Robert R. Layerle

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Counsel for Defendants/Appellants
William J. Dutel and Dutel and
Tranchina, LLC

BEFORE: CARTER, C.J., GUIDRY, AND PETTIGREW, JJ.

Carter C.J. concurred and assigns reason

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GUIDRY, J.

In this legal malpractice action, Esther Layerle and Robert Layerle appeal from a trial court judgment sustaining William J. Dutel and Dutel & Tranchina, LLC's peremptory exceptions raising the objections of prescription, preemption, and no cause of action and dismissing their claims with prejudice. For the reasons that follow, we vacate the trial court's judgment and remand.

FACTS AND PROCEDURAL HISTORY

In 2001, Esther and Robert Layerle hired William J. Dutel and Dutel & Tranchina, LLC to represent them in the acquisition of Investment Management Services, Inc. (IMS), a business engaged in the sale and repair of trailers and related activities. On September 19, 2001, The Trailer Outlet, Inc. (Trailer Outlet), a corporation owned by Esther and Robert Layerle, purchased movable assets and related intangible property from IMS. On that same date, Remtac Investments, LLC (Remtac), a limited liability company also owned at the time of the sale by Esther and Robert Layerle, purchased the real estate and improvements on which IMS operated from Hampton Life Insurance Limited (Hampton). Remtac paid Hampton \$125,000.00 at the time of sale and executed a promissory note secured by a mortgage on the real estate in favor of Hampton for the remaining \$925,000.00 of the purchase price. The act of sale for the movable and intangible property from IMS to the Trailer Outlet stated that the consideration for that sale was contained in the payment and promissory note described in the act of sale between Remtac and Hampton.

Thereafter, on January 9, 2003, Remtac executed a dation en paiement in favor of Hampton, whereby Remtac transferred to Hampton the real estate that secured the \$925,000.00 promissory note. On February 27, 2003, IMS filed a lawsuit against the Trailer Outlet, seeking rescission of the sale of its business and requesting a preliminary injunction, enjoining the Trailer Outlet from transferring

or disposing of any of the assets of the business pending resolution of the lawsuit. IMS later added Esther and Robert Layerle as defendants.

William J. Dutel represented the Layerles and the Trailer Outlet in all of the above transactions and in the suit brought against them by IMS, and he continued to represent them until April or May 2005. On March 30, 2006, the Layerles and the Trailer Outlet filed a petition for damages, naming William J. Dutel and Dutel & Tranchina, LLC, the law firm employing Dutel, as defendants and asserting various acts of malpractice. Particularly, the plaintiffs asserted that the defendants were negligent in their review, participation in, and approval of the September 2001 sale documents, by permitting plaintiffs to execute the dation en paiement without requiring that the document provide for their indemnification by Hampton in the event IMS brought suit against them, and in failing to understand the risk that IMS might be determined to be a third party beneficiary of the consideration set forth in the agreement between Hampton and Remtac and to provide plaintiffs with appropriate protection.

Thereafter, Dutel and Dutel & Tranchina, LLC filed peremptory exceptions raising the objections of prescription, peremption, and no cause of action. Following a hearing, the trial court signed a judgment on July 16, 2009, sustaining the exceptions and dismissing the plaintiffs' claims with prejudice. Esther and Robert Layerle now appeal from this judgment.¹

DISCUSSION

The time limitation for filing a legal malpractice action is set forth in La. R.S. 9:5605, which provides, in pertinent part:

A. No action for damages against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the

¹ According to the parties, the Trailer Outlet is in bankruptcy, and it is not a party to this appeal.

practice of law, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide legal services shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.

B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. ... *The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.*

* * *

E. The peremptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953. [Emphasis added.]

The burden of proving peremption is typically on the party pleading it. However, when the action is preempted on the face of the petition, the burden shifts to the plaintiff to show the claim has not preempted. See Dauterive Contractors, Inc. v. Landry and Watkins, 01-1112, pp. 15-16 (La. App. 3rd Cir. 3/13/02), 811 So. 2d 1242, 1253.

The Layerles filed their petition for damages against defendants on March 30, 2006. In their petition, they asserted that Dutel represented them with respect to the September 19, 2001 purchases of movable and immovable property from IMS and Hampton and the January 9, 2003 execution of a dation en paiement in favor of Hampton. The Layerles further asserted that as a result of Dutel's negligence in his review, participation, and approval of the September 19, 2001 sale documents, and his negligence in permitting them to execute the dation en paiement without requiring the document to provide for indemnification by Hampton in the event IMS brought a claim or suit against the Layerles, IMS filed suit against the Layerles on February 27, 2003, exposing them to personal

liability. Accordingly, because the Layerles filed their action for malpractice in March 2006, over four years following the execution of the sale documents and over three years following the execution of the dation en paiement, their action is preempted on its face and the burden shifted to them to show that their claim is not preempted.

In opposing the defendants' exceptions, the Layerles acknowledged that their claim for malpractice was not filed within three years of the date of the alleged negligent acts. However, they asserted that the preemptive periods in La. R.S. 9:5605(A) do not apply because Dutel's deliberate suppression of the truth regarding the execution of the dation en paiement and assurances made to plaintiffs that they would prevail in the IMS litigation in order to obtain the unjust advantage of preventing the Layerles from knowing, or timely knowing, that they had a claim against him, fall within the fraud exception contained in La. R.S. 9:5605(E).

As stated previously, La. R.S. 9:5605(E) provides that the preemptive periods of La. R.S. 9:5605(A) shall not apply in cases of fraud, as defined in Civil Code Article 1953.² Louisiana Civil Code article 1953 defines fraud as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other ... and may result from silence or inaction."

Some circuits have held that the fraud exception only applies in cases where the fraudulent act itself constitutes the malpractice. See Brumfield v. McElwee, 07-0548, p. 7 (La. App. 4th Cir. 1/16/08), 976 So. 2d 234, 240; Smith v. Slattery, 38,693, pp. 8-9 (La. App. 2nd Cir. 6/23/04), 877 So. 2d 244, 249, writ denied, 04-

² This court has previously determined that the fraud exception applies to both the one-year and three-year preemptive periods. See Coffey v. Block, 99-1221, p. 8 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1181, 1187, writ denied, 00-2226 (La. 10/27/00), 772 So. 2d 651; see also Klein v. American Life & Casualty Company, 01-2336, p. 6 n.4 (La. App. 1st Cir. 6/27/03), 858 So. 2d 527, 531 n.4, writs denied, 03-2073 and 03-2101 (La. 11/7/03), 857 So. 2d 497 and 499 (noting that the fraud exception in La. R.S. 9:5606(C) applies to both the one-year and three-year preemptive periods).

1860 (La. 10/29/04), 885 So. 2d 592; Atkinson v. LeBlanc, 03-365, p. 8 (La. App. 5th Cir. 10/15/03), 860 So. 2d 60, 65. This court, however, has previously found that allegations of misrepresentation or suppression of the truth occurring subsequent to the acts of malpractice are sufficient to raise the issue of fraud within the meaning of La. R.S. 9:5605(E).³ See Coffey v. Block, 99-1221, p. 8 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1181, 1186-1187, writ denied, 00-2226 (La. 10/27/00), 772 So. 2d 651.

As such, in accordance with this court's previous ruling in Coffey, and keeping in mind that peremptive statutes are to be strictly construed against peremption and in favor of maintaining the claim, Albach v. Kennedy, 00-0636, p. 9 (La. App. 1st Cir. 8/6/01), 801 So. 2d 476, 482, writ denied, 01-2499 (La. 10/12/01), 799 So. 2d 1138, we find that the Layerles' allegations regarding Dutel's suppression of the truth in order to prevent them from knowing, or timely knowing, that they had a claim against him are sufficient to raise the fraud exception contained in La. R.S. 9:5605(E). Therefore, we find the trial court erred in failing to consider the Layerles' allegations of fraud as a defense to the defendants' exceptions. However, because the Layerles were not permitted to present evidence in support of their allegations of fraud at the trial of the exception, nor were they given an opportunity to amend their petition to formally plead fraud, we must remand this matter to the trial court with instructions to permit amendment of the pleadings and to conduct a full evidentiary hearing on the

³ Additionally, in Borel v. Young, 07-0419, p. 13 (La. 11/27/07), 989 So. 2d 42, 60 (on rehearing), the Louisiana Supreme Court, in examining the three-year period in La. R.S. 9:5628 for filing actions under the Louisiana Medical Malpractice Act, recognized La. R.S. 9:5605 and reasoned that when the legislature chose to establish a peremptive period for negligence actions against professionals, it specifically stated its intent and specially exempted claims for fraud. The court went on to reason that presumably, by exempting claims for fraud, the legislature intended to restore the third category of *contra non valentem* so as to prevent a potential defendant from benefitting from the effects of peremption by intentionally concealing his or her wrongdoing. Borel, 07-0419 at p. 13 n.3, 989 So. 2d at 60 n.3.

allegations of fraud. See La. C.C.P. art. 934; Coffey, 99-1221 at pp. 9-10, 762 So. 2d at 1187-1188.

CONCLUSION

For the foregoing reasons, we vacate the judgment of the trial court sustaining defendants' exceptions raising the objections of prescription, peremption, and no cause of action and remand this matter to the trial court for further proceedings consistent with this opinion. All costs of this appeal are assessed equally to William J. Dutel and Dutel & Tranchina, LLC.

VACATED AND REMANDED WITH INSTRUCTIONS.

THE TRAILER OUTLET, INC.,
ESTHER LAYERLE, AND
ROBERT R. LAYERLE

STATE OF LOUISIANA
COURT OF APPEAL


VERSUS

FIRST CIRCUIT

WILLIAM J. DUTEL AND
DUTEL & TRANCHINA, LLC

NO. 2009CA2139

CARTER, C.J., CONCURS AND ASSIGNS REASONS.
CARTER, C.J., Concurring.

 I reluctantly agree with the result reached by the majority opinion, but I have serious misgivings about the effects of this interpretation of LSA-R.S. 9:5605.

It is respectfully submitted that the results reached by the Second, Fourth, and Fifth Circuit cases referred to in the majority opinion are the better interpretation of LSA-R.S. 9:5605. I am of the opinion that the fraud exception should only apply where the fraudulent act itself constitutes the malpractice and such was clearly not the case herein, where the alleged suppression of the truth occurred subsequent to the supposed malpractice.¹ However, this Circuit is bound by the decision in **Coffey v. Block**, 99-1221 (La. App. 1 Cir. 6/23/00), 762 So.2d 1181, 1187, writ denied, 00-2226 (La. 10/27/00), 772 So.2d 651, until overruled by an *en banc* decision of this court.

¹ An excellent discussion contrasting cases where the fraudulent act comprised the malpractice with cases involving fraud that occurred in acts after the legal malpractice occurred can be found in **Brumfield v. McElwee**, 07-0548 (La. App. 4 Cir. 1/16/08), 976 So.2d 234, 239-243.

Finally, I believe the **Coffey** case and this majority opinion open the door to all kinds of unpleaded, unsubstantiated fraud allegations. I recognize, however, that the law takes a liberal approach toward allowing amended pleadings to raise the *possibility* that a claim is not preempted. See **Reeder v. North**, 97-0239 (La. 10/21/97), 701 So.2d 1291, 1299; **Klein v. American Life & Cas. Co.**, 01-2336 (La. App. 1 Cir. 6/27/03), 858 So.2d 527, 531, writs denied, 03-2073 and 03-2101 (La. 11/7/03), 857 So.2d 497, 499. For this reason, I respectfully concur.