NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 0193

MICHELLE CHASE, LEONARD JAMES HOLMES,
AND STRATEGY DEVELOPMENT, LLC

VERSUS

RESOURCE BANK, CHRIS KELLER, MILES APPRAISAL GROUP,
ABC INSURANCE COMPANY AND XYZ INSURANCE COMPANY

Judgment rendered September 10, 2010.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 2009-11856
Honorable Martin E. Coady, Judge

* * * * * *

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BEFORE: KUHN, PETTIGREW, JJ., and KLINE, J. *pro tempore*.[1]

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[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

PETTIGREW, J.

In this case, plaintiffs, Michelle Chase, Leonard James Holmes, and Strategy Development, LLC ("Strategy"), filed a petition for damages asserting various claims of fraud, misrepresentation, breach of fiduciary duty, and breach of contract in relation to two loans that were funded by defendant, Resource Bank, to finance the purchase of certain properties in Mandeville and Abita Springs. According to the record, Chase and Holmes were partners in Strategy. Also named as defendants in plaintiffs' petition for damages were Chris Keller, an officer of Resource Bank, and Miles Appraisal Group.[2]

Resource Bank and Chris Keller (hereinafter collectively referred to as "Resource Bank") responded to plaintiffs' petition by filing peremptory exceptions urging the objections of no cause of action, no right of action, and prescription, and a dilatory exception urging the objection of vagueness and ambiguity. The crux of the argument on these various exceptions, as set forth in the "Memorandum In Support Of Exceptions To Petition For Damages," was as follows:

> [Strategy] made speculative investments in property which proved to be unsuccessful. Plaintiffs now would like to blame [Resource Bank] for their business losses. These defendants, however, bear no fault or responsibility in this case and the plaintiffs' claims must be dismissed.
>
> The plaintiffs' Petition for Damages alleges (1) the first appraisal of the Mandeville property was fraudulent and created false equity; (2) Resource Bank breached its initial verbal promise to loan development funds for the Mandeville property on the basis of the second appraisal; (3) Resource Bank breached its second verbal promise to loan developmental funds on the Abita Springs property; (4) [Resource Bank] made misrepresentations that resulted in foreclosure on both the Mandeville and Abita Springs properties.
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> None of the factual allegations within the Petition, however, establish a cause of action and/or right of action against [Resource Bank]. Pursuant to La. R.S. 6:1122, lending agreements must be in writing to be enforceable.

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[2] Miles Appraisal Group filed a brief in the instant appeal as an appellee, noting that its brief was "purely for protective purposes." However, in the trial court proceedings below, Miles Appraisal Group filed various exceptions to plaintiffs' petition raising the objections of prescription, no cause of action, no right of action, and vagueness. The exceptions were heard by the trial court on August 26, 2009, at which time counsel for plaintiffs appeared and offered no opposition. Accordingly, in a judgment signed by the trial court that same day, the exceptions were sustained, and all of plaintiffs' claims adverse to Miles Appraisal Group were dismissed, with prejudice. No appeal was taken from this judgment. Thus, Miles Appraisal Group is no longer a party to this matter as all claims against it have been finalized.

> There is no contention that the defendants violated any written agreement. Accordingly, on its face, the Petition fails to state a cause of action. Further, even if the Petition did set forth a valid cause of action (which it does not), the clear statements contained in the Petition establish that the claims are barred by prescription.
>
> Moreover, the individual plaintiffs, Michelle Chase and Leonard J. Holmes, have no right of action in this matter, which relates to transactions entered into by the corporate entity of [Strategy]. Under Louisiana law, a shareholder of a corporation does not possess an individual basis to pursue damages allegedly sustained by the corporation.
>
> Finally, the Petition is impermissibly vague and thus does not meet the pleading requirements of the Louisiana Code of Civil Procedure.

Plaintiffs submitted no opposition to any of the exceptions. The matter was scheduled for hearing on July 15, 2009, at which time plaintiffs failed to appear. The trial court noted that plaintiffs had been served with notice of the hearing, but failed to appear or file an opposition. Thus, the trial court sustained the exceptions and dismissed, with prejudice, all claims by plaintiffs against Resource Bank. A judgment in accordance with these findings was signed by the trial court on July 21, 2009.

Plaintiffs timely moved for a new trial, which was heard by the trial court on September 16, 2009. At the hearing on the motion for new trial, counsel for plaintiffs submitted that there were outstanding discovery requests and that the parties had agreed to a July 15, 2009 deadline for the responses to same. Plaintiffs' counsel acknowledged that he did not appear at the July 15, 2009 hearing on the exceptions, but continued as follows: "I am saying that there is no prejudice here. We sent the discovery in good faith.[3] There was enough there to lull us into believing that this [the hearing on the exceptions] wasn't going forward." After considering the arguments of the parties and the evidence in the record, the trial court denied the motion for new trial in a judgment rendered on September 16, 2009.

[3] Although plaintiffs' counsel seems to allude to the fact that discovery responses were provided by the July 15, 2009 date, the record and defendants' brief on appeal indicate otherwise. According to the record, the discovery responses were filed into the record on July 30, 2009. In brief, Resource Bank maintains that it "did not receive plaintiffs' discovery responses until July 28, 2009, when they were attached to the Plaintiffs' Motion for New Trial."

This appeal by plaintiffs followed,[4] wherein the following specifications of error were assigned:

> 1. Appellants argue that under the circumstances shown appellants were lulled into lack of appearance in court and fairness and equity should be considered on appeal.
>
> 2. The trial court erred in granting judgment dismissing the matter with prejudice.

Resource Bank answered the appeal, seeking attorney fees for a frivolous appeal.[5]

On appeal, plaintiffs make the same argument that they made in support of their motion for new trial, i.e., that they were lulled into inaction based on what they believed was a tacit understanding that the hearing on the exceptions would not go forward once they agreed to submit the discovery responses. Plaintiffs maintain that there is no prejudice to Resource Bank and that the trial court's judgment should be reversed in the interest of equity and justice. They argue further that the trial court erred in dismissing their claims with prejudice. Based on our thorough review of the record before us, we find plaintiffs' arguments to be without merit and find no error in the trial court's judgment sustaining the exceptions raised by Resource Bank. See **Todd v. Tate**, 2004-2754, p. 4 (La. App. 1 Cir. 12/22/05), 928 So.2d 113, 115, writ denied, 2006-0158 (La. 4/24/06), 926 So.2d 542.

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[4] We note that plaintiffs actually appealed from the trial court's denial of the motion for new trial. "[T]he established rule in this circuit is that the denial of a motion for new trial is an interlocutory and non-appealable judgment." **McKee v. Wal-Mart Stores, Inc.**, 2006-1672, p. 8 (La. App. 1 Cir. 6/8/07), 964 So.2d 1008, 1013, writ denied, 2007-1655 (La. 10/26/07), 966 So.2d 583. (By 2005 La. Acts No. 205, effective January 1, 2006, La. Code Civ. P. art. 2083 was amended to remove the longstanding provision that interlocutory judgments that "may cause irreparable harm" are appealable. An interlocutory judgment is now appealable only when expressly provided by law. Accordingly, the denial of a new trial is not generally appealable.) The Louisiana Supreme Court, however, has instructed us to consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits, when it is clear from appellant's brief that the appeal was intended to be on the merits. **Carpenter v. Hannan**, 2001-0467, p. 4 (La. App. 1 Cir. 3/28/02), 818 So.2d 226, 228-229, writ denied, 2002-1707 (La. 10/25/02), 827 So.2d 1153. It is obvious from plaintiffs' brief that they intended to appeal the judgment on the merits. Thus, we will treat the appeal accordingly.

[5] The imposition of damages for a frivolous appeal is provided for in La. Code Civ. P. art. 2164, which provides in pertinent part, "[t]he [appellate] court may award damages for frivolous appeal." Even when an appeal lacks serious legal merit, damages for a frivolous appeal will not be awarded unless it is clear that the appeal was taken solely for the purpose of delay or that appellant is not serious in the position he advocates. **Assaleh v. Sherwood Forest Country Club Inc.**, 2007-1939, p. 11 (La. App. 1 Cir. 5/2/08), 991 So.2d 67, 74. We have carefully considered Resource Bank's request for attorney fees for frivolous appeal, but based on our review of the record, we do not find that such an award is warranted. Although we have determined that plaintiffs' appeal lacks merit, we cannot say that this appeal was taken solely for the purpose of delay or harassment. We also believe that plaintiffs were serious in the position they advocated. Therefore, we decline to assess penalties in the form of damages for a frivolous appeal.

While Resource Bank presented cogent arguments in support of each of its exceptions, this court finds that the sole issue for our review is whether plaintiffs' claims were prescribed. If the claims have in fact prescribed, as argued by Resource Bank, our inquiry and discussion ends.

Ordinarily, the party pleading prescription bears the burden of proving the claim has prescribed. However, when the face of the petition reveals that the plaintiff's claim has prescribed, the burden shifts to the plaintiff to demonstrate prescription was interrupted or suspended. **Reed v. Evans**, 2009-1120, p. 4 (La. App. 1 Cir. 2/12/10), 35 So.3d 359, 362.

A review of the record reveals that plaintiffs' petition has prescribed on its face. Any claim for a breach of fiduciary responsibility "may only be asserted within one year of the first occurrence thereof." La. R.S. 6:1124. In the instant case, all of plaintiffs' claims against Resource Bank stem from the initial appraisal on the Mandeville property, which plaintiffs allege was fraudulent and created "false equity" that they then attempted to use to purchase other property. According to plaintiffs' petition for damages, plaintiffs were advised in July 2006 "that all equity in the Mandeville property had been lost by land devaluation and there was minus equity now." Thus, at the latest, plaintiffs knew of the "devaluation" of the Mandeville property in July 2006. However, plaintiffs did not file suit until April 1, 2009, almost three years later. Because plaintiffs' petition was prescribed on its face, the burden of proof shifted to plaintiffs to prove that prescription was either interrupted or suspended. Plaintiffs failed to satisfy this burden. As previously indicated, plaintiffs never submitted any opposition to the exceptions, all of which were well-founded in law and fact. Nor did plaintiffs appear at the hearing on the exceptions to offer any argument to the trial court in an attempt to meet its burden of proof on the prescription issue. Thus, the trial court did not err in sustaining Resource Bank's peremptory exception raising the objection of prescription and dismissing, with prejudice, all claims by plaintiffs against Resource Bank.[6]

[6] Having determined that plaintiffs' petition was prescribed, we pretermit discussion of any remaining issues.

For the above and foregoing reasons, the July 21, 2009 judgment of the trial court is affirmed. All costs associated with this appeal are assessed against plaintiffs-appellants, Michelle Chase, Leonard James Holmes, and Strategy Development, LLC. We issue this memorandum opinion in accordance with Uniform Rules--Courts of Appeal, Rule 2-16.1B.

AFFIRMED.