

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 2176

RAFAEL AND DIOIGNA ACEVEDO

VERSUS

LOUISIANA FARM BUREAU MUTUAL INSURANCE COMPANY

VGW
JM
DATE OF JUDGMENT: JUL - 2 2012

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2008-16821, DIV. B, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE AUGUST J. HAND, JUDGE

Al J. Robert, Jr.
New Orleans, Louisiana

Counsel for Plaintiffs-Appellants
Rafael and Dioigna Acevedo

Andrew L. Pauche, Jr.
James K. Ordeneaux
Scott H. Mason
New Orleans, Louisiana

Counsel for Defendant-Appellee
Louisiana Farm Bureau Mutual
Insurance Company

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: AFFIRMED.

KUHN, J.

Plaintiffs-appellants, Rafael and Dioigna Acevedo, appeal the trial court's judgment, which sustains a peremptory exception raising the objection of prescription filed by defendant-appellee, Louisiana Farm Bureau Mutual Insurance Company (Farm Bureau), and dismisses their claims. We affirm.

On January 5, 2009, the Acevedos filed this lawsuit against their homeowner insurer, Farm Bureau. According to the allegations of their petition, on August 29, 2005, as a result of the wind and wind-driven rains of Hurricane Katrina, the Acevedos' home, located in Slidell, Louisiana, sustained roof damage and interior damage, including the contents. The Acevedos averred that the damage rendered their home uninhabitable for an extended period of time and caused a total loss. Farm Bureau made a partial payment, declining to pay the Acevedos full payment for damage to structure, other structures, contents, debris removal, and loss of use/additional living expenses. Claiming Farm Bureau failed to tender a timely and sufficient payment under the insurance contract, they sought the difference between the partial payment and the policy limits as well as penalties and attorney's fees.

Farm Bureau answered the lawsuit, generally denying the Acevedos' claims and asserting several affirmative defenses. Subsequently, Farm Bureau filed a peremptory exception objecting to the petition on the basis of prescription, noting that by special legislation, all claims under insurance policies for damages caused by Hurricane Katrina were barred if not filed by August 30, 2007.¹ Since the

¹ See Act 802 of the 2006 Louisiana Regular Session.

Acevedos filed their lawsuit well after the August 30, 2007 deadline, Farm Bureau maintained it was untimely and, therefore, should be dismissed.

After a hearing, the trial court concluded that the Acevedos' claims were prescribed and dismissed their petition. From a judgment in conformity with this ruling, the Acevedos have devolutively appealed.

The Acevedos maintain that because they are putative class members in two actions where the court has not yet ruled upon the propriety of class certification,² they are entitled to suspension of prescription under the provisions of La. C.C.P. art. 596.³ The filing of an individual lawsuit is an effective opt out of a class action and prevents a plaintiff from taking advantage of suspension of prescription under La. C.C.P. art. 596. It does not matter when the lawsuit is filed, in which forum it is filed, or even if it is correctly filed. *Wilkinson v. Louisiana Farm Bureau Mut. Ins. Co.*, 2011-1421, p. 6 (La. App. 1st Cir. 3/23/12), 2012 WL

² See *Wilkinson v. Louisiana Farm Bureau Mut. Ins. Co.*, 2011-1421, p. 3 n.3 (La. App. 1st Cir. 3/23/12), 2012 WL 996539 (unpublished opinion).

³ At the time the Acevedos filed their lawsuit, La. C.C.P. art. 596 provided:

Liberative prescription on the claims arising out of the transactions or occurrences described in a petition brought on behalf of a class is suspended on the filing of the petition as to all members of the class as defined or described therein. Prescription which has been suspended as provided herein, begins to run again:

(1) As to any person electing to be excluded from the class, from the submission of that person's election form;

(2) As to any person excluded from the class pursuant to Article 592, thirty days after mailing or other delivery or publication of a notice to such person that the class has been restricted or otherwise redefined so as to exclude him; or

(3) As to all members, thirty days after mailing or other delivery or publication of a notice to the class that the action has been dismissed, that the demand for class relief has been stricken pursuant to Article 592, or that the court has denied a motion to certify the class or has vacated a previous order certifying the class.

996539 (unpublished opinion); *Lory v. Louisiana Farm Bureau Mut. Ins. Co.*, 2011-1621, p. 3 (La. App. 1st Cir. 3/23/12), 2012 WL 996536 (unpublished opinion); accord *Duckworth v. Louisiana Farm Bureau Mut. Ins. Co.*, 2011-0837 (La. App. 4th Cir. 11/23/11), 78 So.3d 835, writ granted, 2011-2835 (La. 3/30/12), --- So.3d ---- and *Dixey v. Allstate Ins. Co.*, (E.D. La. 2011), 2011 WL 4403988 (relying on *Katz v. Allstate Ins. Co.*, 2004-1133 (La. App. 4th Cir. 2/2/05), 917 So.2d 443, 447, and *Lester v. Exxon Mobil Corp.*, 2009-1105 (La. App. 5th Cir. 6/29/10), 42 So.3d 1071, 1074-76, writ denied, 2010-2244 (La. 12/17/10), 51 So.3d 14; but see *In re WorldCom Securities Litigation*, 496 F.3d 245, 254-56 (2d Cir. 2007). Because the Acevedos filed this lawsuit before the class certification in either of the two actions for which they are putative class members, they effectively opted out of the class actions and are, therefore, unable to rely on the suspension provisions of La. C.C.P. art. 596. Thus, having filed their suit over sixteen months after the August 30, 2007 deadline, their claims against Farm Bureau are prescribed. And since an amendment of their pleadings to allege that they are putative class members cannot remove the grounds of the objection of prescription, the trial court correctly denied that relief. See La. C.C.P. art. 934 (when the grounds of the objection cannot be removed, the claim shall be dismissed).

DECREE

Based on the law of this circuit, we find no error in the trial court's judgment, which sustains Farm Bureau's exception of prescription and dismisses the lawsuit. Appeal costs are assessed against plaintiffs-appellants, Rafael and Dioigna Acevedo.

AFFIRMED.