NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 2323

PHILIP DELANEY

VERSUS

AMITE HOMES, INC.

Judgment Rendered: JUN 13 2012

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On Appeal from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
Trial Court Number 516,558

The Honorable Brenda Bedsole Ricks, Judge

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal of a judgment sustaining peremptory exceptions pleading the objections of prescription and no right of action. For the reasons that follow, we dismiss the appeal in part, reverse the August 24, 2011 trial court judgment, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

On May 21, 2008 Philip Delaney purchased a 2007 Patriot mobile home, for $78,000, from Amite Homes, Inc. (Amite Homes). During delivery of the mobile home, the "tongue" was broken, allegedly causing extensive damage to the mobile home. On January 26, 2009 Mr. Delaney filed suit against Amite Homes, alleging the mobile home was delivered to him unfit for its intended use, and he would not have purchased it had he known of the defects. He further alleged that the mobile home's defects were not known or apparent to him when he purchased it and that Amite Homes was provided an opportunity to repair the mobile home. Mr. Delaney sought redhibition of the mobile home, return of the sales price, damages, attorney fees, interest, and all costs of suit. Mr. Delaney later amended his petition to add as defendants: Northfield Insurance Company[1] (Northfield), Amite Homes' insurer; and Sumrall's Big Yellow Truck, L.L.C. (Big Yellow), the mobile home delivery company.

Amite Homes filed an answer denying the allegations and asserting a third party demand against: Big Yellow (who it alleged "was actually and physically responsible for the transportation, delivery, and set up"); Republic Vanguard Insurance Company (Republic), Big Yellow's commercial general liability insurer; Progressive Security Insurance Company (Progressive), Big

[1] Although the plaintiff's amended petition named this defendant as "Northland" Insurance Company, the defendant in its answer indicated that its correct name was "Northfield" Insurance Company.

Yellow's automobile insurer; and Certain Underwriters at Lloyds (Underwriters), a liability insurer for Big Yellow.[2]

In answer to the suit, Northfield, Republic, and Progressive all asserted that their respective policies of insurance did not provide coverage for the damages claimed or relief sought by the plaintiff and further affirmatively pled the defenses of comparative negligence, contributory negligence, plaintiff's duty to mitigate his damages, waiver, estoppel, prescription, peremption, and/or applicable statutes of limitation.

Underwriters ("subscribing each for themselves and no other to a proportionate share of Policy No. W0405C08PNYG") filed a peremptory exception pleading the objection of no right of action, contending that it had issued to Big Yellow an automobile *physical damage* insurance policy and that Louisiana's Direct Action Statute authorized a direct action against only a *liability* insurer.

Amite Homes also filed an exception of no right of action, asserting that Mr. Delaney was not entitled to bring an action in redhibition, since at the time the suit was filed he was no longer the owner of the mobile home.[3] Following a March 28, 2011 hearing on Amite Homes' exception of no right of action, judgment was signed on April 11, 2011, granting the objection and dismissing, with prejudice, the petition of Philip Delaney. However, in that judgment "Plaintiff's counsel" was allowed ten days to amend the petition.

An amended petition was filed, on April 6, 2011, amending Paragraph (1) of the petition, which previously read "Petitioner Philip Delaney...[,]" to

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[2] In its third party demand, Amite Homes further alleged that Big Yellow had filed for bankruptcy protection. (The bankruptcy of an alleged tortfeasor triggers Louisiana's Direct Action Statute, LSA-R.S. 22:1269, allowing an action to be brought directly against an insurer, as provided therein.)

[3] Although Amite Homes stated that it was not relying on the point for purposes of its exception of no right of action, it asserted, in brief to the trial court, that Mr. Delaney made a judicial admission in his petition that the mobile home was not defective at the time of purchase, but rather, was allegedly damaged due to improper delivery, and Amite Homes did not perform the delivery.

read "Petitioner Dianne Delaney...[,]" and amending Paragraph (3) of the petition, which previously read "Petitioner herein, Philip Delaney, purchased a 2007 Patriot Pinnacle Neighborhood Mobile Home...[,]" to read "Philip Delaney[] purchased a 2007 Patriot Pinnacle Neighborhood Mobile Home ... which he gifted to petitioner Dianne Delaney." Dianne Delaney was further substituted in place of Philip Delaney in the petition's prayer for relief.

Thereafter, Republic and Progressive each filed a motion for summary judgment, seeking dismissal of the third party demand as to each company, on the basis of the respective insurance policy provisions.[4]

On May 5, 2011 Amite Homes filed an exception of prescription as to the plaintiff's second amending petition, which had substituted Dianne Delaney as the plaintiff in the case. Amite Homes argued that since the petition of Philip Delaney was previously dismissed, on the trial court's finding that he had no right to bring the suit in redhibition, Dianne Delaney's claim, filed via the April 6, 2011 second amended petition, had prescribed as it was filed more than one year after the May 2008 sale of the mobile home. Northfield and Republic also filed exceptions of prescription and, additionally, filed exceptions of no right of action, asserting that Dianne Delaney had no right of action since she was not the purchaser of the mobile home, only a donee of the purchaser.

The exceptions filed by Amite Homes, Northfield, and Republic were heard by the trial court on August 15, 2011, and a judgment was signed on August 24, 2011 granting the exceptions of prescription and no right of

[4] We mention these motions for summary judgment as part of the procedural history of this case, but the record reflects that no hearing was held on these motions and that they were removed from the trial court's docket, as moot, after the granting of the exceptions of no right of action and prescription and judgment thereon dismissing the case. However, Progressive was dismissed, on consent of the parties, by a judgment signed on August 18, 2011.

action and "dismissing all demands of all plaintiffs, including Dianne Delaney," with prejudice.

A motion for devolutive appeal was subsequently filed on September 12, 2011, purporting to appeal both the April 11, 2011 judgment and the August 24, 2011 judgment. On appeal, one assignment of error is presented:

> The Trial Court committed manifest error when it granted Appellees' Exceptions of No Right of Action and Exceptions of Prescription finding that Philip Delaney did not have a right of action to pursue his claim, and that if Dianne Delaney was the proper party that she too did not have a right of action and that her claims had prescribed.

LAW AND ANALYSIS

Finality of Dismissal of Philip Delaney's Action

Philip Delaney's action was dismissed by the April 11, 2011 judgment of the trial court, which he did not attempt to appeal until the instant appeal was filed on September 12, 2011. All of the appellees in this matter (Amite Homes, Northfield, and Republic) have challenged the effectiveness of the September 12, 2011 motion for appeal vis-à-vis the April 11, 2011 judgment dismissing Philip Delaney's suit. Furthermore, this court has a duty to examine subject matter jurisdiction *sua sponte*, even when the issue has not been raised by the litigants. See **McGehee v. City/Parish of East Baton Rouge**, 2000-1058 (La. App. 1 Cir. 9/12/01), 809 So.2d 258, 260.

An appellant's failure to timely file a devolutive appeal is a jurisdictional defect, in that neither the court of appeal nor any other court has the jurisdictional power and authority to reverse, revise, or modify a final judgment after the time for filing a devolutive appeal has elapsed. When an appellant fails to timely file a devolutive appeal from a final judgment, the judgment acquires the authority of the thing adjudged, and the

court of appeal has no jurisdiction to alter that judgment. **Lay v. Stalder**, 99-0402 (La. App. 1 Cir. 3/31/00), 757 So.2d 916, 919.

A judgment that dismisses a party from a suit is a partial final judgment,[5] subject to immediate appeal pursuant to LSA-C.C.P. art. 1915(A)(1),[6] without the need of the trial court's certification as such. See **Block v. Bernard, Cassisa, Elliott & Davis**, 2004-1893 (La. App. 1 Cir. 11/4/05), 927 So.2d 339, 344 n.4. The failure to appeal a partial final judgment, subject to immediate appeal under LSA-C.C.P. art. 1915(A)(1), deprives this court of jurisdiction to review any issues as to the propriety of that judgment. See **Cavalier v. Rivere's Trucking, Inc.**, 2003-2197 (La. App. 1 Cir. 9/17/04), 897 So.2d 38, 40 (citing **Motorola, Inc. v. Associated Indemnity Corporation**, 2002-0716 (La. App. 1 Cir. 4/30/03), 867 So.2d 715, 721 (en banc)). A dismissal with prejudice has the effect of a final judgment on the merits. **Id.**, 897 So.2d at 41.

In the instant case, the April 11, 2011 trial court judgment dismissed the claims of a party, Mr. Delaney, with prejudice, but allowed an amendment to add Dianne Delaney as a plaintiff; other issues remained

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[5] A judgment is either final or interlocutory, as stated in LSA-C.C.P. art. 1841, which provides:

> A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.
>
> A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.
>
> A judgment that determines the merits in whole or in part is a final judgment.

[6] Louisiana Code of Civil Procedure Article 1915 (A)(1) provides:

> A final judgment may be rendered and signed by the court, even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court:
>
> (1) Dismisses the suit as to less than all of the parties, defendants, third party plaintiffs, third party defendants, or intervenors.

Louisiana Code of Civil Procedure Article 1911 further provides, in part:

> No appeal may be taken from a partial final judgment under Article 1915(B) until the judgment has been designated a final judgment under Article 1915(B). An appeal may be taken from a final judgment under Article 1915(A) without the judgment being so designated.

unadjudicated in the case. Therefore, the April 11, 2011 judgment was a partial final judgment, subject to immediate appeal in accordance with LSA-C.C.P. art. 1915(A). The failure of Mr. Delaney to appeal that judgment of dismissal within either the thirty-day time period for the taking of a suspensive appeal, as provided in LSA-C.C.P. art. 2123, or the sixty-day time period for the taking of a devolutive appeal, as provided in LSA-C.C.P. art. 2087, resulted in the judgment becoming *res judicata*, and it cannot now be altered by this court.

Thus, only the issues raised on appeal relating to the trial court's August 24, 2011 judgment, which sustained exceptions of no right of action and prescription as to Dianne Delaney's action in redhibition, may be reviewed on appeal at this time.

Exception of No Right of Action

In their exceptions of no right of action, Northfield and Republic contended that Dianne Delany did not purchase the mobile home in question and therefore had no right to bring this suit seeking redhibition.

Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts. LSA-C.C.P. art. 681. Article 681 serves as the basis of the peremptory exception urging the objection that the plaintiff has no right of action. LSA-C.C.P. art. 681, 1960 Revision Comment (b).

The exception of no right of action is designed to test whether a plaintiff has a real and actual interest in the action; i.e., whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case is a member of the class that has a legal

interest in the subject matter of the litigation. See **Robertson v. Sun Life Financial**, 2009-2275 (La. App. 1 Cir. 6/11/10), 40 So.3d 507, 511 (citing LSA-C.C.P. art. 927(6)[7]).

Unlike the exception of no cause of action, evidence may be received under the exception of no right of action for the purpose of showing that the plaintiff does not possess the right he claims or that the right does not exist. To prevail on the exception of no right of action, *the defendant has the burden of establishing* that the plaintiff does not have an interest in the subject matter of the suit or legal capacity to proceed with the suit. Where doubt exists regarding the appropriateness of an objection of no right of action, it is to be resolved in favor of the plaintiff. **Robertson v. Sun Life Financial**, 40 So.3d at 511-12.

The right of redhibition is set forth in LSA-C.C. art. 2520, which provides:

> The seller warrants the buyer against redhibitory defects, or vices, in the thing sold.
>
> A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale.
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> A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

The redhibitory action is between a seller and a buyer, and without such a relationship, the action cannot be maintained. **Duplechin v. Adams**, 95-0480 (La. App. 1 Cir. 11/9/95), 665 So.2d 80, 84, writ denied, 95-2918 (La.

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[7] Louisiana Code of Civil Procedure Article 927(6) provides:

> A. The objections which may be raised through the peremptory exception include but are not limited to the following:
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> * * *
>
> (6) No right of action, or no interest in the plaintiff to institute the suit.

2/2/96), 666 So.2d 1104. See also **Connell v. Davis**, 2006-9 (La. App. 5 Cir. 10/17/06), 940 So.2d 195, 205, writs denied, 2006-2810, 2006-2839 (La. 1/26/07), 948 So.2d 175, 178; **Long v. Bruns**, 31,427 (La. App. 2 Cir. 1/20/99), 727 So.2d 664, 66, writ denied, 99-0480 (La. 4/23/99), 742 So.2d 881; **Leflore v. Anderson**, 537 So.2d 215, 218 (La. App. 4 Cir. 1988).

The issue is, then, whether the defendant/appellees sustained their burden to prove that Dianne Delaney was not a purchaser/buyer of the mobile home. The only items of evidence presented on this point were the excerpts from the August 9, 2010 depositions of Philip Delaney and Dianne Delaney, filed into the record. Mr. Delaney testified that the $78,000 used to purchase the mobile home came, in part, from the proceeds of an old mobile home that had been sold. Mr. Delaney indicated that the old mobile home had been purchased partially with his money and partially with Dianne's money. Mr. Delaney stated that he paid the major portion of the purchase price of the new Amite Homes mobile home and that it was "like a gift" to Dianne (he later stated that "[i]t was a gift"). Dianne testified, "It was my money that purchased the Amite Mobile Home trailer." When asked why she was not listed on the bill of sale, Dianne stated, "I should be." She further stated that although her father had put up money for the purchase of the mobile home, she paid it back. Dianne explained that since she did not have a husband, her father helped her with business matters. Even though Mr. Delaney stated that Dianne did not "formally" pay him back, he indicated that she did so by helping out him and his wife, who were both in their 70's.

This testimony reveals that funds belonging to both Philip Delaney and Dianne Delaney were used to purchase the mobile home from Amite Homes, making them ostensible co-owners. Another reasonable inference to

be drawn from the testimony is that Philip Delaney acted as Dianne Delaney's agent or mandatary (see LSA-C.C. art. 2989 et seq.) in purchasing the mobile home on her behalf, at least to the extent that a portion of the funds belonged to her; obviously, he acted on his own behalf as to the portion of the funds that belonged to him. Therefore, the testimony failed to establish that Dianne Delaney was not a co-buyer of the mobile home at issue. Applying the jurisprudential tenet, set forth in **Robertson**, *supra*, that doubt regarding the appropriateness of an objection of no right of action is to be resolved in favor of the plaintiff, we must conclude that the trial court erred in granting the no right of action exception.

Exception of Prescription

Amite Homes, Northfield, and Republic each filed exceptions of prescription in the trial court, asserting that, when this suit was amended to add Dianne Delaney as a party plaintiff, her action had prescribed, since it could not relate back to the filing of the original petition by Philip Delaney, who the trial court ruled had no right to bring the action.

The prescriptive period for a redhibition action is one year from the day the defect is known by the buyer. LSA-C.C. art. 2534. The mobile home at issue in this case was purchased on May 21, 2008, and the defects were apparent on the date of delivery, which occurred on or about May 29, 2008. The amending petition, substituting Dianne Delaney as plaintiff, was filed more than one year later, on April 6, 2011.

However, "[p]rescription is interrupted ... when the obligee commences action against the obligor, in a court of competent jurisdiction and venue." LSA-C.C. art. 3462. Further, "[t]he filing of suit in a court of competent jurisdiction and venue interrupts any kind of prescription as to the causes of action therein sued upon, provided the plaintiff is a proper party

plaintiff and the defendant is a proper party defendant." LSA-C.C. art. 3462, 1982 Revision Comment (b).

When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading. LSA-C.C.P. art. 1153. An amendment adding or substituting a plaintiff should be allowed to relate back if: (1) the amended claim arises out of the same conduct, transaction, or occurrence set forth in the original pleading; (2) the defendant either knew or should have known of the existence and involvement of the new plaintiff; (3) the new and the old plaintiffs are sufficiently related so that the added or substituted party is not wholly new or unrelated; (4) the defendant will not be prejudiced in preparing and conducting his defense. **Giroir v. South Louisiana Medical Center, Division of Hospitals**, 475 So.2d 1040, 1044 (La. 1985).

In this case, the amended claim of Dianne Delaney clearly arose out of the same conduct, transaction, or occurrence set forth in the original petition filed by Philip Delaney. Further, the depositions of Dianne and Philip Delaney were taken on August 9, 2010, placing the defendants on notice at that time that Dianne Delaney had a financial interest in the mobile home. Nor have the defendants shown any way in which they were prejudiced by the substitution of Dianne as the party plaintiff in April 2011.

Thus, the only remaining issue is whether Philip Delaney was a proper party plaintiff at the time he filed the original petition, so that prescription was interrupted, making Dianne's April 6, 2011 petition timely. As stated hereinabove, we cannot review the April 11, 2011 trial court judgment, dismissing the claims of Mr. Delaney, for purposes of granting Mr. Delaney relief from that judgment, since he failed to timely file an appeal from the

judgment; however, we are not precluded from determining whether Mr. Delaney was, in fact, a proper party plaintiff for purposes of addressing the prescription issue as it relates to Dianne Delaney.

The testimonial evidence of Philip and Dianne Delaney in this case did not exclude the possibility that Philip Delaney had some ownership interest in the Amite Homes mobile home at the time this suit was filed. He testified that he provided the "major portion" of the funds for the purchase price of the home. And while Philip's intent to make a gift of the mobile home to Dianne was evident in his testimony, no evidence has been presented to establish that the donation has actually been accomplished. Further, the bill of sale clearly names Philip Delaney as a buyer. Therefore, the evidence established that Philip Delaney was a buyer, who had a right to bring this suit for redhibition.[8]

Since Mr. Delaney was a proper party plaintiff at the time he filed the instant suit, prescription was interrupted. Consequently, when Dianne Delaney filed the April 6, 2011 amended petition to substitute herself as a party plaintiff, that petition related back to the filing of the original petition and must be considered as timely filed.[9] We conclude that Dianne Delaney's action has not prescribed.

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[8] We recognize that in order to rescind a sale, the vendee must have ownership of the purchased property or its return to the vendor would be impossible, but ownership is not required to maintain an action for *quanti minoris*. See **Gustin v. Shows**, 377 So.2d 1325, 1328 (La. App. 1 Cir. 1979). In the instant case, the evidence showed that Philip Delaney and Dianne Delaney were co-buyers and co-owners of the mobile home; there was no indication that Mr. Delaney would have been unable to return the mobile home, which was the object of the sale, in the event that rescission of the sale was awarded by the trial court. See LSA-C.C. art. 2532; **Mitchell v. Popiwchak**, 95-1423 (La. App. 4 Cir. 6/26/96, 677 So.2d 1050, 1054.

[9] It is important to note that on the date that Dianne Delaney filed an amended petition in this matter, substituting herself as the party plaintiff, April 6, 2011, the judgment dismissing Philip Delaney had not been signed, and the judgment dismissing Mr. Delaney was not final until the date it was signed, April 11, 2011. See LSA-C.C.P. art. 1911 (stating that every final judgment must be signed by the judge). See also **Davis v. Clemmons**, 205 So.2d 143 (La. App. 1 Cir. 1967).

CONCLUSION

For the reasons assigned herein, we dismiss the appeal in part, insofar as it purports to make Philip Delaney an appellant, and we reverse the August 24, 2011 trial court judgment, granting the exceptions pleading the objections of no right of action and prescription, and dismissing the claims of Dianne Delaney; we also remand the matter to the trial court for further proceedings consistent with the foregoing. All costs of this appeal are assessed to the defendant/appellees (Amite Homes, Inc., Northfield Insurance Company, and Republic Vanguard Insurance Company), equally.

APPEAL OF PHILIP DELANEY DISMISSED; AUGUST 24, 2011 TRIAL COURT JUDGMENT REVERSED; REMANDED.