STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CW 1217

LORISE M. NAQUIN AND LUCY NGUYEN NAQUIN AND GRANTLY, LLC

VERSUS

BOLLINGER SHIPYARDS, INC., FORMERLY BOLLINGER MACHINE SHOP AND SHIPYARD, INC.

Judgment Rendered: SEP 07 2012

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Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Suit Number 101102

Honorable Jerome J. Barbera, III, Presiding

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BEFORE: WHIPPLE, KUHN, GUIDRY, GAIDRY, AND McCLENDON, JJ.

Whipple, J. concurs.
Kuhn, J. dissents and assigns reasons.
Gaidry, J. agrees in part and dissents in part for the reasons assigned by Kuhn, J.

GUIDRY, J.

Plaintiffs-lessors, Lorise M. and Lucy Nguyen Naquin and Grantly, LLC (collectively the Naquins), appeal that portion of the trial court's judgment that sustained a peremptory exception raising the objection of prescription and dismissed their claims for damages *ex delicto* arising out of five of six leases they have with defendant, Bollinger Shipyards, Inc. (Bollinger). Bollinger appeals that portion of the trial court's judgment that overruled its dilatory exception raising the objection of prematurity. For the reasons that follow, we affirm the trial court's ruling on the exception of prescription, and we convert Bollinger's appeal to a writ and deny the writ.

FACTUAL AND PROCEDURAL BACKGROUND

It is undisputed that the Naquins are owners of real property located in Lafourche Parish, just west of Larose, Louisiana. Pursuant to a series of six leases, entered into by both the parties and their predecessor interests, Bollinger has used the Naquins' property for shipyard operations. Three of the leases were entered into by the parties on May 24, 1990, including Leases A and B. The other three leases were entered into prior to that time. Of the six leases, four are for property located on the banks of the Intracoastal Waterway (the Intracoastal Waterway Leases). Leases A and B are adjacent to one another, with Lease A located primarily northwest and west of Lease B. These two leases are comprised exclusively of interior real property.

On April 8, 2005, the Naquins filed this lawsuit seeking damages for disbursement and deposits of lead, asbestos, petroleum, and other toxic, polluting, carcinogenic and noxious chemicals and substances (toxic substances) by Bollinger on the property that the Naquins had leased to the shipyard. They alleged that the

U.S. Environmental Protection Agency had investigated the property and located toxic substances, and that Bollinger's concealment of intentionally deposited and buried toxic substances was in bad faith. They sought compensatory and punitive damages as well as rescission and termination of the lease. On November 29, 2005, Bollinger answered the lawsuit, generally denying the allegations and asserting that the Naquins' claims were time barred.

After answering a subsequent amendment by the Naquins to their petition, Bollinger filed, among other things, a dilatory exception of prematurity and a peremptory exception raising the objection of prescription. After a hearing, the trial court sustained both exceptions but provided the Naquins an opportunity to amend their petition.

A second amending petition was filed by the Naquins to which Bollinger again raised objections of prescription and prematurity. After another hearing, the trial court again sustained the exception of prescription and dismissed all of the Naquins' tort claims except those relating to the property subject to Lease B. However, the trial court overruled the exception of prematurity. A judgment signed on April 11, 2011, was certified as final by the trial court. The Naquins appeal the dismissal of five of their six tort claims as prescribed, and Bollinger appeals the overruling of its exception of prematurity.

EXCEPTION OF PRESCRIPTION

Initially we note that the trial court only dismissed the Naquins' tort claims. Thus, it is undisputed that they may proceed for damages *ex contractu* under their leases. See La. C.C. art. 2687 and Marin v. Exxon Mobil Corp., 09-2368 (La. 10/19/10), 48 So. 3d 234, 239 and 255-56; see also Onstott v. Certified Capital Corp., 05-2548 (La. App. 1st Cir. 11/3/06), 950 So. 2d 744, 747 (a set of

circumstances can give rise to more than one cause of action, and each of those causes has its own prescriptive period), and Gallant Investments, Ltd. v. Illinois Cent. R.R. Co., 08-1404 (La. App. 1st Cir. 2/13/09), 7 So. 3d 12, 17 (the nature of the duty breached determines whether the action is in tort or in contract; the classic distinction between damages *ex contractu* and damages *ex delicto* is that the former flow from the breach of a special obligation contractually assumed by the obligor, whereas the latter flow from the violation of a general duty owed to all persons).

In reviewing a peremptory exception raising the objection of prescription, appellate courts strictly construe the statutes against prescription and in favor of the claim that is said to be extinguished. Onstott, 950 So. 2d at 747. When evidence is received on the trial of the peremptory exception, the factual conclusions of the trial court are reviewed by the appellate court under the traditional rules governing appellate review of facts. As such, a trial court's factual determinations regarding prescription should not be reversed in the absence of manifest error. Onstott, 950 So. 2d at 746; Stobart v. State through Dep't of Transp. and Dev., 617 So. 2d 880, 882 (La. 1993).

In this case, although evidence was adduced at the hearing, no testimony was presented. The evidence consisted of the entire record, including the original and the amending petitions, as well as the environmental reports that Bollinger had supplied to the Naquins.[1] The last environmental report was dated June 19, 2000.

Delictual actions are subject to a liberative prescription of one year and for damage caused to immovable property, the one-year prescription commences to run

[1] Chain of title supporting the Naquins' right to bring these claims involving the leases was also admitted but is of no relevancy to the disposition of this appeal.

from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage. See La. C.C. arts. 3492, 3493; Marin, 48 So. 3d at 244.

Based on the evidence admitted, the record supports a finding that the Naquins had in their possession an environmental report, dated June 19, 2000. But that finding would not explain how the Naquins' tort claims were timely on April 8, 2005, because if they knew or should have known of the damage to their property by June 19, 2000, their tort claims would have prescribed by June 19, 2001. Thus, on the face of the petition, the matter was untimely. If we were to apply the manifest error standard of review, the trial court's conclusion that the tort claims relating to Lease B were not prescribed would, therefore, be manifestly erroneous. Bollinger does not challenge the trial court's conclusion that the Lease B tort claims were timely asserted because a review of the record shows that it has conceded it did not provide the environmental records to the Naquins until July 21, 2005, which was over three months after the lawsuit was filed.

Based on our review of the record, it is evident that the heart of this dispute centers around interpretation of the allegations contained in the Naquins' original petition. The evidence admitted at the hearing of this matter, however, simply does not allow any factual findings that resolve the issue presented in this appeal, *i.e.*, whether the original petition timely interrupted the Naquins' claims arising out of all six leases they have with Bollinger. In the absence of evidence, the objection of prescription must be decided upon the properly pleaded material allegations of fact alleged in the petition, and those alleged facts are accepted as true. Onstott, 950 So. 2d at 747. Thus, we turn our attention to the allegations contained in the petition.

In their April 8, 2005 petition, the Naquins set forth the following relevant allegations:

IV.

THE PROPERTY INVOLVED

> Petitioners are the owners of certain real property on the banks of the Intracoastal Waterway just to the West of Larose, Louisiana, which property is operated as a shipyard by [Bollinger]. The property is located in Lafourche Parish.

V.

LEASE

> For many years prior to 1990, Petitioners' predecessor in title leased to and on the 24th day of May, 1990, [Bollinger] leased from [the Naquins], the property involved in this matter, said property described above. The lease was recorded in the records of the Parish of Lafourche on May 31, 1990 in Conveyance Book 1080, Folio 280, Entry No. 712528. ...

In their first amending petition, filed on April 8, 2010, the Naquins modified, among other things, paragraph "V," renaming it "**LEASES**," (emphasis added) articulating in specificity that the property consists of six leases and particularly describing each of the six leases. The second amended petition did not aver additional facts but instead added additional legal theories and conclusions.

The party urging a peremptory exception raising the objection of prescription bears the burden of proof. Only if prescription is evident from the face of the pleadings will the plaintiff bear the burden of showing an action has not prescribed. Onstott, 950 So. 2d at 747. We find nothing in the original petition that sets forth facts sufficient to establish the date that the Naquins acquired, or should have acquired, knowledge of the damage caused by Bollinger. Thus, Bollinger bore the burden of proof.

Conceding that on July 21, 2005,[2] it gave the Naquins all of the environmental reports in its possession, Bollinger asserts that the tort claims arising

[2] The record contains a copy of a letter sent from Bollinger to the Naquins.

out of the five more specifically described leases set forth in the amending petition prescribed no later than July 21, 2006, one year from the date that the Naquins knew or should have known of the damage to their property as a result of any disbursements and deposits of toxic substances intentionally made and concealed from them by Bollinger. Thus, it maintains that only the tort claim related to Lease B, which was the lease "recorded in the records of the Parish of Lafourche on May 31, 1990 in Conveyance Book 1080, Folio 280, Entry No. 712528," as stated in the original petition, was not untimely. We agree.

As set forth in Marin, in determining whether an owner of immovable property acquired or should have acquired knowledge of the damage sufficient to start the running of prescription, "the question is whether knowledge of these facts constitutes 'the acquisition of sufficient information, which, if pursued, will lead to the true condition of things' ... Put another way, should the knowledge of these facts have put the plaintiffs on notice that further inquiry and investigation was necessary, and would further inquiry have led to knowledge that the land was contaminated ...?" Marin, 48 So. 3d at 248. From our review of the record, the Naquins clearly had such notice when they received the environmental reports from Bollinger on July 21, 2005. Accordingly, the claims asserted in the supplemental and amending petition, filed on April 8, 2010, and well after the expiration of the one-year prescriptive period, are clearly prescribed.

The Naquins assert, however, that the claims raised in the supplemental and amending petition are nevertheless timely because they relate back to the date of the timely filed original petition. Louisiana Code of Civil Procedure article 1153 provides that "[w]hen 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." Pursuant to this Article, if a comparison of the amended petition to the original petition shows that the original petition gave fair notice of the factual situation out of which the amended petition arises, the amended petition will relate back to the date of the filing of the original petition. Reese v. State, Department of Public Safety and Corrections, 03-1615 (La. 2/20/04), 866 So. 2d 244, 248; Giroir v. South Louisiana Medical Center, 475 So. 2d 1040 (La. 1985).

From our review of the record, we find no error in the trial court's finding that the claims asserted in the supplemental and amending petition do not relate back to the date of the timely filed original petition. As detailed above, the original petition states in paragraph four that "[p]etitioners are the owners of certain real property on the banks of the Intracoastal Waterway just to the West of Larose, Louisiana, which property is operated as a shipyard by [Bollinger.]" The subsequent paragraph, however, particularly describes *only* Lease B. Contrary to the Naquins' assertion, these paragraphs do not create an inconsistency or ambiguity. The shipyard operation referenced in paragraph four, which consists of multiple parcels of land, including the land subject to Lease B, is located on the Intracoastal Waterway. However, the allegation in the subsequent paragraph indicates that the Naquins are only seeking damages for the land subject to Lease B. Because the original petition specifically details only the land subject to Lease B, and does not discuss the other five, separate leases or parcels of land, Bollinger did not have fair notice of the claims raised in the amended petition as to the separate leases and parcels of property. Accordingly, we find no error in the trial court's determination that the claims asserted in the amended petition do not arise

out of the same transaction or occurrence so as to relate back to the date of the timely filed original petition and therefore, are prescribed.

EXCEPTION OF PREMATURITY

Bollinger asserts that the trial court erred in overruling its exception of prematurity with regard to the Naquins' contractual claims. Although the denial of a dilatory exception raising the objection of prematurity is interlocutory and not immediately appealable, the trial court certified the judgment as final. However, the trial court's denial of the exception of prematurity is not susceptible to being certified as final for purposes of immediate appeal under La. C.C.P. article 1915. Under La. C.C.P. article 2083, an interlocutory judgment is appealable only when expressly provided by law, but in the interests of judicial economy, we will convert the appeal to a writ and, under our supervisory jurisdiction, address the trial court's ruling.[3]

The gist of Bollinger's assertion is that because the leases have not terminated, and Bollinger is continuing to use the property as a shipyard as specified in the lease provision, the Naquins cannot sue for damages to their property at this time. The dilatory exception of prematurity questions whether the cause of action has matured to the point where it is ripe for judicial determination. Williamson v. Hosp. Serv. Dist. No. 1 of Jefferson, 04-0451 (La. 12/1/04), 888 So. 2d 782, 785. An action is premature when it is brought before the right to enforce it has accrued. La. C.C.P. art. 423; Williamson, 888 So. 2d at 785.

In the instant case, the Naquins assert that Bollinger breached the lease by not using the premises as a prudent administrator in accordance with the purposes for

[3] Bollinger's failure to appeal the trial court's April 11, 2010 ruling granting the exception of prematurity and allowing the Naquins leave to amend precludes review of the propriety of the amendment.

which it was leased. Particularly, the Naquins assert that Bollinger deposited hazardous substances on the leased premises. Accordingly, the Naquins seek rescission and cancellation of the lease and compensatory damages adequate to restore the premises to the condition existing prior to the lease. Louisiana Civil Code article 2686 provides that "[i]f the lessee uses the thing for a purpose other than that for which it was leased or in a manner that may cause damage to the thing, the lessor may obtain injunctive relief, dissolution of the lease, and any damages he may have sustained." The Louisiana Supreme Court held in Marin that although La. C.C. art. 2683 contains obligations that only arise at the end of the lease, i.e., return of the thing at the end of the lease in a condition that is the same as it was when the thing was delievered, there is no language to suggest that the other obligations imposed by these codal provisions are not operational until termination of the lease. These provisions, i.e., La. C.C. arts. 2686, 2687, 2692, continue throughout the term of the lease, and a lessor need not wait until the end of the lease to sue a lessee for damage to his property. Marin, 48 So. 3d at 256. Therefore, because the Naquins' allegations in their petition do not arise from Bollinger's obligation to restore the land on which the operations are ongoing, but arise from La. C.C. art. 2686, the Naquins did not have to wait until the lease expired to bring their contractual claim. Accordingly, the trial court correctly overruled Bollinger's exception raising the objection of prematurity.

DECREE

For these reasons, we affirm that portion of the trial court's judgment, which sustains Bollinger's exception of prescription and dismisses the tort claims involving the property related to the additional five leases. Because we find no error in the trial court's denial of the exception of prematurity as to the Naquins'

contractual claims, having converted Bollinger's appeal to a writ, under our supervisory power, we deny the writ. Appeal costs are assessed equally to the parties.

AFFIRMED; APPEAL CONVERTED TO WRIT, AND WRIT DENIED.

LORISE M. NAQUIN AND
AND LUCY NGUYEN NAQUIN
AND GRANTLY, LLC

VERSUS

BOLLINGER SHIPYARDS , INC.
FORMERLY BOLLINGER MACHINE
SHOP AND SHIPYARD, INC.

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2011 CW 1217

JEK

KUHN, J., dissenting in part.

I disagree with the majority's affirmance of the trial court's ruling on the exception of prescription. As the majority correctly notes, in reviewing a peremptory exception raising the objection of prescription, this court is required to strictly construe statutes against prescription and find in favor of maintaining a claim. See ***Onstott v. Certified Capital Corp.***, 2005-2548 (La. App. 1st Cir. 11/3/06), 950 So.2d 744, 747. I believe the trial court, and now this court on appeal, has erred in its interpretation of the petition and therefore turned a blind eye to the requirement that we strictly construe prescription statutes.

Careful observation of the map attached to the second amending petition shows the location of each of the leased properties. As noted by the majority, four of the leases are adjoining property on the banks of the Intracoastal Waterway. The specific property descriptions of these four leases describe their respective locations by reference to the Intracoastal Waterway. All the property subject to the six leases is in close proximity. The property of abutting Leases A and B is southwest of the adjoining Intracoastal Waterway Leases and is separated from the remaining four leases by a strip that is approximately 312 feet at its narrowest point and 775 feet at its widest.

Leases A and B (and one of the Intracoastal Waterway Leases) are dated May 24, 1990. The remaining Intracoastal Waterway Leases are dated March 11, 1977, June 29, 1977, and January 11, 1978. Thus, Leases A and B do not conform to the allegations of the Naquins' petition indicating that those were leases included within the description of their ownership, i.e., "certain real property on the banks of the Intracoastal Waterway." Additionally, the majority has failed to include in its analysis the allegations of paragraph VII, which state that "Bollinger has continuously operated the premises as a lessee in possession and has operated the property as a shipyard for in excess of twenty years." Leases A and B do not conform to that description set forth in paragraph VII. Bollinger did not file an exception of vagueness to clarify these references to the description of the property. And the Naquins did nothing to clarify the inconsistencies in the allegations of their original petition until April 8, 2010.

A review of the record establishes that at the earliest, on July 21, 2005, when Bollinger provided the environmental reports, the Naquins had actual knowledge of the damages on the leased property. Thus, prescription on the Naquins' tort claims commenced on that date and accrued on July 21, 2006. On that date, the allegations of fact set forth in the original lawsuit remained as the basis for the lawsuit.

The purpose of a prescription statute is to afford a defendant economic and psychological security if a cause of action is not pleaded timely and to protect the defendant from stale claims and the loss of relevant proof. A prescription statute is designed to protect the defendant against lack of notification of a formal claim within the prescriptive period, not against pleading mistakes that the defendant's opponent makes in filing the formal claim within the period. ***Terrel v. Perkins***, 96-2629 (La. App. 1st Cir. 11/7/97), 704 So.2d 35, 38.

Bollinger, who was in actual possession of the leases, **knew** that, unlike Lease B, which was described with specificity, the other leases -- except Lease A -- were on the banks of the Intracoastal Waterway. And Bollinger **knew** that the property of all of the leases was used in its operations as a shipyard. Thus, Bollinger was aware that the allegations of paragraph IV and V were either inconsistent or referencing more than simply Lease B. Reading paragraphs IV and V in light of the facts to which Bollinger was aware, and mindful of the close geographic proximity of the leased parcels, both to one another and to the Intracoastal Waterway, as well as the fact that all of the leased property was used to conduct Bollinger's shipyard operations, the Naquins' petition put Bollinger on notice that all the leases were "the property involved in this matter." It is evident that the Naquins filed their petition in an effort to make a formal claim within the delictual prescriptive period, and that the ambiguities and inconsistencies in their description of the property were merely mistakes in pleading. Bollinger's opportunity to seek clarity in the allegations was waived when it filed its answer, over a year later, without raising a dilatory objection of vagueness. See La. C.C.P. arts. 926 and 928; see also ***Vanderbrook v. Jean***, 2006-1975 (La. App. 1st Cir. 2/14/07), 959 So.2d 965, 968 (the purpose of the objection of vagueness is to place the defendant on notice of the nature of the facts sought to be proved so as to enable him to identify the cause of action; it must be pleaded prior to or in the answer, or it is waived).

Thus, because the Naquins timely interrupted prescription with the filing of their petition for damages on April 8, 2005, the subsequent amendments filed on April 8, 2010 and September 10, 2010, which merely clarified the original allegations asserted in the original pleading, arose out of the same transaction and occurrence and, therefore, related back to the April 8, 2005 petition. See La. C.C.P. art. 1153 (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); see also ***Scott v. Haley***, 632 So.2d 793, 794-95 (La. App. 1st Cir. 1993) (an amendment of the petition is permitted despite technical prescriptive bars where the original pleading gives fair notice of the general fact situation out of which the amended claim arises; and where there is some factual connexity between the original and amended assertions, together with some identity of interest between the parties, amendment should be allowed).

For these reasons, although I believe that the majority correctly affirmed the trial court's conclusion that the tort claim related to the Lease B property was timely asserted, I believe it erred in affirming the trial court's action of sustaining the exception of prescription and dismissing the tort claims related to the property of the remaining leases. I would reverse that portion of the judgment that sustains the exception of prescription and dismisses all of the Naquins' other tort claims.

I concur with the majority's disposition converting the appeal of the trial court's action of overruling of the exception of prematurity (insofar as the Naquins' contractual claims) and would, likewise, deny the writ.