NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0540

TODD REBSTOCK, MONICA MATHERNE, JOEY MATHERNE AND AARON GUIDRY

VERSUS

SEISMIC EXCHANGE, INC. AND SUNCOAST LAND SERVICES, INC.

Judgment Rendered: NOV 01 2013

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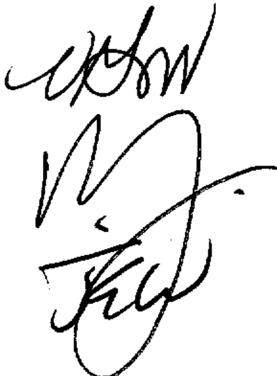

On Appeal from
17th Judicial District Court,
In and for Parish of Lafourche,
State of Louisiana
Trial Court No. 110098

The Honorable Ashly Bruce Simpson, Judge Presiding

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* * * *

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

CRAIN, J.

Plaintiffs, Todd Rebstock, Monica Matherne, and Joey Matherne, appeal a judgment sustaining a peremptory exception raising the objection of prescription and dismissing their claims against Seismic Exchange, Inc. (SEI). We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On August 29, 2008, the plaintiffs instituted suit against SEI.[1] They alleged that in September 2007, SEI conducted vibratory seismographic testing that caused property damage to their homes. In response, SEI filed a peremptory exception of prescription, asserting that the testing occurred on August 11, 2007, and that this suit filed more than one year later is barred.

After a two-day hearing, the trial court determined that SEI proved that the testing occurred on August 11, 2007, and that SEI met its initial burden of proving that the suit filed more than one year later on August 29, 2008 was untimely. The trial court then found that the plaintiffs failed to prove that they did not acquire, or should not have acquired, knowledge of their damages, until on or after August 29, 2007. The trial court sustained the exception and dismissed the plaintiffs' claims against SEI with prejudice at the plaintiffs' cost. The plaintiffs now appeal.

DISCUSSION

Liberative prescription is a mode of barring actions as a result of inaction for a period of time. La. Civ. Code art. 3447. Delictual actions are subject to a liberative prescription of one year, which commences to run from the date the injury or damage is sustained. La. Civ. Code art. 3492. However, "[w]hen damage is caused to immovable property, the one year prescription commences to

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[1] Aaron Guidry is also a plaintiff in the underlying suit, but his claims were not dismissed by the judgment before the court on appeal and are not considered in this appeal. Plaintiffs' claims against a second named defendant, SunCoast Land Services, Inc., were voluntarily dismissed without prejudice.

run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage." La. Civ. Code art. 3493. Tracts of land with their component parts, including buildings belonging to the landowner, are immovables. La. Civ. Code arts. 462, 463; *Exxon Corp. v. Foster Wheeler Corp.*, 00-2093 (La. App. 1 Cir. 12/28/01), 805 So. 2d 432, 435, *writ denied,* 02-0261 (La. 3/28/02), 812 So. 2d 633.

"Statutes regulating prescription are strictly construed against prescription and in favor of the obligation sought to be extinguished." *Mallett v. McNeal*, 05-2289 (La. 10/17/06), 939 So. 2d 1254, 1258. Generally, the burden of proving an action is prescribed lies with the party pleading prescription. *Hogg v. Chevron USA, Inc.*, 09-2632 (La. 7/6/10), 45 So. 3d 991, 998. An exception to this general rule exists when the face of the petition shows that it is prescribed, in which case the burden shifts to the plaintiff to prove that prescription was interrupted or suspended. *Bailey v. Khoury*, 04-0620 (La. 1/20/05), 891 So. 2d 1268, 1275. Stated another way, it is only when the plaintiff's claim is prescribed on the face of the petition that the initial burden of proof is shifted to the plaintiff to prove that the claim is not prescribed. The party urging the application of an exception to the general rule on prescription has the burden of proving that the exception applies. *Cf. Roba, Inc. v. Courtney*, 09-0508 (La. App. 1 Cir. 8/10/10), 47 So. 3d 500, 506. Consequently, the burden of proof does not shift to the plaintiff unless the defendant can establish that the face of the plaintiff's petition reveals that the plaintiff knew or should have known of the damage more than one year before the petition was filed. *Sadler v. Midboe*, 97-2120 (La. App. 1 Cir. 12/28/98), 723 So. 2d 1076, 1082.

In this case, although the plaintiffs' petition references the alleged date of the seismographic testing, it does not state a specific date when the plaintiffs

learned of the alleged damage. The petition alleges that the seismographic testing was performed in September, 2007, which makes the petition filed on August 29, 2008 not facially prescribed. Because the petition does not allege that plaintiffs knew or should have known of the damage more than one year prior to the suit, the burden of proof did not shift to plaintiffs to prove a suspension or interruption of prescription. Rather, the burden of proving prescription remains with the defendant who is urging the exception. *Cf. Naquin v. Bollinger Shipyards, Inc.*, 11-1217 (La. App. 1 Cir. 9/7/12), 102 So. 3d 875, 880, *writs denied*, 12-2676 (La. 2/8/13), 108 So. 3d 87, and 12-2754 (La. 2/8/13), 108 So. 3d 93. The trial court erred in placing the initial burden of proof relative to prescription on the plaintiffs.

The introduction of evidence to support or controvert the objection of prescription is permitted when the grounds do not appear on the face of the petition. *Pal v. Stranco, Inc.*, 10-1507 (La. App. 1 Cir. 8/3/11), 76 So. 3d 477, 485, *writ denied*, 11-1834 (La. 11/4/11), 75 So. 3d 925. When evidence is received, the trial court's factual findings are generally reviewed under the traditional rules governing appellate review of facts, meaning that the trial court's factual determinations regarding prescription should not be reversed in the absence of manifest error. *Naquin*, 102 So. 3d at 878. However, where one or more legal errors by the trial court interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the reviewing court should make its own independent *de novo* review and assessment of the record. *Campo v. Correa*, 01-2707 (La. 6/21/02), 828 So. 2d 502, 510. Application of an improper burden of proof calls for *de novo* review of the evidence. *Campo*, 828 So. 2d at 510.

The critical question presented in this appeal is when the plaintiffs acquired or should have acquired knowledge of the alleged property damage. La. Civ. Code

art. 3493; *Hogg*, 45 So. 3d at 997. Although the petition alleges that the seismographic testing occurred in September, 2007, it was established at the hearing on the exception that the testing actually occurred on August 11, 2007. Therefore, if plaintiffs knew or should have known of the property damage before August 29, 2007, then the petition filed on August 29, 2008 is untimely.

The prescriptive period is triggered by actual or constructive knowledge of damage. *Hogg*, 45 So. 3d at 997. Thus, a plaintiff need not have actual knowledge, or even full knowledge of the extent of his damage. *Marin v. Exxon Mobil Corp.*, 09-2368 (La. 10/19/10), 48 So. 3d 234, 245. A prescriptive period will begin to run even if the injured party does not have actual knowledge of facts that would entitle him to bring a suit as long as there is constructive knowledge of same. *Gallant Investments, Ltd. v. Illinois Cent. R. Co.*, 08-1404 (La. App. 1 Cir. 2/13/09), 7 So. 3d 12, 19. Prescription commences upon "whatever notice is enough to excite attention and put the injured party on guard or call for inquiry." *Hogg*, 45 So. 3d at 997. When immovable property has been damaged, "knowledge sufficient to start the running of prescription 'is the acquisition of sufficient information, which, if pursued, will lead to the true condition of things.'" *Marin*, 48 So. 3d at 246. This date has been found to be the date the damage becomes apparent. *Marin*, 48 So. 3d at 246. The analysis is the same as the discovery rule of the jurisprudential doctrine of *contra non valentem*. *Marin*, 48 So. 3d at 245. A plaintiff is deemed to know what he could have learned through the exercise of reasonable diligence and cannot rely on ignorance attributable to his own willfulness or neglect. *Marin*, 48 So. 3d at 246.

The testimony at the hearing established that in July and August of 2007, SEI conducted seismographic testing as part of the Bully Camp Survey. Plaintiffs' homes are within the geographic boundaries of the survey. The testing involved a

convoy of four vibroseis trucks specially designed to generate energy to create seismic waves in residential or urban areas. Vibrations generated by the seismic waves were measured with a seismograph to map layers of the Earth's crust for purposes of petroleum exploration. The testing also involved cables or wires laid on the ground across properties of those who agreed, which were described as being larger than an extension cord and obvious to property owners.

Prior to the actual testing, SEI sought and obtained permits from landowners relating to the testing, which granted SEI the right to conduct geophysical exploration surveys by seismograph for a one-year period. Rebstock refused to sign the permit, but testified that he allowed cables to be run across his property. Monica Matherne signed two permits dated February 27, 2007, and July 2, 2007, identifying separate tracts of land, and was compensated for doing so, but denied reading the documents and upon examination believed that the properties described were family properties and not the house she alleges was damaged. In connection with the testing, cables were laid across all of the plaintiffs' properties, which remained on the ground for one to two weeks.

The evidence introduced at the hearing establishes, and the trial court found, that the seismographic testing near plaintiffs' homes took place on August 11, 2007. Rebstock denied being at home when the testing occurred. He testified that he learned of the testing "a few days" later from another neighbor who complained that the testing had shaken his house. That neighbor gave Rebstock the business card of Adam Young, who contracted with SEI as a land man in connection with the Bully Camp Survey. The neighbor described Young as the man to call with complaints.

Within days of receiving the business card, Rebstock called Young because he was upset about the seismographic activity in the neighborhood and wanted

someone to check his house, believing that the testing shook it and could have caused damage. Young recalled the phone call taking place within three to four days of the August 11 testing, with the latest possible date being August 18. Young testified that Rebstock was angry and concerned that the vibroseis trucks had damaged his home, although Young could not recall the specific complaints. Young informed Rebstock that SEI would respond to the complaints and likely send someone over.

Thereafter, SEI sent Rudy Ledet, another contractor whose wife is a first cousin of Rebstock's, along with another individual from the company that SEI contracted to monitor the vibration levels, to photograph and document any damage to Rebstock's house. Ledet believed that his supervisor at SEI contacted him about going to Rebstock's house approximately four to five days before completion of the Bully Camp Survey on August 23, 2007. Ledet testified that the meeting with Rebstock occurred within one week of his supervisor calling him and at that meeting Rebstock pointed out potential damage that he believed was caused by SEI.

We find that SEI established that Rebstock had constructive knowledge of the alleged damage at the time he called Young. By that time, Rebstock knew that the seismographic testing had occurred and had potentially shaken his house. Rebstock admitted that he was upset and, prior to calling Young, looked around his house "a little" and thought he saw "a little bit of damage."

It is undisputed that the call to Young occurred prior to Rebstock's meeting with Ledet. Ledet recalled that the seismographic activity for the Bully Camp Project was still going on at the time his SEI supervisor called and instructed him to meet with Rebstock. Eric Schuster, an SEI project manager, testified that the testing for that project concluded on August 23, 2007. Thus, the record establishes

that Rebstock's phone call to Young occurred prior to August 23, 2007. At the time of the call Rebstock had notice enough to excite his attention and call for inquiry, thereby equating to constructive knowledge that commenced the running of the one-year prescriptive period. *Cf. Hogg*, 45 So. 3d at 997. SEI satisfied its burden of proving that Rebstock's claims had prescribed when the petition was filed on August 29, 2008.

Rebstock argues that application of the third category of *contra non valentem* prevents the running of prescription due to actions by SEI that prevented him from availing himself of his cause of action. The Louisiana Supreme Court has explained that "[t]his category [of *contra non valentem*] is implicated only when[:] (1) the defendant engages in conduct which rises to the level of concealment, misrepresentation, fraud or ill practice[;] (2) the defendant's actions effectively prevented the plaintiff from pursuing a cause of action[;] and (3) the plaintiff must have been reasonable in his or her inaction." *Marin*, 58 So. 3d at 252 (citations omitted). The testimony at the hearing established that Rebstock believed SEI caused damage to his house at the time he called Young and at the time he met with Ledet. Additionally, Ledet testified that the entire community knew about SEI in connection with the Bully Camp Survey. The evidence does not support the assertion that SEI acted to prevent plaintiffs from pursuing their causes of action and, therefore, does not support application of the third category of *contra non valentem*. *See Marin*, 58 So. 3d at 252-253.

Monica Matherne's chief complaint is of cracks around the edges of her swimming pool, which could have appeared in August or September 2007. As previously set forth, she acknowledged signing two permits allowing SEI to conduct seismographic testing, but denied reading them, and upon examination, believed that they related to family property but not her home. She further

acknowledged seeing the cables on her property and stated that she questioned a neighbor who told her "they were seismogaphing." She is certain the cracks around the pool did not appear before the time the cables were on her property. Monica Matherne testified that she did not learn that the seismographic testing had occurred until she showed the cracks to Rebstock who told her there had been "some seismogaphing" that may have caused them. She did not know if that conversation occurred before or after Rebstock met with Ledet, but believed that she spoke with Rebstock in September 2007.

Monica Matherne's husband, Joey Matherne, did not inspect the pool and had no independent recollection of when the cracks appeared. Further, he indicated that his wife, Monica, handled the home, implying that he did not have knowledge of facts sufficient to put him on notice prior to Monica acquiring that knowledge.

The testimony at the hearing does not establish the date Monica Matherne first noticed the cracks around the pool, or the date of her conversation with Rebstock in which she learned the testing had occurred.[2] In contrast to Rebstock, SEI had no phone calls from the Mathernes or meetings with them through representatives that would indicate the date they were in possession of sufficient facts to constitute constructive knowledge. The trial court, after finding that the burden of proof rested with the Mathernes, stated that "it is equally probable that she discovered the damage prior to August 29, 2007." According to the trial court, Matherne could not say whether the cracks in her pool appeared before or after August 29, 2007, so the trial court held that she did not carry her burden of proving that her claims were timely. Considering the same evidence as the trial court, but placing the burden of proof with SEI, we find that it is equally probable that

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[2] The record also does not contain photographs showing the severity of the cracks.

Matherne discovered the damage after August 29, 2007. Therefore, SEI failed to prove that the Mathernes' claims were prescribed.

CONCLUSION

For the foregoing reasons, the trial court's judgment sustaining the peremptory exception raising the objection of prescription and dismissing the claims of Todd Rebstock is affirmed. The trial court's judgment sustaining the peremptory exception raising the objection of prescription and dismissing the claims of Monica Matherne and Joey Matherne at their costs is reversed. This matter is remanded for further proceedings. Costs of this appeal are assessed equally between Seismic Exchange, Inc. and Todd Rebstock.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.