

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1105

MARK PILIE

VERSUS

SHAW ENVIRONMENTAL & INFRASTRUCTURE, INC.

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JUN 05 2014

Judgment Rendered: _____

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 618,753

Honorable Janice Clark, Judge

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& Infrastructure, Inc.

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

Crain, J. dissents and will assign reasons

WELCH, J.

Plaintiff, Mark Pilie, appeals a judgment sustaining a peremptory exception raising the objection of prescription filed by defendant, Shaw Environmental & Infrastructure, Inc. (Shaw). We reverse.

BACKGROUND

On January 29, 2013, Mr. Pilie, a former employee of Shaw, filed this lawsuit against Shaw alleging that he was harassed, demoted, and terminated by Shaw in violation of La. R.S. 23:967, commonly referred to as Louisiana's "whistleblower statute." Specifically, Mr. Pilie claimed that the retaliatory actions had been taken against him by Shaw because he protested and reported the acceptance of bribes within one of Shaw's programs and because he provided evidence and testimony in connection with criminal investigations that culminated in the conviction of former Shaw employees for accepting bribes and the indictment of others. He also asserted a cause of action for intentional infliction of emotional distress. Mr. Pilie sought to recover past and future loss wages and benefits, loss of earning capacity, damages for emotional distress and humiliation, and attorney's fees.

In the petition, Mr. Pilie alleged various instances of retaliatory actions against him by Shaw commencing in mid-April of 2011 and continuing that year. He further alleged that on January 28, 2012, he was advised by human resources employee Darlene Burton that Shaw had records of every time he scanned into the building, he was questioned whether he had ever been 10-15 minutes late, and was told that he was being "suspended pending an investigation." Mr. Pilie asserted that he then offered his resignation because he believed he had no other alternative but to resign or be fired in retaliation for his whistle blowing activities. However, Mr. Pilie alleged, Shaw refused his attempt to resign and instead terminated him on February 17, 2012, for the false reason of "violation of policy."

Shaw filed an exception of prescription in which it asserted that Mr. Pilie filed this lawsuit more than one year after the last possible date of alleged retaliation and infliction of emotional distress. In support of the exception, Shaw submitted the affidavit of its human resources generalist, Darlene Burton, who attested that she met with Mr. Pilie on January 26, 2012, to discuss allegations that Mr. Pilie violated Shaw's time-keeping policies, and that on this date, she presented Mr. Pilie with evidence that he charged clients for his time on days when Shaw had no record of him reporting to work. Ms. Burton further attested that Mr. Pilie was suspended on January 26, 2012, pending further investigation into the time-keeping violations and that Shaw gave him the opportunity to refute the alleged time keeping violations. According to Ms. Burton, Mr. Pilie submitted a letter of resignation on January 27, 2012, which Shaw chose not to accept because Mr. Pilie provided it with no evidence to refute the time-keeping violations, and Shaw terminated Mr. Pilie effective January 26, 2012, the date of his suspension.

In further support of its exception, Shaw offered a copy of an e-mail written by Mr. Pilie to Ms. Burton on January 27, 2012. Therein, Mr. Pilie informed Ms. Burton that he was resigning from Shaw effective two weeks from that date. In the e-mail, Mr. Pilie insisted that he had no choice other than to resign, claiming that Shaw made baseless allegations against him and continued to harass him as a result of his status as a whistleblower and his cooperation with authorities, all of which made his work environment unpleasant and professionally damaging. Mr. Pilie also advised Ms. Burton that he had a Shaw computer in his possession and would return it on January 30, 2012. Shaw also submitted a document entitled "Change in Status Notification" dated January 26, 2012, which set forth Mr. Pilie's obligations to Shaw in light of his separation of employment with Shaw. Although there are spaces for Mr. Pilie and a company representative to sign and date the document, no signatures appear thereon. Lastly, Shaw submitted a time and pay

inquiry spanning the time period of January 1, 2012 through March 15, 2013. This document reflects that on January 26, 2012, Mr. Pilie worked three hours and was paid for those hours and that January 26, 2012 is the last date reflecting a payment for hours worked for Shaw by Mr. Pilie.

Shaw argued that this evidence demonstrated that it terminated Mr. Pilie on the date of his suspension, January 26, 2012, and that this is the latest possible date Mr. Pilie could have sustained injury as a result of Shaw's alleged retaliation. Shaw urged that Mr. Pilie had one year, or until January 26, 2013, to file his petition. Because January 26, 2013, was a Saturday, Mr. Pilie had until the next business day, Monday, January 28, 2013, to file his petition. However, Mr. Pilie did not file his petition until January 29, 2013, and any claims based on Mr. Pilie's retaliatory termination prescribed. Shaw also asserted that any claims that Mr. Pilie had been demoted or harassed while in the employment of Shaw were also prescribed because they had to have occurred more than one year before the lawsuit was filed. Further, Shaw claimed that the last date on which it could have committed intentional infliction of emotional distress was the last day Mr. Pilie was employed at Shaw, January 26, 2012, and therefore, this cause of action was also time barred. Lastly, Shaw urged that even if Mr. Pilie's resignation letter dated January 27, 2012, is used as the effective date of his termination, the lawsuit would still be untimely because Mr. Pilie would have had to file his lawsuit by Monday, January 28, 2013, for his claim to be timely.

In opposition to the exception of prescription, Mr. Pilie also relied on the January 27, 2012 resignation email he sent to Ms. Burton. Mr. Pilie submitted his affidavit in which he made the following attestations: On or about January 28, 2012, Ms. Burton called him and advised him that Shaw had a record of every time he scanned in and out of the building and inquired whether he had ever been 10-15 minutes late. Ms. Burton then advised him she was suspending him pending an

investigation. He offered to resign because he believed he had no alternative other than to resign or be fired in retaliation for his whistle-blowing activities. However, Shaw refused to accept his resignation and instead terminated him on February 17, 2012, for violating policy. Mr. Pilie also submitted emails he and Ms. Burton exchanged on January 30 and February 1, 2012. This correspondence reflects that on January 30, Mr. Pilie sent Ms. Burton an email from his personal email address in which he stated that he noticed his account has been disabled and assumed such meant that Shaw was not accepting his two weeks notice. He asked Ms. Burton to contact him through email to let him know what, if anything, he had to do to complete the exit process. Ms. Burton responded that he needed to turn his computer in that day in accordance with the resignation email, that she would mail his exit paperwork to him, and that this would complete the exit process. On February 1, Mr. Pilie emailed Ms. Burton to let her know that the laptop had been returned and asked her to acknowledge the receipt thereof, which Ms. Burton did.

Mr. Pilie argued that prescription on his claims did not begin to run until February 17, 2012, the date on which he was notified that his resignation would not be accepted and on which he was actually terminated. He insisted that the January 26, 2012 separation date indicated on Shaw's human resource document is nothing more than a bookkeeping measure and a fabrication on Shaw's part. He further asserted that the email correspondence showed that Shaw was still considering the resignation he submitted on January 27, 2012, as of at least January 30, 2012. He claimed that he had no notice or reason to know he would be terminated by Shaw until February 17, 2012, the date on which he became aware of Shaw's ultimate act of retaliation—its refusal to accept his resignation and termination of his employment. Therefore, he argued that the ultimate termination date of February 17, 2012, was the triggering date on which his claim for damages for retaliatory discharge and the intentional infliction of emotional distress became

ripe. He asserted that the earliest date on which prescription on these claims could have run is January 30, 2012, the date on which Shaw was still considering his resignation, and not the retroactive date designated on its human resources document. Thus, Mr. Pilie maintained that this lawsuit, filed on January 29, 2013, was not prescribed.

In reply, Shaw relied on two documents it claimed refuted Mr. Pilie's assertion that he was not aware he was terminated until February 17, 2012. The first is the January 30, 2012 correspondence between Mr. Pilie and Ms. Burton in which Mr. Pilie stated that he assumed that Shaw was not accepting his two weeks notice, which Shaw claimed demonstrated that Mr. Pilie had notice he was already separated from Shaw before February 17, 2012. Shaw submitted a second email exchange between Mr. Pilie and Mr. Burton that occurred on February 9, 2012, in which Mr. Pilie asked when he could expect his "separation stuff" and thanked her for her help while he "was at Shaw." Shaw maintained that this exhibit demonstrated that Mr. Pilie knew that he was terminated before February 17, 2012. Finally, Shaw submitted its termination policy which states that an employee must physically work on his or her last day of employment and urged that Mr. Pilie's termination was effective pursuant to that policy on January 26, 2012, the last day that Mr. Pilie physically performed work for Shaw.

A hearing on the exception of prescription was held, during which the parties introduced all of the exhibits they had attached to their memoranda in support of and in opposition to the exception. At the conclusion of the hearing, the trial judge sustained the exception of prescription on the basis that Mr. Pilie had in fact resigned (on January 27, 2012), and found it was of no moment whether Shaw accepted the resignation or not for the purpose of prescription. Thus, the trial court concluded that Mr. Pilie's act of resignation started the running of prescription on

all of his claims against Shaw. A judgment was signed sustaining the exception of prescription and dismissing this lawsuit on May 8, 2013.

DISCUSSION

Applicable prescriptive period

The only issue in this appeal is whether Mr. Pilie's causes of action for retaliation in violation of La. R.S. La. 23:967 and for intentional infliction of emotional distress have prescribed. Louisiana Revised Statute 23:967 does not set forth a specific prescriptive period. However, because the "whistleblower" claims made by Mr. Pilie are delictual in nature, this cause of action is subject to the general one-year prescriptive period for delictual actions provided in La. C.C. art. 3492. See **Nolan v. Jefferson Parish Hospital Service District No. 2**, 01-175 (La. App. 5th Cir. 6/27/01), 790 So.2d 725, 733. Mr. Pilie's cause of action for intentional infliction of emotional distress is also governed by La. C.C. art. 3492's one-year prescriptive period. **King v. Phelps Dunbar, L.L.P.**, 98-1805 (La. 6/4/99), 743 So.2d 181, 187.

The one-year prescriptive period for delictual actions commences to run from the day injury or damage is sustained. La. C.C. art. 3492. Where the acts complained of are continuous, by the same actor, and of the same nature, and the conduct becomes tortuous and actionable because of its continuous, cumulative, synergistic nature, prescription does not commence until the last act occurs or the conduct is abated. **Bustamento v. Tucker**, 607 So.2d 532, 542 (La. 1992).

In computing a period of time allowed or prescribed by law, the date of the act, event, or default after which the period begins to run is not to be included. The last day of the period is to be included, unless it is a legal holiday, in which event the period runs until the end of the next day which is not a legal holiday. La. C.C. P. art. 5059.

Burden of Proof and Standard of Review

Unless prescription is evident from the face of the pleadings, the party raising the objection of prescription bears the burden of proof. **King**, 743 So.2d at 188. Here, Mr. Pilie alleged in his petition that he was terminated on February 17, 2012. Because prescription is not evident on the face of the petition, Shaw had the burden of proving that Mr. Pilie's claims had prescribed. Further, because evidence was introduced by the parties at the hearing on the exception, we must review the trial court's findings of fact under the manifest error-clearly wrong standard of review. **Carter v. Haygood**, 2004-0646 (La. 1/19/05), 892 So.2d 1261, 1267. Under that standard, if the trial court's findings are reasonable in light of the record reviewed in its entirety, this court may not reverse even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.*; **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993).

Arguments of the Parties

In this appeal, Mr. Pilie contends that prescription could not have begun to run on his claims for retaliation and intentional infliction of emotional distress until February 17, 2012, the date on which he was notified that his resignation would not be accepted and on which he was actually terminated. He insists that the trial court committed manifest and legal error in not finding that February 17, 2012, was the triggering date for the commencement of prescription on his claims. According to Mr. Pilie, the evidence shows that Shaw placed him on leave pending an investigation, which presumably then occurred, and then notified him on February 17, 2012, that it was terminating him as a result of that investigation. He submits that Shaw cannot refute his sworn testimony that he was advised of his termination on February 17, 2012, and contends that the email correspondence between himself and Ms. Burton on January 27 and January 30 demonstrate that

Shaw was still considering whether to accept his resignation as of at least January 30. Thus, he claims that there are only two possible conclusions under the disputed facts--either Shaw spent the period of time during his leave to conduct a sham investigation or it actually conducted a good faith investigation leading to its determination that legitimate, non-retaliatory reasons existed to terminate his employment on February 17, 2012. Mr. Pilie insists that under either scenario, the decision to terminate was not made nor communicated to him until after the alleged "investigation" on February 17, 2012.

Shaw contends that Mr. Pilie's claim that he was not notified of his termination until February 17, 2012, is wholly unsupported by the evidence and has no bearing on the prescription issue. It asserts that the key issue on the exception is the date on which the last act of reprisal took place and argues that date is January 26, 2012, the date on which it allegedly terminated Mr. Pilie. It further contends that there is no evidence in the record to support Mr. Pilie's claim that Shaw conducted an investigation from January 30, 2012, until February 17, 2012. Instead, Shaw argues that the evidence demonstrates that Mr. Pilie was suspended on January 26, 2012, after being confronted with timekeeping violations; he was given the opportunity to submit evidence to rebut the violations; however, he did not do so and instead resigned on January 27, 2012. Shaw claims that the evidence shows that Mr. Pilie's last day of work was January 26, 2012, and pursuant to its policy, that date was his separation date. It submits that even if Mr. Pilie's resignation date is considered the effective date of his separation from Shaw, his claims have prescribed, as Mr. Pilie's own emails show that he clearly had knowledge of his alleged injuries on January 27, 2012, when he wrote that he was resigning because Shaw made baseless allegations against him and continued to harass him as a result of his status as a whistleblower and his cooperation with authorities, giving Mr. Pilie until January 27, 2013 to file this lawsuit. Further,

Shaw asserts that any conduct giving rise to the alleged intentional infliction of emotional distress by Shaw abated when Mr. Pilie was terminated by Shaw on January 26, 2012, or the latest by January 27, 2012, when Mr. Pilie resigned.

Application of Law to Facts

In sustaining Shaw's exception of prescription, the trial court concluded that the day Mr. Pilie resigned, January 27, 2012, commenced the running of the prescriptive period. Under this scenario, because January 27, 2013, fell on a Sunday, Mr. Pilie would have had until Monday, January 28, 2013, to file his lawsuit, making his filing on January 29, 2013, one day outside the one-year prescriptive period.

We find that the trial judge erred in determining that Mr. Pilie's attempted resignation on January 27, 2012, commenced the prescriptive period on his causes of action for retaliation and intentional infliction of emotional distress. The evidence on the exception showed that Mr. Pilie gave Shaw a two weeks notice on January 27, 2012, which would not have made his resignation effective until February 10, 2012. Furthermore, Shaw refused to accept Mr. Pilie's resignation and instead terminated him; thus, Mr. Pilie's causes of action for retaliatory discharge and intentional emotional distress could not have begun to run on the day of his attempted, ineffective resignation.

Nor do we accept Shaw's argument that prescription on Mr. Pilie's causes of action began to run on January 26, 2012, one day prior to his attempted resignation. Shaw claims that it retroactively terminated Mr. Pilie on the date he was suspended pending an investigation. However, Shaw, which bore the burden of proving that Mr. Pilie's causes of action prescribed, did not demonstrate that it communicated its intent to terminate Mr. Pilie prior to January 30, 2012. Instead, email correspondence indicates that it was not until January 30, 2012, that Mr. Pilie had reason to suspect that Shaw was not going to accept his two weeks notice

and had in fact terminated him. Indeed, Mr. Pilie argues that Shaw's refusal to accept his resignation, and to instead terminate him, was the final act of retaliation against him for his whistle-blowing activities.

On review, considering all of the evidence presented on the exception of prescription, we find that the trial court erred in finding that Shaw met its burden of proving that Mr. Pilie's delictual claims had prescribed. Shaw did not prove that prescription on the claims commenced to run on either January 26 or January 27. Instead, we find under the facts herein that the earliest date on which prescription could commence to run is January 30, 2012, making this lawsuit, filed on January 29, 2013, timely.

CONCLUSION

Based on the foregoing, the judgment sustaining the peremptory exception raising the objection of prescription is hereby reversed. All costs of this appeal are assessed to appellee, Shaw Environmental & Infrastructure, Inc. The case is remanded to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

MARK PILIE

FIRST CIRCUIT

COURT OF APPEAL

VERSUS

STATE OF LOUISIANA

SHAW ENVIRONMENTAL &
INFRASTRUCTURE, INC.

2013 CA 1105

 CRAIN, J., dissents, in part.

The evidence establishes that plaintiff resigned on January 27, 2012, essentially alleging in his email a constructive discharge. This is affirmed by plaintiff's own affidavit in which he attests "I offered [my] resignation because I believed I had no other alternative but to resign or be fired in retaliation for my whistle-blowing activities." Subsequent emails reflect that plaintiff left Shaw's employment by January 27, 2012, leaving only administrative matters to be handled. In my opinion, the two-week notice in the resignation email is irrelevant. *See Prejean v. Radiology Associates of Southwest Louisiana, Inc.*, 06-1709 (W.D. La. 2008) 2008WL4360884 (finding that Louisiana state law employment discrimination claims accrued and prescription began to run on the date of the employee's resignation letter, not the later date on which his resignation became effective.). *See and compare Eastin v. Entergy Corp.*, 03-1030 (La. 2/6/04), 865 So. 2d 49, 54 (recognizing that in an employment discrimination case "prescription begins to run when the termination decision has been made and conveyed to the employee, even if the employment does not cease until a future date.").

Plaintiff argues that his resignation email was ineffective to start prescription because subsequent emails show that Shaw was considering whether to accept his resignation and points to the subsequent notification by Shaw that it had rejected his resignation and terminated him effective the date prior to his resignation email. However, plaintiff did not attempt to withdraw his resignation and offers no explanation as to how Shaw could have forced him to remain in its employ after he

submitted his resignation. Furthermore, at least as to his whistleblower claims, the later notification that plaintiff was being terminated served only to change the characterization of plaintiff leaving Shaw's employment from resignation/constructive discharge to actual termination, and perhaps the extent of his damages. In *Delaware State College v. Ricks*, 449 U.S. 250, 258 101 S.Ct. 498, 66 L.Ed. 2d 431 (1980), the U.S. Supreme Court analyzed the timeliness of an employment discrimination complaint and determined that it was insufficient for the plaintiff to allege that his termination gave present effect to past illegal acts (the allegedly discriminatory denial of tenure), therefore perpetuating the consequences of the discrimination. Similarly, I find it insufficient here for plaintiff to allege that although he resigned, his claim did not ripen until he received notice of termination. Accepting that construction would preclude prescription of claims based on constructive discharge because, without a notice of termination, they would never accrue.

On January 27, 2012, plaintiff had knowledge of his whistleblower claim and that his employment with Shaw was over, such that his claim had accrued and prescription began to run. Accordingly, I dissent from that portion of the opinion reversing the judgment of the trial court as to the whistleblower claim.