

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1975

MSF TRUST I

VERSUS

PATRICK DELANE STEWART A/K/A PATRICK D. STEWART,  
PATRICK DELANE

*Consolidated with*

NUMBER 2013 CA 1976

PATRICK DELANE STEWART

VERSUS

MSF TRUST I & EAST BATON ROUGE PARISH SHERIFF'S OFFICE

**Judgment Rendered: MAY 11 2015**

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Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Suit Number C596135 c/w C604255

Honorable Janice Clark, Presiding

\* \* \* \* \*

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BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

**GUIDRY, J.**

In this executory proceeding, Patrick Delane Stewart appeals from a district court judgment sustaining MSF Trust I's (MSF) peremptory exception raising the objection of peremption and dismissing Mr. Stewart's claims, in their entirety, with prejudice. For the reasons that follow, we amend the district court's judgment and affirm the judgment as amended.

**FACTS AND PROCEDURAL HISTORY**

On October 29, 2010, MSF filed a petition for executory process in the 19<sup>th</sup> Judicial District Court, Docket Number C596,135, asserting that it was the holder of a promissory note executed by Mr. Stewart in the original principal sum of \$170,050.00, with principal and interest payable at the rate of \$1,363.37 per month commencing on May 1, 2005. MSF stated that the note was subsequently modified by a loan modification agreement dated October 11, 2007, increasing the original indebtedness to \$196,632.94, with monthly payments of \$1,308.20. MSF asserted that the note is secured by a mortgage on certain described property located at 17345 Wisdom Drive, Baker, Louisiana. According to MSF, Mr. Stewart was in default under the terms of the note as of August 1, 2008, and MSF requested that a writ of seizure and sale issue, directing the Sheriff of East Baton Rouge Parish to seize and sell the said described property according to law. Thereafter, the subject property was sold at sheriff's sale on May 18, 2011.

On August 12, 2011, Mr. Stewart, through counsel, filed a Petition for Injunction for Wrongful Seizure in a separate suit in the 19<sup>th</sup> JDC, Docket Number C604,255, seeking a temporary restraining order and/or preliminary injunction restraining the Sheriff of East Baton Rouge Parish from proceeding with the sale and seeking damages for the wrongful seizure. MSF filed an opposition to Mr. Stewart's petition. Following a hearing on September 26, 2011, wherein Mr. Stewart failed to appear but counsel for Mr. Stewart did appear, the district court

signed a judgment on October 11, 2011, dismissing Mr. Stewart's petition for injunction with prejudice.<sup>1</sup> Mr. Stewart did not appeal this judgment.

Thereafter, on October 19, 2011, Mr. Stewart, acting pro se, filed a Petition to Rebut Defendant's Claim for Foreclosure Relief, Petition to Enforce Defense Claim of Recoupment and Set Off—TILA (Petition to Rebut) in the executory proceeding. Mr. Stewart alleged that MSF was not entitled to enforce the note and mortgage and had "presented [a] fraud upon the court" and had "deceived the court," because MSF was not the holder of the original note and because the debt had been settled. In response, MSF filed a peremptory exception raising the objections of res judicata, prescription, and no cause of action. While MSF's exceptions were pending a hearing, Mr. Stewart filed a Petition to Annul Judgment in suit number C604,255 on April 13, 2012, asserting that actions that took place during the September 26, 2011 hearing regarding his Petition for Injunction for Wrongful Seizure constituted "ill practices." Additionally, Mr. Stewart adopted by reference his allegations set forth in his Petition for Injunction and Wrongful Seizure and asserted that the actions of MSF constitute unfair trade practices. Mr. Stewart requested that the district court grant a preliminary injunction prohibiting MSF from evicting Mr. Stewart and selling the property at issue and also requested that following due proceedings, there be judgment rendered in favor of Mr. Stewart, rescinding, vacating, and setting aside the sale of the subject property, restoring Mr. Stewart's ownership of the subject property, and awarding Mr. Stewart his actual damages, attorney's fees, and costs.

The district court subsequently issued an order consolidating suit number C604,255 with suit number C596,135. On June 25, 2012, MSF filed an answer to Mr. Stewart's petition to annul. Additionally, MSF filed a peremptory exception

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<sup>1</sup> MSF acquired the subject property at the sheriff's sale, and the judgment also dismissed, with prejudice, Mr. Stewart's request to revoke MSF's writ of possession in connection with the subject property. The judgment also dissolved a temporary restraining order that had issued, restraining MSF and the Sheriff of East Baton Rouge Parish from evicting all occupants from the subject property.

raising the objection of *lis pendens*, asserting that Mr. Stewart's Petition to Annul Judgment involved the same parties in the same capacities, the same transaction or occurrence, and sought the same relief as Mr. Stewart's Petition to Rebut. On July 27, 2012, Mr. Stewart filed a First Supplemental and Amending Petition to Annul Judgment, wherein he did not set forth any new allegations as to why the August 11, 2011 judgment should be set aside but merely requested that a temporary restraining order issue to enjoin MSF from proceeding with the eviction of the subject property scheduled for August 2, 2012. The district court issued a temporary restraining order on July 30, 2012.

On August 20, 2012, the district court conducted a hearing on MSF's exceptions to Mr. Stewart's Petition to Rebut.<sup>2</sup> Following the hearing, the district court sustained MSF's exception raising the objection of no cause of action and dismissed Mr. Stewart's Petition to Rebut without prejudice to Mr. Stewart's ability to amend his petition within ten days of the ruling.<sup>3</sup> The district court further extended Mr. Stewart's temporary restraining order until the expiration of the aforementioned ten-day period.<sup>4</sup>

Thereafter, on September 21, 2012, Mr. Stewart filed an Amended Petition to Rebut in which he set forth similar allegations as those set forth in his Petition to Annul Judgment. Particularly, Mr. Stewart asserted that the September 26, 2011 preliminary injunction hearing and the district court's October 11, 2011 judgment dismissing his request for preliminary injunction with prejudice constituted "ill practices." Additionally, Mr. Stewart adopted the allegations set forth in his

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<sup>2</sup> Mr. Stewart's Petition to Annul was also scheduled to be taken up at the August 20, 2012 hearing. However, Mr. Stewart was not available to attend the hearing. Nevertheless, the district court stated that its ruling on MSF's exception raising the objection of "no cause of action is dispositive" of the issue of the preliminary injunction filed associated with the Petition to Annul Judgment. However, the record does not contain any evidence that the district court signed a judgment with regard to the Petition to Annul Judgment.

<sup>3</sup> The district court signed a judgment in conformity with its oral ruling on January 3, 2013.

<sup>4</sup> This court subsequently dissolved the temporary restraining order pursuant to MSF's application for expedited supervisory writs on September 17, 2012.

Petition for Injunction for Wrongful Seizure, requesting that the court rescind, vacate, and set aside the May 18, 2011 sheriff's sale. Mr. Stewart further alleged that "[t]he actions of MSF constitute unfair trade practices" and have caused him to suffer actual damages. Finally, Mr. Stewart asserted that he was in the process of applying for an independent foreclosure review by the Board of Governors for the Federal Reserve System for the wrongful actions of MSF in handling the foreclosure sale of his home. Mr. Stewart requested that the district court grant a temporary restraining order and a preliminary injunction, preventing MSF from proceeding with an eviction of the property.

Thereafter, MSF filed an opposition to Mr. Stewart's request for a preliminary injunction and issuance of the temporary restraining order in connection with his amended Petition to Rebut. MSF asserted that Mr. Stewart could not make a prima facie showing that he would prevail on the merits of his claim and, therefore, the district court should dissolve the temporary restraining order and deny Mr. Stewart's request for a preliminary injunction.

The district court conducted a hearing on Mr. Stewart's request for a preliminary injunction on October 4, 2012. Following the introduction of evidence and argument of counsel, the district court declined to rule on the preliminary injunction but rather, permitted counsel to submit post-trial briefs within five days of the hearing. Thereafter, the parties submitted post-trial briefs; however, rather than ruling on the preliminary injunction, the district court ordered that the parties submit settlement proposals to all parties and to the court and schedule a settlement conference with the court.

Following the settlement conference, MSF filed a peremptory exception raising the objections of prescription and preemption to Mr. Stewart's Amended Petition to Rebut. Therein, MSF asserted that Mr. Stewart's cause of action is prescribed, because he failed to assert his defense to MSF's executory process suit

through a timely injunction proceeding to arrest seizure and sale as provided in La. C.C.P. art. 2751 through 2754 or a suspensive appeal from the order directing the issuance of a writ of seizure and sale. MSF further asserted that any action to annul the Sheriff's sale is prescribed, because no action may be instituted to set aside or annul a judicial sale of immovable property by executory process by reason of an objection to form or procedure in the executory proceedings or by reason of lack of authentic evidence to support the order and seizure after the sheriff executing the foreclosure has either filed the proces verbal of the sale or filed the sale for record in the conveyance office of the parish where the property is located. Finally, MSF asserted that Mr. Stewart's cause of action for unfair trade practices is preempted, because he failed to bring his claim within one year of the alleged violations as set forth in La. R.S. 51:1409(E).

Thereafter, Mr. Stewart filed a Second Amended and Supplemental Petition to Rebut, wherein he sought a temporary restraining order and a preliminary injunction preventing his eviction from the subject property. Mr. Stewart reasserted the same allegations as contained in his previous petitions, including allegations of "ill practices" at the September 26, 2011 preliminary injunction hearing and unfair trade practices by MSF. Additionally, Mr. Stewart asserted that Mariners Companies was the holder and owner of the note, and therefore, MSF wrongfully foreclosed on his property, because it was not the holder and owner of the note when it filed the executory process suit.

At the March 4, 2013 hearing on MSF's exception raising the objections of prescription and preemption, the district court took the matter under advisement but issued a preliminary injunction to allow the court sufficient time to review the exception. Thereafter, the district court issued a ruling, sustaining MSF's exception raising the objection of preemption after finding that any unfair trade practices would have had to occur prior to the sheriff's sale on May 18, 2011, and

Mr. Stewart did not file his unfair trade practices cause of action until September 21, 2012, after the expiration of the one-year preemptive period. Thereafter, the district court signed a judgment sustaining MSF's exception of raising the objection of preemption and dismissing the matter, with prejudice, in its entirety. The judgment further ordered that the preliminary injunction previously granted by the court be dissolved.

Mr. Stewart subsequently filed a motion for new trial, which was denied by the district court. Mr. Stewart now appeals from the district court's judgments.

### **DISCUSSION**

Preemption is a period of time fixed by law for the existence of a right. The right is extinguished upon the expiration of the preemptive period. La. C.C. art. 3458. When the preemptive period has run, the cause of action itself is extinguished unless timely exercised. Boes Iron Works, Inc. v. M.D. Descant, Inc., 14-0270, p. 4 (La. App. 1st Cir. 9/19/14), 154 So. 3d 555, 558. Preemption may not be renounced, interrupted, or suspended. La. C.C. art. 3461.

An exception of preemption is a preemptory exception. La. C.C.P. art. 927; Rando v. Anco Insulations, Inc., 08-1163, p. 20 (La. App. 1st Cir. 5/22/09), 16 So. 3d 1065, 1083. Ordinarily, the exceptor bears the burden of proof at trial of the preemptory exception. Carter v. Haygood, 04-0646, p. 8 (La. 1/19/05), 892 So. 2d 1261, 1267. Preemption has been likened to prescription; namely, it is prescription that is not subject to interruption or suspension. Straub v. Richardson, 11-1689, p. 5 (La. App. 1st Cir. 5/2/12), 92 So. 3d 548, 552, writ denied, 12-1212 (La. 9/21/12), 98 So. 3d 341, cert. denied, 133 S.Ct. 1805, 185 L.Ed.2d 811 (2013). As such, the following rules governing the burden of proof as to prescription apply to preemption.

If prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show the action has not prescribed. Carter, 04-0646 at p. 6, 892 So. 2d



at 1267. If evidence is introduced at the hearing on the peremptory exception of prescription, the trial court's findings of fact are reviewed under the manifest error-clearly wrong standard of review. Onstott v. Certified Capital Corporation, 05-2548, p. 3 (La. 11/3/06), 950 So. 2d 744, 746. In the absence of evidence, an objection of prescription must be decided upon the facts alleged in the petition with all the allegations accepted as true. Kirby v. Field, 04-1898, p. 6 (La. App. 1st Cir. 9/23/05), 923 So. 2d 131, 135, writ denied, 05-2467 (La. 3/24/06), 925 So. 2d 1230. If no evidence is introduced, the appellate court's role is to determine whether the trial court's ruling was legally correct. See Onstott, 05-2548 at p. 4 950 So. 2d at 746.

In the instant case, Mr. Stewart filed an Amended Petition to Rebut on September 12, 2012, asserting a claim for unfair trade practices. Mr. Stewart incorporated by reference in his Amended Petition to Rebut allegations regarding the actions of MSF in the handling of his loan. All of these actions occurred prior to and including the sheriff's sale on May 18, 2011. Accordingly, any claim for unfair trade practices had to be filed, at the latest, within one year of May 18, 2011. Because Mr. Stewart's unfair trade practices claim was not filed until September 12, 2012, after the expiration of the one-year preemptive period, his unfair trade practices claim as contained in the Amended Petition to Rebut is preempted on its face. Furthermore, Mr. Stewart failed to introduce any evidence at the hearing to show that his unfair trade practices claim is not preempted.<sup>5</sup> Accordingly, we find

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<sup>5</sup> Counsel for MSF asserts that Mr. Stewart filed an opposition to MSF's exception raising the objections of preemption and prescription, wherein counsel for Mr. Stewart asserted that the unfair trade practices claim was not preempted because it related back to the timely filed Petition to Rebut in accordance with La. C.C.P. art. 1153. This opposition is not contained in the record and this argument was not raised by Mr. Stewart's counsel at the hearing on the exception. However, we note that in accordance with the supreme court's decision in Naghi v. Brener, 08-2527, pp. 10-11 (La. 6/26/09), 17 So. 3d 919, 925-926, an amendment cannot relate back when a cause of action is extinguished by preemption. If a cause of action no longer exists after the termination of a preemptive period and any right to assert the claim is destroyed, there is nothing to which an amended or supplemental pleading filed after the preemptive period has expired can relate back. Boes Iron Works, Inc., 14-0270 at p. 9, 154 So. 3d at 561.

no error in the district court's judgment sustaining the exception of peremption as to that claim.

However, the trial court's judgment sustaining MSF's exception raising the objection of peremption did not dispose of the entire matter. Mr. Stewart's Amended Petition to Rebut also asserted claims for wrongful foreclosure and ill practices and sought annulment of the sheriff's sale. As previously noted, MSF filed the exception raising the objection of peremption only as to Mr. Stewart's unfair trade practices claim. MSF filed an exception raising the objection of prescription regarding Mr. Stewart's allegation of wrongful foreclosure and his attempt to seek annulment of the sheriff's sale, but it did not file an exception to Mr. Stewart's allegations regarding the alleged ill practices during the September 26, 2011 hearing. Accordingly, because the district court did not rule on MSF's exception raising the objection of prescription, and the judgment sustaining the exception of peremption did not dispose of the remaining issues in the case, the district court erred in dismissing Mr. Stewart's case in its entirety.<sup>6</sup>

### **CONCLUSION**

For the foregoing reasons, we affirm the judgment of the district court to the extent that it sustained MSF's exception raising the objection of peremption. However, we amend the trial court's judgment to reflect that only Mr. Stewart's claim for unfair trade practices is dismissed. All costs of this appeal are assessed to MSF Trust I.

**JUDGMENT AMENDED AND AS AMENDED, AFFIRMED.**

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<sup>6</sup> We also note that in addition to Mr. Stewart's claims for wrongful foreclosure, ill practices, and annulment of the sheriff's sale, Mr. Stewart's action seeking annulment of the trial court's October 11, 2011 judgment dismissing his claim for wrongful seizure is also still pending, as no judgment has been signed by the trial court dismissing that action.