NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 1232

SHERIE LANDRY WIFE OF/AND RAYMOND C. BURKART, JR.

VERSUS

ELAINE L. WILLIAMSON WIFE OF/AND JAMES R. WILLIAMSON; WILLIAM L. DUNFORD; RHONDA HEMELT WIFE OF/AND CHRISTOPHER J. AUBERT; GROUP INTEGRITY, L.L.C. d/b/a KELLER WILLIAMS REALTY; JACKIE E. STALEY; JEAN BROWN; WILLIAM STONE HATCHETT, III; JOHN J. HENRY; JOHN J. HENRY & ASSOCIATES, L.L.C. d/b/a HATCHETT INSPECTION SERVICES, L.L.C d/b/a HENRY & HATCHETT INSPECTION SERVICES

Judgment Rendered: MAY 01 2015

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2003-13648

Honorable William J. Knight, Presiding

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BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

GUIDRY, J.

Sherie Landry and Raymond Burkart, Jr. (the Burkarts), appeal from a trial court judgment granting summary judgment in favor of defendant, Scottsdale Insurance Company (Scottsdale). For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 28, 2002, the Burkarts purchased a home located at 806 Heather Hollow in Highlands Subdivision in Covington, Louisiana, from Elaine and James Williamson. On or about September 26, 2002, water started leaking into the home during periods of rainfall. Consequently, on August 1, 2003, the Burkarts filed a petition in redhibition and for damages, naming as defendants the Williamsons; all prior homeowners in the chain of title, including Rhonda Hemelt wife of/and Christopher Aubert; unidentified insurance companies; inspectors; and realtors.

The Auberts originally purchased the home at issue from the contractors, LCV Partnership. The sole partners of LCV consisted of Lee Road Development Company, Crowne Colony Builders, Inc., and Viking Land, Inc. After retaining a civil engineer to examine the home in 2004, the Burkarts discovered that the exterior walls of the home were not constructed with a secondary water barrier, and that this improper method of construction caused the widespread water intrusion throughout the Burkarts' home.

Thereafter, the Burkarts filed a first supplemental and amending petition on August 2, 2005, naming LCV and its individual partners and their respective insurers as defendants and asserting claims against them for negligence, negligent supervision, respondeat superior, and claims under the Louisiana New Home Warranty Act and La. C.C. art. 2545. By way of a second supplemental and amending petition filed on April 11, 2008, the Burkarts substituted Scottsdale as the insurer of Crowne Colony Builders, Inc. (CCB).

Thereafter, on November 5, 2012, Scottsdale filed a motion for summary judgment, asserting that it is undisputed that Scottsdale did not insure CCB or any other defendant at the time that the Burkarts' alleged property damage and/or bodily injury occurred. As such, Scottsdale asserted that it does not provide coverage for the Burkarts' claims. Scottsdale also filed a motion for partial summary judgment regarding the Burkarts' claims asserted under La. C.C. art. 2545 for CCB's alleged failure to disclose defects in their home and filed peremptory exceptions raising the objections of no cause of action and peremption. Following a hearing on Scottsdale's motions and exceptions, the trial court rendered judgment in favor of Scottsdale, granting its motion for summary judgment regarding trigger of coverage and finding the remaining motion for partial summary judgment and exceptions moot. The Burkarts now appeal from the trial court's judgment.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. Johnson v. Evan Hall Sugar Cooperative, Inc., 01-2956, p. 3 (La. App. 1st Cir. 12/30/02), 836 So. 2d 484, 486. A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2). Only evidence admitted for purposes of the motion for summary judgment shall be considered by the court in its ruling on the motion. La. C.C.P art. 966(F)(2).[1]

[1] Louisiana Code of Civil Procedure article 966 was amended by 2013 La. Acts No. 391, § 1, and the content of former subparagraph (E)(2) was reenacted in subparagraph (F)(2) and (3).

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966(C)(2).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Lieux v. Mitchell, 06-0382, p. 9 (La. App. 1st Cir. 12/28/06), 951 So. 2d 307, 314, writ denied, 07-0905 (La. 6/15/07), 958 So. 2d 1199.

The commercial general liability policy issued by Scottsdale obligates it to pay sums which the insured becomes obligated to pay as damages because of bodily injury or property damage to which the insurance applies. Scottsdale's policy provides:

> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period.

The policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In seeking summary judgment in its favor, Scottsdale argued that coverage under its policy was not triggered because no property damage or bodily injury occurred during the policy period.[2] "Trigger of coverage" is the event or condition that determines whether (and when) a policy responds to a specific claim. Mangerchine v. Reaves, 10-1052, p. 7 (La. App. 1st Cir. 3/25/11), 63 So. 3d 1049, 1054. It describes what must happen, according to the terms of an insurance policy, for the potential of coverage to arise. Mangerchine, 10-1052 at p. 7, 63 So. 3d at 1054.

According to the plain language of Scottsdale's policy, insurance only applies if property damage occurs during the policy period. Generally, if the date the damage occurred is known, courts apply that date in determining if insurance under the policy is triggered. See McKenzie & Johnson, Insurance Law and Practice, § 6:6, in 15 La. Civil Law Treatise 516 (4th ed. 2012). However, when the alleged damage or injury is latent or hidden, courts nationwide have developed and applied a number of different trigger theories, applicable to various factual situations and coverage types, to address the complicated issue of coverage of continuous and progressive property damage with delayed onset or manifestation. Mangerchine, 10-1052 at p. 8, 63 So. 3d at 1054.

In the case of third-party claims for construction defects under commercial general liability (CGL) policies, Louisiana courts have generally applied the manifestation trigger theory for such claims. See St. Paul Fire & Marine Insurance Company v. Valentine, 95-0649, p. 5 (La. App. 1st Cir. 11/9/95), 665 So. 2d 43, 46, writ denied, 95-2961 (La. 2/9/96), 667 So. 2d 534; Rando v. Top Notch Properties, LLC, 03-1800, p. 18 (La. App. 4th Cir. 6/2/04), 879 So. 2d 821, 833; Oxner v. Montgomery, 34,727, p. 12 (La. App. 2nd Cir. 8/1/01), 794 So. 2d 86, 93,

[2] The parties do not raise, and we do not address, the issue of whether the property damage was caused by an "occurrence" under the terms of the policy.

writ denied, 01-2489 (La. 12/7/01), 803 So. 2d 36; James Pest Control, Inc. v. Scottsdale Insurance Company, 99-1316, p. 12 (La. App. 5th Cir. 6/27/00), 765 So. 2d 485, 491, writ denied, 00-2285 (La. 10/27/00), 772 So. 2d 657; and Korossy v. Sunrise Homes, Inc., 94-473, p. 17 (La. App. 5th Cir. 3/15/95), 653 So. 2d 1215, 1226, writs denied, 95-1522 and 95-1536 (La. 9/29/95), 660 So. 2d 878; but see Orleans Parish School Board v. Scheyd, Inc., 95-2635, pp. 6-7 (La. App. 4th Cir. 4/24/96), 673 So. 2d 274, 277-278 (refusing to find that the manifestation theory is applicable, as a matter of law, in all cases but declining to issue a definitive ruling on the manifestation versus occurrence argument as unnecessary). Additionally, courts have applied the manifestation trigger theory to claims for emotional distress damages as a result of construction defects. See Ricks v. Kentwood Oil Company, Inc., 09-0677, pp. 11-12 (La. App. 1st Cir. 2/23/10), 38 So. 3d 363, 371; Lawyer v. Kountz, 97-2701, pp. 11-12 (La. App. 4th Cir. 7/29/98), 716 So. 2d 493, 498, writ denied, 98-2290 (La. 11/13/98), 731 So. 2d 264.

Under the manifestation trigger theory, coverage is triggered when the damage manifests itself and is discovered during the policy period, not when the causative negligence took place. See Mangerchine, 10-1052 at p. 8, 63 So. 3d at 1055 and St. Paul Fire & Marine Insurance Company, 95-0649 at p. 5, 665 So. 2d at 46; see also McKenzie & Johnson, Insurance Law and Practice, § 6:5, in 15 La. Civil Law Treatise 510 (4th ed. 2012) (noting that in third-party CGL claims, the defective construction itself does not trigger coverage under the CGL policy, but rather, the coverage is triggered when the defect causes property damage).

In the instant case, the Burkarts purchased the subject property on August 28, 2002, and moved into the home on September 5, 2002. Thereafter, the Burkarts first noticed water leaking into the home on September 26, 2002. The Burkarts did not become aware that the leaks, and subsequent damage, were the result of the absence of a secondary water barrier until 2004. It is undisputed that

all of these events transpired *after* the Scottsdale policy expired on August 1, 2002.[3] Accordingly, because the property damage did not manifest until after the expiration of Scottsdale's policy, the Burkarts' alleged property damage did not "occur" during the policy period.[4]

We likewise find that any claim for emotional distress damages did not arise during the policy period, as any claim for emotional distress damages could not arise prior to the Burkarts' knowledge and/or discovery of the defect in their home, which did not occur until after the expiration of the Scottsdale policy. See Ricks, 09-0677 at pp. 11-12, 38 So. 3d at 370-371.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to the plaintiffs, Sherie Landry wife of/and Raymond Burkart, Jr.

AFFIRMED.

[3] The effective date of Scottsdale's policy was August 1, 2001 through August 1, 2002.

[4] The Burkarts assert on appeal that property damage manifested during the policy period and that said damage was not disclosed to them by the previous property owners. However, the Burkarts failed to raise this argument or present any evidence in support of this argument in connection with their opposition to Scottsdale's motion for summary judgment. Furthermore, this court has previously rejected this argument in Landry v. Williamson, 13-0929, pp. 3-4 (La. App. 1st Cir. 4/25/14) (unpublished opinion), writ denied, 14-1089 (La. 9/26/14), 149 So. 3d 262.