NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 0524

TCHEFUNCTE HARBOUR TOWNHOME
ASSOCIATION, INC.

VERSUS

THOMAS MICHAEL COSTANZA

Judgment Rendered: NOV 06 2015

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2011-10227, Div. D

Honorable Peter J. Garcia, Judge

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D. Blayne Honeycutt
Donald L. Miers, Jr.
Denham Springs, LA

Attorneys for Appellant
Defendant/Plaintiff-in-Reconvention/
Third Party Plaintiff—Thomas Michael Costanza

Thomas P. Hubert
Robert L. Walsh
David K. Theard
New Orleans, LA

Attorneys for Appellee
Plaintiff/Defendant-in-Reconvention
Tchefuncte Harbour Townhome
Association, Inc. and Third Party
Defendants—The Alcor Group, LLC
and Albert Oglesby

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

WELCH, J.

Thomas Michael Costanza appeals a judgment sustaining the peremptory exception raising the objections of no cause of action and prescription and dismissing, with prejudice, his claims against Tchefuncte Harbour Townhome Association, Inc. ("the Association"), Albert Oglesby, and The Alcor Group, LLC ("Alcor"). For the reasons that follow, we affirm in part, reverse in part, and vacate in part the judgment of the trial court and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

Mr. Costanza is the owner of two units (S-13 and S-14) in the Tchefuncte Harbour Townhome (THT) complex. In late 2008 to 2009, a disagreement arose between Mr. Costanza and the Association regarding Mr. Costanza's alleged violations of the by-laws, rules, and regulations of the Association that allegedly occurred when Mr. Costanza renovated unit S-13,[1] and eventually, the Association filed suit against Mr. Costanza regarding the purported violations. It is undisputed that on October 10, 2013, the Association, through its property managers, Mr. Oglesby and Alcor, recorded a lien against the two townhomes owned by Mr. Costanza in the amounts of $63,265.41 (on unit S-13) and $9,004.00[2] (on unit S-14), which sums represented the amount of unpaid fines imposed on Mr. Costanza by the Association for his purported violations of its by-laws, rules, and regulations. In response, on November 18, 2013, Mr. Costanza filed a reconventional demand against the Association and a third party demand against Mr. Oglesby and Alcor, alleging that the liens were improper and that he had been continuously harassed over the past several years by the Association, Mr. Oglesby,

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[1] At the time of the renovations, Mr. Costanza only owned unit S-13. One of the disputes between the Association and Mr. Costanza concerned his encroachment onto the adjacent unit, *i.e.*, unit S-14. In an apparent attempt to resolve that dispute, Mr. Costanza subsequently acquired unit S-14.

[2] It is unclear from the record as to the correct amount of this lien since it is referred to in the record as both $9,004.00 and $9,400.00 at various times. We note that, for purposes of this appeal, the exact amount is irrelevant.

and Alcor in their attempt to enforce invalid restrictions and rules against him. Therefore, Mr. Costanza sought damages against the Association, Mr. Oglesby, and Alcor for intentional infliction of emotional distress, intentional interference with contractual relations, negligently placing an improper lien on Mr. Costanza's property, violating Louisiana's Unfair Trade Practice Act, breaching its duty to deal fairly and in good faith with Mr. Costanza, attempting to enforce invalid restrictions and rules, and for improper seizure of Mr. Costanza's property.

On January 24, 2014, the Association, Mr. Oglesby, and Alcor filed a peremptory exception raising the objections of no cause of action and prescription and a dilatory exception raising the objections of vagueness and prematurity. The trial court subsequently sustained the objection of vagueness and granted Mr. Costanza the opportunity to amend his reconventional demand and third party demand to comply with La. C.C.P. arts. 860 and 891. The trial court deferred ruling on the remaining objections until a later hearing.

On May 22, 2014, Mr. Costanza amended his reconventional demand and third party demand, and in response, the Association, Mr. Oglesby, and Alcor again filed a peremptory exception raising the objections of no cause of action and prescription and a dilatory exception raising the objections of prematurity and vagueness. By judgment signed on October 1, 2014, the trial court sustained the objection of no cause of action and dismissed, with prejudice, Mr. Costanza's claims. In addition, the trial court sustained the objection of prescription as to "any claim for alleged conduct that occurred before November 18, 2012." Mr. Costanza now appeals, challenging the trial court's determination that his reconventional and third party demand failed to state a cause of action.

LAW AND DISCUSSION

The function of the peremptory exception raising the objection of no cause of action is to test the legal sufficiency of a pleading by determining whether the

law affords a remedy on the facts alleged in the pleading. **Ourso v. Wal–Mart Stores, Inc.**, 2008-0780 (La. App. 1st Cir. 11/14/08), 998 So.2d 295, 298, writ denied, 2008-2885 (La. 2/6/09), 999 So.2d 785. The exception is triable on the face of the pleadings, and, for the purposes of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. *Id.* In reviewing a trial court's ruling sustaining an exception raising the objection of no cause of action, appellate courts conduct a *de novo* review, because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. **Torbert Land Co., L.L.C. v. Montgomery**, 2009-1955 (La. App. 1st Cir. 7/9/10), 42 So.3d 1132, 1135, writ denied, 2010-2009 (La. 12/17/10), 51 So.3d 16.

To determine herein whether Mr. Costanza is afforded a remedy in the law based on the alleged conduct of the Association, Mr. Oglesby, and Alco, we must review the applicable law with respect to his claims. Mr. Costanza sought damages against the Association, Mr. Oglesby, and Alcor. For purposes of the Louisiana Homeowners Association Act, La. R.S. 9:1141.1, *et seq.*, a homeowners association is defined as "a non profit corporation, unincorporated association, or other legal entity, which is created pursuant to a declaration, whose members consist primarily of lot owners, and which is created to manage or regulate, or both, the residential planned community. La. R.S. 9:1141.2(5). Each owner of a lot in the planned community regulated by a homeowners association is a mandatory member of that association by virtue of such ownership. La. R.S. 9:1141.2(7). A homeowners association's community or organizational documents, including any building restrictions, "shall have the force of law between the homeowners association and the individual lot owners and as between individual lot owners." La. R.S. 9:1141.8. Remedies for breach of any obligation

imposed upon lot owners or a homeowners association shall include damages, injunctions, or such other remedies as are provided by law. *Id.*

Mr. Costanza's claims against the Association, Mr. Oglesby, and Alcor are based on La. C.C. art. 2315, which provides, in pertinent part, that "[e]very act whatever of man that causes damages to another obliges him by whose fault it happened to repair it." In addition, Mr. Costanza particularly sought damages against the Association, Mr. Oglesby, and Alcor for intentional infliction of emotional distress, intentional interference with contractual relations, negligently placing an improper lien on Mr. Costanza's property, violating Louisiana's Unfair Trade Practices Act, breaching its duty to deal fairly and in good faith with Mr. Costanza, attempting to enforce invalid restrictions and rules, and for improper seizure of Mr. Costanza's property.

A plaintiff seeking damages for intentional infliction of emotional distress must prove that: (1) the conduct of the defendant was extreme and outrageous; (2) the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. **White v. Monsanto Co.**, 585 So.2d 1205, 1209 (La. 1991).

In Louisiana, actions against a corporate officer for intentional interference with contractual relations are limited to actions where (1) there exists a contract or legally protected interest between the plaintiff and the corporation; (2) the corporate officer has knowledge of the contract; (3) the corporate officer intentionally induces or causes the corporation to breach the contract or intentionally renders performance under the contract impossible or more burdensome; (4) there is an absence of justification on the part of the officer; and (5) damage is caused to the plaintiff by the breach of contract or by rendering

performance of the contract impossible or difficult. See **9 to 5 Fashions, Inc. v. Spurney**, 538 So.2d 228, 234 (La. 1989).

On the other hand, Louisiana's Unfair Trade Practices Act ("LUTPA"), set forth in La. R.S. 51:1401, *et seq.*, provides for an action by any person, natural or juridical, who suffers an ascertainable loss as a result of another person's use of unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. **Cheramie Service, Inc. v. Shell Deepwater Production, Inc.**, 2009-1633 (La. 4/23/10), 35 So.3d 1053, 1057. Because of the broad sweep of this language, Louisiana courts determine what is a LUTPA violation on a case-by-case basis. **Quality Environmental Processes, Inc. v. I.P. Petroleum Co., Inc.**, 2013-1582, 2013-1588, and 2013-1703 (La. 5/7/14), 144 So.3d 1011, 1025. Under LUTPA, the plaintiff must show that the alleged conduct offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious. **Cheramie Services, Inc.**, 35 So.3d at 1059.

Further, LUTPA requires the deceptive or unfair act to be one in the course of "trade" or "commerce." Louisiana Revised Statutes 51:1402(10) defines "trade" or "commerce" as "the advertising, offering for sale, sale, or distribution of any services and any property, corporeal or incorporeal, immovable or movable, and any other article, commodity, or thing of value wherever situated, and includes any trade or commerce directly or indirectly affecting the people of the state."

With regard to the privilege or lien, based on the language of the Louisiana Homeowners Association Act, it is apparent that the Association is entitled to assert a privilege (or lien), which may be recorded against the lots of owners, for any owner's non-payment of assessments, charges, dues and expenses. See La. R.S. 9:1141.9 and 9:1145-1146. However, because statutes creating privileges and liens are in derogation of common rights, they must be strictly construed. See

McGee v. Missouri Valley Dredging Co., 182 So.2d 764, 766 (La. App. 1st Cir.), writ denied, 184 So.2d 734 (1966). As such, damages based on a claim that a lien was wrongfully filed may be awarded if the wrongful lien recordation was made in bad faith or with malice. See **Sova v. Cove Homeowner's Association, Inc.**, 2011-2220 (La. App. 1st Cir. 9/7/12), 102 So.3d 863, 873.[3]

Furthermore, while the filing of a lien against a property in Louisiana creates a cloud on the title to the subject property, it does not constitute a deprivation or a taking of a significant property interest (or a seizure). See **C.J. Richard Lumber Co., Inc. v. Melancon**, 476 So.2d 1018, 1024 (La. App. 3rd Cir.), writ denied, 478 So.2d 1236 (1985). Rather, the cause of action for damages for wrongful seizure is

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[3] In **Sova**, a case factually similar to the case at bar, a lot owner brought an action for damages against the homeowners association and its insurer pertaining to the legality of fines and penalties imposed by the homeowners association, the homeowners association's repeated harassment of the lot owner, and the homeowners association's unlawful placement of a lien on his property. Thereafter, an issue of the insurer's coverage arose concerning the lot owner's claims against the homeowners association. In determining whether the lot owner's claims could be characterized as defamation (such that the claims constituted personal injuries, thereby falling within the ambit of coverage under the insurer's policy with the homeowners association), this court noted that "[d]amages based on claims of wrongfully filed liens are not awarded unless the wrongful lien recordation was made in bad faith or with malice." **Sova**, 102 So.3d at 873.

We further note that the Association, Mr. Oglesby, and Alcor have specifically urged this Court to adopt the Louisiana Fifth Circuit Court of Appeal's holding in **Peyton Place, Condominium Associates, Inc. v. Guastella**, 2008-0365 (La. App. 5th 5/29/2009), 18 So.3d 132, 152-153—a case involving the Louisiana Condominium Act—and extend that holding to the present case involving the Louisiana Homeowners Association Act. In **Peyton Place, Condominium Associates, Inc.**, the Fifth Circuit, despite finding that the condominium association had wrongfully filed a privilege against a condomimum owner, held that there was no statutory basis for an award of damages under the Louisiana Condomimum Act. Based on this holding, the Association, Mr. Oglesby, and Alcor argue that, since the Louisiana Homeowners Association Act and Louisiana Condominium Act are statutorily similar, this Court should find that there is no statutory basis for an award of damages for their alleged wrongful filing of a lien against Mr. Costanza's property.

While we respect the opinions of our brethren in the Fifth Circuit, we are not bound by their holdings and we specifically decline to extend the holding of **Peyton Place, Condominium Associates, Inc.** to this case involving the Louisiana Homeowners Association Act. First, we note that the Louisiana Homeowners Association Act, specifically La. R.S. 9:1141.8, provides for "damages, injunctions, or such other remedies as are provided by law" when there is a "breach of any obligation imposed on ... the association." Thus, the Louisiana Homeowners Association Act, on its face, provides a statutory basis for an award of damages if the Association breaches an obligation, such as asserting a privilege or lien against an owner's property that is not authorized by law, *i.e.*, by La. R.S. 9:1141.9 and 9:1145-46. In addition, this Court already determined in **Sova**, 102 So.3d at 873 (which involves the Louisiana Homeowners Association Act), that damages based on claims of wrongfully filed liens can be awarded if the wrongful lien recordation was made in bad faith or with malice. Accordingly, we find no merit to the argument of the Association, Mr. Oglesby, and Alcor.

a tort claim based on La. C.C. art. 2315. See **Grocery Supply Company v. Winterton Food Stores**, 31,114 (La. App. 2nd Cir. 12/9/98), 722 So.2d 94, 97. Under La. C.C. art. 2315, "[d]amages for wrongful seizure are allowed after an illegal seizure. This award can include damages in compensation for embarrassment, humiliation, mental anguish, and worry." **Bank of New York Mellon v. Smith**, 2011-0060 (La. App. 3rd Cir. 6/29/11), 71 So.3d 1034, 1045, writ denied, 2011-2080 (La. 11/18/11), 75 So.3d 1034, quoting **Dixie Sav. And Loan Ass'n v. Pitre**, 99-154 (La. App. 5th Cir. 7/27/99), 751 So.2d 911, 921, writ denied, 99-2867 (La. 12/10/99), 751 So.2d 855.

With these precepts in mind, we now turn to an examination of the factual allegations of Mr. Costanza's reconventional and third party demand, as amended. Mr. Costanza asserted that he was a member of the Association and that as such, the Association had an obligation to deal fairly and in good faith with him. He claimed that the Association improperly recorded a lien on his properties, *i.e.*, units S-13 and S-14 in the amount of $63,265.41 and $9,004.00[4] respectively. Mr. Costanza alleged that the whole plan of restrictions created by the Declaration of Servitudes, Conditions, and Restrictions of Tchefuncte Harbour ("initial Declaration") dated June 24, 1998 and recorded in the official records of St. Tammany Parish had been abandoned, and therefore terminated pursuant to La. C.C. art. 782[5], as there had been a great number of violations of all or most of the restrictions specified within that initial Declaration. Mr. Costanza further alleged that all of the amendments to the restrictions, dated December 15, 1988, May 4, 2000, September 8, 2000, and April 3, 2013 (all of which were recorded in the

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[4] See footnote 2.

[5] Louisiana Civil Code article 782 provides that "[b]uilding restrictions terminate by abandonment of the whole plan or by a general abandonment of a particular restriction. When the entire plan is abandoned the affected area is freed of all restrictions; when a particular restriction is abandoned, the affected area is freed of that restriction only."

official records of St. Tammany Parish), were without effect as the amendments were improper in form and there was no evidence of proof in the public records satisfactory to infer that the proper procedure was followed in establishing those amendments as required by the initial Declaration and the Louisiana Homeowners Association Act, La. R.S. 9:1141.1, *et seq*.

In accordance with these allegations, Mr. Costanza claimed that on October 10, 2013, the Association, Mr. Oglesby, and Alcor illegally seized his property and that this seizure was the result of a continuous activity and continuous tort dating back to the original placing of illegal restrictions. He further claimed that the Association, Mr. Oglesby, and Alcor were aware of the subdivision restrictions and that the changes to them were invalid and illegal, and that the invalid and illegal subdivision restrictions caused a substantial burden to Mr. Costanza, specifically by the Association placing a lien on his property. Mr. Costanza alleged that the Association, Mr. Oglesby, and Alcor were in bad faith in placing a lien on Mr. Costanza's property and that the conduct of the Association, Mr. Oglesby, and Alcor offended established public policy and was immoral, unethical, oppressive, unscrupulous, and substantially injurious.

Mr. Costanza further alleged that the Association had a duty to Mr. Costanza (as a member of the Association) to promulgate legal restrictions, that the Association hired Alcor and Mr. Oglesby to advise the association as to the promulgation of legal restrictions, and that the Association, through Mr. Oglesby and Alcor, breached this duty and caused injury to Mr. Costanza. Mr. Costanza claimed that the conduct of the Association, Mr. Oglesby, and Alcor was extreme and outrageous, that Mr. Costanza suffered severe emotional distress, and that the Association, Mr. Oglesby, and Alcor desired to inflict this severe emotional distress or knew that severe emotional distress would be certain to result from their conduct.

Mr. Costanza further asserted that the Association, through Mr. Oglesby and Alcor, had taken illegal means and actions, without authority or legal proceedings in seizing his property, that the Association, Mr. Oglesby, and Alcor were in bad faith, that the Association, Mr. Oglesby, and Alcor had continuously harassed Mr. Costanza over the past several years by attempting to enforce invalid restrictions and rules against him, and that the conduct of the Association, Mr. Oglesby, and Alcor constituted a breach of their duty to deal fairly and in good faith with Mr. Costanza. Mr. Costanza claimed that his injuries, damages, and expenses were caused solely by the fault and/or negligence of the Association.

Accepting all of these allegations in Mr. Costanza's amended reconventional and third party demand as true, as we are required to do for purposes of the exception, we agree with the trial court that Mr. Costanza has not stated a cause of action against the Association, Mr. Oglesby, and Alcor for intentional interference with contractual relations, for improper seizure of the Mr. Costanza's property, and for violating LUTPA. Mr. Costanza's reconventional and third party demand, as amended, contains no allegations regarding the existence of a contract (or breach thereof) between Mr. Costanza and the Association and that a corporate officer of the Association induced or caused the Association to breach the contract without justification. Additionally, although Mr. Costanza asserted that his property was improperly seized, there are no specific allegations about what property was seized and why such seizure was wrongful or improper. As noted above, the filing of a lien does not constitute a deprivation or a taking of a significant property interest (or a seizure). See **C.J. Richard Lumber Co., Inc.**, 476 So.2d at 1024. Likewise, while Mr. Costanza asserted that the Association, Mr. Oglesby, and Alcor engaged in conduct that was immoral, unethical, oppressive, unscrupulous, and substantially injurious, the petition contains no allegations that the Association, Mr. Oglesby, and Alcor acted in such a manner in the course of trade or commerce. Absent

such allegations, we cannot say that Mr. Costanza has stated a cause of action against the Association, Mr. Oglesby, and Alcor for intentional interference with contractual relations, improper seizure, or violating LUTPA. Accordingly, we find no error in the judgment of the trial court insofar as it sustains the peremptory exception raising the objection of no cause of action with respect to Mr. Costanza's claims for intentional interference with contractual relations, improper seizure of property, and violations of LUTPA. Therefore, we affirm that portion of the October 1, 2014 judgment.

However, we do find that Mr. Costanza has stated a cause of action for damages against the Association, Mr. Oglesby, and Alcor for wrongfully recording an improper lien on Mr. Costanza's property, breaching its duty to deal fairly and in good faith with Mr. Costanza, attempting to enforce invalid restrictions and rules, and intentional infliction of emotional distress. Mr. Costanza's factual allegations establish that the Association, Mr. Oglesby, and Alcor owed Mr. Costanza, a member of the Association, a duty of good faith and fair dealing. The petition further alleged that the Association, Mr. Oglesby, and Alcor breached this duty by harassing him, by attempting to enforce restrictions against him that had been abandoned by law (and which the Association, Mr. Oglesby, and Alcor knew had been abandoned), and by filing an improper lien against his properties in bad faith because said liens were imposed based on restrictions that had been abandoned and were not enforceable. Moreover, the petition alleged that the breach of this duty by the Association, Mr. Oglesby, and Alcor caused Mr. Costanza specific injuries and damages, including severe emotional distress. Accordingly, we find that the trial court erred in sustaining the peremptory exception raising the objection of no cause of action with respect to Mr. Costanza's claims against the Association, Mr. Oglesby, and Alcor for placing an improper lien on his property, breaching the duty of good faith and fair dealing, attempting

to enforce invalid restrictions and rules, and intentional infliction of emotional distress. Therefore, we reverse that portion of the October 1, 2014 judgment.

Last, although Mr. Costanza has not challenged the trial court's determination that "any claim for alleged conduct that occurred before November 18, 2012" was prescribed, we note that at the time the trial court made this determination, it had already dismissed Mr. Costanza's claims against the Association, Mr. Oglesby, and Alcor. Therefore, the issue of prescription was moot and should not have been considered by the trial court. See **First National Bank of Picayune v. Pearl River Fabricators, Inc.**, 2006-2195 (La. 11/16/07), 971 So.2d 302, 307-308 (an issue is moot when a judgment on that issue has been deprived of practical significance or made abstract or purely academic.) In addition, we note that the record lacks the appropriate evidence that would allow us (or the trial court) to resolve the issue of prescription.[6] Therefore, we vacate that portion of the October 1, 2014 judgment sustaining the peremptory exception raising the objection of prescription with respect to any claim for conduct occurring before November 18, 2012.

This matter is remanded for further proceedings consistent with the views expressed in this opinion. See La. C.C.P. art. 2164 (providing that the "appellate court shall render any judgment which is just, legal, and proper upon the record on appeal.").

CONCLUSION

For all of the above and foregoing reasons, the October 1, 2014 judgment of the trial court is affirmed insofar as it sustained the objection of no right of action and dismissed Mr. Costanza's claims for intentional interference with contractual relations, improper seizure of property, and violations of LUTPA. The judgment is

[6] The record does not reflect that an evidentiary hearing was conducted with respect to the objection of prescription.

reversed insofar as it sustained the objection of no cause of action and dismissed Mr. Costanza's claims against the Association, Mr. Oglesby and Alcor for wrongfully recording an improper lien on his property, breaching its duty to deal fairly and in good faith with Mr. Costanza, attempting to enforce invalid restrictions and rules, and intentional infliction of emotional distress. That portion of the judgment sustaining the objection of prescription and dismissing Mr. Costanza's claims with respect to any claim for conduct occurring before November 18, 2012 is vacated. This matter is remanded for further proceedings.

All costs of this appeal are assessed to the Tchefuncte Harbour Townhome Association, Inc., Albert Oglesby, and The Alcor Group, LLC.

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; AND REMANDED.