

STATE OF LOUISIANA  
COURT OF APPEAL  
FIRST CIRCUIT

2017 CA 0434

VANGUARD VACUUM TRUCKS, L.L.C.

VERSUS

MID-AMERICA RESOURCES CORPORATION

Judgment rendered NOV 01 2017

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On Appeal from the  
Thirty-Second Judicial District Court  
In and for the Parish of Terrebonne  
State of Louisiana  
No. 169,189

The Honorable David W. Arceneaux, Judge Presiding

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Timothy C. Ellender, Jr.  
Houma, LA

Attorney for Plaintiff/Appellee  
Vanguard Vacuum Trucks, L.L.C.

Joseph P. Brantley, IV  
Baton Rouge, LA  
And  
Stephen C. Hanemann  
Zoe W. Vermeulen  
New Orleans, LA

Attorneys for Defendant/Appellant  
Mid-America Resources Corporation

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**BEFORE: HIGGINBOTHAM, HOLDRIDGE, PENZATO, JJ.**

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## **HOLDRIDGE, J.**

In this lawsuit on an open account, defendant, Mid-America Resources Corporation (Mid-America), appeals a summary judgment awarding plaintiff, Vanguard Vacuum Trucks, L.L.C. (Vanguard), the principal amount due on the account, finance charges, attorney's fees, and costs of the proceeding. Mid-America filed a peremptory exception raising the objection of prescription for the first time in this court, to which Vanguard responded with a motion to supplement the record with evidence relating to the prescription objection. For the reasons that follow, we deny the motion to supplement the record and remand the matter to the district court to permit the parties to introduce evidence on the prescription objection.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On March 28, 2013, Vanguard filed a petition on an open account pursuant to La. R.S. 9:2781 *et. seq.* against Mid-America. Vanguard alleged that it maintained an open account with Mid-America and that Mid-America failed to pay the balance owed on the account. Vanguard further alleged that Mid-America was indebted to it in the principal amount of \$31,574.00, together with finance charges in the amount of 18% per annum on all invoices 30 days past due, reasonable attorney's fees, and costs of the proceeding. To the petition, Vanguard attached five invoices dated from July 31, 2008, through September 30, 2009, the affidavit of its president attesting to the correctness of the account, and a demand letter it wrote to Mid-America on January 23, 2012. After a preliminary default judgment was rendered against Mid-America, Mid-America answered the petition, essentially denying the allegations and setting forth four affirmative defenses.

On July 11, 2016, Vanguard filed a motion for summary judgment, seeking to recover the amounts set forth in its petition. Vanguard later filed an amended

motion for summary judgment, to which it attached the affidavit of its president regarding the correctness of the account as “Exhibit A” and seven alleged past-due invoices, dated from July 31, 2008, through September 30, 2009, as “Exhibit B.”

A hearing on the amended motion for summary judgment was held, at which Mid-America failed to appear. Vanguard offered Exhibits A and B, the documents attached to its amended motion for summary judgment, in support of the motion. Finding there was no genuine issue of material fact and that Vanguard was entitled to judgment as prayed for, the district court granted Vanguard’s motion for summary judgment. On December 22, 2016, the district court signed a judgment against Mid-America awarding Vanguard the sum of \$31,574.00, finance charges in the amount of 18% per annum on all invoices 30 days past due, attorney’s fees equal to 15% of principal and interest, and costs of the proceeding.

From this judgment, Mid-America appeals, contending that summary judgment was improper for the following reasons: (1) service of Vanguard’s amended motion for summary judgment was defective because Vanguard sought to have Mid-America served through an attorney who was not counsel of record at the time; (2) the demand letter did not correctly set forth the amount owed, and thus, the attorney fee award was in error; and (3) the invoices did not indicate that there would be any finance charges for past due payments, making the award of finance charges improper. In response, particularly with respect to the third assignment of error, Vanguard concedes that it was not entitled to judgment for finance charges, noting that at the time the invoices in question were incurred, it did not specify finance charges due and owing on delinquent accounts. Thus, Vanguard asserts that the judgment should be amended by this court to remove the order for the payment of finance charges.

Mid-America also filed a peremptory exception raising the objection of prescription for the first time in this court. Therein, it asserts that Vanguard's suit is subject to a three-year prescriptive period provided for in La. C.C. art. 3494(4), and that the lawsuit has prescribed because it was filed on March 28, 2013, more than three years after the date of the last invoice sued upon, September 30, 2009. Vanguard filed a motion to supplement the record to include two checks written to it by Mid-America on May 9, 2011, and June 25, 2011, along with a May 13, 2011 accounts receivable open invoice report and an accounts receivable detail report from May 1, 2011 to June 30, 2011, referencing invoices issued to Mid-America. Vanguard insists this evidence demonstrates that prescription has been interrupted, making this lawsuit timely. Vanguard asks this court to order that the documents "be deemed admitted into evidence."

Appellate review is limited to the record. La. C.C.P. art. 2164. This court cannot consider evidence submitted in connection with a peremptory exception filed for the first time in this court. **Robinson v. Ieyoub**, 97-2204 (La. App. 1 Cir. 12/28/98), 727 So.2d 579, 582, writs denied, 99-0933, 99-0981 (La. 9/17/99), 747 So2d 1096, 1097. The evidence offered by Vanguard in opposition to the prescription objection does not appear in the record, and this court may not consider it in ruling on Mid-America's prescription objection. Accordingly, Vanguard's motion to supplement the record is denied.

Louisiana Code of Civil Procedure article 2163 allows an appellate court to consider a peremptory exception filed for the first time in that court "if proof of the ground of the exception appears of record." The only evidence in the record which could relate to prescription are the invoices introduced by Vanguard, all of which are dated more than three years from the date of the lawsuit. While the face of the invoices indicate that the lawsuit may be prescribed, Vanguard is entitled to

demonstrate that a suspension, interruption, or renunciation of prescription has occurred. We believe that the interests of justice demand that we remand the matter to permit the parties to develop evidence on the prescription issue. See La. C.C.P. art. 2164; **LeBlanc v. City of Donaldsonville**, 2003-2533 (La. App. 1 Cir. 10/29/04), 897 So.2d 104, 108; **Willett v. Premier Bank**, 97-187 (La. App. 3 Cir. 6/4/97), 696 So.2d 196, 201.

### **CONCLUSION**

For the foregoing reasons, the motion to supplement the record is denied. The case is remanded to the district court for proceedings consistent with this opinion. Costs of this appeal are to await a final determination in this matter.

**MOTION DENIED; REMANDED**