

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0515

BARRETT W. MAGEE AND MEGAN A. MAGEE

VERSUS

CADIS CONSTRUCTION, LLC

DATE OF JUDGMENT: JAN 11 2018.

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2011-13075, DIVISION A, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE RAYMOND S. CHILDRESS, JUDGE

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Cadis Construction, LLC

BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

Disposition: AFFIRMED IN PART; REVERSED IN PART

McDonald, J. agrees in part and dissents in part and will assign reasons.

CHUTZ, J.

Defendants-appellants, Cadis Construction, LLC (Cadis Construction), Christopher “Chris” Cadis, and Justin Cadis, appeal the trial court’s judgment ordering them to pay the repair costs of the home of plaintiffs-appellees, Barrett “Will” Magee and his wife, Megan, based on a finding that Chris and Justin had committed fraud. The trial court’s judgment further ordered Chris and Justin to pay the Magees’ attorney fees. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

The Magees purchased a newly constructed home, located at 421 Autumn Creek Drive in Madisonville, Louisiana, from Cadis Construction in 2007. By 2008, the Magees noticed issues with sheetrock cracking. Additional problems ensued in the Magees’ new home interior including shifting of the front door jamb such that the deadbolt did not properly align; windows that would not open; tiles that popped out; and grout that shifted off the floor. They also experienced issues on the exterior of their home including cracks in the bricks and stucco. Each time that Megan called Chris, he came out and repaired the problem. But despite Chris’s timely repair, the problem would soon return. An engineer ultimately determined that the foundation of the Magees’ house had a six-inch differential. In February 2011, the Magees discontinued Chris’s attempted repairs, and in May 2011, they filed this lawsuit against Cadis Construction, seeking damages as a result of the failing foundation or, alternatively, for relief under the New Home Warranty Act.¹

When Cadis Construction did not file responsive pleadings, in October 2011, based on research by their attorney, the Magees learned that Cadis Construction was not the construction company that had built the homes which Chris had represented to them he had built prior to their purchase. Rather, the homes had

¹ See La. R.S. 9:3141-3150.

been built by C&C Homebuilders Construction, Inc. (C&C), a different entity owned by Chris.

On November 23, 2011, the Magees amended their petition to name Chris and Justin in their individual capacities as defendants. According to the salient facts of the Magees' amended petition, prior to the sale of the house, they had in-person discussions with Chris about the qualities and construction of the house. They averred that Chris identified himself as the builder of the house with over 20 years of experience in residential home construction, specifically identifying another home in the same subdivision as an example of the quality of his construction. Having learned that the house Chris had identified had actually been built by C&C, the Magees alleged that they would not have purchased the house had they been apprised of the true qualities of Cadis Construction.

Defendants answered the amended petition. Additionally, Chris and Justin filed a peremptory exception raising the objection of no cause of action and a motion for summary judgment. Finding that the Magees' amended petition pled fraud with sufficient specificity, in a judgment signed on May 27, 2015, the trial court overruled the exception of no cause of action and denied the summary judgment dismissal of the Magees' fraud and misrepresentation claims. A peremptory exception raising the objection of prescription that Chris and Justin subsequently filed was referred to the merits.

The matter proceeded to trial after which the trial court rendered judgment in favor of the Magees expressly finding that Chris and Justin had committed fraud. A judgment in the amount of \$92,127.88 was rendered against Cadis Construction, Chris, and Justin, *in solido*. Additionally, the trial court ordered Chris and Justin to

pay attorney fees in the amount of \$30,600.00.² From this judgment, defendants appeal.

FRAUD

According to La. C.C. art. 1953:

Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

Liability:

Chris and Justin assert the trial court erred in imposing liability against them in their respective individual capacities. They maintain the record lacks evidence to support a finding that they committed fraud against the Magees.

The trial court's findings with respect to a claim of fraud are subject to the manifest error standard of review. Under the manifest error standard, a factual finding cannot be set aside unless the appellate court finds that the trier of fact's determination is manifestly erroneous or clearly wrong. In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Lovell v. Blazer Boats Inc.*, 2011-1666 (La. App. 1st Cir. 10/24/12), 104 So.3d 549, 558.

In its written reasons for judgment, the trial court stated:

When [Megan] entered the home, she was met by [Chris], a reputable local builder with 15 to 20 years [of] experience in the area. It was her testimony that he told her he built the home. He showed her the home, and pointed out other homes in the subdivision which he had built. At no time did he disclose that the other homes were built by him through his primary construction company, [C&C]. At no time did he disclose that he did not build the home he was showing, which in fact was the first and only new home construction of a brand new company formed by his two young sons, Justin and Preston. He also

² Expert fees, court costs, and the Magees' deposition and sheriff's fees assessed against Cadis Construction, Chris, and Justin *in solido* have not been appealed.

did not disclose that neither Justin nor Preston, who were 20 and 22 years of age when they built 421 Autumn Creek, had a residential contractor's license.

The Magees liked the home, and met with [Chris] two or three more times before entering [into] negotiations with him. ... After negotiations through the listing agent, they agreed to a purchase price... . On December 28, 2007, they went to the Act of Sale which was attended by Chris and his listing agent[,] Christine Curtis. Though the purchase agreement reflected that the property was being sold by [Cadis Construction], represented by [Chris], at no time during the negotiations or at [the] act of sale did anyone alert or disclose that [Chris] was not [Cadis Construction].

The heart of the defense is that no one ever asked which company built the home. This is ... undercut by confusion concerning the listing agreement. When the Cadis listing agent, Christine Curtis, was later asked by [the Magees'] counsel to produce her file, no listing agreement was produced. ... [H]owever, the agent [subsequently] produced the missing listing agreement, signed by [Chris] as representative of [Cadis Construction] and the broker, dated September 17, 2007. Surprisingly, the form upon which the signatures appeared bore a revision date of 2009, rendering the contemporaneous 2007 signing an impossibility.

Sometime after the sale of the home, Justin and Preston sold the only assets of the company, two lots, to [C&C], effectively shutting down their company. Unknown to the Magees, this left them with a very expensive problem and no sufficiently capitalized builder to rely upon for repairs.

For the reasons set forth by the trial court, a reasonable factual basis exists to support its finding that Chris, in his individual capacity, committed fraud on the Magees. Therefore, this conclusion by the trial court is not manifestly erroneous.

The record, however, is devoid of any evidence to support the trial court's finding that Justin is liable to the Magees for fraud in his individual capacity. Both Megan and Will testified that they did not know Justin even existed at any time prior to the December 28, 2007 sale of the house. While evidence showed that Justin had signed a counteroffer during the negotiation process, Megan stated that she never saw the document, indicating that she believed her realtor verbally conveyed its contents. And Will offered no testimony representing that he had seen Justin's signature. Thus, lacking a reasonable factual basis to support a

finding that, in his individual capacity, Justin committed fraud by a misrepresentation or silence thereby inducing the Magees to purchase the house at 421 Autumn Creek Drive house, the trial court's judgment awarding damages against Justin *in solido* with Cadis Construction and Chris is reversed.³

Prescription:

Urging that any claims for fraud against him individually was subject to a one-year prescriptive period, Chris contends that the Magees had until December 28, 2008, or one year from the date that the act of sale was executed, to institute litigation for relief.

Delictual actions are subject to a liberative prescription of one year which commences to run from the date injury or damage is sustained. La. C.C. art. 3492. Prescription runs against all persons absent an exception established by legislation. La. C.C. art. 3467. This statute, like all prescription statutes, is strictly construed against prescription and in favor of maintaining the cause of action. *Paragon Dev. Group, Inc. v. Skeins*, 96-2125 (La. App. 1st Cir. 9/19/97), 700 So.2d 1279, 1281.

Prescription is generally suspended pursuant to the rule of *contra non valentem* when the circumstances of the case fit within one of the following four categories: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the

³ The Magees contend that the trial court's award against Justin individually can be upheld on the basis that he was Cadis Construction's alter ego. In its May 27, 2015 judgment denying defendants' motion for summary judgment on the fraud and misrepresentation claims, a partial summary judgment was granted and the claims asserted by the Magees against Justin individually on the grounds that Cadis Construction had been operated as his alter ego were dismissed. The Magees did not appeal that judgment; and even if we were to assume that the May 27, 2015 judgment was interlocutory and not immediately appealable, see La. C.C.P. art. 1915B, the Magees neither answered defendants' appeal nor filed a separate appeal. Since the issue of whether Cadis Construction operated as the alter ego of Justin was not within the scope of defendants' appeal, the propriety of the grant of partial summary judgment on that claim is not before us in this review. See *Stafford v. Exxon Mobile Corp.*, 2016-1067 (La. App. 1st Cir. 2/17/17), 212 So.3d 1257, 1263, writ denied, 2017-0447 (La. 4/24/17), 221 So.3d 67 (the filing of an appeal from the judgment of the trial court by another party only brings up on appeal the portions of the judgment that were adverse to that party).

proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff even though his ignorance is not induced by the defendant. *Id.*

Here, we focus on the fourth category of *contra non valentem* commonly referred to as the discovery rule. It provides that prescription runs from the date the plaintiff discovers or should have discovered facts upon which his cause of action is based. In other words, prescription does not accrue against a party ignorant of his rights provided that ignorance is not willful, negligent, or unreasonable. *Id.*

The trial court found that the Magees had no knowledge of the fraud committed by Chris until October of 2011. Therefore, the trial court reasoned that the Magees' amended petition, adding Chris as a defendant, was timely filed on November 23, 2011.

Both Megan and Will testified that they did not learn that Cadis Construction was not the company in which Chris had obtained the 15-20 years of experience he had represented that he had until after they had filed the lawsuit against Cadis Construction in May 2011. Identifying a letter from their attorney to the attorney for Cadis Construction dated October 25, 2011, Megan and Will each testified that it was just before that letter was drafted that they had actual knowledge of the difference in identity between Chris's work for his primary construction company, C&C, and his role as a member in Cadis Construction.

Chris testified that a large construction sign was placed in the yard of 421 Autumn Creek Drive, which identified Justin and Preston as the owners of Cadis Construction, from the time they had cleared the lot. But both of the Magees testified that the sign was not in the yard at any of their visits to the house; only the

sign of the listing real estate agent was present. The Magees' real estate agent's testimony was in conformity with theirs. The trial court was free to reject Chris's testimony to the contrary and conclude that a Cadis Construction sign, indicating that Justin and Preston were the owners of the business that built the 421 Autumn Creek Drive house, was not present so as to have alerted the Magees to the actual identity of the builder of their home prior to October 2011. *See Stobart v. State, Dep't of Transp. and Dev.*, 617 So.2d 880, 882 (La. 1993) (where conflict exists in the testimony, the factfinder's reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review).

Because the Magees' testimony supports the trial court's factual finding that they had no knowledge of the fraud committed by Chris until October of 2011, it is not manifestly erroneous. As such, we find no error in the trial court's conclusion that the Magees' claim for fraud against Chris is not prescribed.

Damages:

Chris and Cadis Construction assert that the trial court's award of \$92,127.88 is not supported by the record. They contend, therefore, that the award should be reduced.

Special damages are those which have a "ready market value," such that the amount of the damages theoretically may be determined with relative certainty. A reviewing court should not set aside an award of special damages unless the award was based on factual findings that are found to be manifestly erroneous. *Welch v. Planning & Zoning Comm'n of East Baton Rouge Parish*, 2016-0751 (La. App. 1st Cir. 4/26/17), 220 So.3d 74, 79.

Matthew Lamp, a general contractor and the owner of a property development business, was admitted as an expert in project estimation, residential construction, and restoration. In an itemized estimate, Lamp testified that to return the Magees' home to a habitable condition would cost \$105,308.51. During cross-

examination, Lamp conceded that \$3,535.00 in material sales tax and approximately \$1,565.00 in labor sales tax should not have been included into his estimate. Lamp also admitted that 10% of profit on work already performed and 5% on loss of material on already-proved materials, which he calculated was \$8,080.00, were also incorrectly included in the estimate. The trial court deducted these amounts from the original estimate to reach its award of \$92,127.88.

We find no merit in the assertion by Chris and Cadis Construction that the record is devoid of proof of the actual sales tax owed. Lamp explained he used sales tax of 8.25%, the rate levied in Tangipahoa Parish. Although these defendants complain because the Magees' house is located in St. Tammany Parish, they failed to establish that the Magees could not purchase their materials from the neighboring parish. Moreover, Lamp stated that he underestimated the tax rate because it is more in St. Tammany Parish than the 8.25% he used in his estimate and this testimony was not rebutted. The trial court's award is not manifestly erroneous on the basis of a lack of proof of the tax rate.

Chris and Cadis Construction next contend that the entire category for loss of material of 5% should also be disallowed. In explaining this item, Lamp testified that the estimate he offered was for exact measurements and that this charge recognizes a contractor has to purchase more material than needed since all of it does not come in exact measurements. He explained that not every item will experience loss; the 5% estimate is the standard factor he uses to average out the losses. Lamp's testimony supports the trial court's inclusion of loss of material of 5% and, therefore, it is not manifestly erroneous.

In their final challenge of the trial court's award of damages, Chris and Cadis Construction assert that because the Magees had already paid for an engineering assessment, leveling of the foundation by a shoring company, and yard and sod work, the inclusion of profits and overhead in the damage award was

improper. Lamp stated that, in his opinion, the Magees were owed the profit and overhead on the amounts they had already expended for their efforts in acting as their own general contractor. The expert testimony supports the inclusion of this item of damages and, therefore, it was not manifestly erroneous.

The trial court reduced the estimate by \$13,180.63 to reflect amounts that Lamp acknowledged were not properly included. Because a reasonable factual basis exists for trial court's award of special damages in the amount \$92,127.88, it was not manifestly erroneous and will not be disturbed on appeal.

Attorney Fees:

The trial court awarded the Magees the amount of \$30,600.00 in attorney fees against Chris and Justin individually. Since we have reversed the imposition of liability against Justin in his individual capacity, the trial court erred in awarding attorney fees against him on the basis of fraud, the award is reversed.

Chris urges that liability founded on fraud does not provide a basis for an award of attorney fees against him individually. We agree.

Under Louisiana law, attorney fees are not allowed except where authorized by statute or contract. *Ballex v. Municipal Police Employees' Retirement System*, 2016-0905 (La. App. 1st Cir. 4/18/17), 218 So.3d 1076, 1087, writ denied, 2017-00822 (La. 9/22/17). Although La. C.C. art. 1958 permits attorney fees in favor of the party who is granted a rescission because of fraud, in this case Chris in his individual capacity was not a party to the contract between the Magees and Cadis Construction. Therefore, rescission of the contract against Chris, who was a third party to the contract between the Magees and Cadis Construction, could not have been the basis for the award of attorney fees. See and compare *Stutts v. Melton*, 2013-0557 (La. 10/15/13), 130 So.3d 808, 814 (permitting purchaser who sought replacement value rather than rescission of the contract to recover attorney fees where the builder/seller of a home committed fraud). Instead, Chris's liability was

based on the conclusion that he had committed fraud upon the Magees by his silence and/or misrepresentation that he had obtained 15-20 years of experience as a residential builder through Cadis Construction thereby inducing the Magees to enter into the contract. Thus, the trial court determined that the Magees' action was based on the quasi-delict of fraud. Since there is no recovery of attorney fees in quasi-delictual actions, it was error for the trial court to impose such an award. See Litvinoff, Saul, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 1, 77 (1989). Accordingly, the award of attorney fees in the amount of \$30,600.00 against Chris is reversed.⁴

DECREE

For these reasons, that portion of the trial court's judgment, which awards damages in the amount of \$92,127.88 against Cadis Construction and Chris is affirmed. The portion of the judgment, which awards damages in the amount of \$92,127.88 against Justin *in solido* with Cadis Construction and Chris, is reversed. The portion of the judgment, which awards attorney fees against Chris and Justin, is reversed. Appeal costs are assessed three-fourths against Cadis Construction, LLC, Christopher Cadis, and Justin Cadis and one-fourth against Barrett and Megan Magee.

AFFIRMED IN PART; REVERSED IN PART.

⁴ Having failed to either answer the appeal or file a separate appeal, the Magees' assertion that Chris is, alternatively, liable for attorney fees in his individual capacity on the basis that he was Cadis Construction's alter ego is without merit. See n.3, *supra*.

STATE OF LOUISIANA

COURT OF APPEAL

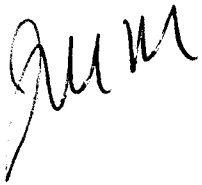
FIRST CIRCUIT

NO. 2017 CA 0515

BARRETT MAGEE

VERSUS

CADIS CONSTRUCTION



McDONALD, J., dissenting in part:

I respectfully dissent from the majority's conclusion that Chris Cadis committed fraud and would reverse the trial court's judgment as to Chris as well as Justin. I do not think the Magees proved that Chris *or* Justin Cadis committed fraud.

There are three basic elements to an action for fraud: (1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to the other party; and (3) the resulting error must relate to a circumstance substantially influencing the other party's contractual consent. *GE Comm. Fin. Bus. Prop. Corp. vs. Louisiana Hosp. Ctr., L.L.C.*, 13-0029 (La. App. 1 Cir. 9/13/13), 134 So. 3d 616, 621.

I think the trial court manifestly erred in finding that Chris Cadis failed to disclose that he was not Cadis Construction and that he did not build the house he showed to the Magees. To the contrary, the record shows that Chris Cadis *was* a member of Cadis Construction when the Magees' house was built and shown to them. Chris Cadis was an experienced builder, he told the Magees what his experience was, and the record shows that he was involved in the construction of the Magee house to the same extent he would have been had his other company built it. Mrs. Magee admitted that she did not know what work Chris Cadis did on the house. The record indicates that he supervised the lot clearing and the preparation and pouring of the slab. It was the slab that was defective. The Magees wanted an experienced builder and that is what they got with Chris Cadis. The failure of the slab is very unfortunate, but Chris is the one who supervised its construction. I find no evidence that he misrepresented anything to the Magees.

For these reasons, I would reverse the trial court's judgment entirely.