STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 1258

WARD'S CREEK INVESTORS, L.L.C.

VERSUS

L & C BATON ROUGE, L.L.C.

Judgment Rendered: MAY 24 2019

* * * * * *

On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 642338

Honorable Richard "Chip" Moore, III, Judge Presiding

* * * * * *

Thomas D. Fazio
Baton Rouge, Louisiana

Counsel for Plaintiff/Appellant
Ward's Creek Investors, L.L.C.

Irl R. Silverstein
David A. Silverstein
Gretna, Louisiana

Counsel for Defendant/Appellee
L & C Baton Rouge, L.L.C.

* * * * * *

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

Higginbotham, J. dissents without reasons.
Whipple, C.J. concurs, noting the result is correct in light of the strong public records doctrine in Louisiana.

McCLENDON, J.

This appeal arises from an action for declaratory judgment and reformation of an instrument that was dismissed upon the trial court's determination that the action had prescribed at the time it was filed, and a trial court judgment denying plaintiff's motion for new trial on the issue of prescription. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Ward's Creek Investors, L.L.C. ("Ward's Creek"), and defendant, L & C Baton Rouge, L.L.C. ("L&C"), are landowners of two adjacent and contiguous properties. R. 3-4. The properties were encumbered by an Act of Restrictive Covenants and Servitude Agreement ("Restrictions") dated September 24, 1997, between Essen Park, L.L.C., predecessor in title to Ward's Creek of the "Essen Parcel," and Sears, Roebuck & Co., predecessor in title to L&C of the "Sears Parcel." Exhibit J-1. The Restrictions were recorded as Original 108, Bundle 10827 of the official records of East Baton Rouge Parish, Louisiana. Exhibit J-1. Pertinent to this appeal, the Restrictions limit the aggregate floor area of any building constructed on the Essen Parcel to 2,500 square feet, and require that fifteen parking spaces be available at all times. With respect to floor area used for a restaurant, the Restrictions require fifteen parking spaces per 200 square feet. Exhibit J-1.

Ward's Creek was formed in 1999 by Kenneth Johnson, William Ball and Dr. Charles Mitchell for the purpose of acquiring land to market and develop. R. 63-67, 79. With this intent, Ward's Creek acquired the Essen Parcel and several other pieces of property in a cash sale executed on February 14, 2001. Exhibit J-3. Ward's Creek considered numerous possibilities for the development of the Essen Parcel during the next twelve years, though none came to fruition.

In July of 2013, Mr. Johnson on behalf of Ward's Creek sent a letter to Mr. Robert Caplan, the principal of L&C, regarding possibilities for the development of the Essen Parcel. The letter also detailed Mr. Johnson's concern that the parking requirements contained in the Restrictions would pose significant difficulties in developing the property, particularly if the property was developed for restaurant use. R. 74. Exhibit P-4. Specifically, the problem Mr. Johnson had identified was that the

Restrictions as written would require 187 parking spaces for a restaurant building measuring 2,500 square feet. R. 3-7. The Essen Parcel is 0.373 acres, or 16,248 square feet, and 188 parking spaces would cover 30,456 square feet. R. 6, 71. Thus, Mr. Johnson reasoned that the Restrictions must have been intended to provide for fifteen parking spaces per 2,000 square feet of restaurant space, instead of fifteen parking spaces per 200 square feet; otherwise, the Restrictions would technically allow restaurant use of the Essen Parcel, but prohibit restaurant use as a practical matter due to the parking space requirements. R. 6, 71-73. Mr. Johnson therefore sought an agreement from Mr. Caplan to amend the Restrictions to provide for fifteen parking spaces per 2,000 square feet for restaurant buildings, rather than fifteen parking spaces per 200 square feet of restaurant buildings. R. 6. Exhibit P-4.

L&C refused to execute the Act of Correction, contending that there was no typographical error or mistake in the Restrictions as written because restaurant use on the Essen Parcel was never envisioned. R. 6.

Ward's Creek filed a *Petition for Declaratory Judgment and Reformation of Instrument* on September 16, 2015, seeking judgment declaring that a mutual mistake and error was made by the parties at the time the Restrictions were recorded, and seeking reformation of the Restrictions to provide for fifteen parking spaces per 2,000 square feet of restaurant space. R. 3-7. Ward's Creek argued that the Restrictions could not have been intended to explicitly permit restaurant use and simultaneously preclude restaurant use by means of the parking restrictions, and therefore the Restrictions as written clearly contained a typographical error or mistake.

L&C filed an *Exception of Prescription* on November 5, 2015. R. 21. L&C argued that the presence of the Restrictions in the public record charged Ward's Creek with knowledge of the Restrictions and their contents from the date it acquired the Essen Parcel on February 14, 2001. L&C concluded that any action for reformation of the Restrictions would have been a personal action subject to liberative prescription of ten years, and would have prescribed ten years after the February 14, 2001 acquisition date, before suit was filed. Exhibit J-3; R. 21-22.

Ward's Creek opposed the Exception, arguing that the prescriptive period did not begin to run until Ward's Creek discovered the mistake, or should have discovered the mistake through due diligence. R. 26-28. Ward's Creek argued that the alleged mistake did not become apparent until it began investigating the feasibility of restaurant use on the Essen Parcel and mathematical calculations were made in 2008, less than ten years before the filing of the 2015 lawsuit, and therefore the action for reformation had not prescribed. R. 26-28.

Following a hearing, the trial court granted the Exception of Prescription in a judgment dated December 19, 2017. R. 40.

Ward's Creek filed a Motion for New Trial on December 29, 2017, arguing that the December 19, 2017 judgment indicated that the trial court had incorrectly applied the burden of proof applicable to the merits of the reformation claim in deciding the issue of prescription. R 41-42. [1]

L&C opposed the Motion for New Trial, arguing again that Ward's Creek had constructive knowledge of the Restrictions pursuant to the public records doctrine and therefore the trial court properly granted the Exception of Prescription. L&C also requested that the trial court *sua sponte* amend the December 19, 2017 judgment to provide that the matter be dismissed based on its grant of the Exception of Prescription, as the December 19, 2017 judgment did not contain language specifically dismissing the matter. R. 40, 46-47.

The trial court denied the Motion for New Trial in a judgment dated April 18, 2018. R. 48. The April 18, 2018 judgment included a provision confirming the grant of the Exception of Prescription and dismissing the matter with prejudice. R. 48.

---

[1] The December 19, 2017 judgment at issue reads in pertinent part:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Peremptory Exception of Prescription filed by the defendant in this matter is GRANTED.
>
> This Court finds that this action for reformation of an instrument executed in 1997 has prescribed. This Court determines that, per *Agurs v. Holt*, 95 So. 2d 644 (La. 1992), Plaintiff has not met its burden of proof regarding establishing mutual error and mistake of the alleged typographical error through clear and convincing evidence.

From this judgment, Ward's Creek appealed, asserting the following assignments of error:

(1) The trial court erred as a matter of law in holding Ward's Creek to a burden of proof that would be applicable to the merits of the reformation claim in a hearing on an Exception of Prescription.

(2) By applying the wrong burden of proof, the trial court erred in failing to make factual findings relating to the issue of prescription and in failing to hold that the discovery rule is applicable to L&C's claim of prescription such that Ward's Creek's claim is not prescribed.

DISCUSSION AND ANALYSIS

We consider this appeal of the denial of a motion for new trial as an appeal of the judgment on the merits as well, as it is clear from the appellant's brief that he intended to appeal the merits of the case. See *Carpenter v. Hannan*, 2001-0467 (La. App. 1 Cir. 3/28/02), 818 So.2d 226, 228–29, *writ denied*, 2002-1707 (La. 10/25/02), 827 So.2d 1153. R. 46-47, 49, Plaintiff's Brief p. 1-2.[2]

When prescription is raised by peremptory exception, with evidence being introduced at the hearing on the exception, the trial court's findings of fact on the issue of prescription are subject to the manifest error-clearly wrong standard of review. *London Towne Condo. Homeowner's Ass'n v. London Towne Co.*, 2006-401 (La. 10/17/06), 939 So. 2d 1227, 1231. Under the manifest error standard of review, a factual finding cannot be set aside unless the appellate courts finds that it is manifestly erroneous or clearly wrong. *Id.* 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. *Id.* The appellate court must not re-weigh the evidence or substitute its own factual findings because it would have decided the case differently. *Id.* Where there are two permissible

[2] We note that the December 19, 2017 judgment was not a final appealable judgment. The trial court may revise non-final judgments at any time prior to rendition of a final judgment. Accordingly, the amended judgment of April 18, 2018 cured the jurisdictional defect posed by the December 19, 2017 judgment. See *In re Interdiction of Metzler*, 189 So.3d at 469; *Templet v. State ex rel. Dept, of Public Safety and Corrections,* 05–1903 (La.App 1 Cir. 11/3/06), 951 So.2d 182, 187; *Metzler*, 2017-0615 (La. App. 1 Cir. 4/4/18), *writ denied sub nom. Interdiction of Metzler*, 2018-0720 (La. 9/14/18), 252 So. 3d 479.

views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *Id.*

Although the exceptor generally bears the burden of proof at the trial of the peremptory exception, when prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show that the action has not prescribed. *Allen v. State*, 2005-1076 (La. App. 1 Cir. 5/5/06), 934 So.2d 172, 174, *writ denied,* 2006-1218 (La. 9/15/06), 936 So.2d 1272. Ward's Creek does not dispute that prescription is evident on the face of the petition and that it bears the burden of proving the claim for reformation has not prescribed. Plaintiff's Brief p. 9.

The law respecting reformation of instruments is well settled here and elsewhere. It is an equitable remedy and lies only to correct mistakes or errors in written instruments when such instruments, as written, do not express the true contract of the parties. *Agurs v. Holt*, 232 La. 1026, 1031, 95 So.2d 644, 645 (1957). It is a personal action, even when applied to real estate, in which the burden is on the one seeking reformation to establish the mutual error and mistake by clear and convincing proof, parol evidence being admissible for this purpose. *Agurs*, 232 La. at 1031-32, 95 So.2d at 649. As a personal action, an action for reformation of instruments is governed by the ten year-liberative prescription provided by Article 3499 of the Civil Code. *Id.*[3] It is well established that this prescription does not begin to run against the party having the right to seek reformation until the error or mistake is discovered by him or should have been discovered by the use of due diligence. *Agurs*, 232 La. at 1040, 95 So.2d at 649.

Thus, the burden on Ward's Creek at the trial of the hearing of the exception of prescription was to show that the alleged error or mistake was not discovered, and should not have been discovered, by Ward's Creek more than ten years prior to the date this action was filed.

In this appeal, Ward's Creek contends that the trial court incorrectly applied the clear and convincing burden of proof applicable to the merits of the claim for

---

[3] Current Louisiana Civil Code Article 3499 was designated as Article 3544 at the time *Agurs* was decided.

reformation at the hearing on the Exception of Prescription. Ward's Creek further argues that a letter from Mr. Johnson to his attorney dated December 2008 is evidence that Ward's Creek did not discover that the parking space requirements contained in the Restrictions would affect possible restaurant retail developments on the Essen Parcel until December of 2008. R. 70-73. Exhibits P-3, P-4.[4] Ward's Creek contends that in granting the Exception of Prescription, the trial court failed to properly apply the discovery rule set forth in *Agurs*, and that this legal error warrants this Court's *de novo* review of this matter. Plaintiff's Brief p. 8-10.

In response, L&C contends that it is disingenuous for Ward's Creek to argue that the trial court applied the wrong burden of proof because that issue was discussed at the hearing on the motion for new trial. R. 116. L&C also argues extensively that there is a legal presumption that knowledge of the Restrictions and their contents was imputed to Ward's Creek at the time Ward's Creek acquired the Essen Parcel in 2001 pursuant to the public records doctrine, such that any claim for reformation had prescribed within ten years of the 2001 acquisition. Defendant's Brief p. 7-10.

Having reviewed the record of this matter in its entirety, we find that it is unnecessary to determine whether the December 19, 2017 judgment indicates that the trial court committed legal error as alleged by Ward's Creek, and it is likewise unnecessary to consider this matter in light of the public records doctrine as argued by L&C. It is the finding of this Court that whether this Court applies the *de novo* standard of review or the manifest error standard of review, Ward's Creek should have discovered the alleged mutual error through the use of due diligence at the time Ward's Creek acquired the Essen Parcel.

At the hearing on the Exception of Prescription, Mr. Johnson testified that there were no specific plans for the Essen Parcel in 2001, though Mr. Johnson's testimony also made clear that the possibility of building a restaurant on the Essen Parcel arose repeatedly over the years. R. 66. In 2001, at the time Ward's Creek acquired the Essen Parcel, Ward's Creek was presented with an offer from Waffle House to purchase the

[4] This letter speculated that the parking requirements contained a typographical error. R. 70-73. Exhibit P-3.

property for the purpose of building a restaurant. This offer was declined. R. 67, 80. In 2006, Ward's Creek considered developing the Essen Parcel for a Jack in the Box, a CC's Coffee, or a Jiffy Lube. R. 69-70, 74. Exhibits P-1 and P-2. In 2008, the Veterans' Administration Clinic approached Ward's Creek seeking to lease land for additional parking. Also in 2008, Starbucks presented Ward's Creek with a proposal to develop a restaurant on the Essen Parcel. R. 70-74. Exhibit P-4. None of these possible developments came to fruition for a variety of reasons.

Mr. Johnson conceded that due diligence in a commercial real estate purchase would include examining recorded documents affecting the subject property and reviewing a title report drafted by attorneys regarding the subject property. Though Mr. Johnson did not specifically recall reviewing the title report on the Essen Parcel or reading the Restrictions prior to the acquisition, he testified that he likely had read the documents in question prior to acquiring the property. R. 78-82. Mr. Johnson testified that if he did read the Restrictions at the time of acquisition, he did not "process [the Restrictions] that way" and "didn't do the math" necessary to realize the significance of the Restrictions. R. 78-86. His explanation for this was that at the time Ward's Creek acquired the Essen Parcel, he "had bigger fish to fry" and he "relied on the zoning."[5] R. 82. The "bigger fish" was developing the property behind the Essen Parcel. R. 82. Mr. Johnson's "reli[ance] on the zoning" was interpreting the offer from Waffle House as evidence that Waffle House had already verified that the Essen Parcel was appropriate for restaurant use. R. 82-84. In sum, Ward's Creek was "not focused" on the Essen Parcel at the time Ward's Creek acquired the Essen Parcel. R. 84.

Mr. Johnson testified that he has an MBA in Finance and that he has been a real estate developer for "quite some time." R. 63, 78. Similarly, though Mr. Johnson's partner Dr. Charles Mitchell is a "passive investor," as a medical doctor, Dr. Mitchell is obviously well-educated. R. 75. Neither can be considered an unsophisticated party. As detailed above, the possibility of developing the Essen Parcel, and specifically the possibility of developing the Essen Parcel for restaurant use, was evident and in

[5] The record is clear that the property was "zoned" to allow for commercial use, inclusive of restaurant development. R. 84.

consideration at the time the property was acquired. This fact is highlighted by the offer from Waffle House to purchase the property during that time period. Even a less sophisticated party should have been prompted to investigate the feasibility of developing the Essen Parcel for restaurant use. Despite the numerous times the possibility of restaurant development on the Essen Parcel arose during the period between 2001 and 2015, Ward's Creek did not seriously analyze the burdens placed on the Essen Parcel by the Restrictions until 2008 and did not contact Mr. Caplan about the parking requirements in the Restrictions until July of 2013. Had Ward's Creek exercised due diligence and investigated and inquired into the matter of the parking space requirements upon acquisition of the property, it could have brought an action to reform the instrument and been well within the ten-year liberative prescription period. Appellants presented no evidence establishing that the parking restrictions for restaurant use were not readily discoverable.

CONCLUSION

At one point Mr. Johnson stated that Ward's Creek would get to the Essen Parcel "at a later day." R. 80-82. The "later day" was more than twelve years after acquiring the Essen Parcel in 2001. R. 74. Exhibit P-4. We cannot find that a sophisticated party may be relieved of his duties of due diligence because he has multiple demands on his attention and because he fails to investigate issues as they arise.

For these reasons, the judgment of the trial court granting the Exception of Prescription and dismissing this matter with prejudice is affirmed.

AFFIRMED.