

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2020 CA 0677

ZACHARY CANIK AND KAYLA CANIK

VERSUS

SU CASA BUILDER, LLC

**Judgment Rendered: DEC 30 2020**

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On appeal from the  
Twenty-first Judicial District Court  
In and for the Parish of Livingston  
State of Louisiana  
Docket Number 153564

Honorable Elizabeth P. Wolfe, Judge Presiding

\* \* \* \* \*

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\* \* \* \* \*

BEFORE: GUIDRY, McCLENDON, AND LANIER, JJ.

*Handwritten notes:*  
Jm  
Pmc by [signature]  
WIL FII by [signature]

**GUIDRY, J.**

The plaintiffs appeal a judgment granting the defendant's exception of no cause of action, exception of peremption/prescription, and motion for judgment on the pleadings. For the reasons that follow, we affirm.

**FACTS AND PROCEDURAL HISTORY**

Plaintiffs, Zachary and Kayla Canik, purchased a newly constructed home from defendant, Su Casa Builder, L.L.C., on August 16, 2013. Thereafter, on October 13, 2016, the plaintiffs filed a petition for damages against the defendant under the Louisiana New Home Warranty Act (NHWA). The plaintiffs alleged the home contained hidden defects, which were known or should have been known by the defendant. They further alleged the home contained defects in materials or workmanship not regulated by building standards and that such defects caused actual damage to the home. The plaintiffs sought actual and special damages, including but not limited to, costs for remediation and repair, inconvenience, mental and emotional distress, additional living expenses, and attorneys' fees and costs.

The defendant answered the petition, generally denying the allegations therein.<sup>1</sup> Thereafter, on September 27, 2019, nearly three years after answering the suit, the defendant filed an exception of no right of action, exception of no cause of action, exception of peremption and prescription, and motion for judgment on the pleadings.

A contradictory hearing was held on October 21, 2019; judgment was signed on October 25, 2019. The trial court's ruling denied the defendant's exception of no right of action, and granted the defendant's exceptions of no cause of action and peremption/prescription and motion for judgment on the pleadings. The plaintiffs are now before this court appealing. The plaintiffs assert that: (1) the trial court erred

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<sup>1</sup> The defendant supplemented its answer to the petition on May 15, 2017.

in granting the defendant's exception of peremption and prescription; (2) the trial court erred in dismissing the case because the plaintiffs failed to provide written notice of the alleged defects by certified mail; and (3) the trial court erred in granting the defendant's exception of no cause of action dismissing plaintiffs' damage claims for the cost of repair/cleaning of the mold, loss of use of the home, and other direct damages. The plaintiffs also assert that the trial court erred in granting the defendant's motion for judgment on the pleadings. The defendant filed an answer to the appeal.

### DISCUSSION

The parties do not dispute the applicability of La. R.S. 9:3144(A) to this case, which provides in pertinent part:

[E]very builder warrants the following to the owner:

(1) One year following the warranty commencement date, the home will be free from any defect due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards.

(2) Two years following the warranty commencement date, the plumbing, electrical, heating, cooling, and ventilating systems exclusive of any appliance, fixture, and equipment will be free from any defect due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards.

(3) *Five years following the warranty commencement date, the home will be free from major structural defects* due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards. [Emphasis added.]

The NHWA defines a major structural defect to mean "any actual physical damage to the following designated load-bearing portions of a home caused by failure of the load-bearing portions which affects their load-bearing functions to the extent the home becomes unsafe, unsanitary, or is otherwise unlivable." La. R.S. 9:3143(5). Load-bearing portions of the home include foundation systems and footings, beams,

girders, lintels, columns, walls and partitions, floor systems, and roof framing systems. See La. R.S. 9:3143(5).

Pursuant to La. R.S. 9:3145(A), “[b]efore undertaking any repair himself or instituting any action for breach of warranty, the owner shall give the builder written notice, by registered or certified mail, within one year after knowledge of the defect, advising him of all defects and giving the builder a reasonable opportunity to comply with the provisions of [the NHWA].” The NHWA explicitly states that “[a]ny action to enforce any warranty provided in this Chapter shall be subject to a peremptive period of thirty days after the expiration of the appropriate time period provided in R.S. 9:3144.” La. R.S. 9:3146.

Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period. La. C.C. art. 3458. Peremption may not be renounced, interrupted, or suspended. La. C.C. art. 3461. At the hearing on the exception of peremption, evidence may be introduced to support or controvert the exception. See La. C.C.P. art. 931. In the absence of evidence, an exception of peremption must be decided based upon the facts alleged in the petition with all of the allegations accepted as true. See Cichirillo v. Avondale Industries, Inc., 04-2894, p. 5 (La. 11/29/05), 917 So. 2d 424, 428. If no evidence is introduced to support or controvert the exception, the manifest error standard of review does not apply, and the appellate court’s role is to determine whether the trial court’s ruling was legally correct. Atain Specialty Insurance Company v. Premier Performance Marine, L.L.C., 15-1128, pp. 5-6 (La. App. 1st Cir. 4/18/16), 193 So. 3d 187, 190.

In addition, the burden of establishing that the petition fails to state a cause of action is on the mover. Because the exception of no cause of action raises a question of law and the trial court’s decision is based solely on the sufficiency of the petition, review of the trial court’s ruling on the exception is *de novo*. Maw Enterprises,

L.L.C. v. City of Marksville, 14-0090, p. 6 (La. 9/3/14), 149 So. 3d 210, 215. The pertinent inquiry is whether, viewed in the light most favorable to the plaintiff, and with every doubt resolved in the plaintiff's favor, the petition states any valid cause of action for relief. Maw Enterprises, L.L.C., 149 So. 3d at 215. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La. C.C.P. art. 931.

The plaintiffs' petition in this matter states, in relevant part:

9. The home sold by defendant to plaintiffs contained hidden defects, which were known or should have been known by the defendant.

10. The home contains defects due to noncompliance with the building standards and/or due to other defects in materials or workmanship not regulated by building standards and such defects caused actual damage.

11. Plaintiffs moved into the property in August of 2013 and soon discovered problems with the air conditioning system not cooling the home and not removing moisture. Plaintiffs promptly advised defendant.

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13. A few months later, a pipe burst in the wall of the laundry room due to a defect in installation. Plaintiffs reported the problem to the defendant.

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16. In July 2014, plaintiffs realized that the cooling system was not cooling properly and excessive moister[sic] had returned to the home.

17. On July 17, 2014, plaintiffs notified Ms. Easterly that the problem with the cooling system had returned and they had discovered mold growth in the kitchen.

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21. On or about June 1, 2015, plaintiffs discovered that the kitchen cabinets began to show signs of deterioration due to excessive moister[sic] and that mold had returned to kitchen cabinets and other parts of the home. They immediately contacted Ms. Easterly and informed her ... .

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26. On July 14, 2015, plaintiffs discover[ed] that the mold had returned again. They called Ms. Easterly... .

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31. At the end of June or early July 2016, plaintiffs once again noticed excessive moisture and that the mold had returned to the house. Upon further inspection, a considerable amount of mold was found... .

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34. On July 18, 2016, plaintiffs' counsel wrote Ms. Easterly and Su Casa Builders, LLC advising of the condition of the property and provided defendant with a copy of a microbial assessment report ... dated July 12, 2016. The results stated very high levels of *Penicillium-Aspergillus* like molds and *Cladosporium* molds present in the surface sample taken from the kitchen cabinet door and very high levels of *Cladosporium* molds and other molds present in the air sample taken from the indoor air of the kitchen. The mold is caused by the defective cooling system and the excessive moisture in the home.

35. On August 5, 2016, Accurate Inspections of Baton Rouge, LLC, a Louisiana Licensed Inspector reported findings of extensive damage to the home due to excessive moisture caused by the failure of the cooling system to remove the humidity from the home.<sup>2</sup>

Having reviewed the petition herein, we cannot say that the plaintiffs' claims concern any major structural defect. Rather, we find that the allegations of the petition are limited to problems of moisture, plumbing, cooling systems, insulation, and ventilation.<sup>3</sup> As such, the plaintiffs' claims are subject to either the one-year warranty set forth in La. R.S. 9:3144(A)(1) or the two-year warranty set forth in La. R.S. 9:3144(A)(2), and we conclude they are preempted. See La. R.S. 9:3146.

It is undisputed in this matter that the plaintiffs' October 13, 2016 petition was filed more than two years and thirty days after the warranty commencement date of August 16, 2013.<sup>4</sup> Therefore, at the time the petition was filed, the only possible warranty period that had not expired under La. R.S. 3144 was the five-year warranty for major structural defects.

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<sup>2</sup> The inspector recommended: add attic insulation; add a return air in master suite; enlarge return air; increase the size of the gap at the peak of the roof beneath continuous ridge vents, to allow for maximum upper attic ventilation; seal all ceiling penetrations to minimize hot, attic air infiltration into condition spaces; remove and replace kitchen cabinets.

<sup>3</sup> The petition also asserts claims based on mold growth and mold damage. However, the builder's warranty generally excludes mold and mold damage. See La. R.S. 9:3144(B)(19). Consequential damages are also excluded. See La. R.S. 9:3144(B)(17).

<sup>4</sup> "Warranty commencement date' means the date that legal title to a home is conveyed to its initial purchaser or the date the home is first occupied, whichever occurs first." La. R.S. 9:3143(7).

While the plaintiffs contend they have a valid claim for a major structural defect, we disagree. Louisiana has chosen a system of fact pleading. La. C.C.P. art. 854 cmt. (a); Ramey v. DeCaire, 03-1299, p. 7 (La. 3/19/04), 869 So. 2d 114, 118. But nowhere in the petition can we find where the plaintiffs have asserted a major structural defect claim within the provisions of the NHTA. The petition is devoid of any allegation concerning physical damage to a load-bearing portion of the home. The petition is devoid of any claim that a defect in a load-bearing portion of the home caused it to become unsafe, unsanitary, or otherwise unlivable. Furthermore, there is no indication that the plaintiffs provided notice to the defendant of any major structural defect as required by La. R.S. 9:3145(A).

Certainly, if evidence of a major structural defect was found, the onus was on the plaintiffs to supplement their original petition (within the five-year preemptive period) to allege with specificity any defects other than those concerning moisture, plumbing, and cooling systems. The plaintiffs did not do so. Accordingly, we find that the plaintiffs failed to state a cause of action under La. R.S. 9:3144(A)(3).<sup>5</sup> And having so found, we will pretermite a discussion of the judgment on the pleadings.

Finally, we will address the defendant's answer to the appeal, which seeks costs and attorneys' fees for frivolous appeal pursuant to La. C.C.P. art. 863 and Rule 2-19 of the Uniform Rules of Louisiana Courts of Appeal.

We first note that the ability to impose sanctions under La. C.C.P. art. 863 is limited to the trial court. See Jason v. Brown, 637 So. 2d 749, 752 (La. App. 1st Cir. 5/20/94), writ denied, 94-1673 (La. 10/7/94), 644 So. 2d 638. Nonetheless, damages for a frivolous appeal may be awarded pursuant to La. C.C.P. art. 2164. Appeals are favored, and penalties for frivolous appeal will not be imposed unless they are

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<sup>5</sup> With the passage of five years, the time for plaintiffs' claims had run. Preemption destroys the cause of action itself. Therefore, the opportunity to amend the petition was not available. See Shields v. Alvin R. Savoie and Associates, Inc., 17-0602, p. 6 (La. App. 1st Cir. 11/1/17), 233 So. 3d 694, 698.

clearly due. Dukes v. Sherwood Acres Apartments, 04-0405, p. 3 (La. App. 1st Cir. 12/30/04), 898 So. 2d 416, 418. Damages for a frivolous appeal are only allowed when it is obvious that the appeal was taken solely for delay, or that counsel is not sincere in the view of the law she advocates even though the court is of the opinion that such view is not meritorious. Hampton v. Greenfield, 618 So. 2d 859, 862 (La. 1993). Although we do not find merit in the plaintiffs' claims, we do find that they seriously advocated their position. Therefore, we find that damages for frivolous appeal are not warranted.

### **CONCLUSION**

For the foregoing reasons, we affirm the October 25, 2019 judgment of the trial court granting the defendant's exception of no cause of action, exception of peremption/prescription, and motion for judgment on the pleadings. All costs of this appeal are assessed to the plaintiffs/appellants, Zachary Canik and Kayla Canik.

**AFFIRMED; ANSWER TO APPEAL DENIED.**