

**WARREN A. GOLDSTEIN, A
PROFESSIONAL LAW
CORPORATION**

*

NO. 2001-CA-1613

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

CON G. DEMMAS

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-20372, DIVISION "F-10"
Honorable Yada Magee, Judge

**Charles R. Jones
Judge**

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, and Judge James F. McKay III)

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AFFIRMED

The Appellant, Con G. Demmas, appeals the judgment of the district court granting the Exception of Prescription on behalf of the Appellee, Warren A. Goldstein, and dismissing Mr. Demmas' reconventional demand. We affirm the judgment of the district court.

This case arises out of a lengthy legal relationship between Mr. Goldstein and Mr. Demmas. The relationship began approximately ten years ago when Mr. Demmas retained the legal services of Mr. Goldstein to represent him and his company, Ventura International Group (hereinafter "Ventura") in a claim against the City of New Orleans and other defendants.

In December 1999, Mr. Goldstein brought a civil action against Mr. Demmas seeking recovery of legal fees in the amount of \$389,275. Mr. Goldstein maintained that he performed legal services for Mr. Demmas and Ventura from 1992 until shortly before the filing of his petition seeking legal fees. Mr. Demmas filed an Answer and Reconventional Demand alleging that Mr. Goldstein collected legal fees until Mr. Demmas learned that Mr. Goldstein did not have the evidence that he claimed to have necessary to

pursue his claim on behalf of Ventura. Mr. Demmas contends that he learned of Mr. Goldstein's inability to produce this evidence in February of 1998. Mr. Goldstein filed an Exception of Prescription as to the Reconventional Demand filed by Mr. Demmas that was granted by the district court resulting of the dismissal of Mr. Demmas' claim. It is from this judgment Mr. Demmas Appeals. In an Answer to the instant appeal, Mr. Goldstein seeks damages for the purposes of finding that this appeal is frivolous pursuant to La. C.C.P. art 2123.

Mr. Demmas argues that the district court erred in holding that his Reconventional Demand had prescribed even though La. R.S. 9:5605(E) provides that the preemptive period of La. R.S. 9:5606(A) does not apply in cases of fraud. La. R.S. 9:5606 (A), Actions for Legal Malpractice, state in pertinent part that:

No action for damages against any attorney at law duly admitted to practice in this state...whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide legal services shall be brought unless filed in a court of competent jurisdiction and proper venue **within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered....** (emphasis added).

Logically, when deciphering the issue of prescription, the procedural

history and the date of the alleged wrongdoing are the important factors.

After review of the record, this Court has established the following timeline of events:

On February 8, 1998, Mr. Demmas contends that Mr. Goldstein admitted to Mr. Demmas that he lacked specific information needed to go forward with Mr. Demmas' claim. On December 20, 1999, Mr. Goldstein filed a petition against Mr. Demmas in Civil District Court for the Parish of Orleans for unpaid legal fees. On October 4, 2000, Mr. Demmas filed an Exception of Prescription and No Cause of Action. On December 29, 2000, the district court signed the judgment overruling the exceptions filed by Mr. Demmas and ordering Mr. Demmas to file an Answer. On December 11, 2000, Mr. Demmas filed an Answer and asserted a reconventional demand alleging misrepresentation by Mr. Goldstein per Mr. Demmas' assertion of February 8, 1998. On December 28, 2000, Mr. Goldstein filed an Answer to Mr. Demmas' Reconventional Demand as well as his Exceptions for No Right of Action, No Cause of Action, Prescription and Prematurity. Mr. Demmas filed an opposition to Mr. Goldstein's exceptions on February 20, 2001. Thereafter he filed a Post Hearing Supplemental Opposition to Mr. Goldstein's exceptions and reconventional demand on February 22, 2001. On February 28, 2001, the district court granted Mr. Goldstein's' Exception

of Prescription and dismissed Mr. Demmas' reconventional demand.

Mr. Demmas contends that the fraud exception to the one-year prescription period applies in this case. Specifically he cites La. R.S. 9:5606 (E) which states that:

The peremptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953.

La. Civ. Code art 1953 defines fraud as:

Fraud may result from misrepresentation or from silence.

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 the loss or inconvenience to the other. Fraud may also result from silence or inaction.

Mr. Goldstein argues that the one-year prescriptive period under La. R.S. 9:5605(A) applies because fraud was never alleged in Mr. Demmas' original Answer and Reconventional Demand.

We find that Mr. Goldstein is correct in his assertion. In Mr. Demmas' original Answer and Reconventional Demand, the specific language of the petition never uses the word "fraud". However, Mr. Demmas maintains that he articulates fraud or misrepresentation by pleading the alleged facts as to what occurred between himself and Mr. Goldstein causing

suit to be instituted. La. Code Civ. Proc. Art. 856 states, “[i]n pleading fraud or mistake, the circumstances constituting fraud or *mistake shall be alleged with particularity*. Malice, intent, knowledge, and other conditions of the mind of a person may be alleged generally”. (*emphasis added*)

Mr. Goldstein maintains that the latest Mr. Demmas alleged the occurrence of fraud or the misrepresentation was February 8, 1998 and that La. R.S. 9:5605(A) limits Mr. Demmas to one-year from the date of discovery. Paragraph 17 of the Demmas’ original petition specifically reads:

On or about **February 8, 1998** Goldstein admitted to Demmas that Goldstein did not have the evidence that he claimed to have in connection with the lawsuit. Goldstein was very apologetic for misleading Demmas and told Demmas the [sic] Demmas did not owe him money. (*emphasis added*).

This Court is in agreement with the district court in that Mr. Demmas’ claim had clearly prescribed; the alleged date of the misrepresentation (that Mr. Demmas later classifies as “fraud” in this appeal) was February 8, 1998. The Reconventional Demand was not filed until December 11, 2000. Mr. Demmas did not allege fraud with particularity as required by La. Code Civ. Pro. Art 856 and therefore, La. R.S. 9:5606(E) does not apply.

Mr. Demmas had one year from the alleged incident to plead his claim

and he failed to meet the time limitations. There was no error by the district court in finding that the claims filed by Mr. Demmas has prescribed.

Mr. Demmas further argues that if this Court finds that La. R.S. 9:5605 bars his reconventional demand, this Court deem the statute unconstitutional under Louisiana Constitution article 2 and article 5 because it subverts the Louisiana Supreme Court's authority to regulate all facets of the practice of law. And, under article 1, sections 2 and 3, because the statute denies the plaintiff equal protection and due process of the law. Further, Mr. Demmas argues that the statute violates the 14th Amendment to the U.S. Constitution. We pretermitt any discussion on this issue, as we agree with our brothers on the First Circuit, and refer to the resolution in *Kennedy v. Macaluso*, 791 So.2d 697 (La. App. 1st Cir. 2001).

In an Answer to the appeal, Mr. Goldstein relies on La. C.C.P. art. 2123, in seeking damages arguing that Mr. Demmas has filed a frivolous appeal. While La. C.C.P. art 2123 outlines the delays in taking a suspensive appeal, La. C.C.P. art 2164 states that:

The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court *may award* damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable. (emphasis added).

We are of the opinion that the instant appeal is not frivolous and therefore we deny Mr. Goldstein's Answer to this appeal.

Decree

For the reasons stated herein, we affirm the judgment of the district court granting the Exception of Prescription on behalf of Warren A. Goldstein and dismissing the Reconventional Demand filed by Con G. Demmas. We further deny Mr. Goldstein's Answer to this appeal order that the record herein remain under seal.

AFFIRMED

