

NOT DESIGNATED FOR PUBLICATION

TAPS COMPANY, INC.	*	NO. 2004-CA-0639
VERSUS	*	COURT OF APPEAL
BOURBON STREET GOSPEL & BLUES, INC., 227 BOURBON STREET, INC., MICHAEL MOTWANI AND IAN HARDCASTLE	* * * *	FOURTH CIRCUIT STATE OF LOUISIANA
	*	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-6691, DIVISION "I-14"
Honorable Piper Griffin, Judge

Judge Edwin A. Lombard

(Court composed of Judge Michael E. Kirby, Judge Edwin A. Lombard,
Judge Leon A. Cannizzaro Jr.)

CANNIZZARO, J. DISSENTS WITH REASONS

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AFFIRMED

This is an appeal of the trial court's granting of an exception of prescription in favor of defendants. For the reasons assigned below, we affirm.

PERTINENT FACTS AND PROCEDURAL HISTORY

On June 18, 1990, plaintiff/appellant, Taps Company, Inc (Taps), entered into an agreement with Bourbon Street Gospel & Blues, Inc. (BSGB), and 227 Bourbon Street, Inc., to sublease the property located at 227-235 Bourbon Street for use as a jazz club. At the time of the agreement, Ian Hardcastle (Hardcastle) was the owner of the property and the president and sole shareholder of BSGB and 227 Bourbon Street, Inc. As part of the sublease, Taps purchased the assets and goodwill of BSGB for the sum of \$75,000.00.

Prior to the lease, Hardcastle installed a large tent over the rear courtyard at 227 Bourbon Street to provide a gospel tent type atmosphere. Taps thereafter used the property, including the courtyard and tent, to

operate a jazz club. On December 30, 1992, Hardcastle sold the entirety of his interests in the two corporations to Kishore “Michael” Motwani (Motwani) and others.

By letter dated February 20, 1995, the Vieux Carre Commission (VCC) notified Taps, through one of its principals, Joseph Sinatra (Sinatra), that the use of the “temporary tent” in the courtyard at 227 Bourbon Street would be placed on the agenda of the Architectural Committee (ARC) of the VCC on March 14, 1995. The letter reflects that Hardcastle was advised in 1989 that the VCC would not recommend approval of the tent beyond two years.

The ARC hearing thereafter took place on March 14, 1995. Taps’ principal, Charles Bacigalupi (Bacigalupi), and Taps’ attorney, Jack Ricci, were present. The ARC voted at that time to recommend that the VCC order Motwani to remove the tent from the premises and to construct a permanent covering. The recommendation of the ARC was taken up by the VCC on March 21, 1995. Bacigaloupe and Ricci were again present at the VCC meeting. At that time, the VCC voted to require Motwani to remove the tent and to encourage him to replace the tent with a new permanent structure.

Taps argued that it was not until June of 1995 that it became apparent that Motwani would not pay for the removal and replacement of the tent. In

response, Taps hired a contractor in August of 1995 to perform the work, at a cost to Taps in excess of \$200,000.00.

On April 26, 1996, Taps filed the present suit against BSGB, 227 Bourbon Street, Inc., Motwani, and Hardcastle. The suit alleged that Hardcastle and Motwani were personally liable for their negligent or intentional misrepresentation regarding the fitness of the leased property as a jazz club. Specifically, Taps submits that both Hardcastle and Motwani knew that the Vieux Carre Commission (VCC) had permitted the use of the tent for only two years and that they failed to provide Taps with that information.

On June 14, 1996, Hardcastle filed an exception of prescription, on the basis that Taps' action against Hardcastle was based in tort and had prescribed pursuant to La. C.C. art. 3492. On July 30, 1999, the Honorable Richard Ganucheau denied the exception of prescription without reasons. On February 13, 2001, Motwani was dismissed from the lawsuit with prejudice pursuant to Taps' motion.

On March 28, 2002, Hardcastle filed an amended exception of prescription, representing that discovery revealed Taps was aware of its alleged cause of action for the tort of negligent or intentional misrepresentation in March of 1995. On September 30, 2003, the amended

exception of prescription was brought before the Honorable Piper D. Griffin and was taken under advisement. On January 30, 2004, the exception was granted in favor of Hardcastle. The trial court, in written Reasons For Judgment, made the following pertinent findings: 1) based on the allegations of the petition, Taps' action sounded in tort, not contract; 2) as a tort, the claim was governed by a one-year liberative prescriptive period; 3) Taps was officially notified of the temporary nature of the tent on February 20, 1995, when the VCC issued a letter to Taps through its principal, Sinatra; and 4) Taps had until February 20, 1996 to timely file its claim.

ARGUMENT

Taps has filed this timely appeal arguing that the trial court erred in granting the exception of prescription. Taps first argues that the trial court erred in finding that the petition asserted only a delictual cause of action, and not a contractual one. Specifically, Taps maintains that the petition clearly presents a case for breach of warranty of the lease due to the misrepresentations of Hardcastle, thereby invoking a ten-year prescriptive period. Second, Taps submits that if the action is delictual, then the one-year prescriptive period began to run from the date that the injury was sustained or the date of actual damage. Taps asserts that the actual damage was sustained in the summer of 1995 when Taps hired an architect and

contractor to build the permanent tent.

In opposition to Taps' arguments, Hardcastle submits that the cause of action asserted in the petition is delictual not contractual. Hardcastle further argues that, as a delictual action, the one-year prescriptive period began to run from the date that Taps became aware of the alleged misrepresentation in connection with the permanency of the tent.

LAW AND ANALYSIS

As stated above, the trial court ruled that this was an action in tort, not contract, based on the allegation in the petition that Motwani and Hardcastle were personally liable to Taps for their negligent or intentional misrepresentation.

Our jurisprudence has recognized that when a party has been damaged by the conduct of another arising out of a contractual relationship, the former may have two remedies: a suit in contract, or an action in tort. He may elect to recover his damages in either of the two actions. *Federal Insurance Co v. Insurance Company of North America*, 263 So.2d 871 (La.1972).

The correct prescriptive period to be applied in any action depends upon the nature of the action; it is the nature of the duty breached that should determine whether an action is in tort or in contract. *Roger v. Dufrene*, 613 So.2d 947 (La. 1993). The classical distinction between "*damages ex*

contractu" and "*damages ex delicto*" is that the former flow from the breach of a special obligation contractually assumed by the obligor, whereas the latter flow from the violation of a general duty owed to all persons. Even when the tortfeasor and the victim are bound by a contract, courts usually apply the delictual prescription to actions that are really grounded in tort. *Raymond v Orleans Parish School Bd.*, 03-0560 (La. App. 4 Cir. 9/3/03), 856 So. 2d 27; *Sterling v. Urban Property Co.*, 562 So.2d 1120 (La. App. 4 Cir.1990).

After review of the petition, and the above referenced jurisprudence, we agree with the trial court that based on the allegations of negligent and intentional misrepresentation, this action sounds in tort. Accordingly, we find no error on the part of the trial court in applying a one-year prescriptive period.

Taps argues, alternatively, that if this action is deemed to be delictual, then the one-year prescriptive period did not begin to run until the damages were sustained. That date, according to Taps, came in either May of 1995 when the architect was hired or in August of 1995 when the contractor was hired to construct the permanent tent. To the contrary, Hardcastle maintains that Taps became aware of the temporary nature of the tent and the alleged misrepresentation in March of 1995.

The action for negligent misrepresentation arises *ex delicto* and is subject to the one-year prescriptive period of La. C.C. art. 3492. *National Council of Compensation Ins. v. Quixx*, 95-0725 (La. App. 4 Cir. 11/16/95), 665 So.2d 120. Pursuant to article 3492, prescription in actions arising *ex delicto* commences on the day actual and appreciable damage is sustained.

Because of the sometimes-harsh consequences that result from the strict interpretation of prescription statutes, *contra non valentum* has been adopted by Louisiana courts as a jurisprudential exception to prescription. *Bergeron v. Pan American Assur. Co.*, 98-2421 (La. App. 4 Cir. 4/7/99), 731 So. 2d 1037, 1042. Under the doctrine of *contra non valentum*, prescription does not begin to run until a plaintiff either knew or should have known of a cause of action, even if that knowledge does not occur until long after the wrongful conduct at issue has occurred. *Simmons v. Templeton*, 97- 2349, 98-0043, (La. App. 4 Cir. 11/10/98), 723 So.2d 1009, 1012. *Contra non valentum* therefore suspends the running of prescription during the period in which the cause of action was not known by or reasonably knowable by the plaintiff. *Louisiana Plaque Corp. v. Chevron U.S.A. Inc.*, 93-1597 (La. App. 4 Cir. 5/26/94), 638 So.2d 354, 356.

In *Jordan v. Employee Transfer Corp.*, 509 So.2d 420, 423 (La.1987), the Louisiana Supreme Court clarified the application of *contra non*

valentum, holding that prescription begins to run, not at the earliest possible indication that the plaintiff may have suffered some wrong, but when the plaintiff has a reasonable basis to pursue a claim against a specific defendant. Louisiana jurisprudence recognizes that *contra non valentum* is an exceptional remedy which is in direct contradiction to the articles in the Civil Code and therefore should be strictly construed. *Harsh v. Calogero*, 615 So.2d 420, 422 (La. App. 4 Cir.1993).

In the present case, the trial court specifically found that Taps was notified of the temporary nature of the tent on February 20, 1995 when the VCC issued a letter to Sinatra, notifying him that the matter concerning the temporary tent had been placed on the March 14, 1995 agenda. The trial court therefore concluded that Taps had until February 20, 1996 to file suit, and that the April 26, 1996 filing was untimely.

The standard of review of a trial court's finding of facts supporting prescription is that the appellate court should not disturb the finding of the trial court unless it is clearly wrong. *In re Medical Review Proceedings of Ivon*, 01-1296 (La. App. 4 Cir. 3/13/02), 813 So.2d 532, 536. From our review of the record, we cannot conclude that the trial court's factual findings are erroneous. It is undisputed that Taps received the February 20, 1995 letter from the VCC advising of the review of the tent. It is also

undisputed that Taps was represented at the ARC meeting on March 14, 1995 and the VCC meeting on March 21, 1995 when the temporary status of the tent was discussed. Furthermore, Bacigalupi admitted in his February 1, 2002 deposition that he was aware of Hardcastle's misrepresentation in March of 1995. Clearly, as of March 1995, Taps had knowledge of the alleged misrepresentation sufficient to support the accrual of the cause of action.

Considering that the plaintiff chose a remedy in tort that carries a one-year prescriptive period, the plaintiff's action for negligent and intentional misrepresentation had prescribed. The trial court did not err in making this determination.

CONCLUSION

For the foregoing reasons, we find no manifest error on the part of the trial court in granting the exception of prescription.

AFFIRMED