NOT DESIGNATED FOR PUBLICATION

EMELIA D. FOURMIGUE, WIFE OF/AND LOUIS FOURMIGUE, KAY F. LANDRY, WIFE OF/AND JOSEPH B. LANDRY, INDIVIDUALLY, AND AS THE NATURAL TUTORS OF THEIR MINOR CHILDREN, CAROLINE LANDRY, JOSEPH LANDRY, JR. AND LIZETTE LANDRY	* * * * * * *	**NO. 2006-CA-1437** **COURT OF APPEAL** **FOURTH CIRCUIT** **STATE OF LOUISIANA**

VERSUS

LAWRENCE E. FRANCIONI D/B/A FRANCIONI CONSTRUCTION COMPANY, THE MARYLAND INSURANCE GROUP, MARYLAND CASUALTY COMPANY, DAN CABALLERO D/B/A CABALLERO PEST CONTROL SERVICE AND LOUISIANA PEST CONTROL INSURANCE COMPANY

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 94-7359, DIVISION "D-16"
Honorable Lloyd J. Medley, Judge
* * * * *

Judge Patricia Rivet Murray
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Max N. Tobias, Jr.)

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AFFIRMED

The plaintiffs, referred to herein as "the Landry family," appeal the trial court's judgment dismissing their First Supplemental and Amended Petition for Damages on the basis of peremption. For the reasons that follow, we affirm.

The Landry family filed the instant lawsuit on May 10, 1994 against their general contractor (Lawrence E. Francioni d/b/a Francioni Construction Company), the contractor's insurer, an unnamed plaster subcontractor, and two pest control subcontractors, alleging that the Landry family's new residence had become infested with termites as a result of the defendants' breach of a contractual duty and/or negligence.

In early 1990, the Landry family signed a written contract with Mr. Francioni whereby the general contractor agreed to build the family a "multi-generational home" on two adjoining lots in New Orleans. The home was

completed, and the Landry family moved in sometime in 1991. Within approximately two years, they discovered the home was severely infested with termites, as a result of which the general contractor and subcontractors began doing repair, remediation and reconstruction work that was still ongoing at the time the plaintiffs filed suit in 1994. In their petition, plaintiffs alleged the termite infestation had been caused by the improper dilution of the formula used to create the chemical barrier against termites, combined with the improper application of stucco to the residence, which together had resulted in the breach of the chemical barrier around the perimeter of the house. In addition to property damages, the plaintiffs claimed they had suffered mental and emotional trauma from the demolition, repair and reconstruction work, all of which had occurred while they were living in the home.

Sometime after the suit was filed, the plaintiffs settled their claims against the contractor and the insurer for the amount of $111,618.27, which the insurer paid on the contractor's behalf.[1] On August 9, 1996, the two termite companies that were original defendants agreed in writing to indemnify the contractor's insurer for this amount in exchange for the insurer's waiver of any claims or rights of subrogation it might have against the termite companies.[2] On April 2, 2004, the plaintiffs filed a "First Supplemental and Amended Petition for Damages" alleging

[1] The timing of this settlement is unclear. See n.2 *infra.*

[2] The record contains the 1996 indemnity agreement, which references the existence and amount of the (presumably) prior settlement between the plaintiffs and the contractor's insurer. Nevertheless, in their appellate brief, the plaintiffs assert that they settled the claims made in their original petition in 2004, after their supplemental petition had been filed; and further, that the Receipt and Release included a reservation of their rights with respect to the claims made in the supplemental petition. Because the settlement agreement does not appear in the record, we are unable to determine the date and or terms of the settlement. We note, however, that all parties agree the claims made in the original petition have been settled.

that the windows in their home were defective and/or had been defectively installed allowing water to seep inside the residence and underneath the stucco of the exterior wall; that the contractor's attempts to repair the windows had failed; that the water and/or the attempted repairs had inconvenienced the Landry family and had damaged the carpet and floors; and that the stucco had been improperly installed. Furthermore, in the supplemental petition the plaintiffs "reiterated, realleged and reaverred" every allegation of their original petition. The supplemental petition did not indicate whether the allegedly defective installation and/or repair of the windows and/or the stucco had occurred during the original construction of the home or during the remediation work done by the contractor as a result of the termite damage.

On May 5, 2005, the contractor filed an exception of peremption[3] demanding that the supplemental petition be dismissed as perempted in accordance with La. R.S. 9:2772. After hearing the matter on June 3, 2005, the trial court granted the exception by written judgment signed June 30, 2005. Plaintiffs timely filed a motion for new trial, which the trial court denied with written reasons for judgment on July 11, 2005. Plaintiffs now appeal both the judgment dismissing their supplemental petition and the denial of their motion for new trial.

[3] The Code of Civil Procedure does not specifically provide for an exception of peremption. See La. C.C.P. art. 927. Although some appellate courts have indicated that peremption may be raised by means of the exception of prescription (see, e.g., *Saia v. Asher*, 01-1038, p.4 (1 Cir. 7/10/02), 825 So.2d 1257, 1259 n.5), this court has generally held that the proper procedural device for raising the issue is the exception of no cause of action. See *Azar-O'Bannon v.Azar*, 00-0101 (La. App. 4 Cir. 9/27/00), 770 So.2d 458; *International River Center v. Henry C. Beck Co.*, 95-1396, p.2 (La. App. 4 Cir. 4/10/96), 672 So.2d 1160, 1161; *Davis v. Sewerage and Water Board of New Orleans*, 469 So.2d 1144 (La. App. 4th Cir. 1985). But see: *Poree v. Elite Elevator Services, Inc.*, 94-2575 (La. App. 4 Cir. 11/16/95), 665 So.2d 133 (wherein this court affirmed the granting of an exception of prescription asserting that plaintiffs' claim was perempted under La. R.S. 9:2772.).

On appeal, plaintiffs assign two errors. First, they contend that the trial court erred procedurally by declining to consider their written opposition to defendants' exception, which they admit was filed untimely,[4] before ruling on the exception and the motion for new trial. Alternatively, on the merits of the exception, plaintiffs argue that the trial court erred by finding that their supplemental petition was perempted; they contend that the trial court should have instead found that the supplemental petition related back to their plaintiffs' timely-filed original petition. Because this argument is the same one plaintiffs asserted in their opposition to the exception, our consideration of it herein moots the issue of whether the trial court erred procedurally by failing to consider the opposition. Accordingly, we pretermit consideration of plaintiffs' first assignment of error.

The basis for peremption of plaintiffs' supplemental petition is La. R.S. 9:2772, which provides, in pertinent part:

> **§ 2772 Peremptive period for actions involving deficiencies in surveying, design, supervision, or construction of immovables or improvements thereon**
>
> A. No action, whether ex contracto, ex delicto, or otherwise, including but not limited to an action for failure to warn, to recover on a contract, or to recover damages, or otherwise arising out of an engagement of planning, construction, design, or building immovable or movable property… shall be brought against…any person performing or furnishing the design, planning, supervision, inspection, or observation of construction or the construction of immovables, or improvement to immovable property, including but not limited to a residential building contractor as defined in R.S. 37:2150.1(9):

[4] The record reflects that the opposition was filed two days prior to the hearing on the exception. The appellee points out that the local district court rules required that any opposition be filed at least eight days prior to the scheduled hearing. Although it is clear from the record that the trial court was not aware of, and therefore did not consider, the opposition before rendering judgment granting the exception, it is impossible to determine whether or not the trial court considered the opposition prior to denying the motion for new trial. However, the court was clearly aware that the opposition existed by that point in time, as the plaintiffs based their motion for new trial on the court's having failed to consider their opposition prior to granting the defendant's exception.

(1) (a) More than five years after the date of registry in the mortgage office of acceptance of the work by owner

(b) If no such acceptance is recorded within six months from the date the owner has occupied or taken possession of the improvement, in whole or in part, more than five years after the improvement has been thus occupied by the owner.

At the time the plaintiffs' original petition was filed in 1994, the peremptive period set forth in this statute was ten years rather than five years.[5] Defendant concedes that the ten-year period applies to this case, but argues that the April 2, 2004 supplemental petition was filed ten years and one month after the repair/ reconstruction work was completed in March, 1994. Plaintiffs do not dispute that the ten year period applies, nor that the supplemental petition was filed more than ten years after the contractor completed the repair work. Instead, plaintiffs argue that the claims raised in their supplemental petition are not statutorily perempted because the supplemental petition relates back to the timely filed original petition.

Considering this argument, we first note that neither the record nor either petition contains any indication that a written acceptance of the contractor's work was registered in the mortgage office. As it is undisputed that plaintiffs have occupied their home since 1991, the supplemental petition filed in 2004 is clearly perempted by the statute unless plaintiffs can show that the relation back principle applies to defeat peremption in this case.

La. C.C.P. art. 1153 states:

When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading.

[5] Acts 1999, No. 1024, changed the time period from ten years to seven years and provided that the change was to be applied prospectively only to contracts entered into on or after its effective date. Acts 2003, No. 919, changed the time period from seven years to five years, effective August 15, 2003. See LSA--R.S. 9:2772 (Comments) (West 2005).

In *International River Center v. Henry C. Beck Co.*, 95-1396 (La. App. 4 Cir. 4/10/96), 672 So.2d 1160, this court held that an amended petition filed after the running of the ten-year peremptive period in La. R.S. 9:2772 arose out of the same fact situation as the original, timely filed petition, and therefore was not barred by peremption. In that case, the original petition, filed against the installer of a hotel roof, alleged that the roof had leaked, causing water infiltration, mold and mildew inside the hotel. The amended petition added the sureties of the roof installer as defendants and "alleged additional damages." 95-1396, p. 1, 672 So.2d at 1160. Plaintiffs herein argue that the instant case is analogous to the *International River Center* case.

We disagree. In the instant case, the "occurrence" alleged by plaintiffs in their original petition was the termite infestation of their newly constructed home. Each and every paragraph of that petition relates to the termite infestation and/or the contractor's attempt to repair damage caused by the infestation. Conversely, the supplemental petition does not mention termite infestation. Instead, it alleges that water seeped into the walls and interior of the plaintiffs' home due to defective and/or improperly installed windows and /or stucco. It therefore alleges a different factual situation or occurrence than is raised in the initial petition.

Moreover, the supplemental petition, filed nearly ten years after the filing of the original petition and thirteen years after the plaintiffs moved into the home, does not indicate when the water infiltration occurred. In considering whether La. C.C.P. art. 1153 applies to a particular factual situation, the passage of time between the original petition and the amended one generally weighs against the relating back of the amended petition because of prejudice to the defendant. *Bogue Lusa Waterworks District v. Louisiana Dept. of Environmental Quality*, 04-0061,

pp.8-9 (La. App. 1 Cir. 12/17/04), 897 So.2d 726, 730 (wherein amended petition filed two years after original petition was not found to relate back). Therefore, it has been held that an amended petition adding a loss of consortium claim filed five years after the filing of the original petition did not relate back because the defendant would suffer prejudice by having to defend the new claim so many years after the occurrence of the automobile accident which was the subject of the original suit. *Mason v. Luther*, 05-25 (La. App. 3 Cir. 6/1/05), 903 So.2d 1145. In the instant case, we find that permitting the relating back of the plaintiffs' supplemental petition, filed ten years after the original and after the parties have settled the claims made in the original petition, would clearly prejudice the defendant and would also frustrate the protective purpose of the peremption statute. See *Bogue Lusa*, 04-0061, p.8, 897 So.2d at 730.

Therefore, we conclude that the trial court did not err by dismissing the supplemental petition as perempted. We also find that the trial court did not abuse its discretion by denying plaintiffs' motion for new trial. Accordingly, we affirm the judgments of the trial court.

AFFIRMED