

NOT DESIGNED FOR PUBLICATION

MARCUS MARTIN * **NO. 2009-CA-0044**
VERSUS *
FIRST AMERICAN * **COURT OF APPEAL**
INSURANCE AGENCY, LLC., * **FOURTH CIRCUIT**
ABC INSURANCE COMPANY, *
JOHN W. "JAY" ROBICHAUX, * **STATE OF LOUISIANA**
WINTERS' TITLE AGENCY, * * * * *
INC. AND XYZ INSURANCE
COMPANY

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 107-683, DIVISION "E"
Honorable Jacques A. Sanborn, Judge
* * * * *
Judge David S. Gorbaty
* * * * *

(Court composed of Judge David S. Gorbaty, Judge Edwin A. Lombard, Judge Roland L. Belsome)

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AFFIRMED

Plaintiff Marcus Martin appeals a judgment granting defendant Eagan Insurance Agency, Inc.'s, Peremptory Exception of Peremption. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY:

Marcus Martin (hereinafter "Mr. Martin") purchased two pieces of property, one located in Orleans Parish on December 19, 2002, and one in St. Bernard Parish on February 21, 2003. Prior to the purchase of each piece of property, Mr. Martin contacted Mr. John W. "Jay" Robichaux (hereinafter "Mr. Robichaux"), an employee of First American Insurance Agency, L.L.C. (hereinafter "First American"), to secure insurance on the properties. Both properties flooded on or about August 29, 2005.

On August 29, 2006, Mr. Martin filed in proper person a lawsuit in St. Bernard Parish making defendants therein: First American Insurance Agency, L.L.C., ABC Insurance Company, John W. "Jay" Robichaux, Winter's Title Agency, Inc., and XYZ Insurance Company. Relative to Mr. Robichaux's

involvement, the petition alleges that Mr. Martin contacted Mr. Robichaux to provide the appropriate insurance for the respective policies. According to the petition, Mr. Robichaux did procure homeowners insurance on both policies, but failed to offer or advise petitioner of his need for flood insurance.

After retaining current counsel, Mr. Martin filed on June 25, 2008, a First Supplemental and Amending Petition adding as a party defendant, Eagan Insurance Agency, Inc. (hereinafter “Eagan”), alleging that Eagan was solidarily and vicariously liable for Mr. Robichaux’s acts or omissions.

First American, Mr. Robichaux, and Westport Insurance Corporation filed an answer to the First Supplemental and Amending Petition. Eagan, however, filed the subject Peremptory Exception of Preemption. Mr. Martin opposed the exception, and on October 24, 2008, the trial court maintained the exception, dismissing Eagan from the lawsuit, with prejudice. This timely appeal followed.

LAW:

Mr. Martin argues that following his retention of current counsel, he learned that Mr. Robichaux had left his employment with First American and had begun working for Eagan, thus prompting the amendment to his petition to add Eagan as a defendant. Because he timely filed suit against Mr. Robichaux and First American in a court of proper jurisdiction, prescription was interrupted as to Eagan. Mr. Martin alleges that it was while Mr. Robichaux worked for Eagan he failed to procure flood insurance for the subject properties. Thus, because he filed timely against Mr. Robichaux and First American and Eagan is solidarily liable with them, suit against Eagan was timely.

Eagan counters that when Mr. Martin filed suit against First American he was aware that Mr. Robichaux was at that time an employee of Eagan. However, for some unknown reason, Mr. Martin chose initially not to sue Eagan. Mr. Martin did not sue Mr. Robichaux in his capacity as an employee of Eagan until June 25, 2008.

Louisiana Revised Statute 9:5606 provides in part:

A. No action for damages against any insurance agent, broker or solicitor, or other similar licensee under this state, whether based on tort, or breach of contract, or otherwise, arising out of an engagement to provide insurance 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. However, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission or neglect.

* * * *

D. The one-year and three-year periods of limitation provided in Subsection A of this Section are preemptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

The one-year and three-year limitation periods of La. R.S. 9:5606 are preemptive, not prescriptive, and therefore cannot be renounced, interrupted or suspended. La. Civ. Code art. 3461.

Thus, actions for professional insurance agent liability must be brought within one year of the date plaintiffs knew or should have known of the alleged act, omission or neglect. At the latest, all actions must be brought within three years from the date of the alleged act, omission or neglect.

Eagan argues that Mr. Martin's claims against it are preempted by both the one-year and three-year provisions of La. R.S. 9:5606. Eagan points to Mr. Martin's allegations that he procured homeowners insurance on the subject properties prior to the date of purchase, December 19, 2002, and February 21, 2003; therefore, Mr. Martin knew or should have known as of those dates that the subject properties were not insured for flood. Because Mr. Martin did not file suit against Mr. Robichaux until August 29, 2006, and against Eagan until June 25, 2008, the claims are preempted by the three-year preemptive period provided by statute.

Further, Mr. Martin's claims are preempted by the one-year preemptive period because he had one year to file suit from the date that the alleged act, omission or neglect was discovered or should have been discovered. Despite Mr. Martin's allegations in his appellate brief that he did not know Mr. Robichaux was an employee of Eagan until spring of 2007, he previously stated in his memorandum in opposition to the subject exception that he knew of Mr. Robichaux's change in jobs much earlier. The memorandum in opposition states:

When defendant Robichaux left First American and joined the Eagan agency, he took with the supervision and maintenance responsibilities for all of the insurance on plaintiff's properties except the Hanover policy that was placed on plaintiff's personal residence on St. Marie Street in Meraux, over which defendant First American maintained responsibility and control. Plaintiff was never informed why defendant Robichaux allowed First American to retain control over that policy, but he acquiesced in the decision that First American would maintain that policy and plaintiff's further insurance needs regarding the St. Marie property.

* * * *

Plaintiff went to Mr. Robichaux's office in the temporary facility established by defendant Eagan in LaPlace after

Hurricane Katrina caused damage to defendant Eagan's facilities. Plaintiff asked defendant Robichaux to make flood damage claims to the insurance company for each of these properties.

As Eagan notes, if Mr. Martin acquiesced in the decision for First American to maintain his policy on the St. Marie property, he had to be aware at that time that Mr. Robichaux had left First American's employ. Further, if Mr. Martin saw Mr. Robichaux at Eagan's facilities in LaPlace sometime between August 29, 2005 and August 29, 2006, clearly he knew that Mr. Robichaux now worked for Eagan. It had to have been during that period at the latest that Mr. Martin learned he did not have flood insurance coverage for the subject properties, yet he chose not to sue Eagan when he filed suit on August 29, 2006.

In *Burk Property Investments, L.L.C. v. Alliance Ins. Agency Services, Inc.*, 08-0489 (La.App. 4 Cir. 9/10/08), 993 So.2d 810, this Court addressed the application of La. R.S. 9:5606. Plaintiff Burk had purchased two properties in June 2005, and procured insurance through Alliance and its agent Dautat. Burk contended that when Dautat assured it the properties were fully insured, that it meant flood insurance was included. When Burk made claims for damages following Hurricane Katrina, its claims for flood damage were denied. Burk sued alleging that 1) it did not know that no flood insurance existed until claims were made, 2) that Dautat had a professional duty to advise Burk of the need for flood insurance; and, 3) Alliance was vicariously liable for Dautat's negligence. Alliance and Dautat argued that Burk's claims were preempted because Burk knew or should have known that it did not have flood insurance in June 2005.

In applying La. R.S. 9:5605, this Court held that the preemptive period begins to run on the date the plaintiff discovered or should have discovered the

alleged act, omission or neglect. *Id.* 08-0489, p. 4, 993 So.2d at 813. The Court found that Burk had sufficient constructive notice that it did not have flood insurance on the dates the insurance applications were signed; thus, the one-year preemptive period applied.

In his original petition, Mr. Martin admits that he knew the properties were located in flood zones and that flood insurance was required by the mortgage companies. He contacted Mr. Robichaux, an employee of First American, and requested that the appropriate insurance for the properties be procured. In his amended petition, Mr. Martin alleges that Mr. Robichaux was employed by both First American and Eagan **at the time he purchased the properties and the insurance coverage and renewals for those properties.** He then alleges that the time the acts or omissions of Mr. Robichaux occurred, Mr. Robichaux was acting in the course and scope of his employment with First American and Eagan, thereby making First American and Eagan solidarily and vicariously liable for Mr. Robichaux's acts of negligence.

It is clear from the record that Mr. Robichaux was not working for both agencies at the same time. It is equally clear that Mr. Martin had to sign papers in connection with insuring his properties and that he received declaration pages and renewal notices for all policies on these properties. He also admitted to knowing that his properties were not insured when he consulted with Mr. Robichaux at Eagan's temporary offices in LaPlace sometime between August 29, 2005 and August 29, 2006. It is disingenuous at best to claim he did not know that the two properties in question were not insured for flood at least three years prior to August 29, 2006, and certainly prior to June 25, 2008.

We find no error in the trial court's ruling maintaining Eagan's peremptory exception of peremption. The judgment of the trial court is affirmed.

AFFIRMED