

**NOT DESIGNATED FOR PUBLICATION**

**EDY A. CRUZ, HUSBAND OF,  
AND NORA PORTILLO**

\*

**NO. 2010-CA-1649**

\*

**VERSUS**

**COURT OF APPEAL**

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**HISPANIC APOSTOLATE**

**FOURTH CIRCUIT**

\*

**STATE OF LOUISIANA**

**\* \* \* \* \***

**APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2002-5691, DIVISION "C"  
Honorable Sidney H. Cates, Judge**

**\* \* \* \* \***

**Judge Patricia Rivet Murray**

**\* \* \* \* \***

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III,  
Judge Roland L. Belsome)

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**AFFIRMED**

Plaintiffs, Edy Cruz and Nora Portillo, appeal the trial court's judgment dismissing their action after granting exceptions of prescription and no right of action, and a motion for summary judgment filed by defendant, the Hispanic Apostolate. For the reasons that follow, we affirm.

#### **FACTS AND PROCEEDINGS BELOW**

On April 11, 2002, Mr. Cruz and Ms. Portillo filed a petition seeking damages from the Hispanic Apostolate for its alleged negligence in advising Mr. Cruz, a citizen of Guatemala and former resident of the United States, regarding the completion and submission of an application to the U.S. Immigration and Naturalization Service ["INS"] for suspension of deportation pursuant to the Nicaraguan Adjustment and Central American Relief Act ["NACARA"]. On April 11, 2001, after the INS had rejected his application, Mr. Cruz was forced to apply for voluntary departure from the U.S. and to post a voluntary departure bond to avoid being deported pursuant to the determination of an Immigration Judge made that date. The petition alleges that, as a result of the negligence of the Hispanic Apostolate, Mr. Cruz lost the opportunity to remain in the United States; moreover,

he and Ms. Portillo, his spouse, suffered damages including mental anguish, emotional distress, and loss of consortium.

The defendant filed exceptions of ambiguity, vagueness and failure to state a cause of action, which exceptions were maintained in part with regard to Ms. Portillo, and the trial court ordered the plaintiffs to file a supplemental and amending petition to cure those exceptions. After the filing of the supplemental and amending petition, the defendant filed an exception of prescription, an exception of no right of action as to the claims of Ms. Portillo, and a motion for summary judgment. The trial court heard the exceptions and motion on March 5, 2010. By judgment rendered March 11, 2010, the trial court maintained the exceptions and granted the motion for summary judgment, dismissing the plaintiffs' petition with prejudice. The plaintiffs filed a motion for new trial, which was denied. This appeal followed.

## **DISCUSSION**

We first address the plaintiffs contention that the trial court erred by maintaining the exception of prescription. Louisiana Civil Code article 3492 provides, in pertinent part:

Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day the injury or damage is sustained.

In the instant case, both parties agree that the Hispanic Apostolate, on behalf of Mr. Cruz, prepared and submitted an application pursuant to section 203 of NACARA representing that Mr. Cruz was eligible to apply for certain benefits because he was a Guatemalan national who had registered under the "ABC settlement agreement" on or before December 31, 1991, one of the requirements for eligibility. The plaintiffs contend that such representation was negligently

made because the Hispanic Apostolate did nothing to verify that Mr. Cruz had in fact registered under the ABC settlement agreement. In response, the defendant argues that it had no duty to verify information that was provided by Mr. Cruz himself, the accuracy of which Mr. Cruz verified before submission of the application.

It is undisputed that on October 3, 2000, the INS informed Mr. Cruz in writing that it had not granted his application and was referring it to an Immigration Judge for decision for the following reason:

You are not eligible to apply for Suspension of Deportation or Special Rule Cancellation of Removal with the INS under 8 CFR 240.62 because:

You indicated that you are eligible to apply with the INS for benefits under section 203 of NACARA because you are a Guatemalan National who first entered the United States on or before October 1, 1990, registered for benefits under the ABC settlement agreement on or before December 31, 1991, and applied for asylum on or before January 3, 1995.

However, there is no evidence that you registered for benefits of the ABC settlement agreement on or before December 31, 1991. Therefore, you are not eligible to apply for benefits under section 203 of NACARA.

It is also undisputed that on April 11, 2001, an Immigration Judge determined that Mr. Cruz was subject to deportation, in lieu of which Mr. Cruz chose to apply for voluntary departure. Based upon these facts, the plaintiffs argue that April 11, 2001, is the date “the injury or damage [was] sustained” and therefore the date prescription began to run; thus, they contend that their April 11, 2002 petition was timely filed. Conversely, the defendant argues that the trial court correctly maintained the exception because prescription began to run on October 3, 2000, when Mr. Cruz was informed that the INS had not granted his

application because there was no evidence that he had registered for benefits under the ABC settlement agreement.

The appellate standard of review for a trial court's grant of an exception of prescription was reiterated by this court in *Parker v. B & K Construction Co., Inc.*, as follows:

[i]n reviewing a peremptory exception of prescription, an appellate court will review the entire record to determine whether the trial court's finding of fact was manifestly erroneous. *Davis v. Hibernia National Bank*, 98-1164 (La.App. 4 Cir. 2/24/99), 732 So.2d 61. When evidence is received on the trial of the peremptory exception, the factual conclusions of the trial court are reviewed by the appellate court under the manifest error-clearly wrong standard as articulated in *Stobart v. State Through Dept. of Transp. And Development*, 617 So.2d 880 (La.1993).

*Parker*, 06-1465, p. 2 (La. App. 4 Cir. 6/27/07), 962 So.2d 484, 485 (quoting *Katz v. Allstate Ins. Co.*, 04-1133, p. 2 (La. App. 4 Cir. 2/2/05), 917 So.2d 443, 444).

Based on the record in the instant case, we find no manifest error in the trial court's determination that the plaintiffs' action was prescribed. The petition and the supplemental, amending petition clearly show that the plaintiffs' entire claim is based upon the defendant's allegedly negligent failure to investigate whether Mr. Cruz had actually registered for benefits under the ABS settlement agreement as he had represented to the defendant. There is no doubt that Mr. Cruz knew or reasonably should have known that his registration status was in doubt on October 3, 2001 when he received the notice from the INS stating that his application had not been granted due to the lack of evidence that he had so registered. Therefore, Mr. Cruz was required to file his action within a year of that date, which he did not do. We reject the plaintiffs' argument that the doctrine of *contra non valentem* should apply to prevent the running of prescription in the instant case. As the Louisiana Supreme Court has held, that doctrine is inapplicable to a case in which

a person is ignorant of the facts upon which his cause of action is based when such ignorance is willful, negligent or unreasonable. *Wimberly v. Gatch*, 93-2361 (La. 4/11/94), 635 So.2d 206, 211-212.

Accordingly, we affirm the trial court's dismissal of the plaintiffs' action on the basis of prescription. In view of this disposition, we pretermitt consideration of the appellants' assignments of error concerning the trial court's granting of the exception of no right of action as to Ms. Portillo and the trial court's granting of summary judgment.

#### **CONCLUSION**

For the reasons stated, the judgment of the trial court is affirmed.

**AFFIRMED**