NOT DESIGNATED FOR PUBLICATION

QUARTER HOLDINGS, LLC AND MAGNOLIA ENTERPRISES, LLC, DOING BUSINESS AS CAJUN MARKET	*	**NO. 2012-CA-1048**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS	*	**STATE OF LOUISIANA**
HIGH COTTON VENTURES, LLC AND CARL E. WOODWARD, LLC	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2005-11188, DIVISION "D-16"
Honorable Lloyd J. Medley, Judge
* * * * * *

Judge Dennis R. Bagneris, Sr.
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(Court composed of Judge Dennis R. Bagneris, Sr., Judge Paul A. Bonin, Judge Daniel L. Dysart)
BONIN, J., CONCURS IN THE RESULT ONLY.

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AFFIRMED

In this appeal, Magnolia Enterprises, Inc. seeks review of the judgment of the trial court granting the exception of peremption filed by Carl E. Woodward, L.L.C. For the following reasons, we affirm.

STATEMENT OF FACTS/PROCEDURAL HISTORY

Quarter Holdings, L.L.C. (Quarter Holdings) owns a building located on Convention Center Boulevard in New Orleans. Magnolia Enterprises, Inc. operates the Cajun Market in the building owned by Quarter Holdings. Starting in 2003, Carl E. Woodward, L.L.C. (Carl E. Woodward) acted as the design-build contractor hired by High Cotton Ventures, L.L.C. (High Cotton) to construct the Convention Center Marriot Hotel (Hotel). The building owned by Quarter Holdings is adjacent to the Hotel. Carl E. Woodward completed construction in 2005.

On August 18, 2005, Quarter Holdings and Magnolia Enterprises, L.L.C. filed a petition for damages.[1] Quarter Holdings alleged that the construction of the Hotel, including pile driving, caused substantial physical damage to its building.

[1] Magnolia Enterprises, L.L.C. was affiliated with the plaintiffs at the time suit was filed; however, it is a separate legal entity than the present appellant, Magnolia Enterprises, Inc.

Magnolia Enterprises, L.L.C. alleged that it was required to close the Cajun Market during repairs, causing a loss of revenue.

During the course of the proceedings, High Cotton and Carl E. Woodward filed an exception of no right of action against Magnolia Enterprises, L.L.C. The exception of no right of action noted that Magnolia Enterprises, L.L.C. had been dissolved in August, 2010. Further, the exception argued that as Magnolia Enterprises, L.L.C. was not the lessee of the building owned by Quarter Holdings, Magnolia Enterprises, L.L.C. had no interest in the litigation. The trial court found that Magnolia Enterprises, L.L.C. had no right of action and granted the exception; however, it gave plaintiffs thirty days to amend their petition.

Thereafter, Quarter Holdings and Magnolia Enterprises, Inc. filed a First Amended Petition For Damages on November 28, 2011, wherein Magnolia Enterprises, Inc. was first named as a plaintiff. The amended petition alleged that Magnolia Enterprises, Inc. operated the Cajun Market and sustained loss of revenue due to the Cajun Market being closed for repairs.

In response, Carl E. Woodward filed an exception of peremption. Carl E. Woodward argued that Magnolia Enterprises, Inc. filed its petition more than five years after the acceptance of the work by High Cotton. It noted that La. R.S. 9:2772 provides a five-year peremptive period for actions involving deficiencies in surveying, design, supervision, or construction of immovables.

Magnolia Enterprises, Inc. countered that the August 18, 2005 petition alleged strict liability and that the filing of that petition interrupted prescription. Additionally, Magnolia Enterprises, Inc. claimed an exception to the peremptive period found in La. R.S. 9:2772.

After a hearing, the trial court granted the exception of peremption and dismissed all of the claims Magnolia Enterprises, Inc. had filed against Carl E. Woodward. From that judgment, Magnolia Enterprises, Inc. filed the instant appeal.

STANDARD OF REVIEW

Among the objections which may be raised through the peremptory exception is peremption. La. Code Civ. Proc. art. 927(A)(2). Peremption has been likened to prescription; namely, it is prescription that is not subject to interruption or suspension. *See Flowers, Inc. v. Rausch*, 364 So.2d 928, 931 (La. 1978); see also La. Civ.Code art. 3461. As such, the following rules governing the burden of proof as to prescription apply to peremption. If prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show the action has not prescribed. *Carter v. Haygood*, 2004-0646, p. 9 (La. 1/19/05), 892 So.2d 1261, 1267. If evidence is introduced at the hearing on the peremptory exception of prescription, the district court's findings of fact are reviewed under the manifest error-clearly wrong standard of review. *Id*., citing *Stobart v. State, through DOTD*, 617 So.2d 880, 882 (La.1993). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id*., citing *Stobart*, 617

So.2d at 882–83.

DISCUSSION

Magnolia Enterprises, Inc. assigned as error the trial court's judgment granting the exception of peremption. In support of its argument, Magnolia Enterprises, Inc. first argued that the petition and the first amended petition state a

cause of action for strict liability which is not perempted. Magnolia Enterprises, Inc. alleged that pile driving is an ultra-hazardous activity which is subject to a one year prescriptive period. Therefore, it concluded that when a claim for an ultra-hazardous activity is presented, contractors cannot rely on peremption to bar the action. However, Magnolia Enterprises, Inc. cited no authority to support that conclusion.

Magnolia Enterprises, Inc. correctly noted that pile driving is an ultra-hazardous activity subject to a one year prescriptive period. La. C.C. art. 667; La. C.C. art. 3492. It maintained that the petition filed August 18, 2005, against Carl E. Woodward interrupted prescription, citing La. C.C. art. 3462. While that may be true for Quarter Holdings, the petition filed on August 18, 2005, failed to name Magnolia Enterprises, Inc. as a party. The August 18, 2005 petition named a completely separate corporate entity, Magnolia Enterprises, L.L.C., as a party. Prescription is interrupted when the obligee commences action against the obligor. La. C.C. art. 3462. In the present matter, the obligee, Magnolia Enterprises, Inc., commenced action against Carl E. Woodward on September 30, 2011, well after the one year period provided to interrupt prescription.

Magnolia Enterprises, Inc. claimed damages resulting from Carl E. Woodward's construction activities, including pile driving. However, the law clearly provides:

> A. [N]o action, whether ex contractu, 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 which may include, without limitation, consultation, planning, designs, drawings, specification, investigation, evaluation, measuring, or administration related to any building, construction, demolition, or work, shall be brought against any person performing or furnishing land surveying services, as such term is

> defined in R.S. 37:682, including but not limited to those services preparatory to construction, or 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:
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> (1)(a) More than five years after the date of registry in the mortgage office of acceptance of the work by owner.
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> (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.

La. R.S. 9:2772.

First, we note that the legislature enacted La. R.S. 9:2772 to protect those named therein "from liability for past construction projects, which could extend for an indefinite period of time." *Burkart v. Williamson*, 2009-0294, p. 6 (La. App. 1 Cir. 11/13/09), 29 So.3d 635, 639. The time period to file suit provided in La. R.S. 9:2772 is peremptive. *See Ebinger v. Venus Const. Corp*., 2010-2516 (La. 7/1/11), 65 So.3d 1279. Peremption is a period of time fixed by law for the existence of a right. Unless the right is timely exercised, the right is extinguished upon the expiration of the period. La. C.C. art. 3458. There is a distinction between prescription and peremption. As the Supreme Court explained:

> Peremption differs from prescription in several respects. Although prescription prevents the enforcement of a right by legal action, it does not terminate the natural obligation (La.C.C. art. 1762(1)); peremption, however, extinguishes or destroys the right (La.C.C. art. 3458). Public policy requires that rights to which peremptive periods attach are to be extinguished after passage of a specified period. Accordingly, nothing may interfere with the running of a peremptive period. It may not be interrupted or suspended; nor is there provision for its renunciation. And exceptions such as *contra non valentum* are not applicable. As an inchoate right, prescription, on the other hand, may be renounced, interrupted, or suspended; and *contra non valentum* applies an exception to the statutory prescription period where in fact and for good cause a plaintiff is unable to exercise his cause when it accrues.

Naghi v. Brener, 2008-2527, pp. 6-7 (La. 6/26/09), 17 So.3d 919, 923, citing *Hebert v. Doctor's Memorial Hosp.*, 486 So.2d 723 (La. 1986).

The petition filed by Magnolia Enterprises, Inc. sought to recover damages arising out of the construction or design of an immovable performed by Carl E. Woodward, an *ex delicto* action. In this instance, there is no evidence of the date of registry in the mortgage office of the acceptance of the work by High Cotton. While a copy of the acceptance was attached to various memoranda in the record, it is well established that "evidence not properly and officially introduced cannot be considered, even if physically placed in the record. Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal." *Ritter v. Exxon*, 2008–1404, p. 9 (La. App. 4 Cir. 9/09/09), 20 So.3d 540, 546, *citing Denoux v. Vessel Management Services, Inc*., 2007–2143 (La. 5/21/08), 983 So.2d 84. Thus, we are unable to consider any document that was not admitted into evidence or otherwise properly made a part of the record, even if attached to memoranda or the briefs filed in this Court. No document was admitted into evidence at the hearing on the exception of peremption.

However, the August 18, 2005 petition alleged that the work on the Hotel ended in July of 2005. Accepting the allegation as true, High Cotton possessed and occupied the Hotel beginning in July of 2005. More than six years passed from the time High Cotton took possession and occupied the Hotel in July, 2005, and the time Magnolia Enterprises, Inc. filed their petition on September 30, 2011. After the passage of five years, any right that Magnolia Enterprises, Inc., possessed to assert a claim for damages against Carl E. Woodward for the design or construction of the Hotel was extinguished or destroyed. We find no support for

Magnolia Enterprises, Inc.'s argument that the strict liability claim under La. R.S. 9:2772 is not preempted. *See also In re: Katrina Canal Breaches Consolidated Litigation*, 2005-4181, 2005-4182, 2005-4191, 2005-5237, 2005-6073, 2006-0886, 2005-6314, 2005-6324, 2005-6327, 2006-0060, 2006-0225, 2006-2278, 2006-2287, 2006-2346, 2006-2545 (La. E.D. 12/8/06), unreported, 2006 WL 3627749 (wherein plaintiffs claimed a cause of action under La. C.C. art. 667 and the court found that claim and others perempted under La. R.S. 9:2772).

Next, Magnolia Enterprise, Inc. argued that an exception to the peremptive period is applicable. The exception relied upon by Magnolia Enterprises, Inc. provides:

> The peremptive period provided by this Section shall not be asserted by way of defense by a person in possession or control, as owner, lessor, tenant, or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury, damage, or death used upon with regard to any cause of action arising out of the alleged delict, quasi delict, or obligation of any such person arising out of his possession or control of the property.

La. R.S. 9:2772(E).

Magnolia Enterprise, Inc. argued that Carl E. Woodward was in possession or control under the "otherwise" portion of the exception. In support of their argument that the exception should apply, Magnolia Enterprise, Inc. cited *Rando v. Anco Insulations*, 2008-1163 (La. 5/22/09), 16 So.3d 1065. In *Rando*, the plaintiff filed a suit for damages after being diagnosed with mesothelioma, a rare cancer caused by exposure to asbestos. The plaintiff alleged that part of his exposure occurred while working for H.E. Wiese, Inc., n/k/a Jacobs Contractors, Inc. (JCI). Shell hired JCI to construct a plant at an existing Shell facility. JCI argued that the perempory period provided in La. R.S. 9:2772 applied to extinguish the plaintiff's

cause of action. The plaintiff averred that the exception to the peremptory period provided in La. R.S. 9:2772(E) applied to defeat JCI's argument.

Looking at the language employed by the legislature, the Supreme Court determined that contractors were not preclusively excepted, considering the use of the word "otherwise." *Id*., p. 21, 16 So.3d at 1083. The Supreme Court stated that it found no manifest error in the lower courts' findings that "JCI had the requisite possession and control necessary to find JCI was excepted from peremption as provided in La. Rev. Stat. §9:2772(E)." *Id*., p. 26, 16 So.3d at 1085.

Rando involved a claim for personal injuries. In decisions before and after *Rando*, courts consistently allowed contractors to claim the peremptory exception found in La. R.S. 9:2772 to dismiss untimely construction claims in non-personal injury suits. *See, Ebinger*, 2010-2516 (La. 7/1/11), 65 So.3d 1279, *Metairie III v. Poche Const., Inc.,* 2010-0353 (La. App. 4 Cir. 9/29/10), 49 So.3d 446, and *McMahon v. Cool-Vue Aluminum Home Improvement, Inc*., 499 So.2d 348 (La. App. 4 Cir. 1986). Thus, we decline to extend *Rando*'s findings to dismiss this construction claim where no personal injury is alleged by Magnolia Enterprise, Inc.

Magnolia Enterprises, Inc. cited *Coffey v. Block*, 1999-1221 (La. App. 1 Cir. 6/23/00), 762 So.2d 1181, superseded by statute, and *Jones v. Arias*, unpub., 2010-0165 (La. App. 4 Cir. 12/09/10), for the proposition that their allegations of ultra-hazardous activity are sufficient to allege control and possession by Carl E. Woodward. Both *Coffey* and *Jones* involved claims of legal malpractice. The defendants in *Coffey* and *Jones* alleged that the legal malpractice claims were perempted under La. R.S. 9:5605.

Legal malpractice claims are governed by La. R.S. 9:5605, which provides in pertinent part:

> A. No action for damages against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, 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; 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.
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> * * *
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> E. 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. R.S. 9:5605.

In both *Coffey* and *Jones*, the plaintiffs alleged fraud. La. R.S. 9:5605(E) specifically exempts fraud from the peremptive period. Magnolia Enterprises, Inc.'s argument that the allegations of construction and ultra-hazardous activity in their petition are sufficient to allege control and possession is not supported by either the *Coffey* or *Jones* case. The statute providing the peremptive period claimed herein, La. R.S. 9:2772, does not provide a specific exception in cases of ultra-hazardous activity as La. R.S. 9:5605 does for cases involving fraud.

The finding of the trial court that Magnolia Enterprises, Inc.'s claim against Carl E. Woodward is perempted is reasonable in light of the record in its entirety. Therefore, this Court finds no manifest error in the judgment granting the exception of peremption.

CONCLUSION

Based on the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED