BENJAMIN F. CROSBY AND BENTEX ASSOCIATES, INC.	*	**NO. 2017-CA-0424**
	*	
VERSUS		**COURT OF APPEAL**
	*	
SAHUQUE REALTY COMPANY, INC., LATTER & BLUM PROPERTY MANAGEMENT, INC., ABC INSURANCE COMPANY AND XYZ INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	
		STATE OF LOUISIANA
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2009-11421 C\W 2010-6486, DIVISION "B"
Honorable Regina H. Woods, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins)

LOBRANO, J., CONCURS IN THE RESULT

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REVERSED AND REMANDED
December 28, 2017

This appeal involves a landlord-tenant dispute over damages to movable property allegedly due to water intrusion in the leased property. Plaintiffs Benjamin Crosby ("Mr. Crosby") and Bentex Associates, Inc. ("Bentex"), seek review of the trial court's November 2016 ruling granting summary judgment in favor of defendant Sahuque Realty Company, Inc ("Sahuque"). We find no error in the trial court's ruling partially granting Sahuque's exception of prescription, finding Mr. Crosby's pre-2008 claims have prescribed. Additionally, pursuant to our *de novo* review, we find genuine issues of material fact exist, precluding summary judgment. Therefore, we reverse the trial court's judgment in favor of Sahuque and remand for further proceedings.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Mr. Crosby, an interior designer, founded his company Bentex, through which Mr. Crosby purchased textiles that Bentex would convert into draperies, rugs, upholstery, bedding, wall covering, and other furnishings. Bentex would then sell the finished products to hotels, cruise ships, and other buyers nationwide.

Mr. Crosby leased three apartments owned by Sahuque, and later managed by Latter & Blum Property Management, Inc. ("Latter & Blum") (collectively "Defendants"), at 708 Orleans Avenue in the New Orleans French Quarter. Mr. Crosby, whose primary residence is in Florida, used two of the apartments as his second home until September 2008. [1] Bentex leased the third apartment for use as

[1] Mr. Crosby was diagnosed with a sinus problem that he alleged was caused by exposure to mold, which allegedly grew on Mr. Crosby's personal belongings after the 2008 water intrusion event. The personal injury claim was severed from his property damage claim and dismissed

a decorated showroom.

Mr. Crosby and Bentex initially entered into written lease contracts for the apartments. A provision included in the leases waived Sahuque's liability for "any injury or damages to any property or to any person on or about the leased premises or for any injury or damage to any property of lessee." The leases further stated that, if the property suffered partial but reparable destruction, the lessor could choose to cancel the lease or instead repair the damage after notification to the lessee. The leases also contained a provision that purported to release Sahuque of any responsibility for water damage "unless same is caused by lessor's failure to comply with any obligations expressly assumed in this lease." After the leases expired on December 31, 2004, Mr. Crosby and Bentex continued leasing the properties pursuant to an oral agreement on a month-to-month basis.

Sahuque admitted that on at least five occasions between 1995 and 2000, rain events caused water to flow into the apartments and cause damage to plaintiffs' property. During plaintiffs' occupancy, from the mid-1990s until June 2009, plaintiffs experienced water intrusion into the apartments that damaged plaintiffs' movable property, including interior furnishings, draperies, and artwork. There is a factual dispute over the last date of water intrusion that caused damages to Mr. Crosby's belongings.

Plaintiffs filed their original petition in October 26, 2009, alleging that defendants breached duties they owed pursuant to the lease contracts and under

with prejudice on summary judgment on March 16, 2012, which Mr. Crosby did not appeal.

law. Plaintiffs alleged that despite repeated notice, defendants failed to make necessary repairs to weatherproof the leased property. Plaintiffs averred that the units became infested with mold, causing Mr. Crosby to seek medical treatment. The original petition sought damages for Mr. Crosby's personal injuries, medical expenses, and for mold contamination and resulting damages to personal property.

Plaintiffs filed a petition for damages, claiming defendants failed to properly weatherproof and make necessary repairs to the leased property constituting a continuing tort, because the operating cause of the injury was ongoing and gave rise to successive damages. Defendants disputed plaintiffs' claims, arguing that the alleged damages resulted from the separate weather-related occurrences of water intrusion into the units, rather than from defendants' continuous tortious conduct. Defendants filed an exception of prescription, which the trial court granted; however, this Court reversed on appeal.[2]

Sahuque reasserted its exception of prescription on remand. The trial court found that because plaintiffs filed suit in October 2009, plaintiffs' claim regarding the January 2009 rain event was within the one-year liberative prescription period. The trial court also found that plaintiffs claim based on the August 2008 rain event was not prescribed. The trial court determined in light of the parties' January 2009 agreement, which Mr. Crosby memorialized, defendants had lulled plaintiffs into inaction, as contemplated by the doctrine of *contra non valentum*. Therefore, on April 2, 2014, the trial court partially granted the exception, concluding that only

[2] This Court found the trial court relied on evidence not properly introduced into the record. *Crosby v. Sahuque Realty Co., Inc.*, 12-1537 (La. App. 4 Cir. 8/21/13), 122 So.3d 1197.

plaintiffs' claims relating to the August 2008 and January 2009 rain events were not prescribed.

In July 2015, shortly after Sahuque filed a motion to compel discovery, plaintiffs' counsel withdrew from the case. The trial court allowed plaintiffs an opportunity to obtain new counsel. Subsequently, Sahuque moved to dismiss plaintiffs' lawsuit, citing plaintiffs' failure to enroll new counsel, to provide dates for Mr. Crosby's deposition, and to respond to discovery. Mr. Crosby appeared *pro se* for himself and Bentex at the April 2016 hearing, explaining the delay in obtaining new counsel. The trial court nevertheless granted in part the motion to dismiss, dismissing with prejudice all of Bentex's claims on the basis that Mr. Crosby could not represent the company *pro se* and ordered Mr. Crosby to respond to defendants' discovery requests.

Thereafter, Sahuque filed a motion for summary judgment. At the hearing, Sahuque argued that Mr. Crosby failed to produce an expert witness to establish that the August 2008 and January 2009 water intrusion events were the cause-in-fact of Mr. Crosby's damages. Mr. Crosby submitted an engineer report which he alleges established that the 2008 and 2009 water intrusion events caused the mold found in the units. Additionally, Mr. Crosby submitted a detailed, sworn affidavit, including specific statements that the August 2008 water intrusion event caused mold to propagate in the units, rendering his personal property toxic and unusable. Mr. Crosby also attached an inventory of the "personal property damaged by exterior water intrusion or mold infestation/contamination or both from August 21,

2008 forward to June, 2009."

The trial court found Mr. Crosby failed to establish what damages were caused by the non-prescribed August 2008 and January 2009 water intrusion events. The trial court also rejected Mr. Crosby's affidavit as "self-serving" and determined that Mr. Crosby failed to corroborate his testimony with the testimony or affidavit of an independent eye-witness. The trial court granted summary judgment in November 2016, and dismissed Mr. Crosby's remaining claims with prejudice. This appeal follows.[3]

JURISDICTION

As an initial matter, we find Bentex's claims are not before this Court. The trial court dismissed Bentex and its claims with prejudice on April 15, 2016. In that the judgment of dismissal was a final, appealable judgment pursuant to La. C.C.P. art. 1915(A)(1), the delay for appealing the dismissal of its claims began to run on April 16, 2016, and expired in June 2016. Thus, the delays for appellate review have prescribed. *See* La. C.C. P. arts. 2123 and 2087 (delays for suspensive and devolutive appeals). Additionally, the January 13, 2017 motion and order for devolutive appeal was filed on behalf of Mr. Crosby only. Bentex never filed a motion for appeal, nor has Bentex obtained an order of appeal on any issue.

This Court will consider the assigned errors only as they relate to Mr. Crosby in his individual capacity.

[3] Plaintiffs filed a motion to dismiss Latter & Blum as an appellee, which this Court subsequently granted. This Court's opinion addresses the appeal against Sahuque only.

Moreover, in its appellee brief, Sahuque asserts its own challenges to the trial court's rulings as to prescription, amendment to the petition, and dismissal sanctions. Sahuque, however, did not file an answer to Mr. Crosby's appeal; nor did it file a cross-appeal. Therefore, this Court lacks jurisdiction to consider them on appeal. *See* La. C.C.P. arts. 2121 and 2133; *Bd. of Sup'rs of La. State Univ. v. Dixie Brewing Co.*, Inc., 15-1053, p. 6-7 (La. App. 4 Cir. 9/1/16), 200 So.3d 977, 983; *Prince v. Mattalino*, 583 So.2d 541, 543 (La. App. 3rd Cir. 1991) (finding absent an order of appeal, or answer filed, appellate court lacked jurisdiction to consider appellee's claims).

PRESCRIPTION

A trial court's findings of fact on the issue of prescription are subject to manifest error/clearly wrong standard of review. *Davis v. Hibernia Nat. Bank*, 98-1164, p. 2 (La. App. 4 Cir. 2/24/99, 2), 732 So.2d 61, 63. ("When evidence is introduced and evaluated at the trial of a peremptory exception, an appellate court must review the entire record to determine whether the trial court manifestly erred with its factual conclusions"); *Stobart v. State through Dept. of Transp. and Development*, 617 So.2d 880, 882 (La. 1993). In reviewing the trial court's legal conclusions, however, the appellate court applies a *de novo* standard of review. *Felix v. Safeway Ins. Co.*, 15-0701, p. 5-6 (La. App. 4 Cir. 12/16/15), 183 So.3d 627, 631.

In his first assigned error, Mr. Crosby avers that the trial court erroneously ruled that his pre-August 2008 damage claims had prescribed. He contends that

his earlier damage claims are predicated on a breach of contract action which is subject to a ten-year prescriptive period, as opposed to a personal tort action subject to a one-year prescriptive period.

Sahuque argues, on the other hand, that Mr. Crosby only obtained an order of appeal from the trial court's November 2016 ruling granting summary judgment and did not request or obtain an order of appeal on the ruling on prescription. We find no merit to Sahuque's argument. A judgment that determines the merits in whole or in part is a final judgment. La. C.C.P. art. 1841. An interlocutory judgment decides only preliminary matters in the course of the action. *Sullivan v. Malta Park*, 16-0875, p. 2 (La. App. 4 Cir. 1/31/17), 215 So.3d 705, 707. When a party obtains an order of appeal of a final judgment, the appellate court obtains jurisdiction over interlocutory judgments that preceded it.

Alternatively, Sahuque contends that Mr. Crosby claims for the first time on appeal that his damage claims are subject to a ten-year prescriptive period. "An appellate court generally finds it inappropriate to consider an issue raised for the first time on appeal when that issue was not pled, urged, or addressed in the court below." *Jones v. Dep't of Police*, 11-0571, p. 8 (La. App. 4 Cir. 8/24/11), 72 So.3d 467, 472 (citing *Graubarth v. French Market Corp.*, 07-0416, p. 5 (La. App. 4 Cir. 10/24/07), 970 So.2d 660, 664) (declining to address an issue raised for the first time on appeal). Counsel for plaintiffs argued that under the theory of continuous tort the pre-August 2008 claims had not prescribed. The assertion that his earlier damage claims are subject to a ten-year prescriptive period was never raised; thus,

we decline to consider the issue on appeal.

Further, we find no error in the trial court's April 2014 ruling on the exception. Claims for damage to movable property are subject to one-year liberative prescription. La. C.C. art. 3492. The prescriptive period begins on the day the plaintiff knew or should have known that he has sustained damage. *Id.*; *Carbo v. Hart*, 459 So.2d 1228, 1230 (La. App. 1st Cir.1984) (citing *Dean v. Hercules, Inc.*, 328 So.2d 69, 73) ("prescription runs from the date the damage becomes apparent"). Based on jurisprudence, repeated instances of flooding do not constitute a continuing tort and cannot serve to interrupt prescription of property damage claims. *Roberts v. Murphy Oil Corp.*, 577 So.2d 308, 311 (La. App. 4th Cir. 1991) (finding "repeated instances of flooding caused by the negligent alteration of drainage are separate and distinct events which do not serve to interrupt prescription"); *Carbo*, 459 So.2d at 1231.

Neither party disputes that Mr. Crosby sustained property damage as a result of water intrusion events beginning in the mid to late 1990s. Thus, prescription began to run on each property damage claim from the date the damage was sustained. Mr. Crosby filed his petition on October 26, 2009, and therefore, the trial court properly dismissed Mr. Crosby's pre-August 2008 damage claims as prescribed. Therefore, we find no error in the trial court's partial granting of the exception of prescription, finding that while Mr. Crosby's claims for damages allegedly suffered after August 2008 have not prescribed, his claims for damages allegedly suffered from 1995 to 2005 have.

SUMMARY JUDGMENT

Motions for summary judgment are subject to *de novo* review. *Garrett v. Adcock Const. Co*., 13-0134, p. 3 (La. App. 4 Cir. 8/14/13), 122 So.3d 1134, 1138. This Court noted:

> [The reviewing court uses] the same standard applied by the trial court in deciding the motion for summary judgment. Under this standard, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." *Steinfelds v. Villarubia*, 10-0975, p. 4 (La. App. 4 Cir. 12/15/10), 53 So.3d 1275, 1278–1279 (quoting *Lingoni v. Hibernia Nat'l Bank*, 09-0737, pp. 4–5 (La. App. 4 Cir. 3/3/10), 33 So.3d 372, 375.

Id., 13-0134, p. 4, 122 So.3d at 1138.

On a motion for summary judgment, the mover has the burden of showing that there is no genuine issue of material fact. La. C.C.P. art. 966(D). When the mover does not bear the burden of proof at trial, the mover is not required "to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim." *Id.* Conversely, a non-moving plaintiff need only show that a disputed material fact exists. *Id*; *Rosen v. United States Auto. Ass'n*, 12-0284, p. 4 (La. App. 4 Cir. 11/14/12), 104 So.3d 633, 637. A plaintiff may use circumstantial evidence to defeat a motion for summary judgment. *Balthazar v. Hensley R. Lee Contracting, Inc.*, 16-0920, p. 16 (La. App. 4 Cir. 3/15/17), 214 So.3d 1032, 1044, *reh'g denied* (3/28/17), *writ denied*, 17-0777 (La. 9/22/17), 228 So.3d 741 (citing *Wood v. Becnel*, 02-1730, p. 5 (La. App. 4 Cir. 2/26/03), 840 So.2d 1225, 1227). The Louisiana Supreme Court explained

the use of circumstantial evidence as follows:

> In a civil case, the plaintiff's burden is to prove her case by a preponderance of the evidence. This burden may be met by direct or circumstantial evidence. If, as in this case, circumstantial evidence is relied upon, that evidence, taken as a whole, must exclude every other reasonable hypothesis with a fair amount of certainty. This does not mean, however, that it must negate all other ***possible*** causes.

Lacey v. Louisiana Coca-Cola Bottling Co., 452 So.2d 162, 164 (La.1984) (emphasis in original); *Wood*, 02-1730, p. 5 (La. App. 4 Cir. 2/26/03), 840 So.2d at 1227.

To prevail on a claim under the lease provisions codified in La. C.C. art. 2696, *et seq.*, plaintiff must prove that there was "a defect in the premises which caused the damage…A defect is a dangerous condition reasonably expected to cause injury to a prudent person using ordinary care under the circumstances." *Freeman v. Julia Place*, 95-0243, p. 7 (La. App. 4 Cir. 10/26/95), 663 So.2d 515, 519. To the extent Mr. Crosby asserts that his claims are based on general negligence, the Louisiana Supreme Court explained:

> a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element); (2) the defendant failed to conform his or her conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and, (5) actual damages (the damages element).

Davis v. Witt, 02-3102, p. 11 (La. 7/2/03), 851 So.2d 1119, 1127.

Pursuant to La. C.C. art. 2696, "the lessor warrants the lessee that the thing is suitable for the purpose for which it was leased and that it is free of vices or defects that prevent its use for that purpose." Article 2697 extends such warranties to include vices or defects not known to the lessor. The warranty established by

these articles cannot be waived except by clear and unambiguous written terms which are brought to the lessee's attention. *McKnight v. McCastle*, 04-2437, p. 5 (La. App. 1 Cir. 12/22/05), 928 So.2d 45, 49; *Walnut Equipment Leasing Co., Inc. v. Moreno*, 26,004, p. 8 (La. App. 2 Cir. 9/21/94), 643 So.2d 327, 332. In its April 2014 ruling, the trial court found that Sahuque had a duty to waterproof the building encompassing the three apartments rented by Mr. Crosby so as to render them suitable for their intended use.

Sahuque argues that it is entitled to summary judgment because the lease provisions excluded liability for property damage, and under Section 19 of the lease, Mr. Crosby waived any right to recovery for water damage. An issue of material fact exists as to the validity of the purported waiver. Upon expiration of the written lease in December 2004, an oral lease governed the parties' relationship. During that period, Mr. Crosby avers he did not give a written warranty waiver. Even if Section 19 of the written lease extended into the oral lease, a fact question remains as to whether Sahuque brought the provision to Mr. Crosby's attention upon the assumption of the oral lease.

Mr. Crosby also contends summary judgment is precluded because there are genuine issues of material fact as to causation. Mr. Crosby contends that Sahuque erroneously argued, at the summary judgment hearing, that it was necessary for Mr. Crosby to definitively prove that the August 2008 and January 2009 water intrusion events caused damages to his personal property as alleged in his petition. Mr. Crosby further asserts that the trial court erred when it adopted Sahuque's misplaced reasoning. In pertinent part, Mr. Crosby directs this Court to the trial court's oral reasoning. The court stated on the record:

> [T]he problem that this Court is having is what would be likened to a causation problem in a personal injury case. Yes, the Gertler Brothers report states that there was mold effective as of the date that they came out and inspected which was November 1, 2008, but they don't say that this mold wasn't present before August or it doesn't say that it was there as of August. ***They don't say a*** **[sic]** ***causation for this particular claim that you have filed***.
>
> Two…***this Court has no idea as it sits here right now*** because it's not been defeated properly in the attachments to summary judgment ***whether or not the damages were the result of the 2008 water intrusion*** as indicated by Mr. Crosby, or if it preceded that.

(emphasis added).

The trial court concluded that based on the lack of direct evidence Mr. Crosby failed to connect the damage he allegedly sustained to the water intrusion events occurring in August 2008 and January 2009. Whether or not the August 2008 water intrusion caused the mold uncovered during the November inspection is a fact question that should be decided by the trier of fact. The only question for the trial court to decide on summary judgment is whether the evidence is sufficient that reasonable minds could disagree. "If reasonable minds could differ as to an issue of material fact, summary judgment is improper." *Prime Ins. Co. v. Imperial Fire & Cas. Ins. Co.*, 14–0323, p. 14 (La. App. 4 Cir. 10/1/14), 151 So.3d 670, 679; *M.R. Pittman Grp., L.L.C. v. Plaquemines Par. Gov't*, 15-0860, p. 19 (La.App. 4 Cir. 12/2/15), 182 So.3d 312, 324. Mr. Crosby avers that the very fact that the trial court could not definitively say that the result of the 2008 and 2009 water intrusions did not cause the damages Mr. Crosby complains of is indicative of the existence of disputed issues of fact; and thus, summary judgment is improper. Additionally, requiring Mr. Crosby to prove his case rather than demonstrate that genuine issues of material fact exist imposes an improper burden on him at the summary judgment stage.

In this case, Mr. Crosby submitted his sworn affidavit, his deposition testimony, the engineer report establishing the presence of mold in the apartments, and an inventory of his personal property allegedly damaged by the water intrusion and/or mold contamination. The trial court rejected Mr. Crosby's affidavit, finding it "contained self-serving statements" and because "there's no independent witnesses" or statements to corroborate Mr. Crosby's sworn statements. Mr. Crosby argues that his affidavit sets forth uncontroverted evidence of Sahuque's repeated failures to remedy the water intrusion problem. Moreover, a review of Mr. Crosby's testimony advances facts regarding the 2008 and 2009 water intrusion events based on his own personal knowledge that would be admissible at trial.

Mr. Crosby testified that following a rain event in August 2008, he was out of town at the time when he was contacted by a representative of Latter & Blum. The representative requested access to the apartments in order to assess the impact of the recent rain event. The representative later informed Mr. Crosby that the units did not sustain water intrusion. When Mr. Crosby returned to New Orleans, however, he discovered that Latter & Blum's representations to him about the property's condition were false. He testified that he found that extensive water damage had occurred, causing the kitchen cabinets to buckle and extensive water damage to his china cabinet and drapes. He also found that someone had placed drying fans in the units.

After the August 2008 event, Mr. Crosby testified that he began withholding rent. Mr. Crosby wrote a letter to Sahuque, detailing the August event and indicated his dissatisfaction with Sahuque and its property manager. The last

significant water intrusion occurred on January 3, 2009, the date of a severe rainstorm. On January 4, 2009, an agent for Mr. Crosby entered the apartments and discovered wet carpets, drapes, and floors. On January 6, 2009, Mr. Crosby sent a second letter advising defendants of the January 3, 2009 rain event and water intrusion. Mr. Crosby had occasion to personally assess the units during his annual January trip to New Orleans to attend a conference. Although he had stopped staying at his allegedly mold-infested apartment during his visits to New Orleans due to a sinus condition, Mr. Crosby had keys to the apartments, which he used to assess the damage to his personal property.

The evidence shows that Mr. Crosby made many attempts to give oral and written notice after each water intrusion event and the resulting property damage. On January 14, 2009, Mr. Joseph Pappalardo, an agent for Sahuque, sent a letter to Mr. Crosby, requesting to inspect the apartments to determine the scope of the remediation work and the logistics for performing the remediation. Mr. Crosby replied with a best date and time for inspection. Mr. Crosby's undisputed testimony indicates that on January 20, 2009, a meeting was held to discuss the results of the inspection. Thereafter, Mr. Katherine Prechter, a representative of Mr. Crosby, negotiated with Latter & Blum by phone and an agreement was reached for Sahuque to weatherproof the building, clean the air conditioning ducts, and remediate the apartments of mold. Mr. Crosby agreed that upon completion of the repairs, he would execute a waiver for any and all damage to personal property belonging to him and Bentex. Sahuque promised to grant Mr. Crosby a five-year

lease on the apartments at the existing rental rate. This phone conversation was memorialized by a letter Ms. Prechter sent to Mr. Pappalardo dated January 30, 2009. Sahuque failed to object in writing to the memorialized version of the agreement. In fact, Sahuque acted in accordance with the agreement by securing permits to waterproof the building and informing Mr. Crosby of the projected start date and instructions for storing his property during remediation. Months later, in May 2009, Sahuque reneged on this agreement, responding in writing to the January 2009 letter and disputing its terms. In June, a month after Sahuque reneged on the agreement, Sahuque evicted Mr. Crosby and Bentex, giving them five days to vacate the leased property.

Sahuque argues summary judgment is warranted in this case because there is no direct evidence from an independent witness to corroborate Mr. Crosby's sworn statements and deposition testimony. "[I]n ruling on a motion for summary judgment, the court must generally accept an affiant's testimony or affidavit as true." *State, Dep't of Transp. & Dev. v. Cecil*, 42, 433, p. 4, (La. App. 2 Cir. 9/19/07), 966 So.2d 131, 134 (citing *Hines v. Garrett*, 04-0806 (La.6/25/04), 876 So.2d 764). "The court may reject such evidence only when [the affiant's testimony] 'contains substantive contradictions or discrepancies that would ordinarily tend to call his credibility into doubt if presented to a fact-finder.'" *Id.*, (citing *Hines* 04-0896, p. 6, 876 So.2d at 769). Further, pursuant to La. C.C.P. art. 967, there is no requirement that Mr. Crosby's affidavit must be corroborated by an independent witness. *Id.*, 42, 433, p. 6, 966 So.2d at 135. La. C.C.P. art. 967(A)

requires that affidavits submitted on summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The simple fact that Mr. Crosby is a plaintiff does not preclude him from submitting his own sworn testimony via an affidavit in opposition to summary judgment.

To the extent Sahuque argues that his affidavit is self-serving, Mr. Crosby contends there is no basis to disregard it in this case, particularly when the affidavit is not contradicted by counter-affidavits. As the moving party, Sahuque bears the burden on summary judgment to show there are no genuine issues of fact. Sahuque did not produce a counter-affidavit or other evidence demonstrating that the 2008 and 2009 water intrusions did not result in damage. Instead, at the hearing, defense counsel argued that Mr. Crosby and Bentex signed the new lease in 2003 with full knowledge that water intruded onto the property in significant rain events. As for the 2008 and 2009 water intrusions, Sahuque relied on the liability waiver in the 2003 lease and the assertion that the pre-2008 rain events had already destroyed Mr. Crosby's property. The issues raised by these arguments present factual questions and, likewise, are insufficient to support summary judgment. *Lacure v. Brookshire's Stores*, 38, 627, p. 6 (La. App. 2 Cir. 6/23/04), 877 So.2d 264, 268 (finding argument alone is insufficient to support summary judgment); *Succession of Harvey v. Dietzen*, 97-2815, p. 16 (La. App. 4 Cir. 6/24/98), 716 So.2d 911, 919 ("[I]t is not the trial court's function on motion

for summary judgment to determine or even inquire into the merits of the issues raised"). Therefore, we find Sahuque has failed to demonstrate that there are no genuine issues of material fact.

DECREE

Based on the foregoing, we find no error in the trial court's partial granting of the exception of prescription, when it determined that Mr. Crosby's pre-2008 claims have prescribed. Additionally, it is settled law that a plaintiff may overcome a motion for summary judgment by a preponderance of direct or circumstantial evidence. Considering the evidence presented, including Mr. Crosby's deposition testimony, affidavit, and the engineer report, reasonable minds may disagree as to whether the 2008 and 2009 water intrusion events caused the alleged damage to Mr. Crosby's movable property. Therefore, genuine issues of material fact exist which make summary judgment inappropriate. Accordingly, the trial court's November 2016 judgment is reversed and remanded for further proceedings in line with this opinion.

REVERSED AND REMANDED