Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **25th day of March, 2022** are as follows:

BY Crichton, J.:

2021-C-00838 LEISURE RECREATION & ENTERTAINMENT, INC. VS. FIRST GUARANTY BANK (Parish of East Baton Rouge)

REVERSED AND REMANDED. SEE OPINION.

Retired Judge Madeline Jasmine appointed Justice ad hoc sitting for Hughes, J., recused in case number 2021-C-00838 only.

Retired Chief Justice Bernette Joshua Johnson appointed Justice ad hoc sitting for Crain, J., recused in case number 2021-C-00838 only.

Johnson, J., concurs in part, dissents in part and assigns reasons.

Jasmine, J., concurs in part, dissents in part and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2021-C-00838

LEISURE RECREATION & ENTERTAINMENT, INC.

VS.

FIRST GUARANTY BANK

On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of East Baton Rouge

CRICHTON, J.*

This summary judgment matter arises out of a petition for declaratory judgment seeking declaration, *inter alia*, that defendant First Guaranty Bank (the "Bank") applied an incorrect interest rate and thus miscalculated the principal owed on a certain Promissory Note executed by borrower-petitioner Leisure Recreation & Entertainment, Inc. ("Leisure") in favor of the Bank on December 31, 1991 (the "Note"). We granted Leisure's writ application to determine whether the court of appeal erred in applying the "voluntary payment doctrine" to hold that Leisure is estopped from recovering payments voluntarily made, regardless of whether owed. We additionally review whether the court of appeal erred in determining the Note presented an alternative obligation as to the Prime Rate interest structure for years 11 through 30 of its repayment, whether it erred in imposing its own interest rate structure during that period, and whether the Bank's prescription arguments preclude Leisure's recovery of any interest paid and not due between December 31, 2001 and October 7, 2013.

Finding the "voluntary payment doctrine" contravenes the Louisiana Civil Code, we reverse the court of appeal insofar as it (1) reversed the portion of the

*Retired Judge Madeline Jasmine appointed Justice *ad hoc* sitting for Hughes, J., recused. Retired Chief Justice Bernette Joshua Johnson appointed Justice *ad hoc* sitting for Crain, J., recused.

district court's judgment denying the motion for summary judgment filed by the Bank as to the voluntary payment affirmative defense, *see* La. C.C. art. 2299; (2) dismissed Leisure's claim for declaratory relief as to the interest it voluntary paid the Bank between December 31, 2001 and October 7, 2013; and (3) rendered judgment ordering the Bank to repay Leisure "any overcharge of interest in excess of the prime rate that Leisure has paid on the [Note] since the filing of its suit on October 7, 2013, together with interest thereon from the date of judicial demand until paid."

Finding that the Note sets forth an "alternative obligation" as defined in La. C.C. art. 1808,[1] we reverse the court of appeal insofar as it (1) reversed the district court decree that Leisure was entitled to select the Prime Rate structure pursuant to La. C.C. art. 1810;[2] and (2) reversed the district court's declaration that Leisure paid all indebtedness owed to the Bank on the Note as of June 28, 2015, and is owed return of all amounts paid thereafter.

We remand to the court of appeal for consideration of the Bank's arguments on appeal that were pretermitted by the court of appeal opinion and are not in conflict with the foregoing disposition and to render judgment in accordance herewith.

FACTS AND PROCEDURAL HISTORY

The underlying dispute centers on the terms of a commercial loan agreement, that certain Borrowing Agreement dated December 31, 1991 (the "Borrowing Agreement"), by which the Bank agreed to extend a revolving line of credit in the amount of $1,600,000 to Leisure. In connection with the Borrowing Agreement, Leisure executed the Note and promised therein to repay the principal amount

[1] La. C.C. art. 1808 provides: "An obligation is alternative when an obligor is bound to render only one of two or more items of performance."

[2] La. C.C. art. 1810 provides: "When the party who has the choice does not exercise it after a demand to do so, the other party may choose the item of performance."

borrowed in monthly installments over a 30-year period, with interest accruing as follows:

> Years 1-5, the simple interest rate shall be fixed at 6.5% per annum; years 6-10, the simple interest rate shall be fixed at 7.5% annum; ***and years 11-30, the simple interest rate shall be at the Citibank Prime, floating for minimum of one year or fixed for a period of not less than one year, nor more than five years at option of [Leisure]*** with floor and ceiling as shown above.[3]

(Emphasis added.) In a section entitled "Repayment Provisions," the Note provides repayment will be made in 360 monthly payments as follows:

> 12 equal monthly payments of $8,817.35 beginning 1/31/92, then 48 equal payments of $10,127.73 beginning 1/31/93, then 60 equal monthly payments of $11,075.28 beginning 1/31/97, then 239 monthly payments ***beginning Jan. 31, 2002 on a 20 year amortization in accordance with the prevailing interest rates as described in Section 3 in the Borrowing Agreement***, then one final payment of the unpaid principal & accrued interest due December 31, 2021.

(Emphasis added.) Section 3 of the Borrowing Agreement provides that interest will accrue at a 6.5% fixed interest rate for years one through five, a 7.5% fixed rate in years six through ten, "then Citibank Prime, floating for a minimum of one year or fixed for a period of not less than one year nor more than five years at the option of [Leisure] with a floor of 4% and a ceiling of 12%."

From December 31, 1991 to December 31, 2001, Leisure made monthly payments in accordance with the terms of the Note and the Borrowing Agreement, with interest accruing at 6.5% for years one through five and at 7.5% in years six through ten. Despite the Note's terms that in "years 11-30, the simple interest rate ***shall be at the Citibank Prime***," the Bank continued to charge Leisure interest at the 7.5% rate in effect for years six through ten. It is undisputed the 7.5% rate exceeds the Prime Rate, on average, over the applicable period.

In May 2013, Leisure's officers became aware that the Bank was not calculating interest at the Prime Rate and contacted the Bank to ascertain more

[3] The floor and ceiling rates provided in the Note are 4% and 12%, respectively.

information. The Bank sent a letter on May 24, 2013, stating "[t]he Prime Rate is currently 3.25% and, accordingly, should [Leisure] make an election, under the terms of the note, the rate today would be the stated floor of 4%." That letter requested Leisure to notify the Bank in writing of its election, if any, as to the rate terms described in the Note's provision that Leisure may elect "CitiBank Prime, floating for a minimum of one year, or fixed for a period of not less than one year, nor more than five years." By letter dated July 15, 2013, however, the Bank advised Leisure of a change in its position on the matter: namely, that Leisure failed to exercise its "option" to apply any Prime Rate interest terms after year ten and, as such, the 7.5% interest rate remained applicable for the last 20 years of the loan.

Following the Bank's refusal to apply a Prime Rate interest structure, Leisure filed a petition for declaratory judgment, asserting that the Bank miscalculated the interest owed on the Note for years 11 through 30 and that Leisure is entitled to assert a defense to the Note's payment.[4] Leisure sought declaration that the Note and Borrowing Agreement required the Bank to calculate interest by using the Prime Rate beginning in year 11 of the loan and thereafter, *i.e.* as of January 1, 2002, and Leisure is entitled to a corrected computation of principal owed applying the Prime Rate. At the time of its petition, Leisure asserted the principal balance owed on the loan was overstated by approximately $425,000.

The Bank filed peremptory exceptions of no cause of action and prescription, an answer and affirmative defenses and argued, *inter alia*, that Leisure's petition

[4] Leisure makes clear in its briefs to the lower courts that it strategically chose to file a petition for declaratory judgment in lieu of stopping payments because the loan agreements provided the Bank certain rights in the event of Leisure's failure to make payments, including the right to accelerate the maturity of the Note. Leisure also indicates it anticipated the Bank would assert prescription as to some of the payments made more than five years prior to its petition under La. C.C. art. 3498 (prescription of five years applicable to actions on promissory notes) and accordingly sought declaration that Leisure is entitled to a defense against the Bank's demands on the Note to ensure applicability of La. C.C.P. art. 424 ("a prescribed obligation arising under Louisiana law may be used as a defense if it is incidental to, or connected with, the obligation sought to be enforced by the plaintiff"), discussed *infra*.

fails to state a cause of action because it does not allege Leisure "exercised the option" to adjust the interest rate to the Prime Rate for years 11 through 30, that it further failed to allege such adjustment was required of the Bank without Leisure's consent, and that the option expired upon the passage of a reasonable time. Since 11 years had passed between the date the interest rate "option" was available to Leisure and the prescriptive period applicable to actions on promissory notes is five years under La. C.C. art. 3498, the Bank argued Leisure's suit was prescribed.

Because Leisure would make its last uncontested payment on June 28, 2015 – *i.e.* as of that date, Leisure believed it had repaid the principal borrowed if applying its chosen Prime Rate structure – Leisure filed a Motion to Permit Deposit of Disputed Funds on June 15, 2015. Leisure asserted that if unable to deposit the disputed funds it would otherwise be "forced to risk breaching its agreement with [the Bank] in order to protect the integrity of its lawsuit." Following an expedited hearing and relevant to Leisure's arguments as to whether its claims prescribed, the parties entered into a consent order by which they agreed Leisure would continue to make the disputed monthly payments with the following reservation of its rights:

> [A]ll payments hereafter made by [Leisure] shall be understood to be made under protest and ***with express reservation of [Leisure's] right to continue to assert any "defense" to the demanded payment of those disputed amounts.***
>
> ***
>
> Solely to the extent necessary to effectuate this Order and for no other purpose, ***[the Bank] renounces any right that it may otherwise have to assert that the making of a disputed payment prejudiced or altered [Leisure's] rights.*** Accordingly, the making of any disputed payments to [the Bank] shall not be deemed to constitute an acknowledgement, waiver, or other similar alteration of [Leisure's] or [the Bank's] legal position. ***Nor shall the making of any disputed payment preclude [Leisure] from affirmatively recovering that payment if the Court ultimately determines that [the Bank] has computed interest illegally or incorrectly or otherwise caused [Leisure] to overpay. It is expressly understood that such disputed payments shall not in any way prejudice, affect, or impact [Leisure's] right to continue to assert that***

a claim or defense is a "defense" to those payments within the meaning of Louisiana Code of Civil Procedure article 424.[5]

(Emphasis added.)

In September 2015, Leisure filed a motion for summary judgment, arguing therein that the disputed interest rate provision required the Bank to calculate interest using the Prime Rate for all payments made since January 2002. Leisure took the position that the Note did not set forth an "option" to apply a Prime Rate but required application of the Prime Rate at a structure determined by Leisure – *i.e.* as to whether the Prime Rate applied would be floating (adjusted daily), for periods of one year or more, or fixed for one-to-five year periods. Leisure asserted that applying a one-year fixed Prime Rate would render the Note completely repaid as of June 28, 2015.

The Bank opposed Leisure's motion for summary judgment and filed a cross-motion seeking summary judgment against Leisure. According to the Bank, the Note created a one-time "option" for Leisure to convert the Note from a 7.5% rate to the Prime Rate at the beginning of year 11. Because Leisure failed to invoke the Prime Rate option, the Bank argued, the option expired and the interest rate became permanently fixed at 7.5%. In conjunction with its summary judgment filing, the Bank also again raised peremptory exceptions of no cause of action and prescription that it had filed in response to Leisure's petition.[6]

The district court overruled the Bank's exceptions of no cause of action and prescription but denied Leisure's motion for summary judgment and granted the Bank's motion for summary judgment. Leisure appealed to the court of appeal, which held that the Note required the Prime Rate to apply in years 11 through 30. *See Leisure Recreation & Ent., Inc. v. First Guar. Bank*, 2016-978 (La. 1st Ct. App.

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[5] *See* Note 4, *supra*.

[6] The hearing on the exceptions was originally continued indefinitely pursuant an unopposed motion filed by Leisure.

8/17/17), 2017 WL 3573998 ("*Leisure I*"). Rejecting the Bank's option theory, the court provided:

> The Note's interest provision is not an option contract because it is not an offer for which the Bank is bound for a specified period of time and which Leisure may accept within that time. The Bank has not cited any cases holding that a provision in a note allowing a choice of a period of time to fix an interest rate is an option contract. ***The Note's interest provision is more similar to an alternative obligation because for years 11–30, Leisure could choose to pay interest at a floating rate or at a fixed rate for a definite period of time.***

Id. at 5 (emphasis added).

Having recognized that the choice of Prime Rate terms for years 11 through 30 was an alternative obligation, the court of appeal observed it was unclear which party had the option to choose. *Id*. at 11-12. Specifically, the court noted that the Bank had originally requested Leisure to submit a written election of Prime Rate structure by its letter dated May 24, 2013, but that the Bank altered its position in its letter dated July 15, 2013. *Id*. Observing the contradictory nature of these positions, the court of appeal remanded because "a genuine issue of material fact exists as to whether the Bank made a demand upon Leisure to exercise its choice pursuant to La. C.C. art. 1810, and, if so, because Leisure failed to choose, which interest rate and term the Bank would choose to apply." *Id*. at 10.[7] After setting forth various theories as to the applicable prescriptive period to this case, the court of appeal ultimately denied the Bank's writ as to its exception of prescription "on showing made." *Id*. at 10. This Court denied writs. *Leisure Recreation & Ent., Inc. v. First Guar. Bank*, 2017-1567 (La. 11/17/17), 229 So. 3d 932.

On remand, the district court granted the Bank leave to file an Amended Answer and Affirmative Defenses and Reconventional Demand. The Bank thereby

[7] Then-Judge Crain concurred, stating that for years 11-30 he interpreted the Note "to provide interest at the applicable prime rate, floating for at least one year, with Leisure having the option at each year end to fix the rate for a period of not less than one year, nor more than five years." He agreed mixed issues of fact and law prevented summary judgment and cited cases applying the voluntary payment doctrine.

added the affirmative defense of equitable estoppel and asserted that at the very least all of Leisure's claims related to payments due between December 31, 2001 and October 31, 2008 are prescribed and should be dismissed. On reconventional demand, the Bank sought declaratory judgment that, *inter alia*, Leisure's option had prescribed, the Bank detrimentally relied on Leisure's continued payments at 7.5% interest rate, and the Bank is entitled to retain all payments received until Leisure exercises the option or is entitled to retain all prior payments due to Leisure's conduct. Leisure answered.

After further discovery, Leisure filed a second motion for summary judgment on August 30, 2018, asserting it is entitled to judgment (1) holding that there is no genuine issue of material fact that the choice of Prime Rate structure has reverted to Leisure, which has selected a permissible Prime Rate format (a fixed, one-year Prime Rate); (2) holding that, in accordance with the Prime Rate structure selected by Leisure, there is no genuine issue of material fact that Leisure paid the amounts owed under the Note in full as of June 28, 2015; (3) ordering the Bank to return to Leisure all Note payments made by Leisure since June 28, 2015, together with judicial interest at the legal rate from the time of each protested payment; and (4) awarding Leisure all such other legal and equitable relief to which it is entitled based upon the evidence presented.

The attachments to Leisure's motion included the Bank's responses to multiple interrogatories in which Leisure requested the Bank to indicate its chosen Prime Rate structure for years 11 through 30. In each instance the Bank refused to select a Prime Rate structure. For example, when asked what Prime Rate structure the Bank would elect if it had acquired the right to choose, the Bank responded:

> [The Bank] objects to [Leisure's interrogatory] on the basis that the language "acquired the right" is vague, ambiguous, and requires a legal conclusion. Subject to the foregoing objection, ***[the Bank] at all times has alleged that it was incumbent upon Leisure to elect the***

appropriate interest rate pursuant to the option clause contained in the borrowing agreements.

(Emphasis added.) Leisure additionally attached an email to the Bank's counsel, dated March 13, 2018, wherein Leisure again requested that the Bank select a Prime Rate, stating **"[w]e accordingly ask that [the Bank] please indicate what, if [the Bank] had the option to select a prime rate structure, that prime rate structure would be**." (Emphasis in the original.) Leisure asserted that the Bank failed to respond to its email in the five months between that email and its summary judgment motion. Regardless of whether the Bank had the choice pursuant to its prior demand letter, Leisure argued, the choice reverted to Leisure after its demand and the Bank's foregoing failure to make a selection. *See* La C.C. art. 1810 ("When the party who has the choice does not exercise it after a demand to do so, the other party may choose the item of performance.").

Leisure further expressly stated its election to use a fixed, one-year Prime Rate and attached an affidavit of its Chief Financial Officer, Bonnie Bush, to which she attached a schedule calculating the principal payoff applying a fixed one-year Prime Rate beginning January 1, 2002, and updating the Prime Rate as of January 1 of each year thereafter. The affidavit concludes that the Note's principal was repaid as of June 28, 2015. In accordance with this evidence, Leisure sought declaration that all protested payments made thereafter were not owed.

On November 14, 2018, the Bank filed a second motion for summary judgment and peremptory exception of prescription. Because Leisure continued to voluntarily make payments under the 7.5% interest rate from 2002-2015, the Bank asserted, Leisure is estopped in accordance with the voluntary payment doctrine from recovering such payments or arguing that such payments were improperly made. *See New Orleans & N.E.R. Co. v. La. Const. & Imp. Co.*, 33 So. 51 (La. 1902) ("It is an established rule of law that if a party, with a full knowledge of the facts,

voluntarily pays a demand unjustly made on him and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim and a knowledge that the claim is unjust."). Further, the Bank asserted Leisure's cause of action is prescribed insofar as it relates to payments made before October 7, 2008, because Leisure waited until October 7, 2013 to file suit. *See* La. C.C. art. 3498 ("Actions on instruments, whether negotiable or not, and on promissory notes, whether negotiable or not, are subject to a liberative prescription of five years;" and "[t]his prescription commences to run from the day payment is exigible.").

The district court granted summary judgment in favor of Leisure, denied the Bank's motion for summary judgment, and overruled the Bank's peremptory exception of prescription. The court held, *inter alia*, that (1) Leisure's selection of a one-year fixed Prime Rate structure should be applied because the Bank repeatedly disclaimed any right to choose; (2) the Bank failed to identify specific facts or competent evidence as to how its affirmative defenses precluded summary judgment; (3) the Bank failed to meet its burden of proving that any part of Leisure's claim had prescribed; and (4) Leisure mistakenly believed that the Note was being amortized such that the voluntary payment doctrine did not apply to estop Leisure from recovering any overpayments it made. In granting summary judgment in favor of Leisure, the district court found that there is no genuine issue of material fact that Leisure paid all indebtedness owed to the Bank on the Note as of June 28, 2015, and ordered the Bank to return all sums received from Leisure thereafter, together with legal interest from the date of judicial demand until paid. The Bank filed a motion for new trial, which the district court denied.

The Bank appealed, and the court of appeal reversed. *Leisure Recreation & Ent., Inc. v. First Guar. Bank*, 2019-1698 (La. 1st Ct. App. 2/11/21), 317 So.3d 809 ("*Leisure II*"). The court held the Bank was entitled to summary judgment as to its

voluntary payment affirmative defense. *Id*. In rejecting that any evidence presented by Leisure in opposition to the Bank's motion would create a genuine issue of fact as to whether the payments on the Note were knowing and, thus, "voluntary," the court of appeal found that Leisure could be deemed to have knowledge that the interest charged was not in accordance with the terms of the Note and Borrowing Agreement by imputing the knowledge of its former chief financial officer who executed the loan agreements in 1991. *Id*. at 822-823. The court reversed the district court ruling insofar as it ordered the Bank to return all payments made after June 28, 2015, but it also rendered judgment ordering the Bank to return all interest payments owed in excess of the applicable Prime Rate following the filing of Leisure's suit. *Id*.

Notably, the court of appeal pretermitted discussion of the Bank's exception of prescription and whether the Bank waived its right to choose under La. C.C. art. 1810 or whether the right reverted to Leisure and instead held that the applicable Prime Rate structure to be applied is as follows: "for years 11-30, the prime rate shall be floating for at least one year, and Leisure has the option at the end of each year to fix the prime rate for a period of not less than one year, nor more than five years." *Id*. at 824-825.

We granted Leisure's application for supervisory writs. *Leisure Recreation & Ent., Inc. v. First Guar. Bank*, 2021-00838 (La. 10/19/21), 326 So. 3d 1223.

DISCUSSION

Though there are numerous issues before the Court, the primary issue is whether the "voluntary payment doctrine" first espoused in *New Orleans & N.E.R. Co. v. La. Const. & Imp. Co.*, 33 So. 51 (La. 1902), is contrary to the Civil Code. We find the express and plain language of La. C.C. art. 2299 rejects the application of this doctrine and accordingly reverse the court of appeal ruling insofar as it held Leisure is precluded from recovering payments voluntarily made, whether made

knowingly or by mistake. We next address whether the applicable interest rate for years 11 through 30 under the Note may be determined on summary judgment and, if so, the rate to be applied. We find the Note sets forth an alternative obligation for the applicable period and that the choice of the interest rate terms either remained with or reverted to Leisure such that Leisure's selection of a one-year fixed Prime Rate interest rate, to be adjusted each year on January 1 from 2002 until the Note was repaid, applies. We next address whether Leisure's claims for payments made between December 31, 2001 and October 7, 2008, prescribed. Finding that the Bank's prescription arguments, if applicable, do not preclude Leisure's claims for overpayment, we find the summary judgment in favor of Leisure declaring that all payments made after June 28, 2015, is proper.

Summary Judgment - Standard of Review

This matter arises in the context of a motion for summary judgment, a procedure favored by law and designed to secure the just, speedy, and inexpensive determination of legal actions. La. C.C.P. art. 966(A)(2); *but see* La. C.C.P. art. 969 (prohibiting summary judgment in certain actions). "Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate." *Elliott v. Cont'l Cas. Co.*, 2006–1505, p. 10 (La. 2/22/07), 949 So. 2d 1247, 1253. Where the facts are undisputed and the matter presents a purely legal question, summary judgment is appropriate. *See Bernard v. Ellis*, 2011-2377 (La. 7/2/12), 111 So. 3d 995, 1002.

Payment of a Thing Not Owed

We must first address whether the court of appeal erred in finding that Leisure's knowledge, if any, precludes it from recovering payments made under the Note pursuant to the "voluntary payment doctrine." This Court first described the common law voluntary payment doctrine in *New Orleans & N. E. R. Co. v. La. Const. & Imp. Co.*, as "an established rule of law that if a party, with a full knowledge

of the facts, voluntarily pays a demand unjustly made on him and attempted to be enforced by legal proceedings, he cannot recover back the money." 33 So. 51, 55 (1902). The *New Orleans & N.E.R.* case appears to be the first and last time that this Court has expressly endorsed the voluntary payment doctrine,[8] and we find that this common law estoppel doctrine is in direct conflict with the current Civil Code.

As with the interpretation of any statute, the only question is the expressed intent of the legislature. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371 (La. 7/1/08), 998 So. 2d 16, 26-27. It is well-settled that "[t]he starting point in the interpretation of any statute is the language of the statute itself." *Id*. at 27. Accordingly, "[w]hen the law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." La. C.C. art. 9.

Making no mention of voluntary payments, Louisiana Civil Code article 2299 provides:

> A person who has received a payment or a thing not owed to him is bound to restore it to the person from whom he received it.

This article applies regardless of whether the person who pays money or delivers a thing not owed does so knowingly or by mistake. *Forvendel v. State Farm Mut. Auto. Ins. Co.*, 2017-2074 (La. 6/27/18), 251 So. 3d 362, 366. Comment (d) to the article supports this interpretation in its annotation that "a person *who knowingly or through error* has paid or delivered a thing not owed may reclaim it from the person who received it." La. C.C. art. 2299, cmt (d) (emphasis added).

The knowledge exception applied by the court of appeal pursuant to the voluntary payment doctrine is thus contrary to the express mandates of La. C.C. art.

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[8] In a 1969 case, several defendants before this Court argued for the application of the voluntary payment doctrine. *See Whitehall Oil Co. v. Boagni*, 229 So. 2d 702, 705 (La. 1969). Rather than reaffirm the doctrine, this Court referred to it only as a "principle said to exist in our law." *Id*. at 703. The Court ultimately did not rule on the continued viability of the doctrine, instead finding that, assuming such a doctrine existed, it would not apply to the facts at issue. *Id*. at 705.

2299, which the Legislature notably adopted after *New Orleans & N. E. R.*, *supra*.[9] There is no place in Louisiana law for a common law estoppel doctrine that addresses a subject already encompassed within positive law of the Civil Code. *See Duckworth v. La. Farm Bureau Mut. Ins. Co.*, 2011-2835 (La. 11/2/12), 125 So. 3d 1057, 1064 ("[A]s the solemn expression of the legislative will, if an enactment provides a solution to a particular situation, then no jurisprudence, usage, equity or doctrine can prevail over the legislation."); *Donelon v. Shilling*, 2019-514 (La. 4/27/20) ("Equitable remedies are only available in the absence of legislation and custom."). Stated simply, there is no knowledge exception to La. C.C. art. 2299's directive that a person receiving a payment or delivery of a thing not owed must return it. Jurisprudence superseded by legislation does not support diverging from the Civil Code's plain language.[10]

For the foregoing reasons, we find the court of appeal erred in applying the voluntary payment doctrine to preclude judgment in favor of Leisure.[11]

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[9] Until the adoption of La. C.C. art. 2299 in 1995, the voluntary payment doctrine was arguably compatible with the Civil Code, as former La. C.C. art. 2302 (1870) provided a claim for payment of a thing not owed was available to someone "who has paid through mistake." Implicit in this rule is that the payor has knowledge that the payment made is not owed. When the Civil Code articles were revised in 1995, the redactors observed that the "mistake" prerequisite "has no counterpart in the French Civil Code or in the Louisiana Civil Code of 1808" and accordingly had been suppressed.

[10] Even assuming, *arguendo*, that the voluntary payment doctrine is not superseded by La. C.C. art. 2299, adoption of the court of appeal's "deemed knowledge" ruling would immunize creditors who send incorrect payment due notices where, as here, the debtor's only source of knowledge as to the inaccuracy of those notices are the indebtedness agreements. Once paid, the court of appeal would find that the debtor had "full knowledge of the facts" in such cases, which could effectively burden a borrower to perform a separate calculation of each amortized payment on a note to determine its correctness or else be deemed to "voluntarily" and "knowingly" have made any overpayments. Such a ruling would suggest a Louisiana creditor has no liability for sending an inaccurate invoice with improper charges and fees if the debtor thereafter makes payment, even though the amount is not due, and is accordingly a questionable jurisprudential doctrine to adopt. Regardless of whether we agree with this policy of providing *de facto* immunity to creditors that send incorrect bills to their consumers, it is not the law for the reasons set forth above. *See* La. C.C. art. 2299.

[11] In its brief to the court of appeal, the Bank did not raise any of the remaining affirmative defenses loosely referenced in its motion for summary judgment.

The Note's Alternative Obligation and Leisure's Choice

Having found that the court of appeal erroneously ruled Leisure is estopped from collecting all payments made to the Bank that were not due, we next address whether Leisure overpaid under the terms of the Note. As a preliminary issue, we must clarify whether the court of appeal in *Leisure I* correctly held that Leisure's right to choose among interest rate terms is an alternative obligation, not an option contract.

"An option is a contract whereby the parties agree that the offeror is bound by his offer ***for a specified period of time*** and that the offeree may accept within that time." La. C.C. art. 1933 (emphasis added). By contrast, "[a]n obligation is alternative when an obligor is bound to render only one of two or more items of performance." La. C.C. art. 1808. Thus, while an option must be exercised within a specified period of time in order to create an agreement binding the parties to the optional terms, an alternative obligation is present where a binding agreement exists in which one of two or more alternative terms *will* apply.

The pertinent language in the Note provided that in years 11 through 30, "the simple interest rate ***shall be at the Citibank Prime***, floating for minimum of one year ***or*** fixed for a period of not less than one year, nor more than five years ***at the option of [Leisure]***." (Emphasis added.) An examination of this language makes clear that the parties did not enter into an option contract simply because the word "option" was used. When reconciled with the term "shall," the words "at the option" indicate a *choice* between alternative terms for the interest rate (*i.e.*, floating for a minimum of one year or fixed for a period of one to five years). Further, there is nothing in the Note that provides "a specified period of time" within which Leisure must elect to accept offered terms as contemplated in La. C.C. art. 1933's definition of option contracts. The Note thus sets forth interest payment obligations in the alternative under La. C.C. art. 1808.

Review of the Note's repayment schedule further supports this interpretation. *See* La. C.C. art. 2050 ("Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole."); *John Bailey Contractor, Inc. v. State Dept. of Transp. And Dev.*, 439 So. 2d 1055, 1058 (La. 1983) ("A cardinal rule in the construction of contracts it that the contract must be viewed as a whole and, if possible, practical effect given to all its parts."). Specifically, after setting forth repayment amounts for years one through ten, the Note provides for repayment of principal by "239 monthly payments beginning Jan. 31, 2002 on a 20 year amortization ***in accordance with the prevailing interest rates as described in Section 3 in the Borrowing Agreement***, then one final payment of the unpaid principal & accrued interest due December 31, 2021." Again, Section 3 of the Borrowing Agreement in turn provides interest will accrue at a 6.5% fixed interest rate for years one through five, at a 7.5% fixed rate in years six through ten, "***then*** Citibank Prime, floating for a minimum of one year or fixed for a period of not less than one year nor more than five years at the option of [Leisure] with a floor of 4% and a ceiling of 12%." Reviewing the terms of the repayment schedule in context of Section 3 of the Borrowing Agreement, this reference to "the prevailing interest rates" indicates the Citibank Prime Rate in accordance with the alternative rate terms set forth in the interest provisions of Borrowing Agreement and the Note. To interpret this provision otherwise would render the term "prevailing" meaningless.

Not only does the use of the word "option," in the context of the remaining terms of the agreements, indicate a choice of alternative obligations under La. C.C. art. 1808 and not an option contract as defined by La. C.C. art. 1933, but the Bank also fails to point to any language in the Note that would direct the 7.5% interest rate to apply in years 11 through 30. Indeed, the Note does not contemplate that this or any interest rate other than the Prime Rate will apply during that period.

Finding that the Note set forth an alternative obligation, we next address whether Leisure or the Bank had the right to choose. Absent an implied or express contractual provision to the contrary, the Civil Code provides that the default choice as to an alternative obligation belongs to the obligor. La. C.C. art. 1809 ("When an obligation is alternative, the choice of the item of performance belongs to the obligor unless it has been expressly or impliedly granted to the obligee."). In this case, then, both default law and the Note provide Leisure with the choice, at least initially, as to which interest rate terms will apply.

While the choice was given to Leisure by contract, "[w]hen the party who has the choice does not exercise it ***after a demand to do so***, the other party may choose the item of performance." La. C.C. art. 1810 (emphasis added). With respect to whether a choice or demand was so made, the record reflects that the Bank advised Leisure, by letter dated May 24, 2013, to select a Prime Rate structure pursuant to the Note. As the court of appeal in *Leisure I* recognized, however, the Bank sent a second letter weeks later, on July 15, 2013, contradicting this request by setting forth its altered position that the applicable rate for years 11 through 30 is 7.5% due to Leisure's failure to exercise the option to apply a Prime Rate. In light of the ambiguity highlighted by the court of appeal in *Leisure I* as to whether the Bank made a demand under La. C.C. art. 1810 such that the choice reverted to the Bank, Leisure presented uncontroverted evidence that it made multiple demands on the Bank to make a choice thereafter and the Bank *refused to make a choice*.

We therefore need not determine here whether the Bank's change in position either revoked the prior demand or – as Leisure argued – waived the Bank's right to demand. The choice of Prime Rate structure may have never reverted to the Bank, in which case the choice belongs to Leisure. Alternatively, the choice may have reverted to the Bank in 2013, but because the Bank refused to make a determination in response to Leisure's La. C.C. art. 1810 demand, the choice has reverted back to

Leisure. Thus, in either potential scenario, the choice of Prime Rate iteration now belongs to Leisure.[12]

The Bank's argument that Leisure should not be able to benefit from choosing the best interest rate with the benefit of hindsight is unsupported by law. Instead of eliminating the alternative obligation, La. C.C. art. 1810 puts the onus on the party who does not have the choice to make a demand and to force or accelerate the election. Stated simply, Leisure would not have had the benefit of hindsight complained of by the Bank if the Bank had made a demand in 2002. There is no practical reason for which the Bank could not have identified by now its chosen Prime Rate structure, subject to any necessary qualifications, but the Bank has instead repeatedly failed to avail itself of its rights under La. C.C. art. 1810.

For the foregoing reasons, we find that summary judgment in favor of Leisure declaring that Leisure was entitled to select the Prime Rate interest structure under the Note is proper.

Leisure's Choice as to Prime Rate Structure

Having recognized Leisure has the right to choose the Prime Rate structure, we review whether the structure selected may now be applied. In its second motion for summary judgment, Leisure expressly stated that if it has the choice, it would apply a one-year fixed Prime Rate with the rate being adjusted each year on January

[12] Implicit in our holding is that the Bank must indicate its choice within a reasonable time following an Article 1810 demand. To hold that the party with the choice has an indefinite period of time would thwart the purpose of La. C.C. art. 1810 – *i.e.*, to prevent the party having the choice from holding up the selection. Nor does anything in La. C.C. art. 1810 indicate that the choice must be made immediately upon demand. Accordingly, we find that the choice must be made within a reasonable time, which will necessarily depend on the applicable facts relevant to the alternative obligation. On remand from *Leisure I*, Leisure made multiple demands on the Bank, but several months passed without the Bank making a selection of Prime Rate structure before Leisure filed its motion for summary judgment. In the context of repayment of a loan with monthly installments, such period of time clearly exceeds a reasonable period of time for making the selection called upon by La. C.C. art. 1810. *See also* La. C.C. art. 1810, cmt (c) ("The demand upon the party who has the choice must, of course, be seasonably made, that is, neither before any condition prior to performance has been met, nor before arrival of a term if any. According to circumstances, the obligor may be allowed a reasonable delay to make his choice after notice has been given.").

1 according to the prevailing Prime Rate at that time. We find this choice to be in accord with the alternative obligation terms set forth in the Note, which again provide that the rate shall be the Citibank Prime Rate "floating for minimum of one year ***or*** fixed for a period of not less than one year, nor more than five years." *See* La. C.C. art. 2057 ("In case of doubt that cannot be otherwise resolved, a contract must be interpreted against the obligee and in favor of the obligor of a particular obligation."). The Note's interest provision clearly provides that the rate chosen may be fixed for one to five years or floating for at least one year. Implicit in the fact that there are twenty years in the applicable period (years 11 through 30), and that the interest provision permits the party choosing to select terms as low as one year, is the requirement that the party choosing must elect a new rate at the expiration of the term originally chosen, which again Leisure has done.[13]

In sum, no genuine issue of material fact precludes summary judgment declaring that the choice as to the applicable Prime Rate terms in years 11 through 30 either remained with or reverted to Leisure. Accordingly, summary judgment may be rendered declaring that Leisure's choice, a fixed one-year Prime Rate, applies beginning in year 11 and until the Note is repaid in full.

Prescription

While Leisure presented uncontroverted evidence that the Note was repaid as of June 28, 2015 if its selected Prime Rate structure is applied, we must determine whether prescription precludes Leisure's recovery of overpayments made between December 31, 2001 and October 7, 2008 before we can conclude that Leisure is owed return of all overpayments made. In opposing the Bank's exception of

[13] We note that the interpretation of the court of appeal in *Leisure II* that the rate must be floating for the first year is contrary to the clear language of the contract, which again provides that the Prime Rate shall be "floating for minimum of one year ***or*** fixed for a period of not less than one year, nor more than five years." (Emphasis added.) There is no directive in the Note that the Prime Rate has to be floating for *any* period of time. Instead, the rate must either be floating for a minimum of one year or fixed for a period of one to five years.

prescription and motion for summary judgment, Leisure makes various arguments as to why its claims had not prescribed despite La. C.C. art. 3498's directive that actions on promissory notes prescribe five years from the date payment is exigible. La. C.C. art. 3498 ("Actions on instruments, whether negotiable or not, and on promissory notes, whether negotiable or not, are subject to a liberative prescription of five years. This prescription commences to run from the day payment is exigible.").[14] Even assuming its claims have prescribed, Leisure alternatively asserts that it has a right to assert its prescribed claims as a "defense" under La. C.C.P. art. 424, which provides, in pertinent part: "[A] prescribed obligation arising under Louisiana law may be used as a defense if it is incidental to, or connected with, the obligation sought to be enforced by the plaintiff." Thus, Leisure argues, even a prescribed claim related to the Note can be asserted to avoid an equivalent obligation under the Note.

Under the narrow facts before us, we agree. During litigation of this matter, Leisure sought declaration by the district court that it "is entitled to assert a defense to the Note's payment." Believing the Note repaid as of June 28, 2015, Leisure requested the district court to permit the deposit of all disputed Note payments in the registry of the court, pending final resolution and further orders relative to the disposition of the deposited funds, in an effort to preserve its rights to defend against the Bank's collection of those payments under La. C.C.P. art. 424. If the district court denied this request, Leisure may have been required to choose between maintaining its rights under La. C.C.P. art. 424 by continuing to make payments thereafter or to stop making payments and risk acceleration of the Note.

[14] Leisure does not dispute the application of La. C.C. art. 3498 to its petition for declaratory judgment despite the lack of jurisprudence from this Court holding that a debtor's action to collect funds overpaid on a promissory note pursuant to La. C.C. art. 2299 is an "action on . . . [a] promissory note[]," presumably because Leisure previously argued that its petition *is* an action on a promissory note in relation to an exception of improper venue filed by the Bank.

Instead, Leisure and the Bank entered into the consent order whereby the Bank agreed, among other things, that Leisure's disputed payments "shall not ***in any way*** prejudice, affect, or impact [Leisure's] right to continue to assert that a claim or defense is a 'defense' to those payments within the meaning of Louisiana Code of Civil Procedure article 424." (Emphasis added.) The parties further stipulated that Leisure's making of disputed payments would not preclude Leisure "***from affirmatively recovering that payment*** if the Court ultimately determines that [the Bank] has computed interest illegally or incorrectly or otherwise caused [Leisure] to overpay." (Emphasis added.) Most importantly, perhaps, the Bank expressly "***renounce[d] any right*** that it may otherwise have to assert that the making of a disputed payment prejudiced or altered [Leisure's] rights." (Emphasis added.)

While La. C.C.P. art. 424 may not have permitted Leisure to recover prescribed payments in a petition for declaratory judgment alone,[15] the Bank's consent to Leisure's recovery of payments made and agreement that such payment would not prejudice Leisure's ability to recover these payments is clearly a renouncement of its prescription arguments, assuming – as the Bank argues – prescription had accrued. *See* La. C.C. art. 3449 ("Prescription may be renounced only after it has accrued."). We therefore find Leisure can recover the payments it made after June 28, 2015, regardless of whether they prescribed.[16]

For the foregoing reasons, we find the district court properly overruled the Bank's peremptory exception of prescription and denied its motion for summary judgment to the extent it relied upon the argument that Leisure could not reclaim any

[15] Though we need not reach the issue here, the Bank's reconventional demand may have rendered La. C.C. art. 424 applicable after the consent order was entered into.

[16] We need not and do not address the merits of either party's arguments with respect to the applicable prescriptive period and when it commenced to run in this case. Because it is the Bank's position that prescription *had* accrued, we find in such instance that the Bank renounced any right to prejudice Leisure's claims.

overpayments made between December 31, 2001 and October 7, 2013 because they were prescribed.

CONCLUSION

Finding the "voluntary payment doctrine" contravenes the Louisiana Civil Code, we reverse the court of appeal insofar as it (1) reversed the portion of the district court's judgment denying the motion for summary judgment filed by the Bank as to the voluntary payment affirmative defense, *see* La. C.C. art. 2299; (2) dismissed Leisure's claim for declaratory relief as to the interest it voluntary paid the Bank between December 31, 2001 and October 7, 2013; and (3) rendered judgment ordering the Bank to repay Leisure "any overcharge of interest in excess of the prime rate that Leisure has paid on the [Note] since the filing of its suit on October 7, 2013, together with interest thereon from the date of judicial demand until paid."

Finding that the Note sets forth an "alternative obligation" as defined in La. C.C. art. 1808, we reverse the court of appeal insofar as it (1) reversed the district court decree that Leisure was entitled to select the Prime Rate structure pursuant to La. C.C. art. 1810; and (2) reversed the district court's declaration that Leisure paid all indebtedness owed to the Bank on the Note as of June 28, 2015, and is owed return of all amounts paid thereafter.

We remand to the court of appeal for consideration of the Bank's arguments on appeal that were pretermitted by the court of appeal opinion and are not in conflict with the foregoing disposition and to render judgment in accordance herewith.

REVERSED AND REMANDED.

SUPREME COURT OF LOUISIANA

No. 2021-C-00838

LEISURE RECREATION & ENTERTAINMENT, INC.

VS.

FIRST GUARANTY BANK

On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of East Baton Rouge

Johnson, J., concurs in part and dissents in part and assigns reasons:

I concur with the majority and its well-reasoned opinion, including its rulings that the voluntary payment doctrine contravene the Louisiana Civil Code and that the interest provision at issue is an alternative obligation, not an option. I dissent in part only with respect to the remand of this matter to the court of appeal for issues pretermitted by the court of appeal opinion. I would not remand to the court of appeal and instead would reverse and render in favor of Leisure.

The only issues raised on appeal that were not resolved by this Court's opinion are: whether the district court erred in ordering the Bank to return to Leisure all amounts paid after June 28, 2015, and whether the district court erred in awarding judicial interest thereon to Leisure. There are several reasons for which I would reject the Bank's appeal on these issues. First, the Code of Civil Procedure makes clear that a litigant is not bound by the relief requested in his original petition. *See* La. C.C.P. art. 862 ("[A] final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief.").

Second, the Bank's argument also ignores the 2015 Consent Order, in which the Bank stipulated that Leisure could continue to make payments without impairing its rights to obtain a refund of those payments. Specifically, the order states: "Nor

shall the making of any disputed payment preclude [Leisure] from affirmatively recovering that payment if the Court ultimately determines that [the Bank] has computed interest illegally or incorrectly or otherwise caused [Leisure] to overpay."

Third, Leisure did request damages and interest in its motion for summary judgment and presented uncontroverted evidence in support. The issue was thus added to Leisure's suit and tried with the Bank's consent. *See* La. C.C.P. art. 1154 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleading.").

Finally, the Bank's argument that Leisure cannot recover interest because its suit does not "sound in tort" overlooks that interest is not limited to claimants with tort claims. *See* C.C. art. 2000 ("When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the rate of legal interest as fixed by R.S. 9:3500. The obligee may recover these damages without having to prove any loss, and whatever loss he may have suffered he can recover no more."); *see also* La. C.C.P. art. 1921 ("The court shall award interest in the judgment as prayed for or as provided by law.").

For the foregoing reasons, I would find that Leisure is entitled to a return of its overpaid funds as well as legal interest and would reverse and render summary judgment in accordance with the majority ruling's findings and the additional findings set forth herein.

SUPREME COURT OF LOUISIANA

No. 2021-C-00838

LEISURE RECREATION & ENTERTAINMENT, INC.

VS.

FIRST GUARANTY BANK

On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of East Baton Rouge

Jasmine, J., concurs in part and dissents in part and assigns reasons:

I dissent in part because I would find that remand is unnecessary. In my view, the Court's ruling addresses each of the issues on appeal such that judgment in favor of Leisure may be rendered. In all other respects, I concur for reasons assigned by the majority.