

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 CA 0454

CERTIFIED CAPITAL CORPORATION

VERSUS

CARL SCOTT REIS AND REBECCA CUNARD REIS

Judgment Rendered: March 27, 2009

**Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Case No. 450,779**

The Honorable Curtis A. Calloway, Judge Presiding

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Carl Scott Reis**

BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

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GAIDRY, J.

This matter arises from a suit on a promissory note filed by plaintiff, Certified Capital Corporation (“CCC”), on June 16, 1998, against Carl and Rebecca Cunard Reis (“defendants”). CCC’s petition alleges that on September 29, 1989, Reis executed a promissory note in the sum of \$300,000.00, the purpose of which was to establish a line of credit from which Reis could take draws periodically, up to a maximum of \$300,000.00. The note was payable on demand to the order of CCC. According to CCC’s petition, Reis made several draws which totaled \$183,000.00. CCC alleges that this is a community obligation, since Carl and Rebecca Cunard Reis were married at the time the note was executed, and sought judgment in its favor against the defendants in the amount of \$183,000.00, plus interest at the rate of twenty-one percent as provided by the note, plus an additional twenty-five percent of principal and interest owed as attorney fees, as stated on the note. CCC attached a copy of the note to their petition, as well as a copy of a demand letter to defendants from Robert Cunard, President of CCC, dated August 1, 1994.

The defendants filed an exception of prescription, which the trial court granted on the basis that more than five years had passed since the execution of the demand note without suit being filed.

On appeal by CCC, this court reversed and remanded the matter to have the trial court consider whether or not prescription was interrupted by demand for payment in accordance with La. R.S. 10:3-118(b).¹ *Certified Capital Corporation v. Reis*, 2003-2525, p. 5 (La.App. 1 Cir. 10/29/04), 897

¹ La. R.S. 10:3-118(b) provides that if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within five years after the demand, and if no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of five years.

So.2d 128, 131. Although there was testimony in the record regarding a demand for payment in the form of an August 1, 1994 letter purportedly sent by CCC to defendants, there were serious issues of credibility with respect to the fact witnesses and the weight of the evidence, making a first-hand view of the witnesses essential to a fair resolution of the issues.

After a new hearing on the exception of prescription, the trial court sustained the exception of prescription because it found that the August 1, 1994 demand letter was a fabrication and that no demand for payment was ever received by the defendants. This appeal by CCC followed.

DISCUSSION

Louisiana Civil Code article 3498 provides that actions 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. Payment is exigible and prescription begins to run on a demand note from the day the note is made. *Smith v. McKeller*, 93-1944, p. 7 (La.App. 1 Cir. 6/24/94), 638 So.2d 1192, 1196. The note in this case was executed on September 29, 1989, and suit was filed almost nine years later, on June 16, 1998. Thus, the petition was prescribed on its face, and the burden is on the plaintiff to prove that prescription was interrupted. CCC claims that prescription was interrupted in accordance with La. R.S. 10:3-118(b) when it sent an August 1, 1994 demand letter to defendants. The defendants deny that they ever received the demand letter from CCC. After a hearing, the court concluded that no demand for payment was ever received by defendants and that the August 1, 1994 demand letter was a fabrication.

On appeal, CCC alleges that the trial court erred in (1) believing the testimony of Carl Reis, a permanently disbarred attorney, that he never

received a demand for payment from CCC; (2) in concluding that a demand for payment was required when the note waives demand; and (3) in failing to find that prescription was renounced by Reis when he pled offset as an affirmative defense.

Credibility Call

It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Rosell v. ESCO*, 549 So.2d 840, 844 (La.1989).

The trial court's findings that the demand letter was a fabrication and that no demand for payment was ever made involved a credibility call. There was a conflict in the testimony, and the trial court obviously believed the testimony of the defendants and disbelieved the testimony of Robert Cunard. CCC argues that the court erred in believing Reis because he has been permanently disbarred. Although there was evidence presented at the hearing that Mr. Reis voluntarily surrendered his law license, there was also testimony presented regarding Cunard's reputation for untruthfulness, and the court clearly found Reis to be more credible. As the trial court had the opportunity to observe the witnesses' demeanor when testifying, it is in a better position than we to judge credibility, and its choice between the two versions of events is neither manifestly erroneous nor clearly wrong.

Requirement of Demand

CCC next alleges that since the terms of the note waive demand, the trial court erred in requiring proof of a demand to interrupt prescription. This assignment of error has no merit. If we were to accept CCC's argument, then a demand note containing a waiver of demand would never prescribe. The court never required proof of demand from CCC; proof of demand was simply the only remaining avenue by which CCC could prove that prescription had been interrupted. Since the court concluded that no demand for payment was ever made, prescription ran from the date the note was signed, and prescription accrued prior to the date suit was filed in this matter.

Affirmative Defense of Offset

In its final assignment of error, CCC argues that Reis's affirmative defense pleading offset amounted to a renunciation of prescription. We disagree with this argument as well.

Prescription may be renounced only after it has accrued. La. C.C. art. 3449. Renunciation may be express or tacit. Tacit renunciation results from circumstances that give rise to a presumption that the advantages of prescription have been abandoned. La. C.C. art. 3450. The mere acknowledgment of a debt is not sufficient to renounce an acquired prescription; there must be a new promise to pay the debt. *Landry v. Guidry*, 210 La. 194, 26 So.2d 695, 698 (1946). Reis's answer does not contain a renunciation, either express or tacit. In fact, he reurges his exception of prescription and unequivocally states that he does not owe any money to CCC prior to urging "the defenses of estoppel, error or mistake, extinguishment of the obligation, failure of consideration, and offset." This can in no way be construed to be a tacit renunciation of accrued prescription,

nor is it an acknowledgement with a new promise to pay a debt. This assignment of error is without merit.

DECREE

The judgment sustaining the defendants' exception of prescription and dismissing plaintiff's claims with prejudice is affirmed. All costs of this appeal are to be borne by plaintiff, CCC.

AFFIRMED.