

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1397

COX COMMUNICATIONS LOUISIANA, LLC

VERSUS

D.J.P. DEVELOPMENT, INC.

Judgment Rendered: March 23, 2012

FW
gd

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston, Louisiana
Trial Court Number 131,290

Honorable Brenda Bedsole Ricks, Judge

Brian K. Abels
Denham Springs, LA

Attorney for
Plaintiff – Appellant
Cox Communications
Louisiana, LLC

Justin B. Champlin
Baton Rouge, LA

Attorney for
Defendant – Appellee
D.J.P. Development, Inc.

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

McClendon, J. concurs.

WELCH, J.

Plaintiff, Cox Communications Louisiana, LLC (Cox), appeals a judgment sustaining a peremptory exception raising the objection of prescription filed by defendant, D.J.P. Development, Inc. (DJP), and dismissing Cox's lawsuit. We reverse and remand.

BACKGROUND

On December 16, 2010, Cox filed this lawsuit against DJP, seeking to recover property damages occurring as a result of a fire occurring on January 10, 2010, at the home of John Schmit, a Cox employee. Cox alleged that the fire destroyed its van, which was parked in Mr. Schmit's driveway, along with the tools and equipment inside the van. Cox further alleged that the fire resulted from the negligence or fault of DJP in improperly installing a fireplace in the home.

On January 27, 2011, DJP filed a peremptory exception of prescription, positing that La. C.C. art. 3500, which sets forth a liberative prescriptive period of ten years on actions against a contractor on account of construction defects, governed Cox's property damage claim. In its memorandum, DJP asserted that the home was constructed in the spring of 1998 and since that date, DJP had not constructed, renovated, or repaired the home. Therefore, DJP insisted, since the fire occurred over eleven and a half years after the home had been constructed, any claims arising from an alleged construction defect have prescribed.

In its opposition to Cox's motion to continue the hearing on the prescription exception, DJP attached two documents it referred to in its exception but did not attach thereto: an act of cash sale from DJP to William and Dayna Wall dated July 9, 1998, and an act of cash sale from the Walls to Jon Schmit dated January 20, 2004. DJP also attached to its opposition an affidavit of Douglas Peak, DJP's sole director and officer, who attested that the home was constructed in the spring of

1998 and since the home's initial construction, he and DJP did not construct, renovate, or repair the home.

On March 2, 2011, Cox filed a memorandum in opposition to the exception of prescription. Cox attached its interrogatories and DJP's responses thereto. Cox asserted that DJP's answers were not complete and did not allow Cox to put forth evidence in support of and in opposition to DJP's exception of prescription. In its interrogatories, Cox asked DJP to provide the names of subcontractors who worked on the home. DJP responded that it was not in possession of such information. Cox also asked DJP whether a "punch list" was provided to DJP by the original purchasers and if so, when that work was performed on the home. DJP responded that since the home's initial construction in 1998, it did not construct, renovate, or repair the home.

On March 2, 2011, the trial court denied Cox's motion to continue the hearing on the peremptory exception. The matter was heard on March 9, 2011. Neither party introduced any evidence in support of or in opposition to the prescription objection. Although DJP did not formally offer Mr. Peak's affidavit into evidence, Cox objected to any consideration of the affidavit by the court in ruling on the exception, urging that an affidavit is not admissible evidence on a peremptory exception of prescription. Cox also asked the court to continue the hearing so that it could conduct discovery. Cox's attorney admitted that the home was built by DJP in the spring of 1998. At the conclusion of the hearing, the trial court granted the peremptory exception, and on March 17, 2011, entered judgment maintaining DJP's exception of prescription and dismissing this lawsuit.

DISCUSSION

In this appeal, Cox contends that the trial court committed legal error in sustaining DJP's exception of prescription because DJP, which it insists bore the burden of proof on the exception, offered no evidence at the hearing in support of

its claim that it completed construction on the home more than 10 years before the fire. Cox points out that the petition does not set forth a date on which construction of the home was completed. As prescription is not evident from the face of the pleadings, and because DJP offered no proof at the hearing in support of its exception of prescription, Cox urges that the trial court erred in sustaining the exception.¹

We agree. A review of the petition reveals that the only date referenced in the petition is the January 10, 2010 fire; there is no reference to the date on which construction was complete and therefore, the lawsuit is not prescribed on the face of the petition. In its exception of prescription, DJP claimed that the home was constructed in the spring of 1998, that it had done no further work on the home, and that the fire occurred more than 10 years after the home had been constructed. Because the petition was not prescribed on its face, DJP bore the burden of proof on the exception. See Denoux v. Vessel Management Services, Inc., 2007-2143 (La. 5/21/08), 983 So.2d 84, 88. While it is true that Cox's attorney acquiesced in DJP's assertion that the home was constructed in 1998 at the hearing on the exception, DJP did not formally offer any evidence at the hearing in support of its prescription exception. Particularly, DJP did not introduce any evidence to support its claim that it had no further involvement in the home's construction after the spring of 1998. And while Mr. Peak's affidavit attesting that no further work was done on the home appears in the record, it is established that evidence not properly and officially offered and introduced cannot be considered by the trial court in ruling on an exception of prescription, even if it is physically placed in the record.

Id.

¹ Alternatively, Cox urged that the court committed legal error in denying its motion to continue the hearing on the exception. Because we find merit in Cox's first assignment of error, we preterm discussion of its second assignment of error.

In the absence of evidence, the objection of prescription must be decided upon the facts alleged in the petition, and all allegations thereof are accepted as true. **Hudson v. East Baton Rouge Parish School Board**, 2002-0987 (La. App. 1st Cir. 3/28/03), 844 So.2d 282, 286. The exception cannot be sustained on the basis of the facts alleged in the petition or Cox's admission at the hearing that the home was built in the spring of 1998. Accordingly, we find that the trial court erred in sustaining DJP's peremptory exception of prescription.

CONCLUSION

For the foregoing reasons, the judgment appealed is reversed. The case is remanded to the trial court for proceedings consistent with this opinion. All costs of this appeal are assessed to appellee, D.J.P. Development, Inc.

REVERSED AND REMANDED.