

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 1382

FRED HALL, ALEX M. PITALO, MARY H. RENTON,
L. L. FLENIKEN, JR., VIRGINIA ROPPOLO REYNOLDS,
ROBERT S. FIFE AND BARBARA B. FIFE,
GLORIA HALL, ELIZABETH CALDWELL, HUM LIVING TRUST,
FRANK LOPINTO, HAROLD HARMS AND SANDRALEIGH
GIBSON

VERSUS

FIDELITY BANK AND TRUST COMPANY

Judgment Rendered: FEB 20 2008

On Appeal from the
19th Judicial District Court
in and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 534,453

The Honorable Donald R. Johnson, Judge Presiding

Donald L. Beckner
Baton Rouge, La.

Counsel for Plaintiffs/Appellants,
Fred Hall, Alex M. Pitalo, Mary H.
Renton, L. L. Fleniken, Jr., Robert S.
Fife and Barbara B. Fife, Gloria Hall,
Elizabeth Caldwell, Hum Living
Trust, Frank Lopinto, Harold Harms
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Counsel for Defendant/Appellee,
Fidelity Bank and Trust
Company

BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

JEW
Q-2P.

CARTER, C.J.

Plaintiffs appeal a district court judgment sustaining the defendant's peremptory exception raising the objection of no cause of action and dismissing their claims with prejudice. For the reasons that follow, we reverse the judgment and remand the matter for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On May 24, 2002, Fidelity Bank and Trust Company (Fidelity) entered into a "Loan and Security Agreement" with River City Finance, Inc. (River City), a consumer finance company.¹ Fidelity agreed to lend River City up to \$750,000 to serve as lending capital from which River City could make consumer loans. As security for River City's indebtedness to Fidelity, River City granted a security interest in certain of its assets, including all of its receivables from consumer loans made to customers.

Thereafter, Fred Hall; Alex M. Pitalo; Mary H. Renton; L. L. Fleniken, Jr.; Virginia Roppolo Reynolds; Robert S. Fife; Barbara B. Fife; Gloria Hall; Elizabeth Caldwell; the Hum Living Trust, through John Hum, Jr., trustee; Frank Lopinto; Harold Harms; and Sandraleigh Gibson (Plaintiffs) filed suit against Fidelity. In their petition, Plaintiffs allege Fidelity established a special relationship with them by encouraging them to make loans to River City, thereby making Fidelity's loan to River City more secure. To solidify this special relationship, Plaintiffs claim that Fidelity stipulated in its Loan and Security Agreement with River City that, if the Plaintiffs made loans to River City, River City would be allowed to make interest and principal payments to the Plaintiffs. In order to further encourage Plaintiffs to make loans to River City, Plaintiffs

¹ Randy J. Pitalo and Rawndy G. Pitalo signed the agreement on behalf of River City and as personal guarantors.

contend Fidelity placed a second stipulation in the Loan and Security Agreement, therein providing River City only had to make interest payments to Fidelity during the entire three-year term of its loan. Fidelity did require, however, that any debt that River City owed to the Plaintiffs would be subordinate to the debt River City owed Fidelity. Plaintiffs allege that, pursuant to this special relationship Fidelity established with them, Plaintiffs knew that if they loaned money to River City, Fidelity would allow River City to make interest and principal payments to Plaintiffs on those loans and that Plaintiffs would have first claim on all of River City's consumer receivables and other assets above the amount River City owed to Fidelity, an amount not to exceed \$750,000. Accordingly, Plaintiffs allege that, by its actions, Fidelity "voluntarily assumed" a duty to them "to allow and permit" River City to make interest and principal payments to Plaintiffs. Plaintiffs claim that this duty, which Fidelity voluntarily assumed in its Loan and Security Agreement, precluded Fidelity from taking any actions to stop River City from making these interest and principal payments.

After voluntarily assuming this duty, Plaintiffs allege that Fidelity undertook to closely inspect, monitor, and supervise River City's compliance with the Loan and Security Agreement and River City's payment of interest and principal to Plaintiffs on the subordinated debt. To accomplish this, every two weeks, Fidelity sent an auditor to River City's offices to review River City's books and records, income and disbursements. The auditor then prepared a report listing all of the holders of the subordinated debt, the amount owed to each, the interest rate being paid, the principal being paid, and compared those payments to the interest payments being paid to Fidelity.

Plaintiffs claim that Fidelity ultimately breached its voluntarily assumed duty to them. According to Plaintiffs, several months after the audits began, Fidelity

began to discourage and eventually tried to stop River City from making its payments to Plaintiffs. When this was unsuccessful, Plaintiffs contend Fidelity made negligent misrepresentations to a district court in order to improperly obtain a writ of sequestration against River City and, further, improperly sequestered nearly all of River City's assets, the total of which amounted to a value far in excess of the \$703,339.58 Fidelity claimed River City owed to Fidelity.² The Plaintiffs maintain that Fidelity took these actions to keep River City from making its required payments to them.

On July 14, 2005, Plaintiffs filed suit against Fidelity alleging that Fidelity's actions in improperly obtaining a writ of sequestration based upon misrepresentations and in seizing almost all of River City's assets, which had a value greatly in excess of the amount River City owed to Fidelity, effectively precluded River City from making interest and principal payments to Plaintiffs on their subordinated debt. Accordingly, Plaintiffs claimed they lost all of the security upon which they had relied when agreeing to lend money to River City.³ Because Fidelity had breached its voluntarily assumed duty to Plaintiffs to allow and permit River City to make interest and principal payments to them, Plaintiffs claimed that they were entitled to damages from Fidelity.

Fidelity responded to the Plaintiffs' petition by filing a peremptory exception raising the objections of no cause of action and no right of action. The district

² In its petition requesting the writ of sequestration, and in two supporting affidavits, Fidelity alleged that River City was in default of the Loan and Security Agreement for failing to make payments to Fidelity when due. River City squarely disputed this allegation. River City ultimately filed a rule to show cause why the writ should not be recalled, and on October 27, 2004, the district court dissolved the writ. Fidelity suspensively appealed, and in an unpublished opinion dated March 24, 2006, this court affirmed the dissolution of the writ because Fidelity's petition failed to satisfy the requirements of LSA-C.C.P. art. 3501. **Fidelity Bank & Trust Company v. River City Finance, Inc.**, 2005-0738 (La. App. 1 Cir. 3/24/06) (unpublished). In that decision, this court noted that Fidelity eventually amended its petition to exclude any allegation of payment default on the part of River City. Instead, Fidelity alleged other events of default, relying primarily on allegations that certain of River City's business dealings caused Fidelity to deem itself insecure. While noting that a clause allowing a creditor to consider a debtor in default when the creditor "reasonably deems itself insecure" may be unenforceable as a null, potestative condition, this court did not address the issue, as it was not actually before the court at that time.

³ Specifically, plaintiffs contend that "Fidelity seized, appropriated, and dissipated over \$1.4 million in River City's consumer receivables, \$700,000.00 in P&L accounts, and almost all of its other assets, despite the fact that River City **only owed Fidelity \$703,339.58.**"

court sustained the exception and granted the plaintiffs 15 days to amend their petition to remove the grounds for the objection due to their failure “to state a cause of action.” Accordingly, Plaintiffs amended their petition. Again, Fidelity filed a peremptory exception raising the objections of no cause of action and no right of action. Following a hearing, the district court denied the exception raising the objection of no right of action but sustained the exception raising the objection of no cause of action and dismissed Plaintiffs’ suit. From this judgment, Plaintiffs appeal.

DISCUSSION

A court of appeal reviews *de novo* a lower court’s ruling sustaining a peremptory exception raising the objection of no cause of action. **City of New Orleans v. Board of Directors of Louisiana State Museum**, 98-1170 (La. 3/2/99), 739 So.2d 748, 756. The peremptory exception raising the objection of no cause of action is a procedural device used to test the legal sufficiency of the petition. **City of New Orleans**, 739 So.2d at 755. The exception is triable on the face of the papers, and for the purpose of determining the issues raised by the exception, the well-pleaded facts alleged in the petition must be accepted as true. **Id.** The court must determine whether the law affords any relief to the claimant if those factual allegations are proven at trial. **Pelts & Skins, L.L.C. v. Louisiana Dept. of Wildlife and Fisheries**, 2005-0952 (La. App. 1 Cir. 6/21/06), 938 So.2d 1047, 1053, writ denied, 2006-1821 (La. 10/27/06), 939 So.2d 1281. The question is whether the petition—viewed in the light most favorable to the plaintiff and with every doubt resolved in the plaintiff’s favor—states any valid cause of action for relief under any evidence admissible under the pleadings. **Id.** A petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim that would

entitle him to relief. **Home Distribution, Inc. v. Dollar Amusement, Inc.**, 98-1692 (La. App. 1 Cir. 9/24/99), 754 So.2d 1057, 1060.

After examining Plaintiffs' lengthy petition and resolving every doubt in their favor, we cannot say beyond a doubt that plaintiffs will be unable to prove a set of facts (under any evidence admissible under their pleadings) that would entitle them to relief. Accordingly, we are compelled to conclude that the district court erred in sustaining Fidelity's peremptory exception raising the objection of no cause of action.

CONCLUSION

For the foregoing reasons, the district court judgment sustaining the peremptory exception raising the objection of no cause of action and dismissing Plaintiffs' suit is hereby reversed, and the matter is remanded for further proceedings. All costs of this appeal are assessed to Fidelity.

REVERSED AND REMANDED.