**NOT DESIGNATED FOR PULICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0682

GLENDA NICHOLAS NDANYI, WIFE OF/AND JOHN MUDAVE NDANYI

VERSUS

LEON J. WHITE, JR. AND HELEN BELL WHITE

**Judgment Rendered:** JAN 30 2008

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On appeal from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Suit Number 2005-002969

Honorable Robert H. Morrison, III, Presiding

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

Whipple, J. dissents and assigns reasons.
Hughes, J., concurs with reasons.

**GUIDRY, J.**

In this redhibition action, Glenda and John Ndanyi (collectively "the Ndanyis") appeal from the trial court's judgment, which sustained Leon and Helen Bell's (collectively "the Bells") exception raising the objection of prescription and dismissed the Ndanyis' action. For the reasons that follow, we affirm.

## FACTS AND PROCEDURAL HISTORY

On May 28, 2004, the Ndanyis purchased approximately six acres of immovable property in Tangipahoa Parish from the Bells. The Ndanyis purchased this property with the intention of subdividing it for resale as residential lots. However, after completion of the sale, the Ndanyis consulted with a professional engineer, who determined on October 22, 2004, that a majority of the property lies within an area designated by the Federal Emergency Management Agency (FEMA) as a floodway. Therefore, construction of a residential subdivision was not feasible.

Thereafter, on August 24, 2005, the Ndanyis filed a petition for rescission of the sale, claiming that the FEMA floodway designation constituted a redhibitory defect in the Ndanyis' title, and had they known of the defect they would not have purchased the property.[1] In response to the allegations raised in the Ndanyis' petition, the Bells filed a peremptory exception raising the objection of prescription, asserting that they did not know of the redhibitory defect at the time of the sale, and therefore, according to La. C.C. art. 2534(A)(2), the Ndanyis' claim was prescribed. Following a hearing on the Bells' exception, the trial court rendered judgment in favor of the Bells, sustaining their exception of prescription and dismissing the Ndanyis' claim. The Ndanyis now appeal from this judgment.

[1] The Ndanyis also asserted that the Bells knew of the defect and failed to disclose the defect to the Ndanyis. However, the Ndanyis did not present any evidence on this issue in the trial court, and they do not assert the Bells' knowledge of the defect on appeal.

## DISCUSSION

An action in redhibition is found in La. C.C. art. 2520, which provides, in part:

> A seller warrants the buyer against redhibitory defects, or vices, in the thing sold.
>
> A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale.

Louisiana Civil Code article 2534 sets forth the prescriptive periods for filing a claim against a seller in redhibition and states, in part:

> A. (1) The action for redhibition against a seller who did not know of the existence of a defect in the thing sold prescribes in four years from the day delivery of such thing was made to the buyer or one year from the day the defect was discovered by the buyer, whichever occurs first.
>
> (2) However, when the defect is of residential or commercial immovable property, an action for redhibition against a seller who did not know of the existence of the defect prescribes in one year from the day delivery of the property was made to the buyer.
>
> B. The action for redhibition against a seller who knew, or is presumed to have known, of the existence of a defect in the thing sold prescribes in one year from the day the defect was discovered by the buyer.

Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception raising the objection of prescription. However, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show that the action has not prescribed. Carter v. Haygood, 04-0646, pp. 8-9 (La. 1/19/05), 892 So. 2d 1261, 1267.

In the instant case, the petition states that the Ndanyis purchased the subject property on May 28, 2004. The petition states that the Ndanyis acquired the property for the purpose and with the intention of subdividing it for resale as residential lots. The Ndanyis also asserted that after the purchase they engaged the services of an engineer who determined that the majority of the property lies in an

area designated by FEMA as a floodway, and accordingly, construction of a residential subdivision on the property is not feasible. The Ndanyis filed a petition for rescission of sale based on redhibition on August 24, 2005.

From a plain reading of the Ndanyis' petition, it is clear that their petition for redhibition has prescribed on its face. In the petition, the only characterization of the property mentioned, other than its location and acreage, is its intended use as a residential subdivision. As such, it appears that residential immovable property was involved, and therefore, La. C.C. art. 2534(A)(2) and its one-year prescriptive period would apply. Accordingly, because the petition has prescribed on its face, not having been filed within one year from the day of delivery to the buyer, the burden of proof shifed to the Ndanyis to prove that the applicable prescriptive period was interrupted or suspended.

At the trial of the Bells' peremptory exception raising the objection of prescription, however, the sole issue raised by the Ndanyis in defense of the exception was the proper classification of the property.[2] According to the Ndanyis, the subject property is raw, undeveloped land, is not residential or commercial, and therefore is subject to the time limitations set forth in La. C.C. art. 2534(A)(1), and not the more restrictive time limitation found in article 2534(A)(2). Specifically, the Ndanyis contend that in order to properly classify the property at issue and determine the applicable prescriptive period, the court must look to the condition of the property at the time of the sale, and not its intended use.

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[2] At the hearing on the exception of prescription, the Ndanyis did not raise the doctrine of *contra non valentem* as a defense to the Bells' exception. Rather, the Ndanyis raised this argument for the first time in filing a motion for new trial, which was denied by the trial court. Additionally, the Ndanyis assert on appeal that while application of *contra non valentem* is not necessary to hold the lawsuit was timely, it provides an alternative basis for this court to reach that conclusion. However, because *contra non valeneum* was not raised at the trial of the exception, and the Ndanyis do not appeal from or assert as error the trial court's denial of their motion for new trial, the issue of *contra non valentem* is not properly before this court on appeal. Therefore, we restrict our review of this matter to determining the proper classification of this property and whether the Ndanyis' action was filed within the applicable prescriptive period.

Under the general rules of statutory construction, courts begin with the premise that legislation is the solemn expression of legislative will, and therefore, the interpretation of a law involves, primarily, the search for the legislature's intent. La. C.C. art. 2; Anthony Crane Rental, L.P. v. Fruge, 03-0115, p. 4 (La. 10/21/03), 859 So. 2d 631, 634. When a 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. When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law, and the words of law must be given their generally prevailing meaning. La. C.C. arts. 10 and 11. When the words of law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole, and laws on the same subject matter must be interpreted in reference to each other. La. R.S. 1:3; La. C.C. arts. 12 and 13; Pumphrey v. City of New Orleans, 05-979, pp. 10-11 (La. 4/4/06), 925 So. 2d 1202, 1209-1210.

The starting point with any statute is the language of the statute itself. Louisiana Civil Code article 2534(A)(2) provides that "when *the defect is of residential or commercial immovable property*, an action for redhibition against a seller who did not know of the existence of the defect prescribes in one year from the day delivery of the property was made to the buyer." (Emphasis added.) The language of this provision does not specifically address if such a classification is based on the intended use of the property, or if it is determined by the state of the property at the time of the sale. However, in reading this provision in conjunction with La. C.C. art. 2520, it is logical to infer that the legislature intended for the property to be classified based upon its intended use. Article 2520 specifically refers to a defect being redhibitory "when it renders the thing *useless*, or its *use* so

inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect." (Emphasis added.) Accordingly, because a suit in redhibition is based on the intended use of the property, in interpreting the language of the prescriptive article on redhibition, we must also look to the use of the property.

In the instant case, the Ndanyis asserted in their petition, and in argument before the trial court, that they purchased the subject property "for the purpose and with the intention of subdividing [it] for resale as residential lots" and that because of the FEMA floodway designation, the property is useless for its intended purpose. While the Ndanyis introduced into evidence at the hearing pictures of the subject property showing it in a raw, undeveloped state, they never asserted any use for the property, either at the time of sale or thereafter, other than their intended use of the property for residential lots. Accordingly, we find no error in the trial court's determination that La. C.C. art. 2534(A)(2) applies to the Ndanyis' claim for redhibition because residential immovable property is involved and that the Ndanyis' failed to show that their claim was not prescribed.

## CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. All costs of this appeal are to be borne by the appellants, Glenda and John Ndanyi.

**AFFIRMED.**

**GLENDA NICHOLAS NDANYI, WIFE OF/AND JOHN MUDAVE NDANYI**

**VERSUS**

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**WHIPPLE, J., dissenting.**

VGW

Regardless of the buyer's intentions as to the ultimate use of the property, it is undisputed that the subject property is raw, undeveloped land. In my view, the restrictive time limitation of LSA-C.C. art. 2534(A)(2) would not apply herein. Thus, I respectfully dissent.

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HUGHES, J., concurring

I respectfully concur. I do not believe that raw land can be "defective." The law and all prior jurisprudence envision action by man, some improvement or construction either above surface (a building) or below (buried tanks or waste). These man-made things contain the defect. Land in a flood plain is no more defective that land on top of a mountain or in a swamp. It is what it is.

For this reason, I do not think there is any way that plaintiff can prevail on the merits, and will concur in the result only.