NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0172

LEVI E. ROBERTSON

VERSUS

SUN LIFE FINANCIAL, SUN LIFE ASSURANCE COMPANY OF CANADA, AND/OR SUN LIFE ADMINISTRATORS (US), INC., WACHOVIA BANK, N.A., CAPITAL ONE BANK, N.A., and MATTHEW PIZZOLATO

Judgment Rendered: June 10, 2011

Appealed from the
Twenty-first Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Docket Number 2008-0003165

Honorable M. Douglas Hughes, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

This is an appeal from a judgment maintaining one of defendant's peremptory exceptions of prescription and dismissing plaintiff's suit against that defendant with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On October 9, 2008, Levi Robertson filed a "Petition for Damages" against defendants, Sun Life Financial, Sun Life Assurance Company of Canada, and/or Sun Life Administrators (U.S.), Inc. (collectively referred to as "Sun Life"); Wachovia Bank, N.A. ("Wachovia Bank"); Capital One Bank, N.A. ("Capital One"); and Matthew Pizzolato. In the original and amended petitions, Robertson alleged that he, an unlearned and trusting offshore worker, was deceived into transferring his entire lifetime retirement savings from his company trust to one managed by defendant Pizzolato. Additionally, Robertson alleged that Pizzolato then placed Robertson's money into an account in Robertson's name with Sun Life, which, in turn, had an account in Wachovia Bank. According to Robertson's allegations, Pizzolato engaged in a massive fraudulent scheme to embezzle funds from many "to the tune of many millions of dollars."

Robertson further alleged that on or about October 21, 2005, defendant Sun Life issued a check in the amount of $99,999.99, which was drawn on defendant Wachovia Bank and made payable to Robertson. According to Robertson, Pizzolato gained possession of the check and forged Robertson's signature on the instrument. Robertson further alleged that, in turn, defendant Capital One cashed the check over a forged endorsement; Wachovia Bank paid the sum of the forged check without verifying the endorsement; and Sun Life withdrew $99,999.99 from Robertson's account based on the negotiation of the forged instrument. According to Robertson's allegations, Robertson was not aware that the check, which was attached to the petition as an exhibit, was issued or cashed until approximately July

8, 2008, almost three years later. Thus, Robertson asserted claims against the various defendants based on the forgery and the payment on the forged instrument.

In response to Robertson's suit, Capital One filed peremptory exceptions of no cause of action and prescription. In support of its exceptions, Capital One asserted that Robertson's claim against it was a claim for conversion pursuant to LSA-R.S. 10:3-420(a)(iii), which provides that an instrument is converted when a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. Capital One further asserted that pursuant to LSA-R.S. 10:3-420(b), an action for conversion cannot be brought by a payee unless the payee received delivery of the instrument. Thus, Capital One argued, because Robertson did not receive delivery of the check at issue, Louisiana law does not recognize a cause of action for conversion in Robertson's favor. Accordingly, Capital One contended that Robertson had failed to state a cause of action against it in his original and amended petitions.

Additionally, Capital One contended that pursuant to LSA-R.S. 10:3-420(f), an action for conversion prescribes one year from the date of the conversion and that suspension of prescription pursuant to the doctrine of *contra non valentum* was inapplicable under the facts alleged. Thus, Capital One also asserted that, even if a cause of action existed, Robertson's claims against it, based on an instrument negotiated on October 21, 2005, were prescribed.

Following a hearing on the exceptions, the trial court issued reasons for judgment, finding that Robertson was "not the proper plaintiff" to bring a claim for conversion against Capital One, apparently based on the assertion by Capital One that Robertson had never taken delivery of the check. Accordingly, by judgment dated July 9, 2009, the trial court maintained Capital One's exception of no cause of action and dismissed with prejudice Robertson's claims against it. The judgment was silent as to Capital One's exception of prescription.

On appeal of this judgment by Robertson, this court affirmed the portion of the trial court's judgment that maintained Capital One's exception of no cause of action, which this court deemed an exception of no right of action, but reversed that portion of the trial court's judgment that dismissed with prejudice Robertson's claim against Capital One without allowing Robertson the opportunity to amend his petition to establish his right to pursue a conversion claim against Capital One by asserting that he had received delivery of the check, such as by it being placed in his mailbox. Robertson v. Sun Life Financial, 2009-2275 (La. App. 1st Cir. 6/11/10), 40 So. 3d 507, 514-515. However, because the trial court's judgment was silent as to the exception of prescription, which was therefore deemed denied, this court declined to address Robertson's assignments of error through which he asserted that the trial court erred in finding his claims against Capital One had prescribed. Robertson, 40 So. 3d at 510.

On remand of the matter to the trial court, Robertson amended his petition to assert that the check issued in his name by Sun Life and drawn on Wachovia Bank was sent to him at his address in Ponchatoula, Louisiana, and placed into his mailbox. Robertson further alleged that Pizzolato or an agent of Pizzolato then removed the check from Robertson's mailbox and forged it and that the check was subsequently cashed by Capital One. Capital One then filed a second exception of prescription, again contending that because the instrument was negotiated on October 21, 2005, almost three years before Robertson filed suit against it, Robertson's claims against Capital One were prescribed.

Following a hearing on the exception, the trial court, by judgment dated August 30, 2010, maintained Capital One's exception of prescription and dismissed with prejudice Robertson's claims against it. From this judgment, Robertson appeals, listing nine assignments of error.

DISCUSSION

At the outset, we note that in assignment of error number nine, Robertson contends that the trial court erred in finding that Capital One exercised reasonable banking industry standards when it negotiated a forged instrument. As set forth above, the trial court's judgment was based strictly on its finding that Robertson's claims against Capital One had prescribed. The court made no findings regarding the underlying merits of any of Robertson's asserted causes of action and specifically made no finding as to the reasonableness of Capital One's actions in negotiating the check at issue. Thus, we decline to address the argument set forth in assignment of error number nine.

Turning to Robertson's first assignment of error, he contends that the trial court erred when it revisited the same issues addressed in Capital One's first exception of prescription, asserting that the implicit denial of the first exception of prescription is res judicata and precluded the trial court from reconsidering the issue. However, it is well settled that the overruling of a peremptory exception of prescription is an interlocutory judgment which does not prevent the party from asserting the defense of prescription in another exception or at a trial on the merits. See Peak Performance Physical Therapy & Fitness, LLC v. Hibernia Corporation, 2007-2206 (La. App. 1st Cir. 6/6/08), 992 So. 2d 527, 530, writ denied, 2008-1478 (La. 10/3/08), 992 So. 2d 1018. The trial court has the authority to review an interlocutory order rendered by it, such as the denial of an exception of prescription, and to change the ruling if the earlier ruling would do substantial injustice. Lee v. East Baton Rouge Parish School Board, 623 So. 2d 150, 154 (La. App. 1st Cir.), writ denied, 627 So. 2d 658 (La. 1993). Thus, Robertson's argument that the trial court improperly reconsidered and ruled upon Capital One's second exception of prescription is without merit.

We also find no merit to Robertson's arguments presented in assignments of error numbers two, three, and four, through which he asserts that the trial court erred in maintaining the exception of prescription where Robertson had learned of the forgery only three months prior to filing suit and, thus, where the delay in filing suit was not unreasonable under the circumstances. Louisiana Revised Statute 10:3-420(a)(iii) defines the action of conversion of an instrument to include the situation where "a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment." If Robertson's allegations as set forth in the original and amended petitions as to Capital One's actions are accepted as true, see Kirby v. Field, 2004-1898 (La. App. 1st Cir. 9/23/05), 923 So. 2d 131, 135, writ denied, 2005-2467 (La. 3/24/06), 925 So. 2d 1230, then those actions in paying the misappropriated check over a forged endorsement would constitute conversion within the meaning of the statute. See ASP Enterprises, Inc. v. Guillory, 2008-2235 (La. App. 1st Cir. 9/11/09), 22 So. 3d 964, 972, writ denied, 2009-2464 (La. 1/29/10), 25 So. 3d 834; Peak Performance, 992 So. 2d at 531.

However, a claim for conversion pursuant to LSA-R.S. 10:3-420(a) prescribes in one year. LSA-R.S. 10:3-420(f); ASP Enterprises, Inc., 22 So. 3d at 972; Peak Performance, 992 So. 2d at 531. According to the allegations of Robertson's petition, as supported by the copy of the check at issue which was attached to his petition below, Capital One cashed the misappropriated check on October 21, 2005, almost three years before Robertson filed the instant suit. Thus, on the face of Robertson's petition, his claim for conversion against Capital One was prescribed, and he bore the burden of demonstrating that prescription was interrupted or suspended. Kirby, 923 So. 2d at 135.

In an attempt to establish that his claim was timely filed, Robertson asserts that his actions in filing suit within three months of discovering the forgery were

reasonable. This "discovery rule" is equivalent to one of the exceptions in Louisiana's doctrine of *contra non valentem*. Peak Performance, 992 So. 2d at 532-533. However, this court in Peak Performance and ASP Enterprises, Inc. considered the issue of whether the doctrine of *contra non valentem* was applicable to prescription of conversion claims under LSA-R.S. 10:3-420(f), and we ultimately held that the equitable doctrine of *contra non valentem* cannot be applied to suspend prescription of a cause of action for the conversion of a negotiable instrument under LSA-R.S. 10:3-420(f), except in the event of fraudulent concealment by the defendant asserting prescription. ASP Enterprises, Inc., 22 So. 3d at 973-974; Peak Performance, 992 So. 2d at 533.

In the instant case, Robertson neither alleged nor presented evidence tending to establish any fraudulent concealment on Capital One's part. Robertson, therefore, failed to meet his burden of proof of suspension of prescription under the limited application of *contra non valentem*. Thus, we find no merit to assignments of error two, three, and four.

In his fifth assignment of error, Robertson contends that the trial court erred in failing to apply the appropriate prescriptive period to his claim for breach of warranty against Capital One based on its negotiating a forged check. Louisiana Revised Statute 10:4-207 provides that a customer or collecting bank that transfers an item and receives a settlement or other considerations warrants certain things to the **transferee** and to **any subsequent collecting bank**, such as that all signatures on the item are authentic and authorized. LSA-R.S. 10:4-207(a)(2). Pursuant to LSA-R.S. 10:4-207(e), a cause of action for breach of warranty under this statute "accrues when the claimant has reason to know of the breach." However, we note at the outset that the warranties set forth in LSA-R.S. 10:4-207(a) are warranties

made by the collecting bank to the transferee and any subsequent collecting bank.[1] Thus, these are warranties that Capital One would have made to any other bank to whom it transferred the misappropriated check, and not warranties it made to Robertson, the actual payee on the instrument. Accordingly, the provisions of LSA-R.S. 10:4-207 are simply inapplicable to Robertson's claims against Capital One. Thus, we also find no merit to assignment of error number five.

Finally, we also find no merit to Robertson's assertions in assignments of error numbers six, seven, and eight, through which he argues that the trial court erred in finding that his claims of conversion, negligence, and collection of money lent were prescribed. In essence, to preserve or maintain his suit, Robertson attempts to assert tort law claims, for which he asserts a suspension or interruption of prescription until he discovered the forgery, and a claim for money lent pursuant to LSA-C.C. art. 3494, which has a three-year prescriptive period. However, this court in ASP Enterprises, Inc. addressed the issue of whether the named payee on third-party checks that were converted could properly assert causes of action against the defendant bank, which accepted the misappropriated checks and thereby made payment to someone other than the named payee, under Louisiana law, independent of the UCC. Therein, we concluded that the named payee's claims for conversion and negligence grounded in general Louisiana law outside the ambit of the UCC were displaced by the UCC. ASP Enterprises, Inc., 22 So. 3d at 973. Accordingly, we must similarly conclude that any attempt by Robertson to style his claim against Capital One in general Louisiana law is inappropriate, those causes of action for conversion and negligence having been displaced by the UCC.[2] Accordingly, we are constrained to find that there is no merit to

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[1]"Collecting bank" is defined as "a bank handling an item for collection except the payor bank." LSA-R.S. 10:4-104(b); LSA-R.S. 10:4-105(5).

[2]Additionally, we fail to see how the provisions of LSA-C.C. art. 3494(3), for an action on money lent, is applicable herein.

Robertson's contentions that the trial court erred in finding his claims against Capital One were prescribed.

CONCLUSION

For the above and foregoing reasons, the trial court's August 30, 2010 judgment, maintaining Capital One's exception of prescription and dismissing with prejudice Robertson's claims against it, is affirmed. Costs of this appeal are assessed against Robertson.

AFFIRMED.