**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1293

PUMPKIN MOBILE HOME PARK, LLC

VERSUS

HENRY FRANK HARRISON, PHYLLIS UNDERWOOD HARRISON, PUNKIN PARK, INC., AND TERRY LEROY STEWART

***DATE OF JUDGMENT:*** MAR 23 2012

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 2010-0001880, DIVISION D, PARISH OF TANGIPAHOA
STATE OF LOUISIANA

HONORABLE M. DOUGLAS HUGHES, JUDGE

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| Bradley A. Stevens<br>John B. Edwards<br>Amite, Louisiana | Counsel for Defendants-Appellees<br>Henry Frank Harrison, Phyllis Underwood Harrison, and Punkin Park, Inc. |
| Scott Sledge<br>Hammond, Louisiana | Counsel for Defendant-Appellee<br>Terry Leroy Stewart |

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

**Disposition: AFFIRMED; MOTION TO STRIKE DISMISSED.**

KUHN, J.

In this appeal, plaintiff, Pumpkin Mobile Home Park, LLC, appeals a judgment dismissing defendants, Henry Frank Harrison, Phyllis Underwood Harrison, and Punkin Park, Inc.,[1] from this possessory action, with prejudice, pursuant to a peremptory exception raising the objection of no right of action. For the following reasons, we affirm.

## FACTS AND PROCEDURAL BACKGROUND

On October 15, 2008, defendants, Henry and Phyllis Harrison, conveyed an approximate twenty-eight acre tract of immovable property located in Hammond to Family RV Center, LLC (Family RV), through an act of cash sale. Following two additional transfers, plaintiff acquired the said property from Glenda Calloway by an act of sale with mortgage on September 30, 2009.[2] Each of the documents transferring the property contained the same property description included in the original act of sale from the Harrisons. None of these descriptions included the approximate four-acre tract of immovable property (the "disputed property") that is the subject of the instant suit.

On November 25, 2009, the Harrisons sold several other tracts of immovable property located in Hammond to Terry Leroy Stewart by an act of credit sale, which was recorded with the Clerk of Court for Tangipahoa Parish that same date. The property description included in the act of sale encompassed the disputed property.

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[1] Although Punkin Park, Inc. is a named defendant in the suit, the judgment notes that it is no longer in existence.

[2] On October 31, 2008, Family RV conveyed the property to RI Holdings, LLC, by an act of transfer for $10.00 and other valuable consideration. On September 14, 2009, RI Holdings conveyed it to Glenda Calloway, plaintiff's vendor, by an act of cash sale.

Thereafter, on May 6, 2010, plaintiff filed the instant possessory action, naming the Harrisons, Punkin Park, and Stewart as defendants. In the suit, plaintiff claimed it owned the disputed property by virtue of the September 2009 act of sale from Calloway, even though the disputed property was not included in the property description contained therein. Nevertheless, plaintiff asserted that it was clearly understood by the Harrisons and Family RV that the October 2008 sale included the disputed property and that it was only through unintentional error that the act of sale failed to include this property. Accordingly, plaintiff maintained that the October 2008 sale conveyed title to the disputed property to Family RV and to each of the successive transferees thereafter. On this basis, plaintiff alleged that the recordation of the November 2009 sale from the Harrisons to Stewart disturbed its peaceful possession of the disputed property.

The Harrisons answered the suit and filed multiple exceptions, including peremptory exceptions raising the objections of no right of action, no cause of action, and non-joinder of indispensable parties. Following a hearing, the trial court overruled the exceptions of no cause of action and non-joinder of indispensable parties, but sustained the exception of no right of action and dismissed the Harrisons from this suit, with prejudice. Plaintiff now appeals.[3]

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[3] Even though the Harrisons did not take an appeal, in their appellate brief, which they additionally labeled as a "cross-appeal," they attempt to assign error to the overruling of their exceptions of no cause of action and non-joinder of indispensable parties. In response, plaintiff filed a motion to strike the purported cross-appeal and related portions of the Harrisons' brief, since they failed to appeal or properly answer the instant appeal. Although the Harrisons attempted to assign error to the trial court overruling their exceptions by means of their brief, rather than in a separate pleading, as required for an answer, see **Smoot v. Hernandez**, 08-1121 (La. App. 3d Cir. 3/4/09, 6 So. 3d 352, 362, the plaintiff's motion to strike is moot, given our resolution of plaintiff's appeal.

## NO RIGHT OF ACTION

In its sole assignment of error, plaintiff contends that the trial court erred in sustaining the Harrisons' exception of no right of action. Specifically, plaintiff argues that, even if it is not the record owner of the disputed property, it has acquired a real right in the property since it and its ancestors in title have been in peaceful possession of the said property for more than one year. Therefore, plaintiff contends it has a real interest in bringing this possessory action against the Harrisons, who have disturbed its peaceful possession of the disputed property. In making this argument, plaintiff points out that ownership of the immovable property is not at issue in a possessory action.

An exception of no right of action is a threshold procedural device used to terminate a suit brought by a person who has no legally recognized right to enforce the right asserted. Unless otherwise provided by law, an action can only be brought by a person having a real and actual interest in the matter asserted. La. C.C.P. art. 681; ***Joseph v. Hospital Service District No. 2 of Parish of St. Mary***, 05-2364 (La. 10/15/06), 939 So.2d 1206, 1210. Thus, a peremptory exception raising the objection of no right of action is designed to test whether a plaintiff has a real and actual interest in the action. La. C.C.P. art. 927(A)(6); ***Joseph***, 939 So.2d at 1210. In considering an exception of no right of action, the focus is on whether the particular plaintiff has a right to bring the suit, while assuming that the petition states a valid cause of action for some person. The exception of no right of action questions whether the plaintiff in a particular case is a member of the class of persons to whom the law grants the cause of action asserted in the suit.

***J-W Power Company v. State ex rel. Department of Revenue & Taxation***, 10-1598 (La. 3/15/11), 59 So.3d 1234, 1239.

Louisiana Code of Civil Procedure article 3655 provides, in pertinent part, that a possessory action is "one brought by the possessor of immovable property or of a real right therein to be maintained in his possession of the property or enjoyment of the right when he has been disturbed...." The required elements of a possessory action are: (1) possession of the immovable property or real right at the time of the disturbance; (2) quiet and uninterrupted possession of the property by the plaintiff and his ancestors in title **"for more than a year immediately prior to the disturbance,"** unless evicted by force or fraud; (3) a disturbance in fact or law; and (4) filing of the possessory action within one year of the disturbance. La. C.C.P. art. 3658.

In the present case, a review of the allegations of plaintiff's original and amended petitions reveals that plaintiff does not fall within the class of individuals entitled to bring a possessory action with respect to the disputed property. Under La. C.C.P. art, 3658, a plaintiff has a right to bring a possessory action only if he and his ancestors in title were in possession of the immovable property **for more than a year prior to the disturbance**. However, the September 2009 act of sale by which plaintiff claims it acquired ownership and possession of the disputed property occurred less than two months prior to the alleged disturbance created by the recordation of the Harrisons' sale to Stewart in November 2009.

Plaintiff maintains that the requirement of one year of prior possession is met in this case, because it and its ancestors in title have had continuous possession of the property since the October 2008 sale by the Harrisons. Thus, in

order to meet this requirement, plaintiff relies on tacking its own possession to that of its ancestors in title. We conclude that plaintiff is not entitled to do so for the following reasons.

The possession required to bring a possessory action is identical to the possession required for acquisitive prescription. ***Prieto v. St. Tammany Homesites, Inc.***, 602 So.2d 1111, 1113 (La. App. 1st Cir. 6/29/92). Under the general tacking provisions of La. C.C. arts. 3441 and 3442, tacking is allowed for prescriptive purposes only with respect to property that is **included and described** in the juridical link between the current possessor and his ancestor in title. See ***Loutre Land and Timber Company v. Roberts***, 10-2327 (La. 5/10/11), 63 So.3d 120, 125. In others words, tacking can be utilized to prescribe only to the extent of the title. ***Loutre***, 63 So.3d at 125.

In the instant case, the property description in the September 2009 act of sale through which plaintiff claims its interest does not include or describe the disputed property. Nor did the identical titles of each of plaintiff's respective ancestors in title specifically include or describe the disputed property. Thus, plaintiff cannot tack its possession to that of its ancestors in title, since tacking generally is not allowed with respect to property beyond one's title.[4] Accordingly,

[4] The Louisiana Supreme Court has noted that different rules apply to tacking under La. C.C. art. 794, which is applicable to issues of boundary prescription, and to tacking under the general codal articles on tacking. Specifically, under La. C.C. art. 794, one may utilize tacking to prescribe beyond one's title on adjacent property and to the extent of visible boundaries, whereas under La. C.C. arts. 3441 and 3442, tacking may be utilized to prescribe only to the extent of one's title. See ***Loutre***, 63 So.3d at 125.

because plaintiff cannot tack the possession of its ancestors in title, it failed to meet the requirement of possession for more than one year immediately prior to the disturbance. In view of this fact, plaintiff is not a member of the class of individuals entitled to bring possessory actions under La. C.C.P. art. 3658. Therefore, the trial court correctly sustained the Harrisons' exception of no right of action.[5] Moreover, there was no necessity to allow plaintiff an opportunity to amend its petition, since its failure to meet the sequential requirement of La. C.C.P. art. 3658 is not a deficiency that can be remedied by amendment of the petition. See La. C.C.P. art. 934.

## CONCLUSION

For the reasons assigned, the judgment of the trial court sustaining the exception of no right of action is affirmed. Additionally, the plaintiff's motion to strike is hereby dismissed as moot. Plaintiff is to pay all costs of this appeal.

**AFFIRMED; MOTION TO STRIKE DISMISSED.**

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[5] In its original petition, plaintiff appears to be asserting a cause of action in fraud, in addition to a possessory action, based on its allegations that the Harrisons recorded the November 2009 sale of the disputed property to Stewart despite their knowledge that the parties to the October 2008 sale intended that the disputed property be included in that sale. To the extent that plaintiff does attempt to assert a cause of action in fraud against the Harrisons, we note that it possesses no right to do so. The three basic elements to an action for fraud are: (1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to the other party; and (3) the resulting error must relate to a circumstance substantially influencing the other party's contractual consent. See La. C.C. art. 1953: ***Terrebonne Concrete, LLC v. CEC Enterprises, LLC***, 11-0072 (La. App. 1st Cir. 8/17/11), 76 So.3d 502, 509, ***writ denied***, 11-2021 (La. 11/18/11), 75 So.3d 464. In this case, there was no privity of contact between plaintiff and the Harrisons, nor does plaintiff allege that the Harrisons made any misrepresentations or omissions of fact to it. If a cause of action exists with respect to either the October 2008 sale or the November 2009 sale, that cause of action lies with the parties thereto, and not with plaintiff.