NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 CA 2180

RICKY E. KOCH AND SUSAN D. KOCH

VERSUS

LAMULLE CONSTRUCTION, L.L.C.,
WILLIAM E. FOSTER, JR.,
FOSTER ENGINEERING, INC.,
RODNEY E. HOLT, CASIE D. HOLT,
AND SOUTHERN HOMES, L.L.C.

Judgment Rendered: May 8, 2009.

* * * * *

On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 2007-13696

Honorable Larry J. Green, Judge Presiding

* * * * *

Jennifer N. Willis
New Orleans, LA
Gary J. Gambel
New Orleans, LA

Attorneys for Plaintiffs-Appellants,
Ricky E. Koch and Susan D. Koch

Martha Y. Curtis
James M. Garner
Amanda Russo Schenck
New Orleans, LA
Scott G. Jones
Mandeville, LA

Attorneys for Defendant-Appellee,
Southern Homes, L.L.C.

Ernest S. Anderson
Slidell, LA

Attorney for Defendant-Appellee,
Lamulle Construction, L.L.C.

Nelson W. Wager, III Bradley J. Luminais, Jr. Metairie, LA	Attorneys for Defendant-Appellee, Republic Vanguard Ins. Co.
Jeffrey P. Green Larry G. Canada New Orleans, LA	Attorneys for Defendants-Appellees, Foster Engineering, Inc. and William E. Foster, Jr.
Rodney E. Holt Casie D. Holt Fountain, CO	Defendants-Appellees, In Proper Person

* * * * *

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

CARTER, C. J.

Plaintiffs appeal a partial final judgment maintaining peremptory exceptions raising the objections of prescription and no cause of action, and dismissing plaintiffs' petition, in favor of all but two defendants.[1] We affirm the trial court's judgment in this memorandum opinion in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.1B.

FACTS AND PROCEDURAL HISTORY

Shortly after losing their home to Hurricane Katrina, Ricky E. and Susan D. Koch (the Kochs) purchased a waterfront home and two lots (lots 80 and 81) in Bradford Place Subdivision in Slidell, Louisiana, from Rodney E. and Casie D. Holt (the Holts). Bayou Liberty runs along the back of the property line of the subject home and lots. On October 15, 2005, approximately three weeks prior to the sale, the Kochs requested that an inspection be made on the property that they were about to purchase. The inspection report informed the Kochs that they should "monitor" and "improve" the retaining wall on the property because it "shows evidence of substantial movement of soil." The inspection specifically did "not include an assessment of [the] geological conditions and/or site stability." The cash sale between the Kochs and the Holts occurred on November 7, 2005; and the act of sale contained an "AS IS" waiver of warranty and redhibition rights clause.

The Kochs' predecessors in title, the Holts, originally purchased the newly constructed home and lots from the builder, Southern Homes, L.L.C. (Southern Homes), on October 22, 2004, about a year prior to the Kochs' purchase. Two months before the original sale to the Holts, Southern Homes determined that construction of a bulkhead was necessary to control erosion and soil instability

[1] As a judgment that dismissed less than all of the defendants, this partial final judgment is appealable pursuant to LSA-C.C.P. art. 1915A(1). The only defendants remaining are the sellers, Rodney E. Holt and Casie D. Holt.

near the bank of the bayou at the back of lot 81 where the house was located. Southern Homes contracted with Lamulle Construction, L.L.C. (Lamulle) for the August 2004 construction of the bulkhead that had been designed by William E. Foster, Jr. of Foster Engineering, Inc. (Foster).

Almost two years after the Kochs purchased their home and lots, they filed a petition for damages on August 1, 2007, in the Twenty-Second Judicial District Court. The Kochs alleged that the suspected failure of the bulkhead along the back of lot 81 and the extreme instability of the soil on both lots had rendered the lots and home unfit and unusable for their intended purpose. The Kochs further alleged that the defective nature of the bulkhead and soil was not apparent to them at the time of the sale, that Southern Homes and the Holts had intentionally concealed the defective condition of the property, and that they did not learn of the defect until November 2006 when they noticed that the bulkhead was leaning and the property was sinking. The Kochs originally named the Holts, Southern Homes, Lamulle, and Foster as defendants; they later added Lamulle's insurer, Republic Vanguard Insurance Company (Republic Vanguard), as another defendant. All of the defendants responded to the Kochs' petition by filing separate peremptory exceptions raising the objections of prescription and no cause of action.[2]

After a hearing on the defendants' exceptions, the trial court maintained all of the defendants' peremptory exceptions raising the objections of prescription and

---

[2] Additionally, Southern Homes raised the objections of no right of action and vagueness or ambiguity in the petition. Lamulle and Republic Vanguard also raised the objections of no right of action. However, none of the defendants filed an answer to the appeal. Thus, we will not consider the issues of whether the trial court correctly denied the various peremptory exceptions raising the objections of no right of action or alternative exceptions. The Holts attempted to answer the Kochs' petition by filing a pro se responsive letter into the record, but they later filed a peremptory exception raising the objection of prescription after hiring an attorney to represent them. Because the attorney had not enrolled as counsel of record at the time of the hearing on the other defendants' exceptions, the trial court did not consider the Holts' exception raising the objection of prescription. According to the record, that exception has yet to be set for hearing, and the attorney withdrew as counsel of record for the Holts on August 6, 2008.

no cause of action, and reserved ruling on the Holts' exception until a later date. It is from this judgment that the Kochs have appealed, arguing that the trial court erred in finding that they had no cause of action against Lamulle (and its insurer), Foster, and Southern Homes, and that their claims had prescribed. The Kochs also contend that the trial court erred in refusing to allow them to present testimony on the prescription issue.

We have thoroughly reviewed the record and the relevant statutes and jurisprudence, and we cannot say that the trial court erred in its ruling. It is clear that the Kochs had no cause of action for breach of contract against Southern Homes, Lamulle, or Foster, because they had no privity of contract with those parties. Additionally, we find that as successors in title to the initial purchasers of the home, the Kochs' only possible cause of action against the builder, Southern Homes, was under the Louisiana New Home Warranty Act (NHWA). See LSA-R.S. 9:3141 and LSA-R.S. 9:3143(1) and (6). But that action is not viable in this case because the act specifically excludes "any other improvement not a part of the home itself" or any other condition not resulting in "actual physical damage to the home[,]" unless the parties otherwise agree in writing. LSA-R.S. 9:3144B(1) and (13). Since the bulkhead is clearly an improvement that is not part of the home itself and there was no evidence of actual physical damage to the home, or a written agreement by Southern Homes to warrant the condition of the bulkhead and soil, the Kochs have no cause of action against Southern Homes.[3]

Furthermore, the record clearly shows that the Kochs brought their claim well after one year from the date that the bulkhead was constructed and from the

---

[3] Even if we were to find that the damages were somehow covered under the NHWA in this case, we find that the Kochs did not provide Southern Homes written notice within the time period required by the NHWA; thus, those claims are perempted. See LSA-R.S. 9:3145A and LSA-R.S. 9:3146.

date of the pre-sale inspection of the property when they were advised that the bulkhead should be monitored and improved because it was showing evidence of "substantial movement." In summary, we conclude there is no manifest error and we agree with the trial court's finding that the October 15, 2005 inspection report reasonably put the Kochs on notice of a potential problem with the bulkhead (retaining wall) on their property.[4] At that time, the Kochs had sufficient information to prompt further inquiry into the stability of the bulkhead and the soil. Cf. **Paragon Development Group, Inc. v. Skeins**, 96-2125 (La. App. 1 Cir. 9/19/97), 700 So.2d 1279, 1281-1282. The Kochs did not file this lawsuit until August 1, 2007. Thus, the trial court correctly found that the Kochs' tort claims had prescribed.

For all of these reasons, we affirm the trial court's judgment in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.1B. All costs of this appeal are assessed against the plaintiffs-appellants, Ricky E. Koch and Susan D. Koch.

AFFIRMED.

[4] The Kochs failed to make an offer of proof regarding their attempt to prove the timing of their knowledge of the defective bulkhead. They cannot now complain on appeal that the trial court refused to allow the evidence. See LSA-C.C.P. art. 1636 and **Our Lady of the Lake Regional Medical Center v. Helms**, 98-1931 (La. App. 1 Cir. 9/24/99), 754 So.2d 1049, 1056, writ denied, 99-3057 (La. 1/7/00), 752 So.2d 863.