NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 CA 1997

ROBERT RUSHING AND
PATRICIA QUAVE RUSHING

VERSUS

THE SUCCESSION OF EMORY L. GRAVES
AND THE SUCCESSION OF
SYLVIA ACOSTA KENNEDY GRAVES

Judgment Rendered: March 27, 2009

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 2007-14028

The Honorable Elaine W. Dimiceli, Judge Presiding

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P. David Carollo Slidell, Louisiana	Counsel for Plaintiffs/Appellants Robert Rushing and Patricia Quave Rushing
Raymond C. Burkart, Jr. Katherine Ogburn Burkart Covington, Louisiana	Counsel for Defendant/Appellee Marian Livaudais, in her capacity as executrix of the Succession of Emory Graves

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

GAIDRY, J.

The purchasers of immovable property sued the executors of the seller's successions over fourteen years after the sale, seeking the rescission of the sale and the return of the purchase price paid. The trial court sustained a peremptory exception of prescription, dismissing one of the defendants, and the purchasers have appealed. The defendant has answered the appeal, contending that it is frivolous and seeking damages and costs. We affirm the trial court's judgment but deny the answer to the appeal.

FACTS AND ACTION OF THE TRIAL COURT

On November 24, 1992, the plaintiffs, Robert Rushing and Patricia Quave Rushing, purchased Lot 111A in Lakeshore Village Subdivision in the City of Slidell for the price of $55,000.00 from the late Emory L. Graves and the late Sylvia Acosta Kennedy Graves.[1] The boundaries, dimensions, and area of the lot ("0.12 acres of land, more or less," or about 5227.2 square feet), were described in the act of sale.

By letter dated July 12, 2001, the director of planning for the City of Slidell wrote to Mr. Rushing regarding a proposed "[r]esubdivision of Lot 111" submitted to the planning department for approval. The director informed Mr. Rushing that the "resubdivision [he] submitted" did not comply with the minimum area of 8,400 square feet for "an A-6 Single Family Residential Zone," and that "Lot 111 will have to remain one lot."

On August 17, 2007, the plaintiffs filed a "Petition for Return of Money," naming as defendants the successions of the deceased sellers. The plaintiffs alleged that in attempting to refinance their property, they learned that "the property was not suitable [*sic*] for any type of . . . permits because the lot [was] too small," referencing the letter of July 12, 2001. The

[1] Presumably, Lot 111A is a portion of the lot originally designated as Lot 111.

plaintiffs claimed that the property was essentially "useless" to them "insofar as wanting [*sic*] to expand, remodel, etc." The plaintiffs further alleged that the sellers knew or should have known that the plaintiffs would encounter the permit problem "because of their redesignation of the lot and as such could not undertake the sale of it as such." Finally, they alleged that they "were unaware of the fact that the property was not the correct size at the time of their purchase." The plaintiffs prayed for the return of the purchase price.

One named defendant, the Succession of Emory L. Graves, filed dilatory and peremptory exceptions, raising objections as to its lack of procedural capacity to be sued and prescription. The dilatory exception of lack of procedural capacity was heard on December 10, 2007, and sustained by the trial court. The plaintiffs then amended their petition to substitute Marian Livaudais, the administratrix of the Succession of Emory L. Graves, and the executrix of the other succession as defendants, in place of the successions.

Ms. Livaudais filed a peremptory exception of prescription on January 22, 2008, affirmatively alleging that the plaintiffs' action was prescribed under La. C.C. art. 3499, being filed over ten years after the date of their purchase of the property. The exception was heard on April 21, 2008. The plaintiffs did not present any testimony or other evidence, and the only evidence introduced was the act of sale, introduced by Ms. Livaudais. The trial court sustained the exception, its judgment dismissing the suit against Ms. Livaudais being signed on April 30, 2008. The plaintiffs moved for a new trial, but their motion was denied.

The plaintiffs now appeal. Ms. Livaudais has answered the appeal, seeking damages and costs from the plaintiffs on the grounds of frivolous appeal.

ANALYSIS

All personal actions, including actions to enforce contractual obligations, are generally subject to a liberative prescription of ten years, unless otherwise provided by legislation. La. C.C. art. 3499. The plaintiffs sought the rescission of the sale based upon their error relating to a substantial quality of the immovable property at issue. *See* La. C.C. arts. 1948, 1949, and 1950.[2] The prescriptive period to bring an action to rescind or annul a contract for error is five years from the time the error was discovered. La. C.C. art. 2032. *See also* La. C.C. art. 3082, Revision Comments – 2007, (a). Here, the plaintiffs filed suit over ten years from the date of the sale, and over five years, but within ten years, of their alleged discovery of the zoning requirements relating to lot size. Based upon the record of this matter, we conclude that the plaintiffs' claims are prescribed under La. C.C. art. 2032, and that even if La. C.C. art. 3499 were to apply, they would likewise be prescribed.

At the hearing of a peremptory exception (except one raising the objection of no cause of action), "evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition." La. C.C.P. art. 931. Generally, in the absence of evidence, the objection of prescription must be decided upon the facts alleged in the petition, and those alleged facts are accepted as true. *Thomas v. State Employees Group Benefits Program*, 05-0392, p. 7 (La. App. 1st Cir.

[2] However, unilateral error will not vitiate consent if the cause of the error was the complaining party's inexcusable neglect in discovering the error. *Scott v. Bank of Coushatta*, 512 So.2d 356, 361 (La. 1987).

3/24/06), 934 So.2d 753, 758. But the latter principle applies only to properly-pleaded material allegations of fact, as opposed to allegations deficient in material detail, conclusory factual allegations, or allegations of law. *Kirby v. Field*, 04-1898, p. 6 (La. App. 1st Cir. 9/23/05), 923 So.2d 131, 135, *writ denied*, 05-2467 (La. 3/24/06), 925 So.2d 1230.

Generally, the party pleading prescription has the burden of proving the facts supporting the exception. *Quality Gas Products, Inc. v. Bank One Corp.*, 03-1859, p. 4 (La. App. 1st Cir. 6/25/04), 885 So.2d 1179, 1181. However, when the face of the petition reveals that the plaintiff's claim has prescribed, the burden shifts to the plaintiff to demonstrate prescription was interrupted or suspended. *In re Medical Review Panel for Claim of Moses*, 00-2643, p. 6 (La. 5/25/01), 788 So.2d 1173, 1177. If the plaintiff asserts a suspension or interruption of prescription, he bears the burden of proof as to that assertion. *Id.*, 00-2643 at p. 6, 788 So.2d at 1177-78.

Contra non valentem non currit praescriptio is a Louisiana jurisprudential doctrine under which prescription may be suspended. *Carter v. Haygood*, 04-0646, p.11 (La. 1/19/05), 892 So.2d 1261, 1268. Because the doctrine is of equitable origin, it only applies in exceptional circumstances. *See Renfroe v. State ex rel. Dep't of Transp. & Dev.*, 01-1646, p. 9 (La. 2/26/02), 809 So.2d 947, 953. There are four recognized categories of this doctrine: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably

knowable by the plaintiff, even though this ignorance is not induced by the defendant. *Carter*, 04-0646 at pp. 11-12, 892 So.2d at 1268.

Although the plaintiffs do not expressly invoke it by name, they in effect contend that *contra non valentem* applies to defeat the defense of prescription, and that prescription did not begin to run until the date of the discovery of their error. The third listed category of *contra non valentem* encompasses situations where an innocent plaintiff has been lulled into a course of inaction in the enforcement of his right by some concealment or fraudulent conduct on the part of the defendant. *Carter*, 04-0646 at p. 12, 892 So.2d at 1269. Any circumstances constituting fraud must be alleged "with particularity." La. C.C.P. art. 856. The director of planning's letter to Mr. Rushing was attached as an exhibit to the plaintiffs' petition. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. La. C.C.P. art. 853. From the record, we cannot discern whether the "re-subdivision of Lot 111" described in the letter was the earlier "redesignation" (or subdivision of Lot 111) by the sellers, as described in the petition, or a proposed re-subdivision of their property, Lot 111A, by the plaintiffs. At any rate, as Ms. Livaudais correctly emphasizes, the plaintiffs' allegations do not sufficiently state a cause of action for fraud or concealment by the sellers. Additionally, the plaintiffs failed to present any testimony or to introduce other evidence at the hearing on the exception, so the record is bare of any proof that the sellers somehow misrepresented or concealed the size of the lot or its zoning at the time of the sale, or that they actually knew of the plaintiffs' ignorance of the zoning requirements. Such being the case, the third category of *contra non valentem* cannot apply here.

The fourth category, commonly known as the "discovery rule," is an equitable pronouncement that statutes of limitation do not begin to run

against a person whose cause of action is not reasonably known or discoverable by him, even though his ignorance is not induced by the defendant. *Teague v. St. Paul Fire & Marine Ins. Co.*, 07-1384, pp. 11-12 (La. 2/1/08), 974 So.2d 1266, 1274. However, the fourth category will not except the plaintiff's claim from the running of prescription if his ignorance is attributable to his own willfulness or neglect; that is, a plaintiff will be deemed to know what he could by reasonable diligence have learned. *Corsey v. State ex rel. Dep't of Corrections*, 375 So.2d 1319, 1322 (La. 1979). Thus, a prescriptive period will begin to run even if the injured party does not have *actual* knowledge of facts that would entitle him to bring a suit as long as there is *constructive* knowledge of same. *Campo v. Correa*, 01-2707, p. 12 (La. 6/21/02), 828 So.2d 502, 510. (Emphasis supplied.) Such constructive knowledge or notice, sufficient to commence the running of prescription, exists when the plaintiff should have known, by exercising reasonable diligence, that he had a cause of action. *See Landry v. Blaise, Inc.*, 02-0822, pp. 6 (La. App. 4th Cir.10/23/02), 829 So.2d 661, 666.

The plaintiffs' cause of action is prescribed on its face, as it was filed well over five years after the date of the plaintiffs' actual discovery of their error. And their allegations that the sellers knew or should have known of their intended use of the lot and that they "were unaware of the fact that the property was not the correct size [to meet the requirements of the zoning ordinance] at the time of their purchase" are plainly insufficient to invoke the fourth category of *contra non valentem*, even if the ten-year prescriptive period of La. C.C. art. 3499 were applicable. The plaintiffs failed to allege or to put forth any proof at the hearing that the zoning requirements relating to lot size were not "reasonably knowable" prior to their receipt of the July 12, 2001 letter. The dimensions and area of the lot were described in the act

of sale, signed by the plaintiffs. The plaintiffs could easily have discovered their error as to the zoning requirements over ten years prior to the filing of suit by obtaining a title examination prior to the sale, as noted by the trial court in its oral reasons, or by reasonable, timely inquiry of the City of Slidell.

Louisiana Code of Civil Procedure Article 934 provides as follows:

> When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection cannot be so removed, or if plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed.

In the context of an objection of prescription, the jurisprudence has interpreted the foregoing provision to mean that where a plaintiff's cause of action is prescribed on its face, and the plaintiff has the opportunity but fails to offer any evidence at the hearing of a peremptory exception that his claim was filed timely, he has failed to adequately establish that amendment of his petition might remove the grounds of the objection. *Mitchell v. Terrebonne Parish Sch. Bd.*, 02-1021, p. 6 (La. App. 1st Cir. 4/2/03), 843 So.2d 531, 534, *writ denied*, 03-2275 (La. 11/26/03), 860 So.2d 1135. Thus, the plaintiffs were not entitled to amend their petition as part of the judgment sustaining Ms. Livaudais's exception.

In summary, the trial court did not err in sustaining the peremptory exception of prescription, dismissing the plaintiffs' cause of action against Ms. Livaudais, or in denying the plaintiffs' motion for new trial.

DAMAGES FOR FRIVOLOUS APPEAL

The recovery of damages for frivolous appeal is authorized by La. C.C.P. art. 2164. Our courts have been very reluctant to grant such damages under this article, as it is penal in nature and must be strictly construed.

Additionally, because appeals are favored in our law, penalties for the filing of a frivolous appeal will not be imposed unless they are clearly due. *Guarantee Sys. Constr. & Restoration, Inc. v. Anthony*, 97-1877 (La. App. 1st Cir. 9/25/98), 728 So.2d 398, 405, *writ denied*, 98-2701 (La. 12/18/98), 734 So.2d 636. Damages for frivolous appeal will not be awarded unless it appears that the appeal was taken solely for the purpose of delay or that the appellant's counsel does not seriously believe in the position he advocates. *Id.* We cannot conclude that the foregoing criteria exist with regard to this appeal. We therefore deny the answer to the appeal.

DECREE

The judgment of the trial court, sustaining the peremptory exception of prescription and dismissing the petition and cause of action of the plaintiffs-appellants, Robert Rushing and Patricia Quave Rushing, is affirmed. The answer of the defendant-appellee, Marian Livaudais, as administratrix of the Succession of Emory L. Graves, to the appeal is denied. All costs of this appeal are assessed to the plaintiffs-appellants.

AFFIRMED.