

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0859

SOUTHGATE RESIDENTIAL TOWERS, LLC,  
SOUTHGATE PENTHOUSES, LLC

VERSUS

MAPP CONSTRUCTION, INC.; MAPP CONSTRUCTION, LLC; MICHAEL A. POLITO; M&R DRYWALL, INC.; M&R STUCCO, INC.; POWER DESIGN, INC.; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA; WESTFIELD INSURANCE COMPANY; CRUM & FORRESTER SPECIALTY INSURANCE COMPANY; SCOTTSDALE INSURANCE COMPANY; BITUMINOUS FIRE AND MARINE INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY; INDIAN HARBOR INSURANCE; AND XYZ INSURANCE COMPANY

Judgment Rendered: December 21, 2007

\* \* \* \* \*

Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge, Louisiana  
Trial Court Number 550,534

Honorable Janice Clark, Judge

\* \* \* \* \*

Phillip W. Preis  
Charles M. Gordon, Jr.  
Crystal D. Burkhalter  
Baton Rouge, LA

Attorneys for  
Plaintiffs – Appellants  
Southgate Residential Towers, LLC  
and Southgate Penthouses, LLC

R. Gray Sexton  
Todd Hebert  
Daniel Crocker  
Baton Rouge, LA

Attorneys for  
Defendant – Appellee  
Michael A. Polito

Hoai T. Hoang  
Julie A. Scheib  
Lafayette, LA

Attorneys for  
Defendant – Appellee  
Indian Harbor Ins. Co.

Traci L. Shirley  
William E. Scott, III  
Baton Rouge, LA

Attorneys for  
Defendants – Appellees  
Bituminous Casualty Corp. and  
Bituminous Fire & Marine Ins. Co.

Raymond C. Jackson, III  
Lafayette, LA

Attorney for  
Defendant – Appellee  
Crum & Forrester Specialty Ins. Co.

Keely Y. Scott  
Michael T. Durham  
Baton Rouge, LA

Attorneys for  
Defendant – Appellee  
Scottsdale Ins. Co.

Jeffery N. Boudreaux  
Baton Rouge, LA

Attorney for  
Defendants – Appellees  
Power Design, Inc. and Westfield  
Ins. Co.

\* \* \* \* \*

BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

WELCH, J.

In this dispute surrounding the construction of a multi-unit apartment complex, Southgate Residential Towers, LLC and Southgate Towers Penthouses, LLC (collectively referred to as the “Southgate plaintiffs”) appeal a judgment of the trial court dismissing, with prejudice, all of its claims against the defendant Michael A. Polito. On appeal, Mr. Polito has filed a motion to stay the proceedings against him and a peremptory exception raising the objection of prescription. For reasons that follow, we reverse in part and affirm in part the judgment of the trial court, grant the motion to stay, and remand with instructions.

### **I. FACTUAL AND PROCEDURAL HISTORY**

The Southgate plaintiffs are the owners of a multi-unit apartment complex known as Southgate Towers, located on Nicholson Drive just south of the Louisiana State University campus in Baton Rouge. Mr. Polito is the major principal in MAPP Construction, LLC, formerly known as MAPP Construction, Inc. (collectively referred to as “MAPP”).<sup>1</sup>

On August 21, 2003, the Southgate plaintiffs entered into two written contracts with MAPP in regards to the construction of Southgate Towers. The first contract was to build the residential apartment complex and the other contract was to build twenty-seven penthouses within that complex. In order to fulfill its obligations under those two construction contracts, MAPP entered into subcontracts with various parties, including but not limited to co-defendants, M&R Drywall, Inc. (“M&R”) and Power Design, Inc. (“PDI”). After construction of Southgate Towers was substantially complete, the Southgate plaintiffs allegedly defaulted on their payments to MAPP because of alleged construction defects in the complex. In turn, this caused MAPP to suspend performance and payments to its subcontractors.

---

<sup>1</sup> MAPP Construction, Inc. was merged into MAPP Construction, LLC on October 1, 2003.

At present, there are numerous disputes between the Southgate plaintiffs, MAPP, and various subcontractors (including M&R and PDI) concerning alleged construction defects in the complex, payments allegedly owed for services rendered in connection with the construction of Southgate Towers, and the enforcement of various promissory notes issued by the Southgate plaintiffs. The various parties involved in this matter have filed several different lawsuits in the 19<sup>th</sup> Judicial District court involving these issues.

The underlying suit in this dispute was filed by the Southgate plaintiffs on December 19, 2006, and sought the recovery of damages for the alleged construction defects resulting from the negligence of MAPP, M&R, and PDI. The corporate entities named as defendants in this matter were: MAPP; M&R; PDI; Travelers Casualty and Surety Company of America (“Travelers”), the surety of MAPP; Westfield Insurance Company (“Westfield”), the surety of PDI; Crum & Forrester Specialty Insurance Company (“Crum & Forrester”), the insurer of PDI; Scottsdale Insurance Company (“Scottsdale”), the insurer of M&R; Bituminous Fire and Marine Insurance Company and Bituminous Casualty Corporation (“Bituminous”), an insurer of MAPP; National Union Fire Insurance Company (“National Union”), an insurer of MAPP; and Indian Harbor Insurance (“Indian Harbor”), an insurer of MAPP. Additionally, Mr. Polito was named individually as a defendant both in his personal capacity and as the surety of M&R.

In response, MAPP, its surety and insurers, and Mr. Polito filed motions to dismiss or alternatively to stay the proceedings, declinatory exceptions raising the objections of *lis pendens* and lack of subject matter jurisdiction, and dilatory exceptions raising the objection of prematurity. The motions and exceptions were based on their contention that a clause in the construction contracts, which provided that parties would arbitrate any and all claims arising out of the construction of Southgate Towers, required the parties to arbitrate before

proceeding with this litigation. Additionally, Mr. Polito filed a peremptory exception raising the objections of no cause of action and no right of action and a declinatory exception raising the objections of lack of subject matter jurisdiction and *lis pendens*.

After a hearing on March 12, 2007, the trial court denied the motion to dismiss and exceptions filed by MAPP and its surety and insurers<sup>2</sup>; however, after a hearing on March 26, 2007, the trial court sustained the exception raising the objection of no cause of action filed by Mr. Polito and rendered judgment dismissing, with prejudice, all of the Southgate plaintiffs' claims against Mr. Polito personally and as the alleged surety of M&R. A written judgment in conformity with the trial court's ruling was signed on April 3, 2007, and it is from this judgment that the Southgate plaintiffs have appealed.<sup>3</sup>

On June 18, 2007, Mr. Polito filed a peremptory exception raising the objection of prescription in this court pursuant to La. C.C.P. art. 2163. Additionally, on July 30, 2007, Mr. Polito filed a motion requesting that any properly stated claims by the Southgate plaintiffs against Mr. Polito be stayed pending resolution of the arbitration between the parties.

---

<sup>2</sup> Pursuant to a supervisory writ application filed by MAPP and Travelers, this court reversed the ruling of the trial court in this regard and granted a stay of these proceedings against MAPP and its surety "until an arbitration has been had in accordance with the terms of the agreement ... [b]ecause there is no dispute that the allegations raised in the ... suit are subject to a valid contractual arbitration clause between the parties." **Southgate Residential Towers, LLC v. MAPP Construction, Inc.**, 2007-0489 (La. App. 1<sup>st</sup> Cir. 6/26/07)(unpublished writ action), writ denied, 2007-1557 (La. 8/31/07), 962 So.2d 442. Additionally, pursuant to supervisory writ applications filed by Bituminous and Indian Harbor, this court also granted a stay of the proceedings against MAPP's insurers pending arbitration. See **Southgate Residential Towers, LLC v. MAPP Construction, Inc.**, 2007-0494 (La. App. 1<sup>st</sup> Cir. 6/26/07)(unpublished writ action), writ denied, 2007-1571 (La. 8/31/07), 962 So.2d 443 and **Southgate Residential Towers, LLC v. MAPP Construction, Inc.**, 2007-0685 (La. App. 1<sup>st</sup> Cir. 6/26/07)(unpublished writ action), writ denied, 2007-1572 (La. 8/31/07), 962 So.2d 443.

<sup>3</sup> The April 3, 2007 judgment was designated as a final judgment for the purpose of an immediate appeal after an express determination that there was no just reason for delay. See La. C.C.P. art. 1915(B). However, as the judgment dismissed Mr. Polito from this suit, certification of the judgment as final under La. C.C.P. art. 1915(B) was unnecessary. See La. C.C.P. art. 1915(A)(1); La. C.C.P. art. 1911; **Motorola, Inc. v. Associated Indemnity Corporation**, 2002-0716, pp. 10-11 (La. App. 1<sup>st</sup> Cir. 4/30/03), 867 So.2d 715, 721.

## II. ASSIGNMENTS OF ERROR

On appeal, the Southgate plaintiffs contend that the trial court erred in sustaining Mr. Polito's peremptory exception raising the objection of no cause of action because: (1) a cause of action for intentional misrepresentation or fraud was properly pleaded against Mr. Polito personally, (2) a cause of action for negligent misrepresentation was properly pleaded against Mr. Polito personally, and (3) the pleadings and facts alleged that Mr. Polito was the surety of M&R.

## III. STANDARD OF REVIEW

The function of the peremptory exception [raising the objection] of no cause of action is to question whether the law extends a remedy to anyone under the factual allegations of the petition. The peremptory exception [raising the objection] of no cause of action is designed to test the legal sufficiency of the petition by determining whether [the] plaintiff is afforded a remedy in law based on the facts alleged in the pleading. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. The exception is triable on the face of the papers and for the purposes of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. In reviewing a trial court's ruling sustaining an exception of no cause of action, the appellate court ... should subject the case to *de novo* review because the exception raises a question of law and the trial court's decision is based only on the sufficiency of the petition. Simply stated, a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief.  
(Citations omitted.)

**Fink v. Bryant**, 2001-0987, pp. 3-4 (La. 11/28/01), 801 So2d 346, 348-349.

See also **Everything on Wheels Subaru, Inc. v. Subaru South**, 616 So.2d 1234, 1235 (La. 1993).

## IV. LAW AND DISCUSSION

The Southgate plaintiffs contend that they have alleged three different causes of action against Mr. Polito; namely, for fraud or intentional misrepresentation, for negligent misrepresentation, and for his liability as the surety of defendant M&R.

### *A. Fraud*

The Southgate plaintiffs contend they have stated a cause of action against Mr. Polito for fraud or intentional misrepresentation. The Southgate plaintiffs allege that Mr. Polito and MAPP misrepresented certain facts and failed to disclose information to them, and as a result the Southgate plaintiffs were damaged by these actions. However, Mr. Polito asserts that all of the Southgate plaintiffs' claims against him relate to his actions as an employee of MAPP. And although Mr. Polito may owe a fiduciary duty to MAPP, Mr. Polito argues that he owed no duty to the Southgate plaintiffs, and therefore, the Southgate plaintiffs' petition fails to state a cause of action against him.

As a general rule, corporations are distinct legal entities, separate from the individuals who comprise them, and individual shareholders, officers or directors are not liable for the debts of the corporation. La. R.S. 12:93(B); **McDonough Marine Service v. Doucet**, 95-2087, p. 4 (La. App. 1<sup>st</sup> Cir. 6/28/96), 694 So.2d 305, 308. There are, however, exceptions to this rule of non-liability. Specifically, La. R.S. 12:95 preserves the rights any person may have against an individual shareholder, director or officer because of the individual's fraudulent practices.<sup>4</sup> Thus, a director or officer of a corporation who has practiced fraud upon any person may be held personally liable for the resultant damage. **First Downtown Development v. Cimochoowski**, 613 So.2d 671, 676 (La. App. 2<sup>nd</sup> Cir.), writ denied, 615 So.2d 340 (La. 1993).

"Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or

---

<sup>4</sup> Louisiana Revised Statutes 12:95 provides:

Nothing in this Chapter shall be construed as in derogation of any rights which any person may by law have against a promoter, subscriber, shareholder, director or officer, or the corporation, because of any fraud practiced upon him by any of such persons or the corporation, or in derogation of any right which the corporation may have because of any fraud practiced upon it by any of these persons.

inconvenience to the other. Fraud may also result from silence or inaction.” La. C.C. art. 1953. Two elements essential to establishing legal fraud are intent to defraud or gain an unfair advantage and a resulting loss or damage. **First Downtown Development**, 613 So.2d at 677.

At issue is whether the Southgate plaintiffs have sufficiently stated a cause of action for fraud or intentional misrepresentation against Mr. Polito. “In pleading fraud or mistake, the circumstances constituting fraud or mistake shall be alleged with particularity.” La. C.C.P. art. 856. With regard to fraud or intentional misrepresentation, the plaintiff’s petition sets forth the following allegations:

249. MAPP and [Mr.] Polito misrepresented certain fact[s] and failed to disclose to [the] Southgate [plaintiffs] and its principals certain information as alleged in paragraphs 125-134.

250. If MAPP and [Mr.] Polito had disclosed to the Southgate [plaintiffs] the information set forth in the allegations or not misrepresented certain information, [the] Southgate [plaintiffs] would have proceeded in a different way and avoided losses relating to the [Southgate Towers] Project.

251. Further, [the] Southgate [plaintiffs have] been damaged by the fraudulent actions and omission[s] of MAPP and [Mr.] Polito, for all damage incurred by [the] Southgate [plaintiffs] as alleged in Paragraph 282.<sup>5</sup>

In paragraphs 125 through 134, the Southgate plaintiffs alleged that Mr. Polito misrepresented to the Southgate plaintiffs and the United States Department of Housing and Urban Development (“HUD”) that all sums had been paid to contractors and that all outstanding bills had been paid, when said funds and bills were not paid; that Mr. Polito made misrepresentations about M&R’s performance bond (or lack thereof) and its status as a licensed contractor in Louisiana; that Mr.

---

<sup>5</sup> In Paragraph 282, the Southgate plaintiffs made numerous claims for damages, including but not limited to actual damages for breach of contract or warranty; costs for correcting construction defects; delay damages; consequential damages; foreseeable and unforeseeable damages; attorney fees and expert costs; costs to repair the Southgate Towers complex; loss of rental revenue as a result of lower occupancy; damages for the defendants’ bad faith, omissions, or intentional or reckless acts; damages incurred after termination of the contract due to MAPP’s failure to perform; loss of rental income; diminution in value of the complex as a result of construction defects; and future expenses for the correction of construction defects.



Polito failed to disclose that he received a payment in the amount of \$13,400.00 in exchange for being M&R's alleged surety; that Mr. Polito failed to disclose construction defects, such as deficient electrical wiring, moisture penetration, and organic growth in the apartment complex buildings; that Mr. Polito continued to assure the Southgate plaintiffs that all construction defect issues, as listed above, would be resolved, despite the fact that Mr. Polito never intended to correct those construction defects; that Mr. Polito intentionally violated rules, regulations, and laws, with regard to proper fire caulking and fire codes; and that Mr. Polito arranged for M&R to use another contractor's license in bidding for the Southgate Towers project in violation of Louisiana law.

Accepting all of the allegations of fact set forth in the Southgate plaintiffs' petition for damages as true, we find that the Southgate plaintiffs have stated a cause of action against Mr. Polito, personally, for fraud or intentional misrepresentation. The facts of the Southgate plaintiffs' petition alleges that Mr. Polito intended to defraud or gain an unfair advantage against the Southgate plaintiffs by intentionally misrepresenting that sums had been paid to contractors (when they had not) and that outstanding bills had been paid (when they were not); that Mr. Polito made misrepresentations about M&R's performance bond and its status as a licensed contractor in Louisiana; that Mr. Polito failed to disclose construction defects; that Mr. Polito continued to assure Southgate that all construction defect issues would be resolved; and that Mr. Polito intentionally violated rules, regulations, and laws in the construction of the Southgate Towers. Additionally, the Southgate plaintiffs alleged, with specificity, that they were damaged by the actions of Mr. Polito.

We find that the Southgate plaintiffs have stated a cause of action against Mr. Polito for fraud or intentional misrepresentation; therefore, the trial court erred in sustaining Mr. Polito's exception raising the objection of no cause of action in

this regard, and we hereby reverse that portion of the April 3, 2007 judgment of the trial court that dismisses the Southgate plaintiffs' claims against Mr. Polito for fraud or intentional misrepresentation.

*B. Negligent Misrepresentation*

The Southgate plaintiffs contend they have stated a cause of action against Mr. Polito for negligent misrepresentation. Again, the Southgate plaintiffs allege that Mr. Polito and MAPP misrepresented certain facts and failed to disclose information to them, and as a result, the Southgate plaintiffs were damaged by these actions.

In Louisiana, negligent misrepresentation cases are evaluated using the duty-risk analysis. **Smith v. Roussel**, 2000-1028, p. 5 (La. App. 1<sup>st</sup> Cir 6/22/01), 809 So.2d 159, 164; **Daye v. General Motors Corporation**, 97-1653, p. 7 (La. 9/9/98), 720 So.2d 654, 659. The duty risk analysis is employed on a case-by-case basis. The plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant, and the risk of harm was within the scope of protection afforded by the duty breached. **Smith**, 2000-1028 at p. 5, 809 So.2d at 164-165.

With regard to negligent misrepresentation the Southgate plaintiffs alleged that:

253. Defendants, [Mr.] Polito and MAPP negligently misrepresented or negligently failed to inform [the] Southgate plaintiffs and its principals of the facts set forth in Paragraphs 125 to 134.

254. The negligent misrepresentations have resulted in damages to [the] Southgate [plaintiffs] as alleged herein.

As previously noted herein, in paragraphs 125-134 the Southgate plaintiffs alleged that Mr. Polito misrepresented to the Southgate plaintiffs and HUD that all sums had been paid to contractors and all outstanding bills had been paid; that Mr.

Polito made misrepresentations about M&R's performance bond and its status as a licensed contractor in Louisiana; that Mr. Polito failed to disclose that he received a payment in the amount of \$13,400.00 in exchange for being M&R's alleged surety; that Mr. Polito failed to disclose construction defects; that Mr. Polito continued to assure the Southgate plaintiffs that all construction defect issues would be resolved; and that Mr. Polito intentionally violated rules, regulations, and laws.

Accepting all of the allegations of fact set forth in the Southgate plaintiffs' petition for damages as true, we find that they have stated a cause of action against Mr. Polito, personally, for negligent misrepresentation. The Southgate plaintiffs alleged that Mr. Polito's conduct, as set forth above, was a cause-in-fact of the harm they sustained; that given the contractual relationship between the Southgate plaintiffs and MAPP, Mr. Polito owed a duty of care to the Southgate plaintiffs; that Mr. Polito's breached that duty; that the risk of harm to the Southgate plaintiffs was within the scope of protection afforded by the duty breached; and that the Southgate plaintiffs were damaged by the actions of Mr. Polito.

We find that the Southgate plaintiffs have stated a cause of action against Mr. Polito for negligent misrepresentation; therefore, the trial court erred in sustaining Mr. Polito's exception raising the objection of no cause of action in this regard, and we hereby reverse that portion of the April 3, 2007 judgment of the trial court that dismisses the Southgate plaintiffs' claims against Mr. Polito for negligent misrepresentation.

### *C. Suretyship*

The Southgate plaintiffs also argue that the trial court erred in dismissing Mr. Polito from this suit because they stated a cause of action against Mr. Polito under the law of suretyship. The Southgate plaintiffs contend that Mr. Polito agreed to be the surety of M&R, that he provided M&R's performance bond on the

project in exchange for the payment of a sum of money, and therefore, he is liable for any defective performance in the construction of Southgate Towers by M&R.

“Suretyship is an accessory contract by which a person binds himself to a creditor to fulfill the obligation of another upon the failure of the latter to do so.” La. C.C. art. 3035. Suretyship must be express and in writing; it cannot be presumed. La. C.C. art. 3038; **Livingston State Bank & Trust Co. v. Steel-Tek, Inc.**, 335 So.2d 482, 483 (La. App. 1<sup>st</sup> Cir. 1976). While no technical form is required to be adhered to in the suretyship agreement, there still must be some clear manifestation of intent to act as surety. *Id.*; see also **Carpet Co-op of Georgia, Inc. v. Economy Carpets Manufacturers and Distributors, Inc.**, 392 So.2d 153, 154 (La. App. 1<sup>st</sup> Cir. 1980) (noting that while a contract of surety need not observe technical formalities, it must express an intention by the party signing the contract to be bound).

Thus, in order to state a cause of action against Mr. Polito, as the surety of M&R, the Southgate plaintiffs had to allege facts sufficient to establish that Mr. Polito, expressly and in writing, manifested the intent to act as surety of M&R. With regard to this, the Southgate plaintiffs made the following allegations in their petition:

125. M&R paid a fee to [Mr.] Polito instead of purchasing a performance bond for M&R’s work on the [Southgate Towers] Project. See **Exhibit U**. M&R has *stated* that [Mr.] Polito personally was providing its performance bond and that there was no need to obtain one from another surety. At all times pertinent hereto, [Mr.] Polito, as surety for M&R, provided the performance bond for M&R. As a matter of law, [Mr.] Polito should be ordered to complete the M&R work in accordance with the Plans and Specifications.

\* \* \*

171. M&R breached the terms of its subcontractor agreement with MAPP as a result of the improper and defective installation as set forth herein and the failure of M&R to complete the M&R Work in accordance with the Plans and Specifications.

172. As surety, [Mr.] Polito guaranteed performance of the M&R

Work by M&R.

173. M&R and [Mr.] Polito are liable to [the] Southgate [plaintiffs] for all actual damages incurred by [the] Southgate [plaintiffs] arising for the breach of contract by M&R including but not limited to the cost of completing the work of M&R in accordance with the original Plans and Specification[s] and the other items of damages set forth in Paragraph 282.

(Emphasis added.)

Additionally, attached to the Southgate plaintiffs' petition was an email dated June 4, 2004, from Mr. Polito to "Marc Lacerte" which provided as follows:

To confirm our agreement in leiu [*sic*] of a bond on stucco[,] [y]ou will pay me for the indemnification that I am providing through my personal indemnificationof [*sic*] the mapp bond the premium that wold [*sic*] have paid for your bond that would have protected me.

It does not releive [*sic*] you or your company of any obligations.

The check should be payable to mike polito and forwarded to 7447 bocage court south, baton rouge, louisiana 70809

The Southgate plaintiffs claim that this email, together with M&R's payment of \$13,400.00 directly to Mr. Polito clearly establishes Mr. Polito's personal role as surety of M&R's work on the Southgate Towers project. On the other hand, Mr. Polito contends that a contract of suretyship never existed between him and M&R and that the email was simply a directive to M&R to refund a bond premium previously collected by M&R from MAPP and does not manifest an intent by Mr. Polito to act as surety for M&R.

Accepting all of the allegations of fact set forth in the Southgate plaintiffs' petition as true, we cannot say that the Southgate plaintiffs have stated a cause of action against Mr. Polito as the surety of M&R. The Southgate plaintiffs' allegation that Mr. Polito *stated* he was providing M&R's performance bond (*i.e.*, acting as its surety) is insufficient to establish a surety agreement that must be express and in *writing*. Moreover, to the extent that the Southgate plaintiffs rely on the June 4, 2004 email (attached to the petition) to establish the written contract of suretyship, we find that such email contains no express manifestation of Mr.

Polito's intent to be bound for M&R's performance on the Southgate Towers project or to act as surety for M&R in any manner. In fact, we note that neither the entity M&R nor the Southgate Towers project are mentioned in the text of the email. Instead, the June 4, 2004 email simply appears to be a confirmation of an agreement between Mr. Polito and an individual identified as "Marc Lacerte." As such, the June 4, 2004 email is insufficient to support a cause of action against Mr. Polito as surety for M&R.

Therefore, as neither the plaintiffs' petition nor the attachments to the petition contain any allegations establishing an express written contract of suretyship between Mr. Polito and M&R, we find that the Southgate plaintiffs have failed to state a cause of action in this regard against Mr. Polito. Accordingly, that portion of the April 3, 2007 judgment of the trial court, which dismisses the claims against Mr. Polito in his capacity as the surety of M&R, is hereby affirmed.

#### V. MOTION TO STAY

As this court previously noted in this case, there is no dispute that the allegations raised in the Southgate plaintiffs' petition are subject to a valid contractual arbitration clause between MAPP and the Southgate plaintiffs. See Southgate Residential Towers, LLC v. MAPP Construction, Inc., 2007-0489 (La. App. 1<sup>st</sup> Cir. 6/26/07)(unpublished writ action), writ denied, 2007-1557 (La. 8/31/07), 962 So2d. 442.<sup>6</sup> When a court is satisfied that the parties have made a written agreement to arbitrate certain disputes, it is under an obligation to stay the proceedings pending conclusion of the arbitration. La. R.S. 9:4202.

In accordance with La. R.S. 9:4202, on June 26, 2007, this court granted a stay of the Southgate plaintiffs' claims against MAPP, its surety, and its insurers in these proceedings, "until an arbitration has been had in accordance with the terms

---

<sup>6</sup> Section 4.6.1 and 4.6.2 of the first construction contract between the Southgate plaintiffs and MAPP provides that "[a]ny claim arising out of or related to the Contract [to construct Southgate Towers] ... shall ... be subject to arbitration."

of the agreement or the arbitrator has determined that arbitration has been waived.”  
See Southgate Residential Towers, LLC v. MAPP Construction, Inc., 2007-0489; Southgate Residential Towers, LLC v. MAPP Construction, Inc., 2007-0494 (La. App. 1<sup>st</sup> Cir. 6/26/07)(unpublished writ action), writ denied, 2007-1571 (La. 8/3/07), 962 So.2d 443; and Southgate Residential Towers, LLC v. MAPP Construction, Inc., 2007-0685 (La. App. 1<sup>st</sup> Cir. 6/26/07)(unpublished writ action), writ denied, 2007-1572 (La. 8/31/07), 962 So.2d 443.

On July 30, 2007, Mr. Polito filed a motion requesting that in the event this court determines that the Southgate plaintiffs have properly stated a cause of action against him, then this court should also grant a stay with regard to those claims pending the arbitration between MAPP and the Southgate plaintiffs. We agree.

The causes of action for fraud or intentional misrepresentation and negligent misrepresentation alleged against Mr. Polito by the Southgate plaintiffs concern Mr. Polito’s actions as a representative of MAPP. The propriety of his behavior in this regard is related to MAPP’s performance under the construction contracts. Since the Southgate plaintiffs cannot enforce any claims against MAPP, its surety, or its insurers until the arbitration is resolved, it follows that the Southgate plaintiffs should not be able to proceed against Mr. Polito, the major principal of MAPP, until it has been determined (by an arbitrator) that MAPP’s performance under the contract was insufficient or defective.

Accordingly, we hereby grant Mr. Polito’s motion to stay the proceedings against him for fraud or intentional misrepresentation and for negligent misrepresentation pending resolution of the arbitration between the Southgate plaintiffs and MAPP.

## VI. PRESCRIPTION

In Mr. Polito’s peremptory exception raising the objection of prescription filed with this court on June 18, 2007, Mr. Polito contends that the petition filed by

the Southgate plaintiffs alleges tortious conduct by him that occurred during the course of the construction of Southgate Towers, which was more than one year prior to the filing of the Southgate plaintiffs' petition for damages. Accordingly, Mr. Polito argues that the Southgate plaintiffs' claims against him are prescribed, and therefore, should be dismissed with prejudice.

On June 28, 2007, the Southgate plaintiffs filed an opposition to the peremptory exception asserting that their claims against Mr. Polito were not prescribed under the doctrine of *contra non valentem agere nulla currit præscriptio*,<sup>7</sup> and further seeking to have the matter remanded to the trial court for consideration of the exception pursuant to La. C.C.P. art. 2163.

Prescription is an objection usually raised in the trial court by a peremptory exception. Such an exception may be filed at any point in the proceedings in the trial court prior to the submission of the case for a decision. See La. C.C.P. art. 927 and 928. In addition, the peremptory exception may be filed in the appellate court for the first time pursuant to La. C.C.P. art. 2163, which provides:

The appellate court may consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record.

If the ground for the peremptory exception pleaded in the appellate court is prescription, the plaintiff may demand that the case

---

<sup>7</sup> No prescription runs against a person unable to bring an action. See Black's Law Dictionary, 5<sup>th</sup> Edition, p. 296.

The doctrine of *contra non valentem* is one of the suspensive theories that may be asserted by plaintiffs to prove that prescription has not run before suit was filed. See **Carter v. Haygood**, 2004-0646, p. 11 (La. 1/19/05), 892 So.2d 1261, 1268. Our supreme court has recognized four instances where *contra non valentem* is applied to prevent the running of prescription: (1) where there was some legal cause that 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 that prevented the creditor from suing or action; (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**, 2004-0646 at pp. 11-12, 892 So.2d at 1268.

The Southgate plaintiffs contend that the last instance, *i.e.* where the cause of action is not known or reasonably knowable by the plaintiff, is applicable in this case due to Mr. Polito's ongoing and continuous misrepresentations and omissions.



be remanded to the trial court for trial of the exception.

The first paragraph of this article authorizes the appellate court to consider and rule on a peremptory exception, when proof of the ground of the exception appears of record. The second paragraph of the article allows the plaintiff to demand that the case be remanded to the trial court for a trial if the ground is prescription. **Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.**, 2001-0993, p. 8 (La. App. 1<sup>st</sup> Cir. 7/3/02), 867 So.2d 709, 714. Thus, while a party may raise an exception raising the objection of prescription for the first time on appeal, the plaintiff has the right, pursuant to La. C.C.P. art. 2163, to have the matter remanded to the trial court for the purpose of having the trial court adjudicate the issue of prescription. **Blanchard v. Southern Pacific Transportation Co.**, 93-1155, p. 4 (La. App. 1<sup>st</sup> Cir. 4/8/94), 635 So.2d 742, 744. Once such a demand is made, this court is without discretion in remanding the matter for consideration by the trial court. *Id.*; **Mandalay Oil & Gas, L.L.C.**, 2001-0993 at p. 8, 867 So.2d at 714.

Therefore, in accordance with the provisions of La. C.C.P. art. 2163, we are required to remand this matter to the trial court for consideration and adjudication of whether the Southgate plaintiffs' claims against Mr. Polito are prescribed. However, in remanding this matter for adjudication on the issue of prescription, we recognize that the adjudication of that issue must be stayed pending resolution of the arbitration between the parties pursuant to the motion to stay granted hereinabove and the previous orders of this court in this case.<sup>8</sup> Accordingly, we hereby remand this matter with instructions that the adjudication of the issue of prescription by the trial court be stayed pending resolution of the arbitration between the parties.

---

<sup>8</sup> See **Southgate Residential Towers, LLC v. MAPP Construction, Inc.**, 2007-0489; **Southgate Residential Towers, LLC v. MAPP Construction, Inc.**, 2007-0494; and **Southgate Residential Towers, LLC v. MAPP Construction, Inc.**, 2007-0685.

## VII. CONCLUSION

For the foregoing reasons, the April 3, 2007 judgment of the trial court is reversed insofar as it dismissed the claims of Southgate Residential Towers, LLC and Southgate Penthouses, LLC against Michael A. Polito for fraud or intentional misrepresentation and negligent misrepresentation. However, the April 3, 2007 judgment of the trial court is hereby affirmed insofar as it dismissed the claim of Southgate Residential Towers, LLC and Southgate Penthouses, LLC against Michael A. Polito as the alleged surety of M&R Drywall, Inc. Further, we hereby grant a stay of the claims against Michael Polito pending resolution of the arbitration between Southgate Residential Towers, LLC, Southgate Penthouses, LLC, and MAPP Construction, LLC.

Additionally, we hereby remand this matter to the trial court for a trial on the peremptory exception raising the objection of prescription filed by defendant Michael A. Polito with instructions that the adjudication of the issue be stayed pending resolution of the arbitration between the parties.

All costs of this appeal are assessed equally to the plaintiffs, Southgate Residential Towers, LLC and Southgate Penthouses, LLC, and the defendant, Michael A. Polito.

**REVERSED IN PART, AFFIRMED IN PART; MOTION TO STAY GRANTED; AND REMANDED WITH INSTRUCTIONS.**