NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 1450

YVONNE MEYERS

VERSUS

BANK ONE, N.A.[1]

Judgment rendered May 4, 2007.

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Appealed from the
21st Judicial District Court
in and for the Parish of St. Helena, Louisiana
Trial Court No. 19033
Honorable Wayne Ray Chutz, Judge

* * * * * *

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* * * * * *

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

[1] This matter was instituted by Yvonne Meyers by filing a "Petition To Annul Judgment" erroneously captioned with Bank One N.A. as the plaintiff and Yvonne Myers [sic] as defendant. However, Yvonne Meyers is actually the plaintiff, and Bank One N.A. is named as defendant in said suit.

Hughes, J., dissents with reasons
Downing, J. concurs and assigns reasons.

PETTIGREW, J.

In this case, plaintiff, Yvonne Meyers, challenges the trial court's granting of a peremptory exception raising the objection of peremption in favor of defendant, Bank One. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On May 8, 2002, Ms. Meyers purchased a 2002 Cadillac El Dorado and executed a "Combination Promissory Note Truth in Lending Disclosure Statement and Security Agreement" ("the note") in order to finance the purchase of the vehicle. The note was assigned without recourse to Bank One. On September 17, 2003, Bank One filed a Petition for Executory Process against Ms. Meyers alleging that she was in default pursuant to the terms of the note and requesting that a writ of seizure and sale issue. On September 24, 2003, the trial court ordered the issuance of executory process and the issuance of a writ of seizure and sale ordering the sheriff to seize and sell the vehicle, with the benefit of appraisal, to satisfy Bank One's claim. On September 30, 2003, the trial court issued a Writ of Seizure and Sale. According to the record, Ms. Meyers was personally served with a "Notice Of Seizure" on October 7, 2003, and on October 22, 2003, she was personally served with a "Notice To Appoint Appraiser" and a "Notice Of Sheriff Sale."

Thereafter, on July 13, 2005, Ms. Meyers filed a "Petition To Annul Judgment" praying that the trial court annul the September 24, 2003 issuance of executory process and writ of seizure and sale. Ms. Meyers alleged that the judgment rendered against her was obtained through ill practices, asserting the following particulars:

> a) Failure to follow the law with regard to admissible evidence under R.S. 10:9-629;
>
> b) Failure to introduce admissible evidence that would support a judgment;
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> c) Introducing hearsay documentation with a prayer for judgment based upon the same;
>
> d) Failure to provide any documentation of any kind as to amounts owed, amounts allegedly unpaid, and allegedly defaulted upon by Ms. Meyers[.]

In response to Ms. Meyers' petition, Bank One filed three peremptory exceptions raising the objections of peremption, no cause of action, and no right of action, which were heard by the trial court on February 17, 2006. Prior to hearing arguments from the parties, the trial court accepted the following stipulation:

> [Counsel for Ms. Meyers]: We have a stipulation before we begin, Your Honor. We are going to stipulate that if Ms. Yvonne [Meyers] were called to the stand, she would testify that she discovered the defects referenced in her petition to annul on the date of May 17, 2005. [Counsel for Bank One] is not stipulating to the truth of those words, merely that she would testify to that. Furthermore, Ms. [Meyers] would not object to any reference in the suit record regarding when she was served with the original petition for executory process. All of these stipulations are for the purposes of this hearing on this exception.

Thereafter, the court considered the arguments of counsel and rejected Ms. Meyers' assertion that Bank One's verification failed to satisfy the requirements of La. R.S. 10:9-629. The trial court held that the verification was essentially an affidavit attesting to the veracity of allegations of fact in the petition for executory process as well as the allegation of the amount due. In a judgment dated February 17, 2006, the trial court granted Bank One's exception raising the objection of peremption and dismissed, with prejudice, Ms. Meyers' claim for damages. With regard to Bank One's objections of no cause of action and no right of action, the trial court concluded that they were rendered moot by its decision on the peremption objection.

It is from this judgment that Ms. Meyers has appealed, assigning the following specifications of error:

> 1. Trial court [erred in] granting exception of peremption filed by Bank One N.A. in response to Ms. Meyers' Petition to Annul Judgment.
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> 2. Trial court [erred in] finding that the verification attached to Bank One N.A.'s Petition for Executory Process was sufficient to prove amount of alleged indebtedness and alleged default by Ms. Meyers.

DISCUSSION

Pursuant to La. Code Civ. P. art. 2004, "[a] final judgment obtained by fraud or ill practices may be annulled." However, the action "must be brought within one year of the discovery by the plaintiff in the nullity action of the fraud or ill practices." The one-year period set forth in Article 2004 is peremptive. **A.S. v. M.C.**, 96-0948, p. 9 (La.

App. 1 Cir. 12/20/96), 685 So.2d 644, 648, writ denied, 97-0213 (La. 3/14/97), 690 So.2d 38. Peremption may not be renounced, interrupted, or suspended. La. Civ. Code art. 3461. Moreover, a plaintiff's right to institute an action to annul a judgment based on fraud or ill practices is extinguished upon the expiration of the one-year peremptive period. La. Civ. Code art. 3458.

In **Ellison v. Ellison**, 2006-0944, p. __ (La. App. 1 Cir. 3/23/07), ___ So.2d ___, this court recently addressed the burden of proof in a nullity action and delineated when the one-year peremptive period begins to run as follows:

> The burden of proof to show that a nullity action was brought within one year of the discovery of the fraud or ill practice is upon the plaintiff. The date of discovery is the date on which a plaintiff either knew, or should have known through the exercise of reasonable diligence, of facts sufficient to "excite attention and put the [plaintiff] on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead." However, a "plaintiff's mere apprehension that something may be wrong is insufficient to commence the running of prescription" or peremption. Thus, the primary issue is the reasonableness of the plaintiff's action or inaction. [Citations omitted.]

On appeal, Ms. Meyers argues that the verification attached to Bank One's petition for executory process failed to comply with the requirements of La. R.S. 10:9-629(a)(5) and (6) and, thus, constituted ill practice under Article 2004. Ms. Meyers contends that through error and omission, Bank One enticed the trial court to issue an order to seize her vehicle without having produced any evidence as to the amounts allegedly unpaid and the alleged default.

To the contrary, Bank One asserts it is undisputed that Ms. Meyers received proper and timely personal service in the foreclosure proceeding on October 7, 2003, and, thus, could have and should have discovered the alleged defect in the verification at that time. Noting that Ms. Meyers did not file the instant nullity action until nearly two years later on July 13, 2005, Bank One maintains that Ms. Meyers' claim was perempted pursuant to Article 2004 and that the trial court's judgment dismissing same with prejudice should be affirmed. We agree.

With regard to Bank One's verification, the trial court concluded that although it may have been better to have a "little more information," the verification contained the

"magic words" and satisfied the requirements of La. R.S. 10:9-629(a)(5) and (6), which provide as follows:

> **(a) Foreclosure.** For purposes of executory or ordinary process seeking enforcement of a security interest and the obligation it secures:
>
> . . . .
>
> (5) The amount of any advances made, whether in written form or otherwise, or of other obligations secured by any security interest or agricultural lien, the terms of such obligations, insofar as they are relevant, the amount thereof due and unpaid, and the fact of the debtors' default may be proven by affidavit or verified petition.
>
> (6) The affidavits or verified petitions referred to in subsections (a)(3), (a)(4), and (a)(5) may be based upon a plaintiff's or affiant's personal knowledge or upon information and belief based upon the records of the secured party, any assignee, or any other person that are kept or obtained in the ordinary course of business. The petition or affidavit need not particularize or specifically identify the records or data upon which such knowledge, information or belief is founded.

We have thoroughly reviewed the petition for executory process and the verification and find no error in the trial court's ruling that the verification was sufficient.

Our focus now turns to the peremption issue. Although Ms. Meyers claims she did not discover the purported ill practice of Bank One (i.e., the alleged evidentiary defect in the verification attached to the petition for executory process) until May 17, 2005, the evidence is clear that Ms. Meyers was properly and timely served in the foreclosure proceeding. Thus, when Ms. Meyers received personal service of the "Notice Of Seizure" on October 7, 2003, she had knowledge of facts sufficient to "excite attention" and "call for further inquiry." See **Ellison**, 2006-0944 at __, ___ So.2d at ___. Despite that knowledge, Ms. Meyers waited almost two years before taking any action, filing her "Petition To Annul Judgment" on July 13, 2005. Article 2004 requires that a nullity action be brought within one year of the date the plaintiff should have discovered the alleged ill practice. A plaintiff's right to institute such an action is extinguished upon the expiration of the one-year peremptive period. La. Civ. Code art. 3458. Accordingly, the trial court was correct in its finding that Ms. Meyers' claim was perempted pursuant to Article 2004.

CONCLUSION

For the above and foregoing reasons, we affirm the trial court's judgment granting Bank One's exception raising the objection of peremption and dismissing, with prejudice, Ms. Meyers' claim for damages. All costs associated with this appeal are assessed against plaintiff-appellant, Yvonne Meyers.

AFFIRMED.

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HUGHES, J., dissenting.

The merits of the nullity action are not before the court, only the issue of preemption or prescription. The only evidence of when plaintiff discovered the grounds for nullity is her stipulated testimony. Therefore, I respectfully dissent.

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Downing J., concurs with reasons

If, on the face of the petition, the peremptive period has expired, then the correct procedural device is the peremptory exception raising the objection of no cause of action. That is because peremption destroys the cause of action. However, if evidence is required to prove that the peremptive period has expired, then the correct procedural device is the peremptory exception raising the objection of prescription. Saia v. Asher, 825 So.2d 1257, 2001-1038 (La.App. 1 Cir. 7/10/02), footnote 5.

The language, "as a general rule," referring to the objection of no cause of action should be eliminated. Applying the exception of no cause of action to peremption claims was suggested by the author in "Legal Rights and the Passage of Time, 41 La.L.Rev.220, 238 (1980). The author did not consider, however, what exception should be used if the expiration of the peremptive period did not appear on the face of the petition and evidence was required. The author's suggestion was adopted by the court in Davis v. Sewerage and Water Board of New Orleans, 469 So.2d 1144, as "the correct procedural device" for raising the issue of peremption. The court declined to grant the exception of prescription and raised the exception of no cause of action on its own motion. It then allowed the plaintiff to amend her

pleadings to prove her claim was not barred by the passage of time. The court should have said "allege" instead of prove because herein lies the problem. If evidence is required to prove peremption then the exception of no cause of action can't be the "correct procedural device" because evidence is not admissible on a no cause of action objection.

The Davis case is then cited in Preferred Investment Corp. v. Neucere, 592 So.2d 889 (La.App. 4 Cir. 1992), without the "as a general rule" denomination. The court in Dowell v. Hollingsworth, 649 So.2d 65 649 So.2d 65 (La. App. 1 Cir. 12/22/94) cites Preferred and Davis and adds the language "as a general rule." The court in Coffey v. Block, 762 So.2d 1181 (La.App. 1 Cir. 6/23/00) notes what has now been accepted as the "general rule" but realizes that somehow a defendant should be able to introduce evidence. The court makes an exception to the "general rule" and creates an "innominate peremptory exception of peremption" wherein a hearing with evidence could be utilized. The esteemed Judge Lanier, facing the same problem in Saia, supra, uses the "general rule" language but resolves the dilemma suggesting the traditional objection of prescription. The Saia case reasoning is followed in Bel v. State Farm Mutual Automobile Ins. Co., 845 So.2d 377, 2002-1292 (La.App. 1 Cir. 2/14/03), again in a footnote. See footnote 2.

It is this writer's suggestion that the language, "as a general rule," be eliminated from our jurisprudence and that the dichotomy be clearly adopted that if the peremptive period has expired on the face of the petition then the objection of no cause of action is the proper procedural device but, if not, then the objection of prescription or the innominate exception of peremption be used so that evidence may be introduced at a hearing.