

CENTRIC GULF COAST, INC.

NO. 24-CA-319

VERSUS

FIFTH CIRCUIT

BULLSEYE MASONRY, LLC

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 832-152, DIVISION "J"
HONORABLE STEPHEN C. GREFER, JUDGE PRESIDING

April 02, 2025

MARC E. JOHNSON
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Marc E. Johnson, and Stephen J. Windhorst

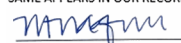
AFFIRMED

MEJ

FHW

SJW

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS


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JOHNSON, J.

Defendant/Appellant, Bullseye Masonry, LLC, appeals the trial court's judgment that sustained a peremptory exception of prescription in favor of Third-Party Defendant/Appellee, Oldcastle APG, Inc., and dismissed its third-party demand with prejudice, which had been filed in the 24th Judicial District Court, Division "J". For the following reasons, we affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

The facts pertinent to this appeal are as follows.

On August 26, 2022, Centric Gulf Coast, Inc. (hereinafter referred to as "Centric") filed a petition for damages and breach of contract against Bullseye Masonry, LLC (hereinafter referred to as "Bullseye").¹ In its petition, Centric alleged that it entered into Master Subcontract Agreement No. 2016-003 with Bullseye on August 2, 2016, whereby Bullseye agreed to perform work specified in a separate work authorization contract. On December 16, 2019, Centric and Bullseye executed Work Authorization No. 1186-006 for all of the labor and materials to complete the masonry scope for the Marrero Waste Water Treatment Plant Safe Room and Administration (hereinafter referred to as "the Project") for \$407,000. Centric alleged that, as early as February 18, 2021, the masonry was found to have been leaking. In April 2021, samples of the masonry were sent for testing at ACM Chemistries in Grapevine, Texas, and the product used for the masonry failed water testing.

Centric then alleged that Bullseye and its product supplier, Oldcastle APG, Inc. (hereinafter referred to as "Oldcastle") acknowledged the masonry products for the Project were defective. It stated that, on June 3, 2021, a notice of default was issued to Bullseye, informing Bullseye that it was in default of its obligations

¹ *Centric Gulf Coast, Inc. v. Bullseye Masonry, LLC* was filed in the 24th Judicial District Court under case number 832-152.

per the master subcontract agreement and the work authorization. Centric sought damages from Bullseye for contractual default and breach of contract.

On February 16, 2023, Bullseye filed a third-party demand against Oldcastle. In its complaint, Bullseye alleged that it and Centric entered into a master subcontract agreement for the Project, with the work to be completed to be specified in a separate work authorization. It stated the Project required an integral water repellent to be included in the concrete masonry units (hereinafter referred to as “CMUs”), and it contracted with Oldcastle to provide the CMUs for the Project. Bullseye asserted it informed Oldcastle that the CMUs required the integral water repellent, and Oldcastle represented that the CMUs it provided included the water repellent specified in the agreement. It alleged that the CMUs were found to have been leaking as early as February 2021; and when the CMUs were sent for testing in April 2021, the products failed the water testing. Bullseye stated that Oldcastle acknowledged the CMUs Oldcastle supplied were defective and did not contain the water repellent. Bullseye sought damages from Oldcastle for breach of contract for failing to provide the specified product and negligence for any damages it would incur as a result of the defective work or product.

In opposition to Bullseye’s third-party demand, Oldcastle filed a peremptory exception of prescription. In its exception, Oldcastle contended that the distribution of the CMUs to Bullseye constituted a contract of sale pursuant to La. C.C. art. 2439, rather than a contract for construction or work. Oldcastle averred that Bullseye’s cause of action in tort or contract/redhibition was prescribed on its face because it was filed over a year after Bullseye had knowledge of any claims it may have had against Oldcastle.

Conversely, in its opposition brief to Oldcastle’s exception of prescription, Bullseye argued that it and Oldcastle were joint tortfeasors, and prescription was interrupted when Centric filed suit against Bullseye in August 2022. Bullseye

further argued that the prescriptive period against Oldcastle did not begin to run until July 1, 2022 because Oldcastle had previously made continuous affirmative representations that it would remedy the Project's defect. In the alternative, Bullseye contended it did not sustain an injury until July 1, 2022—when Oldcastle refused to remedy the issue—and it filed its demand well-within the date of injury. To support its position, Bullseye attached the Project's bid documents; an affidavit of its member and manager, Melisa Hedrick; Work Authorization No. 1186-006; the ACM Chemistries Water Repellency Testing Results; and various correspondence between Centric, Bullseye, and Oldcastle to its opposition brief.

The exception of prescription was heard before the trial court on November 7, 2023. No evidence was offered by either party at the hearing. At the conclusion of the hearing, the trial court orally sustained Oldcastle's exception of prescription. A written judgment was rendered on April 3, 2024, sustaining Oldcastle's exception and dismissing Bullseye's third-party demand with prejudice. The instant appeal followed.

ASSIGNMENTS OF ERROR

Bullseye alleges the trial court manifestly erred in applying the one-year prescriptive period to its third-party claims because: 1) Oldcastle and Bullseye are joint tortfeasors, and prescription was interrupted; and 2) Oldcastle made continuous affirmative representations that it would remedy the defect.

LAW AND ANALYSIS

General Exception of Prescription Law

An exception of prescription is a type of peremptory exception. The function of the peremptory exception is to have the plaintiff's action declared legally nonexistent or barred by the effect of law, and hence this exception tends to dismiss or defeat the action. *Ruffins v. HAZA Foods of Louisiana, LLC*, 21-619 (La. App. 5 Cir. 5/25/22), 341 So.3d 1259, 1262, citing *Farber v. Bobear*, 10-985

(La. App. 4 Cir. 1/19/11), 56 So.3d 1061, 1069. Prescriptive statutes are strictly construed against prescription and in favor of the claim. *Henry v. Southwest Airlines*, 23-522 (La. App. 5 Cir. 7/31/24), 392 So.3d 1176, 1179, *writ denied*, 21-1081 (La. 11/20/24), 396 So.3d 68. Of the possible constructions of a prescriptive statute, the one that maintains enforcement of the claim, instead of the one that bars enforcement, should be adopted. *Id.*

The burden of proof in an exception of prescription lies with the party asserting it; however, where the petition shows on its face that it has prescribed, the burden shifts to the plaintiff to prove the prescriptive period has been interrupted or suspended. *McClellan v. Premier Nissan, L.L.C.*, 14-726 (La. App. 5 Cir. 2/11/15), 167 So.3d 934, 935. If evidence is introduced at the hearing on the peremptory exception of prescription, the trial court's findings of fact are reviewed under the manifest error/clearly wrong standard of review. *Id.* If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.* In the absence of evidence, the exception of prescription must be decided on the well-pleaded allegations of material facts set forth in the petition, which are accepted as true. *Ruffins, supra.*

At the hearing on Oldcastle's exception of prescription, neither party introduced any evidence for the trial court to consider. Because no evidence was introduced, we must decide this matter on the well-pleaded allegations of material facts set forth in Bullseye's third-party demand.

Joint Tortfeasors

Bullseye alleges the trial court erroneously sustained Oldcastle's exception of prescription by applying the one-year prescriptive period, pursuant to La. C.C. art. 3492. It argues that the trial court failed to acknowledge the joint tortfeasor relationship between Oldcastle and Bullseye, as both companies could be deemed

as contributors to Centric's damages. As such, Bullseye contends that its claims against Oldcastle were interrupted by the filing of Centric's petition for damages against Bullseye in September 2022. It avers that, if its claims against Oldcastle are prescribed, Centric's claims against Bullseye must also be prescribed.

Oldcastle maintains the trial court properly sustained its exception of prescription. It asserts that Centric sued Bullseye for breach of contract and default of the contract to build, neither of the actions sued upon being a tort action; thus, Oldcastle and Bullseye cannot be joint tortfeasors because their obligations arose out of conventional obligations. Oldcastle avers it was solely a supplier of movables to Bullseye, and an action against a seller for an alleged defect or vice in the thing purchased is one of redhibition. Because Bullseye discovered the alleged defect or vice in the CMUs more than a year prior to filing the third-party demand, Oldcastle submits that Bullseye's demand is prescribed on its face.

In order to ascertain the viability of Bullseye's third-party demand, we must determine the prescriptive period applicable to this matter. The nature of an obligation in Louisiana, for the purpose of determining the applicable prescriptive period, is either contractual, quasi-contractual, delictual, quasi-delictual or legal. *We Sell Used Cars, Inc. v. United Nat. Ins. Co.*, 30,671 (La. App. 2 Cir. 6/24/98), 715 So.2d 656, 658. The prescriptive period applicable to an action is determined by the character of the action as disclosed in the pleadings. *Succession of Theobald*, 20-68 (La. App. 5 Cir. 12/23/20), 309 So.3d 878, 883, citing *Born v. City of Slidell*, 15-136 (La. 10/14/15), 180 So.3d 1227, 1232.

Bullseye's demand alleged that it contracted with Oldcastle to provide the CMUs for the Project, and the Project required that the CMUs contain an integral water repellant. It further alleged Oldcastle represented that the CMUs contained the water repellant specified, and the CMUs supplied by Oldcastle were installed by Bullseye at the Project's site. The CMUs, however, leaked in February 2021

and, subsequently, failed the water testing in April 2021. Bullseye then alleged that Oldcastle was liable for breach of contract for failing to provide the specified product for the Project and, in the event Centric proved that any work performed on the Project by Bullseye was defective, for negligently providing the product that caused the damages.

It is well-settled that the same acts or omissions may constitute breaches of both general duties and contractual duties and may give rise to both actions in tort and actions in contract. *Lahare v. Valentine Mech. Servs. LLC*, 17-289 (La. App. 5 Cir. 6/29/17), 223 So.3d 773, 776, citing *In re St. Louis Encephalitis Outbreak*, 41,250 (La. App. 2 Cir. 9/1/06), 939 So.2d 563, 566-67. A plaintiff may assert both actions and is not required to plead the theory of his case. *Id.* The classical distinction between “damages ex contractu” and “damages ex delicto” is that the former flow from the breach of a special obligation contractually assumed by the obligor, whereas the latter flow from the violation of a general duty owed to all persons. *Id.*, citing *Dubin v. Dubin*, 25,996 (La. App. 2 Cir. 8/17/94), 641 So.2d 1036, 1040.

Generally, where a person neglects to do what he is obligated to do under a contract, he has committed a passive breach of the contract. *Lahare, supra*. If he negligently performs a contractual obligation, he has committed active negligence and, thus, an active breach of contract. *Id.* at 777. A passive breach of contract warrants only an action for breach of contract; an active breach of contract, on the other hand, may also support an action in tort under La. C.C. art. 2315. *Id.*

Upon review of Bullseye’s third-party demand, we find that it fails to allege Bullseye’s injuries were caused by Oldcastle’s negligent performance of the contract. Instead, the demand alleges that the injuries were caused by Oldcastle’s non-performance of the contract, namely Oldcastle’s failure to provide CMUs that contained an integral water repellent. Consequently, we conclude that Bullseye

alleged a passive breach of contract, which does not support a claim in tort. While the filing of a petition against one joint tortfeasor does interrupt prescription against the other joint tortfeasors,² we find that Bullseye’s demand is not a tort action. Instead, we hold that the allegations in Bullseye’s demand arise from contractual obligations.³

Pursuant to La. C.C. art. 3499, “[u]nless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years.” The prescriptive period applicable to an action alleging a breach of contract is ten years. *McClellan v. Premier Nissan, L.L.C.*, 14-726 (La. App. 5 Cir. 2/11/15), 167 So.3d 934, 935. However, an action for redhibition prescribes one year from the date the defect is discovered by the buyer. La. C.C. art. 2534; *Gaspard v. Camping World RV Sales, L.L.C.*, 20-125 (La. App. 3 Cir. 9/30/20), 304 So.3d 1050, 1054. A “breach of contract claim based upon the sale of an allegedly defective product would be founded in redhibition and subject to the one year prescriptive period.” *Bottinelli Real Estate, L.L.C. v. Johns Manville, Inc.*, 19-619 (La. App. 4 Cir. 12/27/19), 288 So.3d 179, 185, quoting *Stewart Interior Contractors, L.L.C.*, 13-922 (La. App. 4 Cir. 1/8/14), 130 So.3d 485, 489.

According to Bullseye’s third-party demand, the CMUs supplied by Oldcastle were found to have been leaking as early as February 2021. When the CMUs were sent for testing in April 2021, the products failed the water testing. Bullseye knew in 2021 that the CMUs did not contain the integral water repellent, which is the basis of its claims for damages. However, Bullseye did not file its

² See, La. C.C. art. 2324(C) that states, “[i]nterruption of prescription against one joint tortfeasor is effective against all joint tortfeasors.”

³ Although Bullseye argues the trial court incorrectly applied the one-year prescriptive period for delictual actions pursuant La. C.C. art. 3492, the record does not reflect that the trial court considered that particular codal article. The judgment does not mention La. C.C. art. 3492, or any other codal article, as the basis for the trial court’s ruling. Furthermore, a review of the transcript of the hearing does not reveal the trial court’s consideration of La. C.C. art. 3492. There is nothing in the record to support Bullseye’s contention that the trial court based its ruling upon La. C.C. art. 3492.

demand against Oldcastle until February 16, 2023, well over a year after Bullseye had notice of the allegedly defective CMUs. Therefore, accepting Bullseye's well-pleaded allegations as true, we find that Bullseye's third-party demand is prescribed on its face. Because Bullseye failed to introduce any evidence at the hearing on the exception of prescription, we also find that Bullseye failed to prove the prescriptive period had been interrupted or suspended.⁴

Affirmative Representations

Alternatively, Bullseye alleges the trial court erroneously determined the date on which it sustained damages to trigger the one-year prescriptive period. It argues that, since the defect was initially detected, Oldcastle made continuous affirmative representations that it would remedy said defect on the Project; however, it was not until July 1, 2022 that Oldcastle refused to remedy the issue by paying liquidated damages. Bullseye contends that its third-party demand against Oldcastle in February 2023 was well-within one year of the date of its injury, which was July 1, 2022—the date Oldcastle reneged on its representations and left Bullseye with the costs to cure the defect.

Oldcastle argues that Bullseye's third-party demand was prescribed on its face. As such, Bullseye was burdened with proving prescription was suspended or interrupted, and Bullseye failed to introduce any evidence at the hearing on the exception of prescription. Thus, it avers there was insufficient evidence presented by Bullseye to prove prescription was interrupted in this matter. Oldcastle also argues that settlement negotiations are inadmissible and objects to the reference to any such negotiations.

As previously mentioned, neither party introduced any evidence at the hearing on the exception of prescription. Bullseye asserts that Oldcastle made

⁴ We express no opinion as to matters that are not currently before this Court, in particular, whether Centric's claims against Bullseye are prescribed.

continuous affirmative representations that it would remedy said defect on the Project. However, there is no evidence before us to consider in support of that argument. Although Bullseye attached exhibits to its opposition brief to the exception of prescription, “[e]vidence not properly and officially offered and introduced cannot be considered, even if it is physically placed in the record. Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal.” *Ford Motor Credit Co., LLC v. Davis*, 20-271 (La. App. 5 Cir. 10/13/21), 329 So.3d 1047, 1056, *writ not considered*, 21-1739 (La. 1/26/22), 331 So.3d 926, quoting *Denoux v. Vessel Management Servs.*, 07-2143 (La. 5/21/08), 983 So.2d 84, 88. Therefore, we find that Bullseye failed to prove that its third-party demand against Oldcastle is not prescribed.

DECREE

For the foregoing reasons, we affirm the trial court’s judgment that sustained Oldcastle APG, Inc.’s peremptory exception of prescription and dismissed Bullseye Masonry, LLC’s third-party demand. Bullseye Masonry, LLC is assessed the costs of this appeal.

AFFIRMED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
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MARC E. JOHNSON
STEPHEN J. WINDHORST
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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **APRIL 2, 2025** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

24-CA-319

E-NOTIFIED

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