

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 2254

CHERYL DONNELLY WOOD

VERSUS

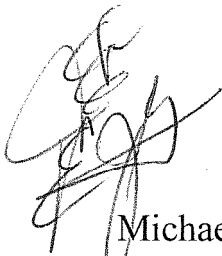
CENTRAL PROGRESSIVE BANK

***DATE OF JUDGMENT: November 3, 2006***

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT  
(NUMBER 2004-13490 "G"), PARISH OF ST. TAMMANY  
STATE OF LOUISIANA

HONORABLE LARRY J. GREEN, JUDGE

\* \* \* \* \*

  
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**BEFORE: KUHN, GAIDRY, AND WELCH, JJ.**

**Disposition: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

*Welch, J. concurs without reasons.*

Kuhn, J.

Plaintiff-appellant, Cheryl Donnelly Wood, appeals the trial court's judgment that dismissed her petition for damages pursuant to an exception raising the objection of prescription urged by defendant-appellee, Central Progressive Bank ("the Bank"). We affirm in part, reverse in part, and remand for further proceedings to allow Mrs. Wood the opportunity to amend her petition to remove the grounds of this objection.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

Mrs. Wood's petition urges she owned an undivided one-half interest in a particular piece of property located in St. Tammany Parish that was sold to Aurora P. Ryan in October 1996. The petition alleges that at the time of the sale, Mrs. Ryan granted a mortgage in favor of the Bank in the amount of \$43,000.00, and she also granted a mortgage in favor of Mrs. Wood and her husband, Corwyn Dale Wood in the amount of \$35,000.00. Both mortgages were allegedly "recorded [on] March 3, 1998." Mrs. Wood also claims that pursuant to judicial proceedings, the Bank seized the property in question and sold it on July 19, 2002 for \$27,000.00. Mrs. Wood asserts that although the mortgage evidencing her interest as a mortgagee was recorded in the public records, the Bank failed to provide notice of the seizure of the property. As a result, Mrs. Wood seeks to recover damages sustained as a result of the bank's negligence.<sup>1</sup>

In response, the Bank filed exceptions urging the objections of prescription and no cause of action, and in the alternative, it sought a summary judgment in its

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<sup>1</sup> Mrs. Wood does not seek to annul the seizure and sale of the property.

favor. These exceptions and the motion for summary judgment were set for hearing on May 26, 2005, but according to the trial court's judgment, "[T]he parties agreed to submit the matter on briefs, waiving oral argument." On June 16, 2005, the trial court signed a judgment denying the Bank's exception raising the objection of no cause of action and its motion for summary judgment, but granting the Bank's exception raising the objection of prescription.<sup>2</sup> The language of the trial court's judgment indicates that the trial court considered the various exhibits that were attached to the memorandums filed both in support of and in opposition to the exceptions. Mrs. Wood has appealed, urging the trial court erred in finding that her claim had prescribed.<sup>3</sup>

## II. ANALYSIS

A party urging an exception raising the objection of prescription has the burden of proving facts to support the exception unless the petition is prescribed on its face. *Cichirillo v. Avondale Industries, Inc.*, 04-2894, 04-2918, p. 5 (La. 11/29/05), 917 So.2d 424, 428. When the face of the petition reveals that the plaintiff's claim is prescribed, the burden shifts to the plaintiff to demonstrate that prescription was suspended or interrupted. *In re Medical Review Panel for Claim of Moses*, 00-2643, p. 6 (La. 5/25/01), 788 So.2d 1173, 1177. Although evidence may be introduced to support or controvert any objection pleaded, in the

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<sup>2</sup> On January 30, 2006, pursuant to an interim order of this court that remanded this case for the trial court to include proper decretal language, the trial court supplemented its original judgment to state that Mrs. Wood's case was dismissed with prejudice.

<sup>3</sup> Our resolution of this case pretermits Mrs. Wood's specific assignments of error, wherein she challenges the trial court's findings that she knew or had reason to know that the property had been sold more than one year before she filed suit and that the doctrine of *contra non valentum* was inapplicable.

absence of evidence, an objection of prescription must be decided upon facts alleged in the petition with all allegations accepted as true. La. C.C.P. art. 931; *Cichirillo v. Avondale Industries, Inc.*, 04-2894, 04-2918 at p. 5, 917 So.2d at 428 n.7. When evidence is introduced at the hearing on a peremptory exception of prescription, the trial court's findings of fact are reviewed under the manifest error-clearly wrong standard of review. *Babineaux v. State ex rel. Dep't of Transp. and Dev.*, 04-2649, p. 3 (La. App. 1st Cir. 12/22/05), 927 So.2d 1121, 1123.

During oral argument before this court, Mrs. Wood's counsel was questioned regarding whether any evidence had been introduced in support of the exception raising the objection of prescription. He confirmed that the matter had been submitted based on the parties' memorandums without either party having formally admitted any evidence in favor of or in opposition to the exception of prescription. We acknowledge that the appeal record contains the various exhibits that were attached to memorandums filed both in support of and in opposition to the exceptions. Also, our record contains the Bank's motion for summary judgment, which included exhibits that were attached to its motion for summary judgment. Because these various exhibits were not formally introduced into evidence, the trial court erred in considering them. *See Cichirillo v. Avondale Industries, Inc.*, 04-2894, 04-2918 at p. 5, 917 So.2d at 428 n.7. Accordingly, we conduct a *de novo* review of solely the allegations of Mrs. Wood's petition to determine whether her claim has prescribed.

Mrs. Wood's petition asserts a negligence claim against the Bank, urging it failed to satisfy its duty to notify her of the seizure of the property. The one-year

liberative prescriptive period for delictual actions begins to run from “the day the injury or damage is sustained.” La. C.C. art. 3492. This statute, like all prescription statutes, is strictly construed against prescription and in favor of maintaining the cause of action. *Babineaux v. State ex rel. Dep’t of Transp. and Dev.*, 04-2649 at p. 4, 927 So.2d at 1124. Mrs. Wood filed her lawsuit on June 24, 2004, more than two years after the property was seized and sold, according to the allegations of the petition. Thus, based on the allegations of the petition, the one-year prescriptive period had lapsed when Mrs. Wood filed her lawsuit. As a result, Mrs. Wood bore the burden of establishing that prescription was interrupted or suspended. *Id.* Although she alleged in the proceedings below and in this court that she did not discover that the property had been seized until October 2003, Mrs. Wood failed to substantiate this allegation with evidence. Accordingly, we affirm the trial court’s judgment granting the Bank’s exception of prescription.

In order to promote the interests of justice, however, the law takes a liberal approach with respect to allowing the amendment of pleadings. *Reeder v. North*, 97-0239, p. 15 (La. 10/21/97), 701 So.2d 1291, 1299. Because Mrs. Wood’s petition alleges the Bank did not notify her of the property’s seizure and sale when these events took place and because she has argued, both in the trial court and in this court, that she filed her petition within one year of her discovery of these events, we conclude plaintiff might be able to remove the grounds of the objection. Thus, she should be afforded the opportunity to amend her petition. La. C.C.P. art. 934; *see Boudreaux v. Angelo Iafrate Construction*, 02-0992, p. 6

(La. App. 1st Cir. 2/14/03), 848 So.2d 3, 8.<sup>4</sup> Since it appears that the grounds of the objection may be removed by amendment of the petition, we remand this matter to the trial court to allow Mrs. Wood a reasonable period of time to amend her petition to provide more specific factual allegations regarding her discovery of the seizure and sale of the property at issue. *Id.*

### III. CONCLUSION

For these reasons, we affirm the trial court's judgment insofar as it granted the Bank's exception raising the objection of prescription, but we reverse that portion of the judgment that dismissed Mrs. Wood's suit with prejudice. We further remand this matter with instructions to the trial court to allow Mrs. Wood a reasonable period of time to amend her petition to set forth facts which will overcome, if possible, the grounds of the objection of prescription. Each party is to bear its own costs with respect to this appeal.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

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<sup>4</sup> Louisiana Code of Civil Procedure article 934 provides:

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 raised through the exception cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed. (Emphasis added.)