NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0117

MARY JOAN MCLIN PALMER

VERSUS

THE FLOOR STORE AND MORE, INC.

Judgment Rendered: NOV - 3 2006

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On Appeal from the 21st Judicial District Court
In and For the Parish of Livingston, State of Louisiana
Trial Court No.104,234, Division "E"

Honorable Brenda Bedsole Ricks, Judge Presiding

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Robert H. Harrison, Jr. Denham Springs, LA	Counsel for Plaintiff/Appellant Mary Joan McLin Palmer
Erik L. Burns Denham Springs, LA	Counsel for Defendant/Appellee The Floor Store and More, Inc.

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Downing J., concurs.

HUGHES, J.

Defendant-in-reconvention appeals a trial court judgment finding her liable for the total amount due under a promissory note. For the reasons that follow, we amend the judgment in part, and affirm as amended.

FACTUAL AND PROCEDURAL HISTORY

In 2000, Mary Joan McLin Palmer and her husband, William, were engaged in business as residential contractors under the name "William H. Palmer Builders." In connection with their business, the Palmers periodically subcontracted with The Floor Store and More ("The Floor Store") to provide flooring materials and installation services on some of the residences they were constructing. On January 20, 2000, Mrs. Palmer issued four checks to The Floor Store for payment of various invoices. On January 26, all four checks were returned to The Floor Store due to insufficient funds. In an effort to resolve the matter, both parties agreed that the Palmers would sign a promissory note in the principal amount of $26,169.00, which represented the sum of the four dishonored checks plus the estimated amount of a pending job The Floor Store was scheduled to perform for the Palmers.[1] On January 27, 2000, Mr. and Mrs. Palmer signed the promissory note, which was payable on demand.

The Palmers failed to make any payments to The Floor Store. Consequently, The Floor Store filed liens on the pertinent properties and filed criminal charges against Mrs. Palmer. As a result, she was subsequently charged with four felony counts of issuing worthless checks. Following a trial, Mrs. Palmer was acquitted of the charges. In May 2004, Mrs. Palmer filed suit against The Floor Store seeking damages for malicious prosecution and intentional infliction of emotional distress arising

[1] The promissory note also provided for 12% interest per annum commencing on February 7, 2000, and The Floor Store's entitlement to attorneys' fees incurred in collection of the note.

from the criminal charges. On September 2, 2004, The Floor Store answered Mrs. Palmer's petition, generally denying her claims.

On January 26, 2005, The Floor Store filed a reconventional demand against Mrs. Palmer based upon the dishonored checks and the promissory note. Mrs. Palmer filed a motion to strike the reconventional demand due to The Floor Store's failure to obtain leave of court in accordance with LSA-C.C.P. art. 1033.[2] A hearing on the motion to strike was set for March 21, 2005. Then, on March 9, 2005, Mrs. Palmer filed a motion to dismiss her claims against The Floor Store with prejudice. A judgment dismissing Mrs. Palmer's original petition, but reserving The Floor Store's right to proceed on its reconventional demand, was signed on March 16, 2005. On the same date, The Floor Store filed a motion for leave of court to file its reconventional demand. Consequently, at the March 21 hearing, the trial court denied Mrs. Palmer's motion to strike. Pursuant to a "Consent Judgment" approved by Mrs. Palmer's counsel, the trial court granted The Floor Store leave to file its reconventional demand on May 17, 2005.

Mrs. Palmer also filed a peremptory exception raising the objection of prescription. Therein, she asserted the five-year liberative prescriptive period had expired because The Floor Store failed to timely obtain leave of court to file its reconventional demand. The exception was ultimately denied.

A trial on The Floor Store's claims was held in August 2005. In a judgment rendered on September 15, 2005, the trial court concluded that the promissory note was a novation of the four dishonored checks.[3] The trial

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[2] When filing its reconventional demand against Mrs. Palmer, The Floor Store also asserted a third party demand against Mr. Palmer. In conjunction with Mrs. Palmer's motion to strike the reconventional demand, Mr. Palmer also sought to strike the third party demand against him. His motion to strike was subsequently granted by the trial court; thus, no claims remain against Mr. Palmer in this case.

[3] Novation is the extinguishment of an existing obligation by the substitution of a new one. LSA-C.C. Art. 1879.

court then ruled in favor of The Floor Store and against Mrs. Palmer for the entire amount due under the promissory note. From this judgment, Mrs. Palmer appeals.

DISCUSSION

In her first assignment of error, Mrs. Palmer contends the trial court erred in failing to grant her motion to strike The Floor Store's reconventional demand. Mrs. Palmer contends that motion should have been granted since the motion to dismiss her claims was granted before The Floor Store obtained leave of court to file its reconventional demand. We disagree. Louisiana Code of Civil Procedure article 1033 provides:

> An incidental demand may be filed without leave of court at any time up to and including the time the answer to the principal demand is filed.
>
> An incidental demand may be filed thereafter, with leave of court, if it will not retard the progress of the principal action, or if permitted by Articles 1066 or 1092.
>
> **An incidental demand that requires leave of court to file shall be considered as filed as of the date it is presented to the clerk of court for filing if leave of court is thereafter granted. (Emphasis added.)**

In the case *sub judice*, The Floor Store filed its reconventional demand on January 26, 2005. It was granted leave of court thereafter. Thus, pursuant to LSA-C.C.P. art. 1033, its reconventional demand is to be considered filed as of January 26, 2005, well before the judgment dismissing Mrs. Palmer's claims. Moreover, we note that the judgment of dismissal submitted by Mrs. Palmer clearly states that The Floor Store's reconventional demand would be unaffected by the dismissal and would remain pending. Accordingly, we find no merit in this assignment of error.

In her second assignment of error, Mrs. Palmer argues that the trial court erred in denying her peremptory exception raising the objection of

prescription. The applicable prescriptive period for an action on a promissory note is five years. LSA-C.C. art. 3498. The promissory note at issue herein was signed by Mrs. Palmer on January 27, 2000. As previously noted, The Floor Store's reconventional demand is considered filed as of January 26, 2005. Clearly, the reconventional demand was filed within the five-year prescriptive period. Accordingly, the trial court was legally correct in denying Mrs. Palmer's peremptory exception raising the objection of prescription.

In her final assignment of error, Mrs. Palmer urges that the trial court erred in failing to give her credit on the promissory note for sums The Floor Store received from third parties. In support of her position, Mrs. Palmer cites **Tumblin v. Gratech Corp.**, 448 So.2d 179 (La.App. 4 Cir. 1984).

The testimony at trial established that The Floor Store did, in fact, receive $9,999.63 from third parties to satisfy the liens it had placed on two of the residential properties due to Mrs. Palmer's nonpayment.[4] According to LSA-C.C. art. 1855, the performance of an obligation may be rendered by a third party, even against the will of the obligee, unless the obligee has an interest in performance only by the obligor. The performance herein simply involved the payment of money. As such, The Floor Store had no interest in performance rendered only by Ms. Palmer.[5] Hence, we find that the trial court was clearly wrong in denying Ms. Palmer credit for the amounts paid to The Floor Store by the third parties.

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[4] The record establishes that The Floor Store received $5,500.00 from "the Mancoffs" representing a partial payment on one of the jobs. It also was paid by Todd and Patty Carpenter for the additional job representing $4,499.63 of the total amount of the promissory note.

[5] Performance rendered by a third person effects subrogation only when so provided by law or by agreement, LSA-C.C. art. 1855

CONCLUSION

Accordingly, we hereby amend the judgment of the trial court to allow Ms. Palmer a credit in the amount of $9,999.63. In all other respects, the judgment of the trial court is affirmed. Each party is assessed with one-half of the costs of this appeal.

AMENDED IN PART; AFFIRMED AS AMENDED.