

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 2127

THE TRAILER OUTLET, INC., ESTHER LAYERLE AND
ROBERT R. LAYERLE

VERSUS

WILLIAM J. DUTEL AND DUTEL & TRANCHINA, LLC

Judgment Rendered: SEP 19 2013

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2006-11350

Honorable William J. Crain, Presiding

Lisa Brener
New Orleans, LA

Counsel for Plaintiffs/Appellants
The Trailer Outlet, Inc., Esther
Layerle, and Robert R. Layerle

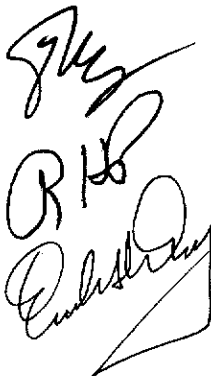
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Counsel for Defendants/Appellees
William J. Dutel and Dutel &
Tranchina, LLC

and

James G. Wyle
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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.



GUIDRY, J.

In this legal malpractice action, plaintiffs, Esther Layerle and Robert Layerle, appeal from a judgment of the trial court dismissing their action against defendants, William J. Dutel and Dutel & Tranchina, LLC, with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

In 2001, Esther and Robert Layerle hired William J. Dutel and Dutel & Tranchina, LLC to represent them in the acquisition of Investment Management Services, Inc. (IMS), a business engaged in the sale and repair of trailers and related activities. On September 19, 2001, the Trailer Outlet, Inc. (Trailer Outlet), a corporation owned by Esther and Robert Layerle, purchased movable assets and related intangible property from IMS. On that same date, Remtac Investments, LLC (Remtac), a limited liability company also owned at the time of the sale by Esther and Robert Layerle, purchased the real estate and improvements on which IMS operated from Hampton Life Insurance Limited (Hampton). Remtac paid Hampton \$125,000 at the time of sale and executed a promissory note secured by a mortgage on the real estate in favor of Hampton for the remaining \$925,000 of the purchase price. The act of sale for the movable and intangible property from IMS to the Trailer Outlet stated that the consideration for that sale was contained in the payment and promissory note described in the act of sale between Remtac and Hampton.

Thereafter, on January 9, 2003, Remtac executed a dation in paiement in favor of Hampton, whereby Remtac transferred to Hampton the real estate that secured the \$925,000 promissory note. On February 27, 2003, IMS filed a lawsuit against the Trailer Outlet, seeking rescission of the sale of its business and requesting a preliminary injunction, enjoining the Trailer Outlet from transferring

or disposing of any of the assets of the business pending resolution of the lawsuit. IMS later added Esther and Robert Layerle as defendants.

William J. Dutel represented the Layerles and the Trailer Outlet in all of the above transactions and in the suit brought against them by IMS, and he continued to represent them until April or May of 2005. On March 30, 2006, the Layerles and the Trailer Outlet filed a petition for damages, naming William J. Dutel and Dutel & Tranchina, LLC, the law firm employing Dutel, as defendants and asserting various acts of malpractice. Particularly, the Layerles asserted that the defendants were negligent in their review, participation in, and approval of the September 2001 sale documents, by permitting plaintiffs to execute a dation en paiement without requiring that the document provide for their indemnification by Hampton in the event IMS brought suit against them, and in failing to understand the risk that IMS might be determined to be a third party beneficiary of the consideration set forth in the agreement between Hampton and Remtac and to provide plaintiffs with appropriate protection.

Thereafter, Dutel and Dutel & Tranchina, LLC filed peremptory exceptions raising the objections of prescription, preemption, and no cause of action. Following a hearing, the trial court signed a judgment sustaining the exceptions and dismissing the Layerles' claims with prejudice. The Layerles appealed the trial court's judgment, asserting that the preemptive periods in La. R.S. 9:5605(A) do not apply, because Dutel's deliberate suppression of the truth regarding the execution of the dation en paiement and the assurances he made to the Layerles that they would prevail in the IMS litigation, in order to obtain an unjust advantage of preventing the Layerles from knowing, or timely knowing, that they had a claim against him, fall within the fraud exception contained in La. R.S. 9:5605(E).

In an unpublished opinion concerning that appeal, this court reiterated prior First Circuit jurisprudence finding that allegations of misrepresentation or

suppression of the truth occurring subsequent to the acts of malpractice are sufficient to raise the issue of fraud within the meaning of La. R.S. 9:5605(E). Trailer Outlet v. Dutel, 09-2139 (La. App. 1st Cir. 6/11/10) 2010 WL 2342753 (unpublished opinion), writ denied, 10-2081 (La. 11/19/10), 49 So. 3d 390 (citing Coffey v. Block, 99-1221, p. 8 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1181, 1186-87, writ denied, 00-2226 (La. 10/27/00), 772 So. 2d 651). This court went on to find that the Layerles' allegations regarding Dutel's suppression of the truth in order to prevent them from knowing, or timely knowing, that they had a claim against him were sufficient to raise the fraud exception contained in La. R.S. 9:5605(E), and that the trial court erred in failing to consider the Layerles' allegations of fraud as a defense to the defendants' exceptions. Because the Layerles were not permitted to present evidence in support of their allegations of fraud at the trial of the exceptions, we remanded the matter to the trial court for a full evidentiary hearing on the allegations of fraud.

On March 8, 2012, the trial court conducted a full evidentiary hearing, at the conclusion of which it determined that Dutel did not intentionally or fraudulently suppress any fact, and therefore, the Layerles failed to meet their burden of proving that the preemptive period was interrupted by fraud. Accordingly, the trial court found the Layerles' claims against the defendants were preempted, and in a judgment signed on May 4, 2012, dismissed their claims with prejudice. The Layerles now appeal from the trial court's judgment.

DISCUSSION

Louisiana Revised Statute 9:5605 provides, in pertinent part:

A. No action for damages against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide legal services shall

be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.

B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. ... The one-year and three-year periods of limitation provided in Subsection A of this Section are preemptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

* * *

E. The preemptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953.

The burden of proving preemption is typically on the party pleading it. However, when the action is preempted on the face of the petition, the burden shifts to the plaintiff to show the claim has not preempted. See Dauterive Contractors, Inc. v. Landry and Watkins, 01-1112, pp. 15-16 (La. App. 3rd Cir. 3/13/02), 811 So. 2d 1242, 1253.

As stated in our previous opinion, the Layerles' petition is clearly preempted on its face, having been filed over four years following the execution of the sale documents and over three years following the execution of the dation en paiement. The Layerles, however, assert that the preemptive period in La. R.S. 9:5605(A) does not apply because Dutel committed fraud. Particularly, the Layerles assert that Dutel did not tell them that he failed to include the price of the movables in the contract between IMS and the Trailer Outlet.

Louisiana Civil Code article 1953 defines fraud as "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 inconvenience to the other ... [and] may ... result from silence or inaction." Fraud cannot be predicated on mistake or

negligence, no matter how gross. Whitehead v. American Coachworks, Inc., 02-0027, p. 6 (La. App. 1st Cir. 12/20/02), 837 So. 2d 678, 682. Fraudulent intent, or the intent to deceive, is a necessary and inherent element of fraud. Whitehead, 02-0027 at p. 6, 837 So. 2d at 682.

The existence of fraud is a question of fact, and the trial court's findings with respect to fraud are subject to the manifest error standard of review on appeal. Smith v. Roussel, 00-1028, p. 4 (La. App. 1st Cir. 6/22/01), 809 So. 2d 159, 164. Under that standard, a court of appeal may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989); Landry v. Leonard J. Chabert Medical Center, 02-1559 (La. App. 1st Cir. 5/14/03), 858 So. 2d 454, 463, writs denied, 03-1748, 03-1752 (La. 10/17/03), 855 So. 2d 761. Moreover, a trial court's credibility determinations are entitled to great deference; thus, if the factfinder's findings are reasonable in light of the record viewed in its entirety, the court of appeal may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Riverside Recycling, LLC v. BWI Companies, Inc. of Texas, 12-0588, p. 4 (La. App. 1st Cir. 12/28/12), 112 So. 3d 869, 872.

In its reasons for judgment, the trial court, after reviewing the documentary evidence and testimony adduced at the hearing on the issue of fraud, specifically found:

Dutel did not intentionally or fraudulently suppress any fact, much less suppress facts to prevent [the] Layerle[s] from suing him. This is not a case where a filing deadline was missed and the attorney tried to hide that fact, knowing he had committed malpractice. While Dutel felt regret that his clients were sued, he believed the IMS suit was unjustified and defended it on that basis. Dutel believed he was right and IMS was wrong. Any failure of Dutel to inform the plaintiffs that he provided substandard work in connection with the original sales or the dation [en paiement] was not fraudulent but based on his belief that the documents reflected all parties' intentions.

From our review of the entire record, we cannot say that the trial court was clearly wrong or manifestly erroneous in its determination. The sale at issue was a complicated transaction, given that the immovable property and movable property were the subject of two separate sale documents. As both parties testified, prior to the signing of the documents, multiple revisions were drafted by Dutel and members of his law firm, who communicated with and received feedback from the Layerles. Both parties were aware that the sale document provided that the consideration for the sale of the IMS business to the Trailer Outlet "is contained in the payment and Promissory Note described in the Act of Sale and Mortgage by and between Hampton Life Insurance Limited, as Seller, and Remtac Investments, L.L.C., as Purchaser, executed simultaneously herewith." In fact, according to Dutel, at one time the documents were drawn up to reflect the amount owed to IMS and the amount owed to Hampton. However, the Layerles did not want an allocation shown on the documents, because they wanted to take the maximum deduction that they could take on the movables, and the documents were changed to reflect that the consideration, or the money owed to IMS, was reflected in the Hampton note.

According to Dutel, he knew that the Layerles did not want any further dealings with IMS's owner, Michael Magee, and he believed that the documents reflected all of the parties' intentions. Dutel testified that even after IMS filed its lawsuit against the Layerles, he still believed that IMS was not owed anything further on the contract. This opinion was shared by Richard Schulze, an attorney who was brought in to take a look at the case after an injunction was issued against the Trailer Outlet in the IMS litigation. According to Schulze, though the individual sale document did not allocate a specific price for the movables, the entire sales package, including the purchase agreement and HUD 1 statement,

showed the amounts paid to each party. Based on this evidence, he felt the Trailer Outlet could ultimately have won the case at trial.

Schulze and Dutel testified that they were in constant communication with the Layerles regarding the status of the IMS litigation, and that the Layerles were aware of the negative direction that the litigation was taking. Particularly, on December 15, 2003, Dutel sent a letter to Esther Layerle stating that the "complexity is due to the fact there is no value stated in the transfer of the movables, but rather it is tied into the Hampton note."

Further, Esther Layerle, though not an attorney, was a knowledgeable and experienced businesswoman who negotiated business contracts, including the purchase agreement with IMS. She communicated daily with Dutel regarding the drafting of the sale documents and took a "hands on" role in the litigation. She even admitted that it was her belief that, based on the documents, they owed nothing further to IMS, and that IMS was trying to complicate a very well-documented transaction.

From our review of the evidence in the record, we cannot find that the trial court was manifestly erroneous in determining that the Layerles failed to establish that Dutel intended to deceive the Layerles in confecting the original sale documents or thereafter. Accordingly, we find no error in the trial court's determination that the Layerles failed to establish that Dutel's actions amounted to fraud and likewise find no error in its determination that the Layerles' claims for malpractice are preempted.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to the appellants, Esther and Robert Layerle.

AFFIRMED.