

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0665

RAY PERISO

VERSUS

BAN VU

Judgment Rendered: DEC 22 2016

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On Appeal from the
22nd Judicial District Court
In and for the Parish of Tammany
State of Louisiana
Trial Court No. 2011-14078

The Honorable Reginald T. Badeaux, III, Judge Presiding

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BEFORE: PETTIGREW, McDONALD, AND CALLOWAY¹, JJ.

Pettigrew, J. Concurs

¹ Hon. Curtis Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

McDonald, J. Concurs

CALLOWAY, J.

Third party plaintiff, Ban Vu, appeals a judgment granting an exception raising the objection of peremption filed by third party defendants, Jamie Frazier and Frazier Insurance Agency, Inc., and dismissing his claims with prejudice. For the reasons stated herein, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

This matter began as a tort suit filed by Ray Periso after he fell at least fifteen (15) feet to the ground on April 28, 2011, when a balcony railing collapsed at the property located at 861 Ashville Drive, Slidell, Louisiana. Periso alleged that he was an invitee on the property owned by Vu when the incident occurred. Periso alleged that Vu was negligent and that he suffered severe and permanent injuries to his feet, legs, head, body, and mind. Vu filed a third party demand against Southern Fidelity Insurance Company (Southern Fidelity), Frazier Insurance Agency, Inc. (Frazier Insurance), and Jamie Frazier (collectively referred to as “Frazier”).² Vu alleged that Southern Fidelity issued a policy of insurance identified as LSD 0026081 01 17, effective August 18, 2010, to August 18, 2011, that provided insurance coverage for the rental property he owned located at 859-865 Ashville Drive, Slidell, Louisiana (insurance policy).

In a prior appeal, we affirmed the summary judgment dismissing Southern Fidelity, as the insurance policy relied upon by Vu did not provide personal liability coverage. *Periso v. Vu*, 2013-1601 (La. App. 1 Cir. 7/17/14), 2014WL3535342 (unpublished). Prior to that appeal, Vu filed an amended and supplemental third party demand adding Susan Jackson, the lessee of the 861 Ashville Drive property, as a defendant.

² The third party demand named ABC Insurance Company and XYZ Insurance Company as third party defendants, but it appears from the record that neither of these insurers were ever identified or served.

In the instant case, Vu's third party demand alleges that Frazier was negligent in not procuring a policy that provided personal liability coverage, which he alleges he requested, or in failing to notify Vu that it had not obtained the requested coverage.

Frazier filed a peremptory exception raising the objection of preemption, which the trial court granted dismissing the Vu's claims against Frazier.³ The trial court signed the judgment on December 23, 2015. It is from this judgment that Vu appeals.

LAW AND DISCUSSION

Vu's only assignment of error is that the trial court erred in calculating when the preclusive period began and when he was put on notice or should have known that Frazier did not obtain the liability insurance as he requested. In both this appeal and the prior appeal, Vu has mentioned that he is an immigrant from Vietnam, who came to the United States in 1976 with his family. English is not Vu's first language.

In support of its exception raising the objection of preemption, Frazier relies on La. R.S. 9:5606, which governs actions against insurance agents and states:

A. No action for damages against any insurance agent, broker, solicitor, or other similar licensee under this state, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide insurance 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 shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.

³ The third party defendants also alternatively filed a motion for summary judgment, which the trial court deemed moot since it granted the exception of preemption.

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

D. 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. (Emphasis added).

According to La. R.S. 9:5606(A), the three-year preemptive period commences on the date of the alleged act, omission, or neglect. *State ex rel. Div. of Admin., Office of Risk Management v. National Union Fire Ins. Co. of Louisiana*, 2007-1134 (La. App. 1 Cir. 2/8/08), 984 So. 2d 91, 94, writ denied, 2008-0548 (La. 4/25/08), 978 So. 2d 370. The one-year preemptive period commences to run when the insured receives a copy of the policy. *See Seruntine v. State Farm Fire and Cas. Co.*, 2010-1108 (La. 9/3/10), 42 So. 3d 968 (per curiam); *see also, Chapital v. Harry Kelleher & Co., Inc.*, 2013-1606 (La. App. 4 Cir. 6/4/14), 144 So. 3d 75, 83.

At the hearing on the exception of preemption, evidence may be introduced to support or controvert the exception. *See* La. C.C.P. art. 931. The trial court held the hearing on the exception and the alternative motion for summary judgment on December 15, 2015. Although both parties attached numerous exhibits to their respective memoranda, no evidence was introduced at the hearing in support of the exception of preemption. Unless properly offered and introduced into evidence, documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal. *Atain Speciality Ins. Co. v. Premier Performance Marine, LLC*, 2015-1128 (La. App. 1 Cir. 4/8/16), 193 So. 3d 187, 190 (citations omitted).⁴

⁴ We recognize that under the version of La. C.C.P. art. 966(F)(2) in effect at the time of the December 15, 2015 hearing (prior to the amendment by 2015 La. Acts, No. 422) the exhibits attached to the memoranda were “deemed admitted for purposes of the motion for summary judgment”; however, the trial court deemed the motion for summary judgment moot, and Frazier

In the absence of evidence, an exception of peremption must be decided based upon the facts alleged in the petition with all of the allegations accepted as true. *Id.* (citing *Cichirillo v. Avondale Industries, Inc.*, 2004-2894 (La. 11/29/05), 917 So. 2d 424, 428; *Williams v. Genuine Parts Co.*, 2014-0857 (La. App. 1 Cir. 1/8/15) 2015 WL 127974 (unpublished)). If no evidence is introduced to support or controvert the exception, the manifest error standard of review does not apply, and the appellate court's role is to determine whether the trial court's ruling was legally correct. *Id.* (citing *MSF Trust I v. Stewart*, 2013-1975 (La. App. 1 Cir. 5/11/15) 2015 WL 2185000 (unpublished), *writ denied*, 2015-1132 (La. 9/18/15), 178 So. 3d 147; *Onstott v. Certified Capital Corporation*, 2005-2548 (La. App. 1 Cir. 11/3/06), 950 So. 2d 744, 746).

As no evidence was introduced at the hearing on this exception, we must accept the allegations of Vu's third party demand as true. The third party demand was filed on April 24, 2012. Vu alleged that "on or before June 2010," he conveyed to Frazier that he needed an agent to procure all necessary insurance on his properties, including 859-865 Ashville Drive, Slidell, Louisiana, for personal and property protection. Vu also alleged that he conveyed that "he had to have an agent who would properly advise him as to needed coverage, and explain the content of the policies he was purchasing." Vu alleged that he did obtain insurance from Frazier, effective from August 18, 2010 through August 18, 2011 for those properties. The third party demand also states:

At the time he met with [Frazier] about securing the requested policy, [Vu] specifically requested that both dwelling and personal liability insurance coverage be placed on the property located at 859-865 Ashville Dr., Slidell, Louisiana.

Vu further claimed that he was made aware of the alleged incident made the basis of the main demand following the accident that occurred on April 28, 2011. Vu

did not seek review of that ruling in an answer to Vu's appeal. *Cf.* La. C.C.P. art. 2133. Therefore, the merits of the motion for summary judgment are not before this court.

alleged that he was never informed by Frazier that the insurance he purchased did not provide personal liability coverage, and that “he had specifically requested personal liability coverage on his policy” and “was assured by [Frazier] that he would obtain said insurance....”

The third party demand alleges that conversations with Frazier regarding the request for coverage were “on or before June 2010” and coverage was procured beginning August 18, 2010. The allegations of the third party demand establish that any misrepresentation or neglect by Frazier occurred less than three years prior to the filing of the third party demand on April 24, 2012. Therefore, Vu’s claim against Frazier is not preempted by the three-year period set forth in La. R.S. 9:5606(A).

Regarding the one-year preemptive period, there is no specific allegation in the third party demand as to Vu’s receipt of the policy at issue. Vu alleges that he did not discover the Frazier’s alleged neglect until May 23, 2011, when he was informed that his policy did not provide personal liability coverage for Periso’s April 28, 2011 accident. The third party demand was filed on April 24, 2012, within one year of the date of Vu’s alleged discovery of the negligent act. Accepting the allegations of Vu’s third party demand as true, the claims are not preempted on the face of the third party demand by the one-year preemptive period. *See Cichirillo*, 917 So. 2d at 428.

Because Vu’s claims against Frazier are not preempted on the face of the third party demand, the burden was on Frazier to prove the facts to support its exception of preemption. *See Atain*, 193 So. 3d at 191. No evidence was introduced at the hearing and, on the face of the record before us, Frazier failed to carry that burden. *See Id.* The trial court legally erred in sustaining the exception of preemption and dismissing Vu’s third-party demand against Frazier.

CONCLUSION

For the reasons set forth above, the trial court's judgment granting the exception of peremption and dismissing Ban Vu's third party demand against Jamie Frazier and Frazier Insurance Agency, Inc. is reversed. This matter is remanded for further proceedings. All costs of this appeal are assessed to Jamie Frazier and Frazier Insurance Agency, Inc.

REVERSED AND REMANDED.