STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0336

STATE OF LOUISIANA, DIVISION OF ADMINISTRATION, OFFICE OF COMMUNITY DEVELOPMENT – DISASTER RECOVERY UNIT

VERSUS

ANN D. ZANDERS AND WILLIE M. ZANDERS SR.

Judgment Rendered: DEC 2 2 2021

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Appealed from the 21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Case No. 162650

The Honorable Brian K. Abels, Judge Presiding

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Willie M. Zanders, Sr. **Ann D. Zanders** **Baton Rouge, Louisiana**	**Defendants/Appellants** **Pro Se**
Mary Catherine Cali **John C. Walsh** **William J. Wilson** **John C. Conine, Jr.** **Baton Rouge, Louisiana**	**Counsel for Plaintiff/Appellee** **State of Louisiana, Division of Administration, Office of Community Development - Disaster Recovery Unit**

BEFORE: LANIER, WOLFE, AND BURRIS,[1] JJ.

[1] The Honorable William J. Burris, retired, is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

LANIER, J.

This matter is before us on appeal by defendants, Willie M. Zanders, Sr. and Ann D. Zanders, from a judgment of the district court granting summary judgment in favor of plaintiff, State of Louisiana, Division of Administration, Office of Community Development, Disaster Recovery Unit ("the State"), and rendering judgment in favor of plaintiff and against defendants in the amount of $57,407.79, together with legal interest, from the date of judicial demand, and costs. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Following Hurricanes Katrina and Rita in 2005, the State was awarded a Community Development Block Grant ("CDBG") from the U.S. Department of Housing and Urban Development to assist homeowners affected by the storms in their efforts to reoccupy damaged homes. The State administered the CDBG funds and created the Road Home Program, through which it awarded grants to eligible homeowners.

After their residence, located at 2309-11 Peniston Street, New Orleans, Louisiana, 70115 ("the Property") was damaged by Hurricane Katrina, defendants received a grant from the Road Home Program on April 28, 2008, in the amount of $42,976.53. In connection with the grant, defendants entered into several agreements with the State: (1) The Road Home Declaration of Covenants Running with the Land Hurricane Katrina/Hurricane Rita ("Declaration of Covenants"); (2) The Road Home Program Grant Agreement ("Grant Agreement"); (3) The Road Home Limited Subrogation/Assignment Agreement ("Subrogation/Assignment Agreement"); (4) The Road Home Grant Recipient Affidavit ("Grant Affidavit"); and (5) The Road Home Direct Disbursement Acknowledgement Form ("Direct Disbursement Form").

In consideration for their receipt of the $42,976.53 grant, defendants agreed to comply with certain obligations of the Road Home Program. As set forth in the Declaration of Covenants, defendants agreed "to commence occupying the Property as his/her primary residence within three (3) years after the Closing Date."[2] With regard to enforcement of the covenants, the Declaration of Covenants included the following language:

> These Covenants shall be enforceable, at law or in equity, by the State of Louisiana ..., and Owner hereby agrees that the State of Louisiana ... **may demand repayment of Grant proceeds** or compel specific performance by the Owner or claim injunctive relief against the Owner for violation of these Covenants, without posting bond and without the need for demonstrating irreparable harm. (Emphasis added.)

Defendants also executed the Grant Agreement, which contained the following relevant conditions:

> Homeowner(s) agree(s) to commence occupying the Property as his/her primary residence within three (3) years after the Closing Date. This provision is a material consideration without which the Homeowner(s) would have received a lesser amount under the Road Home Program. **Homeowner(s) will be required to repay the Grant in the event of a violation of this Section 6.** (Emphasis added.)

Finally, defendants executed the Grant Affidavit in which they both certified and declared under oath that they had executed and delivered to the State the Declaration of Covenants and the Grant Agreement, which imposed on them an obligation to occupy the Property as their primary residence at some point during the three-year period beginning on the date of the Grant Agreement, or April 28, 2008. They further attested that they would comply with the terms of the Declaration of Covenants and the Grant Agreement and that failure to comply may result in an obligation to repay the grant money.

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[2] The Closing Date was listed in the Grant Agreement as April 28, 2008, the date defendants received the grant money and the date all of the agreements were signed by defendants.

Thereafter, on May 8, 2010, defendants executed a Final Award Acknowledgement Form, acknowledging that they were receiving their final disbursement under the Road Home Program. On that same day, defendants received an additional $14,431.26 in grant funds, bringing their total award to $57,407.79.

On September 14, 2017, defendants were notified by the State that they had failed to comply with the obligations as outlined in the Grant Agreement. Defendants were advised of what was necessary to establish compliance and told that if they could not establish compliance, they could opt to either repay the Grant funds in one lump sum or through a payment plan. Defendants apparently attempted to show proof of compliance by sending the State a copy of Mr. Zanders' driver's license and a copy of an insurance policy (with a policy period of 12/02/2017 to 12/02/2018) on the Property that had been secured by their lender. No other proof of occupancy as requested by the State was provided, and defendants never repaid the grant funds or established a method by which the funds would be repaid.

On April 21, 2019, the State filed suit against defendants for breach of contract, seeking judgment in the amount of $57,407.79, together with legal interest from the date of judicial demand and all costs. Defendants answered the suit, generally denying the allegations of the petition. Thereafter, the State filed a motion for summary judgment asserting that there was no genuine issue as to any material fact in dispute and that the State was entitled to summary judgment as a matter of law. The State argued that defendants failed to offer proof of compliance with terms of the Road Home Program. Thus, the State maintained, the Road Home Program agreements should be enforced as written and agreed to by the

parties. Defendants did not file a timely opposition to the motion for summary judgment.[3]

The hearing on the motion was originally set for February 24, 2020. On February 14, 2020, defendants filed a motion for continuance, which was granted. The hearing was reset for May 26, 2020. On May 26, the matter was continued again and reset for August 10, 2020. Thereafter, on August 7, 2020, just three days before the hearing date, defendants filed an exception raising the objection of prescription and peremption and a memorandum in support of same.

Following a hearing on the motion for summary judgment, the district court signed a judgment on August 31, 2020, granting summary judgment in favor of the State and rendering judgment in favor of the State and against defendants in the amount of $57,407.79, together with legal interest, from the date of judicial demand, and costs. This appeal by defendants followed, wherein the following specifications of error were assigned for our review:

> 1. The [district court] erred in failing to rule on [defendants'] timely filed motion for new trial.[4]
>
> 2. The [district court] erred in failing to consider [defendants'] timely filed peremptory exceptions of prescription and peremption before ruling on the State's motion for summary judgment.
>
> 3. The [district court] erred in granting the State's motion for summary judgment based on the law and evidence in the trial record.

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[3] We note that defendants filed an opposition to the motion for summary judgment on September 10, 2020, a full month after the hearing. However, pursuant to La. Code Civ. P. art. 966(B)(2), "Any opposition to the motion and all documents in support of the opposition shall be filed and served ... not less than fifteen days prior to the hearing on the motion." Therefore, any arguments or exhibits filed in support of the opposition filed by defendants on September 10, 2020, could not be considered by the district court and are not properly before us at this time.

[4] Defendants argue that their appeal is premature because the motion for new trial was never acted on by the district court. We note that the district court signed a judgment denying the motion for new trial on October 26, 2021. A trial court's denial of a motion for new trial during the pendency of an appeal cures the defect of prematurity. **Marshall v. Sandifer**, 2017-1246 (La. App. 1 Cir. 9/21/18), 2018 WL 4520245, at *3 (unpublished), writs denied, 2018-1991, 2018-1907 (La. 2/11/19), 263 So.3d 896, 1152.

PRESCRIPTION/PEREMPTION

The Zanders argue on appeal that the district court erred in ruling on the motion for summary judgment before considering their exception raising the objection of prescription and peremption. Although they acknowledge that the district court "heard a few brief comments regarding the exception," the Zanders assert that because there was no formal ruling, the district court should be ordered to hear the exception and rule on the matter before the case is reviewed by this court.

As previously indicated, the Zanders filed the exception just three days prior to the hearing on the motion for summary judgment. During argument on the motion for summary judgment the following colloquy occurred:

> MR. ZANDERS: [T]he [S]tate sent us a lot of documents, and at first I was led to believe that it had been -- it had not been ten years. But actually that transaction had been ten years, and we submit that as of May 2008 when the grant was made to May 2018 was the ten years, and that the action prescribed. So that is why I filed the exception. And I don't know how Your Honor is going to rule, but we believe that the exception is in order and that there should be a hearing on the exception.
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> . . . .
>
> [COUNSEL FOR THE STATE]: Now, Your Honor, in regards to Mr. and Mrs. Zanders' prescription argument, he is correct ... that it is a ten-year prescriptive period, but what he is incorrect about [is] that it is not from the date that the contract is executed. Prescription begins to run on the contract at the time of the breach. So in this case the contract was executed April 28, 2008. The Zanders had three years to reoccupy the property; bringing that to April 28, 2011. When they had not reoccupied the property on April 28, 2011, that's [when prescription] begins to run, not the 2008 date. So with all due respect to Mr. Zanders, it's not prescribed.
>
> . . . .
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> THE COURT: Thank you. All right. I've looked at the motion and everything filed with it, and I do agree that ... **if that matter was before me today, the ten years would start from the breach, not the execution of the contract. So I think the exception of prescription is of no mind.** (Emphasis added.)

After the district court ruled on the pending motion for summary judgment, the discussion of prescription continued:

> MR. ZANDERS: Judge, also would the court be kind enough to also address the issue of the affidavit with regards to the exception and our motion for the exception since the whole case --
>
> THE COURT: Well, I think I did address it. I said it's not filed before the court today, but even if it were that exception would be denied.
>
> MR. ZANDERS: Okay. I understand what you're saying, Your Honor .... But we're going to request a hearing on the exception.
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> THE COURT: I understand, Mr. Zanders; but if you filed it Friday and this thing has been on the docket for I don't know how long already; and again -- so it's not on the docket for today, but again if it were on the docket today, it would be denied.

Furthermore, on the Zanders' "Order Setting Hearing Date" that was filed along with the exception, the district court noted as follows: "DENIED. All claims adjudicated on August 10, 2020."

All personal actions, including an action on a contract, are subject to a liberative prescription of ten years, unless otherwise provided by legislation. La. Civ. Code art. 3499; **Alliance Hospitality, L.L.C. v. Esquivel**, 2020-0807 (La. App. 1 Cir. 2/24/21), 322 So.3d 253, 256. It is clear from our review of the record that the district court considered the Zanders' argument concerning prescription and peremption and found it to be without merit. Based on these unique facts and circumstances, we find no error by the district court ruling on the motion for summary judgment without first having a hearing on the exceptions. But c.f. **Tanner v. Morgan**, 2018-1719 (La. App. 1 Cir. 7/10/19), 280 So.3d 1237 (when defendant-in-reconvention asserted peremptory exceptions of no cause of action and no right of action in his answer, district court erred in failing to conduct a hearing on the exceptions prior to the hearing on the merits of defendants' motion for partial summary judgment as mandated by La. C.C.P. art. 929(A)). Thus, the Zanders' argument in this assignment of error is without merit.

SUMMARY JUDGMENT

After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(A)(3). In reviewing a district court's ruling on a motion for summary judgment, appellate courts review evidence *de novo* using the same criteria that govern the district court's determination of whether summary judgment is appropriate. **Georgia-Pacific Consumer Operations, LLC v. City of Baton Rouge**, 2017-1553 (La. App. 1 Cir. 7/18/18), 255 So.3d 16, 22, writ denied, 2018-1397 (La. 12/3/18), 257 So.3d 194.

The Code of Civil Procedure places the initial burden of proof on the party filing the motion for summary judgment, here the State. See La. Code Civ. P. art. 966(D)(1). If the mover will not bear the burden of proof at trial on the issue raised in the motion for summary judgment, as in the instant matter, the mover is not required to negate all of the essential elements of the adverse party's claim, action, or defense. See La. Code Civ. P. art. 966(D)(1). See also **Babin v. Winn-Dixie Louisiana, Inc.**, 2000-0078 (La. 6/30/00), 764 So.2d 37, 39. However, the mover must demonstrate the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. Code Civ. P. art. 966(D)(1). See also La. Code Civ. P. art. 966, Comments—2015, Comment (j).

Once the motion for summary judgment has been made and properly supported, the burden shifts to the non-moving party to produce factual support, through the use of proper documentary evidence attached to its opposition, which establishes the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. See La. Code Civ. P. art. 966(D)(1). If the non-moving party fails to produce sufficient factual support in its opposition which

proves the existence of a genuine issue of material fact, Article 966(D)(1) mandates the granting of the motion for summary judgment. See **Babin**, 764 So.2d at 40; **Jenkins v. Hernandez**, 2019-0874 (La. App. 1 Cir. 6/3/20), 305 So.3d 365, 371, writ denied, 2020-00835 (La. 10/20/20), 303 So.3d 315.

In ruling on a motion for summary judgment, the district court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. **Janney v. Pearce**, 2009-2103 (La. App. 1 Cir. 5/7/10), 40 So.3d 285, 289, writ denied, 2010-1356 (La. 9/24/10), 45 So. 3d 1078. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Georgia-Pacific Consumer Operations, LLC**, 255 So.3d at 22.

The party opposing summary judgment cannot rest on the mere allegations of his pleadings but must show that he has evidence that could satisfy his evidentiary burden at trial, if he does not produce such evidence then there is no genuine issue of material fact and the mover is entitled to summary judgment. **Thomas v. Tobin**, 2015-1362 (La. App. 1 Cir. 6/3/16), 197 So.3d 209, 212.

Under Louisiana law, "[a] contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished." La. Civ. Code art. 1906. The party who demands performance of a contract must prove that it exists. La. Civ. Code art. 1831. A party having obligations under a contract "is liable for the damages caused by his failure to perform a conventional obligation." La. Civ. Code art. 1994. The essential elements of a breach of contract claim are: (1) the obligor's undertaking of an obligation to perform; (2) the obligor's failure to perform the obligation (the breach); and (3) the failure to perform resulted in damages to the obligee. **Denham Homes, L.L.C. v. Teche Federal Bank**, 2014-1576 (La. App. 1 Cir. 9/18/15), 182 So.3d 108, 119.

The burden of proof in an action for breach of contract is on the party claiming rights under the contract. The existence of the contract and its terms must be proven by a preponderance of the evidence. **Bond v. Allemand**, 632 So.2d 326, 329 (La. App. 1 Cir. 1993), writ denied, 94-0718 (La. 4/29/94), 637 So.2d 468. Further, a party alleging a breach of contract bears the burden of proving that breach. **Hinchee v. Soloco, L.L.C.**, 2007-770 (La. App. 3 Cir. 12/5/07), 971 So.2d 478, 484, writ denied, 2008-0065 (La. 3/7/08), 977 So.2d 911.

Following our exhaustive review of the record and based on the facts and circumstances of this case, we conclude that the State carried its burden of proof on the motion for summary judgment. In order to defeat the motion for summary judgment filed by the State, the Zanders were required to produce factual support sufficient to establish that they would be able to satisfy their evidentiary burden of proof at trial, *i.e.*, that they did not breach the contractual terms they entered into with the State through the Road Home Program.

In support of its motion for summary judgment, the State submitted all of the pertinent documents concerning the Zanders' participation in the Road Home Program. As previously noted, the Zanders received a total of $57,407.79 in grant money from the Road Home Program. In return, there were certain obligations that the Zanders were required to comply with under the terms of the Declaration of Covenants and the Grant Agreement, including, but not limited to, occupying the Property as their primary residence within three years after the closing date. If the Zanders failed to comply with their obligations under the agreements, they were required to repay the grant money to the State. As previously indicated, the closing date was listed in the Grant Agreement as April 28, 2008, the date defendants received the grant money and the date all of the agreements were signed by defendants. Thus, the Zanders had until April 28, 2011 to occupy the

Property as their primary residence in order to comply with the terms of the contract.

On November 1, 2018, the State sent a letter to the Zanders advising them that they should send "insurance documents and possibly a utility statement from the time [they] were living at 2311 Peniston St., New Orleans, LA 70115." Thereafter, on January 7, 2019, the State sent another letter to the Zanders containing the following:

> We are in receipt of and thank you for the insurance documents and copy of your driver's license you sent to our office on November 30, 2018 ....
>
> The documentation you provided has been deemed insufficient to prove that the damaged residence ... has been reoccupied as agreed upon in the terms of the Road Home Grant Agreement. The insurance documents you provided are only evidence of Lender-placed hazard insurance. Also, there is no homestead exemption claimed on the damaged residence, and it does not appear reoccupied according to the tax assessor records and Google Earth images. Accordingly, to establish that the home has been reoccupied, you will need to provide a copy of a utility bill showing adequate usage at the damaged residence, dated *after* your receipt of the Road Home Grant funds. If you can obtain utility service documentation which can even be a letter from Entergy showing your usage of services after your receipt of the Grant funds, please feel free to submit them to our office and we will be certain to have them reviewed.

There is nothing in the record to suggest that the Zanders complied with the State's repeated requests for the necessary documentation to prove that they reoccupied the Property as their primary residence by April 28, 2011.

Accordingly, the State proved each essential element for a breach of contract claim. Under the terms of the Road Home Program, (1) the Zanders had an obligation to occupy the Property as their primary residence within three years of April 28, 2008; (2) the Zanders breached that obligation by not occupying the Property within the allotted time; and (3) the Zanders' breach resulted in stipulated damages to the State and the Zanders' affirmative obligation to repay the grant proceeds to the State.

Once the State satisfied its burden of showing that no genuine issue of material fact remained, the burden shifted to the Zanders to establish the existence of a genuine issue of material fact. As previously indicated, the Zanders failed to file a timely opposition to the State's motion for summary judgment. Moreover, a review of the Zanders' answer in this matter reveals that they have failed to raise any issues that would suggest that a genuine issue of material fact remains as to the formation of the contracts, their breach of said contracts, and the resulting damages. Rather, the Zanders only defenses to the petition are (1) that their mortgage company forced a large payment of approximately $25,000.00 toward the mortgage; (2) that the Property was occupied as of January 2006; (3) that the Property remained insured between 2006 and 2018 when proof of insurance was requested and forwarded to the State; (4) that Mr. Zanders provided a Louisiana-issued driver's license that showed the Property as his permanent address; and (5) that major renovations commenced in 2006 but were not completed due to personal illness and the withholding of funds by the mortgage company. None of these alleged defenses shows compliance by the Zanders with the obligations of the Road Home Program sufficient to defeat summary judgment in this case.

With respect to the grant proceeds being used to pay off a portion of their mortgage, we note that pursuant to the Direct Disbursement Form, the Zanders were advised that they may have certain obligations and responsibilities under their mortgage that were not part of the Road Home Program. They were further told that their "mortgage loan documents may impose conditions and obligations" on them with respect to the use of the grant proceeds.

Concerning insurance on the Property between 2006 and 2018, there is a renewal letter in the record for the Property showing that the lender secured insurance on the Property for the period of December 2, 2017 through December 2, 2018. However, this submission to the State does not satisfy the Zanders'

obligation to demonstrate compliance with the requirement of the Road Home Program that they occupy the Property as their primary residence between April 28, 2008 and April 28, 2011.

Finally, the Louisiana-issued driver's license that Mr. Zanders produced was issued on December 12, 2015. Again, the Zanders were obligated to occupy the Property between April 28, 2008 and April 28, 2011. The driver's license provided by Mr. Zanders does not demonstrate compliance with the requirements of the Road Home Program.

Based on our review of the record and the Zanders' failure to come forward with any opposition evidence establishing that there is a genuine issue of material fact, we find no error in the district court's ruling. The Zanders failed to meet their burden of proof. Summary judgment in favor of the State was warranted.

CONCLUSION

For the above and foregoing reasons, we affirm the district court's ruling granting summary judgment in favor of State of Louisiana, Division of Administration, Office of Community Development, Disaster Recovery Unit and rendering judgment in favor of State of Louisiana, Division of Administration, Office of Community Development, Disaster Recovery Unit and against Willie M. Zanders, Sr. and Ann D. Zanders in the amount of $57,407.79, together with legal interest, from the date of judicial demand, and costs. We assess all costs associated with this appeal against Willie M. Zanders, Sr. and Ann D. Zanders.

AFFIRMED.