DONALD MORGAN	*	**NO. 2016-CA-1250**
VERSUS	*	**COURT OF APPEAL**
ENTERGY NEW ORLEANS, INC.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2013-08800, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge
* * * * * *
JUDGE SANDRA CABRINA JENKINS
* * * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins)

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REVERSED; REMANDED

DECEMBER 6, 2017

In this personal injury action, plaintiff Donald Morgan appeals the trial court's October 7, 2016 judgment granting a peremptory exception of prescription filed by defendant/appellee Cox Communications Louisiana, LLC ("Cox"). For the reasons that follow, we reverse the trial court's judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On September 17, 2013, Mr. Morgan filed an Original Petition for Damages (the "Petition") against Entergy New Orleans, Inc. ("Entergy"). The Petition alleged that Mr. Morgan sustained personal injuries on February 9, 2013 when he tripped and fell over an unguarded guy wire attached to a utility pole owned by Entergy. Along with the Petition, Mr. Morgan served interrogatories and requests for production of documents (the "Discovery Requests") on Entergy which, among other things, asked for the identity of all persons and entities that owned, leased, installed, worked on, or had "any interest in" the utility pole at issue, including those who were responsible for attaching the guy wire.

On November 7, 2013, Entergy responded to the Discovery Requests (the "Discovery Responses"). Entergy did not identify any persons or entities as required, but simply made blanket references to an attached 1982 agreement between New Orleans Public Service Inc. ("NOPSI") and South Central Bell Telephone Company ("Bell") (the "Entergy/BellSouth Joint Use Agreement"). Under the agreement, in exchange for rental payments, NOPSI gave Bell the right to use NOPSI's utility poles to attach Bell's wires and cables needed in the construction, operation, and maintenance of Bell's facilities.[1]

Based on the Entergy/BellSouth Joint Use Agreement, Mr. Morgan filed a First Amended Petition on January 27, 2014 naming BellSouth Communication Systems, LLC, and BellSouth Telecommunications, LLC (collectively, "BellSouth"), and Bell as additional defendants.

On February 6, 2014, during a Rule 10.1 discovery conference, counsel for Entergy told counsel for Mr. Morgan that the Entergy/BellSouth Joint Use Agreement specified which utility had the authority to attach guy wires at certain heights on the pole, and that the height of the wire at issue signified that BellSouth was responsible for the wire.

On February 9, 2014, three days after Entergy confirmed that BellSouth was responsible for the wire, the one-year prescriptive period for Mr. Morgan's tort claims ended. Based on this information from Entergy, on March 13, 2014, Mr. Morgan propounded discovery requests to BellSouth to confirm that BellSouth was

[1] For purposes of this exception, we assume without deciding that NOPSI and Bell are the predecessors, respectively, of Entergy and BellSouth.

the owner of the guy wire. On October 13, 2014, BellSouth responded to Mr. Morgan's discovery requests, denying ownership of, and responsibility for, the wire.

On November 3, 2014, nine months after expiration of the one-year prescriptive period, Entergy supplemented its original Discovery Responses by producing a July 16, 1982 agreement between Louisiana Power & Light Company ("LP&L") and Cox (the "Entergy/Cox Joint Use Agreement").[2] Under this agreement, in exchange for rental payments, Entergy gave Cox the right to use Entergy's utility poles for the attachment of Cox's wires and cables needed to furnish cable communication system service to Orleans Parish. Based on the Entergy/Cox Joint Use Agreement, on March 13, 2015, Mr. Morgan filed a Second Amended Petition naming Cox as a defendant.

On September 8, 2015, Mr. Morgan voluntarily dismissed BellSouth from the action, without prejudice. On April 6, 2016, the trial court granted Entergy's Motion for Summary Judgment and dismissed Mr. Morgan's claims against Entergy, with prejudice.

On June 23, 2016, Cox filed an Exception of Prescription, seeking dismissal of Mr. Morgan's claims. After conducting a hearing on September 23, 2016, the trial court signed a judgment dated October 7, 2016 sustaining Cox's Exception of Prescription. The trial court stated that, even though the result was "harsh," the court was bound by the Supreme Court's decision in *Renfroe v. State ex rel. Dept. of Transp. & Dev.*, 01-1646 (La. 2/26/02), 809 So.2d 947 ("*Renfroe*").

Mr. Morgan timely appealed.

[2] Again, for purposes of this exception, we assume that LP&L is a predecessor of Entergy.

DISCUSSION

Standard of Review

"When prescription is raised by peremptory exception, with evidence being introduced at the hearing on the exception, the trial court's findings of fact on the issue of prescription are subject to the manifest error-clearly wrong standard of review." *In re Med. Review Panel of Hurst*, 16-0934, p. 4 (La. App. 4 Cir. 5/3/17), 220 So.3d 121, 125-26, *writ denied*, 17-803 (La. 9/22/17), -- So.3d --, 2017 WL 4546566. "The relevant issue in a manifest error inquiry is not whether the finder of fact was right or wrong, but whether its decision was a reasonable one." *Id.*, 16-0934, p. 4, 220 So.3d at 126.

"If the trial court commits an error of law, however, the applicable standard of review is *de novo*." *Richard v. Richard*, 14-1365, p. 9 (La. App. 4 Cir. 6/3/15), 171 So.3d 1097, 1102-03. "The standard controlling our review of a peremptory exception of prescription also requires that we strictly construe the statutes against prescription and in favor of the claim that is said to be extinguished." *Jones v. Sewerage & Water Bd.*, 16-0691, p. 3 (La. App. 4 Cir. 3/8/17), 213 So.3d 497, 499.

Mr. Morgan contends that: (1) the trial court erred in failing to apply the doctrine of *contra non valentem* to suspend prescription of his claim against Cox; and (2) the trial court erred in deciding that *Renfroe* was controlling, and sustaining Cox's Exception of Prescription.

Contra Non Valentem

Mr. Morgan's delictual action is subject to a one-year prescriptive period, which commenced to run on the day the injury was sustained. *See* La. C.C. art. 3492. Mr. Morgan was allegedly injured on February 9, 2013, and he filed suit against Cox on March 13, 2015. Thus, the Second Amended Petition is prescribed on its face.

Mr. Morgan relies on the doctrine of *contra non valentem,* which is a judicially created exception to the general rules of prescription that is applied to ameliorate the sometimes harsh consequences resulting from the strict interpretation of prescription statutes. *Bergeron v. Pan Am. Assurance Co.*, 98-2421, p. 9 (La. App. 4 Cir. 4/7/99), 731 So.2d 1037, 1042. This doctrine operates to suspend prescription when the plaintiff is prevented from acting under one of four scenarios: (1) where there was some legal cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff's action; (2) where there was some condition or matter coupled with the contract or connected with the proceedings which prevented the plaintiff from availing himself of his cause of action; (3) where the defendant has done some act effectually to prevent the plaintiff from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though this ignorance is not induced by the defendant. *Bayou Fleet, Inc. v. Bollinger Shipyards, Inc*., 15-0487, pp. 12-13 (La. App. 4 Cir. 7/21/16), 197 So.3d 797, 806.

The fourth category of *contra non valentem* applies only when "the plaintiff's ignorance of his cause of action cannot be attributable to his own willfulness or neglect, as a plaintiff is deemed to know what he could have learned by reasonable diligence." *Ferrara v. Starmed Staffing, LP*, 10-0589, pp. 6-7 (La. App. 4 Cir. 10/6/10), 50 So.3d 861, 866.

Mr. Morgan contends that the fourth category (also known as the "discovery rule") applies in this case because he was reasonably diligent in his efforts to discover the identity of the owner of the guy wire. Mr. Morgan also argues that, despite his diligence, the "fact that someone other than Entergy or BellSouth owned the guy wire was not reasonably discoverable . . . within the one-year prescriptive period."

In order to establish "reasonable diligence," Mr. Morgan relies on the following facts taken from the record:

- On **February 9, 2013**, Mr. Morgan allegedly tripped over a guy wire attached to a utility pole located at the intersection of Canal Street and South Jefferson Davis Parkway and sustained injuries.
- **Before suit was filed**, counsel for Mr. Morgan went out to the intersection and inspected the pole. After finding a tag identifying a company that was no longer viable, counsel was able to learn that the pole belonged to Entergy. There were no other markings on the pole that identified any other company.
- On **September 17, 2013**, counsel for Mr. Morgan filed a Petition for Damages against Entergy, the owner of the pole. On that date, Mr. Morgan attorney propounded Discovery Requests to Entergy seeking to discover the owner of the guy wire.

- On **October 24, 2013**, counsel for Mr. Morgan set up a Rule 10.1[3] discovery conference with Entergy to discuss the outstanding Discovery Requests.

- On **November 7, 2013**, counsel for Entergy served Discovery Responses, which contained blanket references to an attached copy of the Entergy/BellSouth Joint Use Agreement.

- On **January 24, 2014**, counsel for Mr. Morgan objected to Entergy's blanket references to the Entergy/Bellsouth Joint Use Agreement, and demanded that Entergy identify all persons and facts to support its affirmative defense that other entities were "responsible for the possession, ownership, contract work and/or maintenance of the pole and its appurtenances."

- On **January 27, 2014**, counsel for Mr. Morgan obtained leave of court to file First Amended Petition naming BellSouth as a defendant.

- On **February 6, 2014**, counsel for Mr. Morgan conducted a Rule 10.1 discovery conference with counsel for Entergy in which he received "direct verbal confirmation from Entergy that the wire belonged to BellSouth." Counsel for Entergy stated that it would supplement its Discovery Responses before February 14, 2014.

- **February 9, 2014:** One year anniversary of alleged incident.

- On **March 13, 2014**, counsel for Mr. Morgan served discovery requests on BellSouth to verify that it was the owner of, or the party responsible for, the guy wire.

- On **October 13, 2014**, counsel for BellSouth served discovery responses in which it denied ownership of, and responsibility for, the guy wire.

- On **November 3, 2014**, counsel for Entergy supplemented the Discovery Responses with a copy of the Entergy/Cox Joint Use Agreement.

- On **December 3, 2014,** counsel for Entergy produced an affidavit attesting that Entergy did not own the guy wire.

- On **March 9, 2015**, counsel for Cox told counsel for Mr. Morgan that Cox was responsible for the guy wire.

[3] Under Rule 10.1 of the Rules for Civil Proceedings in District Courts, "[b]efore filing any motion to compel discovery, the moving party or attorney shall confer in person or by telephone with the opposing party or counsel for the purpose of amicably resolving the discovery dispute."

- On **March 13, 2015**, counsel for Mr. Morgan obtained leave of court to file a Second Amended Petition adding Cox as a defendant.

Mr. Morgan contends that he (through his attorney) exercised reasonable diligence in trying to identify the owner of the pole and the attached wire by: (1) inspecting the pole and filing suit against Entergy five months before the one-year prescriptive period ended; (2) immediately serving the Discovery Requests upon Entergy in order to identify the owner of, or person responsible for, the guy wire; (3) objecting to Entergy's "blanket reference" to the Entergy/BellSouth Joint Use Agreement, and demanding that Entergy specifically identify the persons/entities called for in the Discovery Requests; and (4) relying on the veracity of the information disclosed by Entergy in its Discovery Responses and in subsequent discovery conferences.

We agree that Mr. Morgan was reasonably diligent in his efforts to find out who was responsible for the guy wire attached to Entergy's pole. In Interrogatory No. 2, Mr. Morgan asked Entergy to "identify the **owners**, manager, **lessors**, and **all persons with** any interest by way of ownership, possession, or **any other interest whatsoever in the utility pole** at issue in this litigation." In Interrogatory No. 6, Mr. Morgan asked Entergy to "identify the person and/or company who was **responsible for securing the support wires** attached to the utility pole . . . at issue in this litigation." In Interrogatory No. 7, Mr. Morgan asked Entergy to "identify the person and/or company who was **responsible for maintaining or securing yellow guards on the support wires** attached to the . . . utility pole at issue in this litigation." In response to all of these interrogatories, Entergy simply referred to the Entergy/BellSouth Joint Use Agreement, a copy of which was produced.

Likewise, in Request for Production No. 1, Mr. Morgan requested "any and all documents" pertaining to any "installation" or "other work" performed "in relation to the utility pole." In Request for Production No. 23, Mr. Morgan requested a copy of "any and all documents that . . . reflect the ownership or lease of the pole." In Request for Production No. 24, Mr. Morgan requested a copy of "all leases between you and any other person of the utility pole at issue in the litigation at all times." Entergy responded with the same blanket reference to the Entergy/BellSouth Joint Use Agreement. In response to Entergy's incomplete Discovery Responses, Mr. Morgan followed up with discovery conferences, and demanded that Entergy identify all third-parties who might be responsible for the wires attached Entergy's utility pole.

Mr. Morgan also contends that, despite his reasonable diligence, he could not have identified Cox as the owner of the guy wire within the one-year prescriptive period because: (1) Entergy, which owned the pole, incorrectly named BellSouth as the party responsible for the wire, and did not correct its error until after prescription ran; (2) the owner of the wire was not "reasonably knowable," given that Entergy, which had contracted with Cox for the attachment of Cox's wires to Entergy's poles, could not identify Cox as the owner of the wire; (3) Mr. Morgan reasonably relied on the accuracy of Entergy's information; (4) aside from Entergy's records, there are no public records that would have otherwise disclosed the owner of the wire.

Cox argues that Mr. Morgan should have known as of November 7, 2013 – when Entergy produced a copy of the Entergy/BellSouth Joint Use Agreement – that other utility companies may have had their wires attached to Entergy's utility pole. Cox refers to Appendix C to the agreement, which refers to third-party

utilities ("TPU") who "may occupy the allocated space of the Electric Company or the Telephone Company provided that the Company to which the space is allocated agrees to such occupancy." According to Cox, as of November 7, 2013, Mr. Morgan had sufficient information which, if pursued, "could have led to the discovery of Cox as a defendant."

Under the doctrine of *contra non valentem*, prescription is suspended until the tort victim discovers or "should have discovered" the facts upon which his or her cause of action is based. *In re Med. Review Panel of Howard*, 573 So.2d 472, 474 (La. 1991). In these "should have discovered" cases, the Supreme Court has focused on the reasonableness of the claimant's "action or inaction." *Id.*

As an initial matter, the 1982 Entergy/BellSouth Joint Use Agreement does not identify Cox as a TPU. According to Appendix C, if Cox (or any other entity) were a TPU entitled to occupy space on Entergy's poles, Entergy would have had to consent to this occupancy. Thus, Entergy was a reasonably reliable source of this information. Entergy, however, identified BellSouth, and not Cox, as the party responsible for the guy wire. And even though Cox asserts that the Entergy/BellSouth Joint Use Agreement would have led Mr. Morgan to discover Cox's identity, Mr. Morgan was told by Entergy that: (1) the **Entergy/BellSouth Joint Use Agreement specified which utility had the authority to attach guy wires** at certain heights on the pole; and (2) **BellSouth was responsible for the wire**. Accordingly, we find that Mr. Morgan's reliance on this information from the Entergy, and his decision not to investigate other public utilities, was reasonable.

Mr. Morgan's inaction is also reasonable given that there are no public records that would have revealed the identity of the owner or party responsible for

the guy wire. *Cf. Williams v. Holiday Inn Worldwide*, 02-0702, p. 5 (La. App. 4 Cir. 5/15/02), 816 So.2d 998, 1002, *overruled on other grounds, Glasgow v. PAR Minerals Corp.*, 10-2011 (La. 5/10/11), 70 So.3d 765 (plaintiff's delay in discovering the names of architect and construction company for hotel was not reasonable because the information was available in records of the City Office of Safety and Permits); *Richards v. Choice Hotels Int'l, Inc.*, 13-973, p. 7 (La. App 5 Cir. 5/21/14), 142 So.3d 249, 253 (*contra non valentem* did not apply when true owner's identity was available in public records of Assessor's Office); *Drake v. Sarpy Props., Inc.*, 01-1323, p. 7 (La. App. 5 Cir. 4/10/02), 817 So.2d 209, 213 (plaintiff unreasonably relied on misrepresentations regarding ownership of property when the correct information was readily available and verifiable from the public records).

Cox also argues that Entergy was not Mr. Morgan's only means of determining ownership of the guy wire. Cox has submitted an affidavit of Brett Robin, Cox's Southeast Region Safety and Risk Manager (the "Robin Affidavit"). Mr. Robin attested that, many times each year, Cox receives telephone calls from customers or the general public regarding incidents allegedly caused by Cox's cables or wires. According to the Robin Affidavit, at the time of the February 9, 2013 incident, Cox had a procedure for determining whether a cable or wire was owned by Cox, which involved his department requesting that the wire or cable at that location be visually inspected. Cox asserts that this determination would have taken a maximum of a few days, but that prior to the filing of the Second Supplemental Petition naming Cox as a defendant, Cox was never contacted regarding the guy wire.

We do not find this argument persuasive. The fact that Cox may have had a "procedure" in place for confirming whether it owned a particular wire on a utility pole does not mean that Cox, if asked, would have voluntarily disclosed to Mr. Morgan or his attorney that it was the owner of the guy wire at issue, particularly when there was pending litigation.

We find that these circumstances are similar to those in *Ferrara v. Starmed Staffing, LP*, 10-0589 (La. App. 4 Cir. 10/6/00), 50 So.3d 861. In *Ferrara*, the alleged tortfeasor worked as a nurse at Tulane University Medical Center ("Tulane"), but was employed by a third-party nursing agency. The name of the nursing agency was not found in the plaintiff's medical records. After prescription ran, Tulane identified these third parties in discovery responses. The agency and its employee filed an exception of prescription, which the trial court sustained. On appeal, this court reversed, finding that the plaintiff could not reasonably have identified these third parties until Tulane responded to the plaintiff's discovery requests and furnished their identities. *Ferrara*, 10-0589, p. 9, 50 So.3d at 867. *See also Shortess v. Touro Infirmary*, 520 So.2d 389 (La. 1988) (applying *contra non valentem* where the hospital's medical records did not disclose that contaminated blood was purchased from a third-party blood bank, and the hospital did not disclose the third party's identity until after prescription ran); *Miller v. Louisiana Gas Serv. Co.*, 601 So.2d 700, 703-04 (La. App. 5th Cir. 1992) (applying *contra non valentem* where it was impossible for plaintiffs to know that a third party had owned and built a gas line until after plaintiffs and other defendants "engaged in extensive discovery regarding the origin of the line").

Renfroe

Mr. Morgan's second contention is that the trial court erred in deciding that *Renfroe* was controlling, and sustaining Cox's Exception of Prescription. Mr. Morgan argues that the facts presented in this case are distinguishable from those in *Renfroe*, in which the Supreme Court refused to apply the doctrine of *contra non valentem* to a plaintiff who did not exercise reasonable diligence when investigating the owner of a particular tract of land.

Because the doctrine of *contra non valentem* applies to suspend the running of prescription in "exceptional circumstances," "the equitable nature of the circumstances **in each individual case** determines the applicability of the doctrine." *Wells v. Zadeck*, 11-1232, p. 15 (La. 3/30/12), 89 So.3d 1145, 1154 (emphasis added). *See also State v. All Prop. & Cas. Ins. Carriers*, 06-2030, p. 19 (La. 8/25/06), 937 So.2d 313, 327 n. 13 ("determinations of whether *contra non valentem* applies generally proceeds on an individual, case-by-case basis").

In *Renfroe*, the plaintiff filed suit against the Department of Transportation and Development ("DOTD") on April 22, 1999. The plaintiff alleged that DOTD was liable for his wife's death in an automobile accident because of its improper construction, maintenance, and design of Causeway Boulevard in Jefferson Parish. Plaintiff named DOTD as a defendant based on signs along parts of Causeway Boulevard designating it as "LA 3046," and also because the State Police investigated the accident.

On July 19, 1999, the DOTD filed a motion for partial summary judgment asserting that the portion of Causeway Boulevard where the accident occurred was not a part of the state highway. On September 20, 1999, the plaintiff filed a first

supplemental and amending petition adding Jefferson Parish and the Greater New Orleans Expressway Commission ("GNOEC") as defendants.

On December 14, 1999, the trial court granted DOTD's motion for partial summary judgment on the grounds that DOTD did not own or maintain that portion of Causeway Boulevard. On October 23, 2000, GNOEC filed an exception of prescription, which the trial court denied. GNOEC appealed.

On appeal, the *Renfroe* plaintiff argued that the doctrine of *contra non valentem* applied because he exercised reasonable diligence in ascertaining the proper party defendants. The plaintiff asserted that he was reasonable in believing that the portion of the roadway was owned and maintained by the DOTD, due to the investigation by State Police at the scene of the accident, and signage on parts of the roadway designating it as a state highway. The Supreme Court, however, concluded that no "exceptional circumstances" existed that would justify the application of the doctrine of *contra non valentem*:

> While it is indeed unusual that different unrelated parties would own and maintain different portions of one roadway, the fact that the portion of the road was owned by some party other that [sic] the DOTD was "reasonably knowable" by the plaintiff within the prescriptive period. Thus, the doctrine of contra *non valentem* does not apply in this case.

Renfroe, 01-1646, p. 10, 809 So.2d at 954.

Thus, the determination of whether *contra non valentem* interrupts prescription depends on the equitable nature of the particular circumstances in this case, which may vary from those in *Renfroe*.

In *Renfroe*, the plaintiff did not utilize discovery before the prescriptive period ended. Mr. Morgan, however, was vigilant in promptly propounding discovery requests along with his Petition, and following up with discovery

conferences. The *Renfroe* plaintiff filed suit only days before prescription ended, leaving no time to confirm the correct identity of the land owner. Mr. Morgan, on the other hand, filed suit five months before the one year anniversary of his injury, giving him time to discover the identity of the owner of the guy wire. *See Allstate Ins. Co. v. Fred's, Inc*., 09-2275 (La. 1/29/10), 25 So.3d 821 (holding that plaintiff's two-year delay between its discovery request and its motion to compel, plus an additional year before adding the defendant to the suit, showed a lack of due diligence by the plaintiff, precluding application of *contra non valentem*). Finally, the plaintiff in *Renfroe* could have reasonably identified the owner of the tract of land through a search of the public land records, but did not do so. In this case, the ownership of the guy wire at issue could not be confirmed through a search of public records.

Because the particular circumstances and equities presented in *Renfroe* are distinguishable in significant ways from the situation before us, we find that the trial court erred as a matter of law in deciding that *Renfroe* is controlling on the facts contained in this record. Weighing the equities in this case, we conclude that Mr. Morgan's lack of knowledge was not attributable to his own willfulness or neglect, and that *contra non valentem* applies to interrupt prescription. Mr. Morgan's claims against Cox, therefore, are not prescribed.

CONCLUSION

Based on the foregoing, the judgment sustaining Cox's Exception of Prescription is hereby reversed, the exception is overruled, and the case is remanded to the trial court for proceedings consistent with this opinion.

REVERSED; REMANDED