

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 0696

JAMIE STARKE

VERSUS

STEPHEN S. ELLENDER AND
STEPHEN S. ELLENDER CONTRACTOR, INC.

Judgment rendered: APR 25 2008

On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, State of Louisiana
Number 137,700
The Honorable George J. Larke, Jr., Judge Presiding

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BEFORE: PARRO, KUHN, AND DOWNING, JJ.

PARRO
JEK
by PARRO
RHP
by PARRO

DOWNING, J.

The plaintiff, Jamie Starke, appeals a judgment granting a peremptory exception raising the objection of prescription in favor of the defendants, Maryland Casualty Company (Maryland), Stephen S. Ellender, and Stephen S. Ellender Contractor, Inc., dismissing plaintiff's claims with prejudice. Plaintiff argues that the trial court erred in considering an affidavit that was not introduced into evidence and in finding that his claims under the New Home Warranty Act against Maryland, as the liability/warranty insurer of his contractor, had prescribed.¹

Plaintiff's suit for damages, filed on February 4, 2003, alleged that the home constructed for him by the Ellender defendants contained "many major structural defects" caused by noncompliance with building standards and defects in materials or workmanship. Plaintiff alleged that despite giving notice of the defects to the Ellender defendants in April 2002, and despite giving them a reasonable opportunity to comply with the provisions of the New Home Warranty Act, the defendants failed to correct the defects on the home.

For the following reasons, we agree with the plaintiff's assertion that the trial court wrongly relied on an affidavit that should not have been considered; however, we find that even without the affidavit, the record reveals that *one*, though not all, of the plaintiff's claims is still potentially viable under the New Home Warranty Act. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent herewith.

¹ Plaintiff also asserts on appeal that La. R.S. 9:3141, *et seq.* (the New Home Warranty Act) is unconstitutional. It is well-established that litigants must raise constitutional challenges in the trial court rather than in the appellate courts, and that the constitutional challenge must be specially pleaded and the grounds for the claim particularized. **Arrington v. Galen-Med, Inc.**, 06-2923, p. 3 (La. 2/2/07), 947 So.2d 719, 720, vacated on other grounds, 06-2944 (La. 2/2/07), 947 So.2d 724 and 06-2968 (La. 2/2/07), 947 So.2d. 727; **Mallard Bay Drilling, Inc. v. Kennedy**, 04-1089, p. 8 (La. 6/29/05), 914 So.2d 533, 541. Because the plaintiff has raised the issue for the first time on appeal, it is not properly before us.

Admissibility of Affidavits

The sworn affidavit at issue is in the record as an attachment to the plaintiff's previously filed opposition to Maryland's motion for summary judgment. Prior to filing the exception at issue herein, Maryland had sought summary judgment on the grounds that the "occurrences" within the meaning of its policy (i.e., manifestation of alleged defects in the home) fell outside of the effective policy period, which was established as September 30, 1999 through September 30, 2000. Plaintiff opposed the motion and attached a sworn affidavit attesting that the defects in his home were "manifest and obvious" within the period of time covered by the policy of insurance issued by Maryland. Maryland's motion for summary judgment was denied.

Subsequently, Maryland filed the peremptory exception raising the objection of prescription at issue in this appeal. The Ellender defendants joined in this exception. In support thereof, the defendants relied in part on the above referenced affidavit submitted by the plaintiff as an attachment to his memorandum in opposition to Maryland's motion for summary judgment. Specifically, defendants sought to establish a conflict between the plaintiff's attestations therein and the assertions made in his petition regarding when the defects became manifest and obvious. Despite plaintiff's objections, the trial court allowed and considered the affidavit in reaching its conclusion that the plaintiff's claims had prescribed. This was erroneous for the following reasons.

At the trial of a peremptory exception, pleaded at or prior to the trial of the case, evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition. La. C.C.P. art. 931.

Our jurisprudence consistently holds that "evidence" as used in this context means competent legal evidence. **Board of Commissioners of the Port of New**

Orleans v. Louisiana Commission on Ethics for Public Employees, 416 So.2d 231, 238 (La. App. 1st Cir.), writ denied, 421 So.2d 248 (La. 1982). It is firmly established in our jurisprudence that a sworn affidavit is hearsay and is not competent evidence unless its use is specifically authorized by statute. **Michael F. Smith, CPA v. Alford**, 04-0586, p. 4 (La. App. 1st Cir. 3/24/05), 906 So.2d 674, 676.²

The only competent evidence submitted at the hearing on the issue of prescription consists of the interrogatories and answers thereto made part of the record. The answers to the interrogatories, introduced by the plaintiff himself in opposition to the exception of prescription, were relied on by the defendants to support their claim that plaintiff began occupying the home in July 2000. By plaintiff's own admission in his petition at paragraph eleven, he asserts that notice of the defects was given by him to the defendant in April 2002. Thus, the trial court should have decided the exception based on the facts alleged in the petition, which are to be accepted as true, as well as the relevant information established by the interrogatories. See Cichirillo v. Avondale Industries, Inc., 04-2894, p. 5 (La. 11/29/05), 917 So.2d 424, 428.

Prescription

As referenced before, the plaintiff's petition, filed on February 4, 2003, asserted claims pursuant to the New Home Warranty Act, La. R.S. 9:3141, *et seq.*, including claims of major structural defects, noncompliance with building standards, and defects in materials and workmanship. The Act provides different warranty provisions for different types of defects. Specifically, at the time the plaintiff filed his suit, La. R.S. 9:3144 provided, in pertinent part:

- A. Subject to the exclusion provided in Subsection B of this Section, every builder warrants the following to the owner:

² For these same reasons, we find the affidavit of Dr. Householder is also inadmissible hearsay; while such is authorized on a motion for summary judgment pursuant to La. C.C.P. art. 966(B), it is not authorized in a hearing on a peremptory exception.

- (1) One year following the warranty commencement date, the home will be free from any defect due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards.
- (2) Two years following the warranty commencement date, the plumbing, electrical, heating, cooling, and ventilating systems exclusive of any appliance, fixture, and equipment will be free from any defect due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards.
- (3) Seven years following the warranty commencement date, the home will be free from major structural defects due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards.³

In addition, La. R.S. 9:3146 provides that “[a]ny action to enforce any warranty provided in this Chapter shall be subject to a preemptive period of thirty days after the expiration of the appropriate time period provided in R.S. 9:3144.”

The warranty commencement date is defined by La. R.S. 9:3143(7) as “the date that legal title to a home is conveyed to its initial purchaser or the date the home is first occupied, whichever occurs first.” Although it is not clear from the record when the legal title to the home was conveyed to Mr. Starke, by answer to interrogatories, Mr. Starke established that he began occupying the home in July 2000. Thus, pursuant to La. R.S. 9:3146, any claims Mr. Starke had under La. R.S. 9:3144(A)(1) would have been preempted by the end of August 2001, at the latest. Likewise, any claims that Mr. Starke may have had under La. R.S. 9:3144(A)(2) would have been preempted by the end of August 2002, at the latest.

However, the potential claims pursuant to La. R.S. 9:3144(A)(3), regarding major structural defects, were still viable at the time suit was filed, because they are subject to a warranty period of seven years and a preemptive period of thirty days after the expiration of the warranty period. Thus, any claims under La. R.S.

³ Prior to 2001, this paragraph provided for a ten-year warranty. In 2004, this paragraph was again amended to change “[s]even years” to “[f]ive years.”

9:3144(A)(3) could not have been extinguished until the end of August 2007, at the earliest.⁴

The defendants attempted at the hearing to establish that the defects existing in the home were not “major structural defects” by the use of the affidavit testimony of Dr. Householder. We have found that affidavit was inadmissible hearsay in the hearing on the exception of prescription. (See fn.2, *supra*). Therefore, taking these allegations in the petition as true, we must find the alleged potential claims for damages for major structural defects in the home, subject to a statutory seven-year warranty period, are still viable at this time.

Conclusion

Accordingly, the judgment of the trial court is affirmed insofar as it grants the exception of prescription in favor of the defendants as to plaintiff’s claims under paragraphs (1) and (2) of La. R.S. 9:3144(A). However, as to plaintiff’s claims pursuant to paragraph (3) of La. R.S. 3144(A), the judgment is reversed, and the matter is remanded to the trial court for further proceedings consistent herewith. Costs of this appeal are assessed 75% to the plaintiff and 25% to the defendants.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

⁴ There may be a question as to whether the plaintiff’s claims for major structural defects were subject to a warranty period of seven years or ten years, since the statute was amended to shorten the warranty period after the warranty commencement date. However, it is not necessary to determine that issue here, since the plaintiff’s suit was filed well within the shorter warranty period.