

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1069

ROSALEE, INC.

VERSUS

ALL SAFE ALARMS, LLC

—
**On Appeal from the 23rd Judicial District Court
Parish of Ascension, Louisiana
Docket No. 98,231, Division "D"
Honorable Jane Triche-Milazzo, Judge Presiding**
—

**Arthur A. Lemann, III
Arthur Lemann III & Assoc., Inc.
New Orleans, LA**

**Attorneys for
Plaintiff-Appellant
Rosalee, Inc.**

and

**Jonathan P. Lemann
Cough Partners
New Orleans, LA**

**Gregory S. Webb
Prairieville, LA**

**Attorney for
Defendant-Appellee
All Safe Alarms, L.L.C.**

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered February 10, 2012

Carter c/j concurs in the results

PARRO, J.

Plaintiff, Rosalee, Inc. (Rosalee), appeals the judgment of the trial court, which sustained the peremptory exception pleading the objection of no cause of action filed by defendant, All Safe Alarms, L.L.C. (All Safe), and dismissed Rosalee's petition, with prejudice. For the reasons that follow, we reverse the judgment of the trial court and remand the matter to the trial court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Rosalee owns a fifty-percent undivided interest in a house in Donaldsonville, Louisiana. The other co-owner of the house is Peter T. Lemann.¹ In January 2010, Mr. Lemann and All Safe entered into a contract for the installation and activation of an alarm system at the house, apparently without Rosalee's knowledge or consent. In October 2010, Rosalee notified All Safe that it was a co-owner of the property and that it had not consented to the installation of the alarm. Rosalee further advised All Safe that Mr. Lemann had not shared the password or access code with Rosalee. Rosalee stated that it would hold All Safe legally responsible if it was denied access to its property as a result of the allegedly unauthorized alarm system. Despite this notice, All Safe continued to maintain the alarm on the house, allegedly preventing Rosalee from accessing its property.

Rosalee subsequently filed suit against All Safe, contending that All Safe had willfully and intentionally maintained the alarm system on the house, thus preventing Rosalee from using its property. All Safe responded by filing a peremptory exception pleading the objection of no cause of action, along with an answer and a third party demand naming Mr. Lemann as a third party defendant. After a hearing, the trial court sustained All Safe's exception, dismissing Rosalee's suit. In sustaining the exception, the trial court specifically found that Rosalee's cause of action was against the other co-owner, Mr. Lemann. The trial court did not grant Rosalee an opportunity to amend its petition. This appeal by Rosalee followed.

¹ According to Rosalee's brief to this court, Rosalee's shareholders are the four children of Arthur Lemann, III, the brother of Peter Lemann.

NO CAUSE OF ACTION

The purpose of the peremptory exception raising the objection of no cause of action is to determine the sufficiency in law of the petition. The exception is triable on the face of the petition. For the purpose of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. Adams v. Owens-Corning Fiberglas Corp., 04-1296 (La. App. 1st Cir. 9/23/05), 921 So.2d 972, 975, writ denied, 05-2501 (La. 4/17/06), 926 So.2d 514; see LSA-C.C.P. arts. 927 and 931. Furthermore, the facts shown in any documents attached to the petition as an exhibit must also be accepted as true. See LSA-C.C.P. art. 853; Cardinale v. Stanga, 01-1443 (La. App. 1st Cir. 9/27/02), 835 So.2d 576, 578. The burden of demonstrating that no cause of action has been stated is on the party filing the exception. Home Distribution, Inc. v. Dollar Amusement, Inc., 98-1692 (La. App. 1st Cir. 9/24/99), 754 So.2d 1057, 1060.

In ruling on an exception of no cause of action, the court must determine whether the law affords any relief to the claimant if it proves the factual allegations in the petition and attached documents at trial. Home Distribution, 754 So.2d at 1060. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. LSA-C.C.P. art. 931. When a petition is read to determine whether a cause of action has been stated, it must be interpreted, if possible, to maintain the cause of action instead of dismissing the petition. Brister v. GEICO Ins., 01-0179 (La. App. 1st Cir. 3/28/02), 813 So.2d 614, 617. Any reasonable doubt concerning the sufficiency of the petition must be resolved in favor of finding that a cause of action has been stated. Id. When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection raised through the exception cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed. LSA-C.C.P. art. 934.

DISCUSSION

According to Rosalee's petition and the documents attached to it,² All Safe entered into a contract with Mr. Lemann for the installation of an alarm system at the house co-owned by Rosalee and Mr. Lemann, without Rosalee's knowledge or consent. The petition further alleges that, when Rosalee notified All Safe several months later that Mr. Lemann had entered into the contract without its consent and had refused to share the password and access code with Rosalee, All Safe failed and refused to remove the alarm. According to the petition, All Safe has willfully and intentionally maintained the alarm since that time, thus preventing Rosalee from accessing its property.

In its exception of no cause of action, All Safe contended that Rosalee had no cause of action against it because, pursuant to LSA-C.C. art. 800, Mr. Lemann as a co-owner may unilaterally and "without the concurrence of any other co-owner take necessary steps for the preservation of the thing that is held in indivision." This is in contrast to an act of management, which, pursuant to LSA-C.C. art. 801, requires the agreement of all the co-owners. According to All Safe, the installation of an alarm in the house is an activity that typifies preservation, as it is a security measure designed to prevent theft and/or unlawful intrusion. However, All Safe has cited no authority for the proposition that the installation of an alarm system is an act of preservation as a matter of law. Moreover, the question of whether the installation of the alarm system in the house is an act of preservation or an act of management is one of fact. See Allain v. Shell Western E & P, Inc., 99-0403 (La. App. 1st Cir. 5/12/00), 762 So.2d 709, 717. In addition, as no evidence can be introduced to support or controvert the exception of no cause of action, that issue is not properly before the court on the trial of the exception. See LSA-C.C.P. art. 931.

In sustaining the exception, the trial court did not address the issue of whether the act of installing the alarm was one of preservation or management. Instead, the

² Attached to the petition was the letter Rosalee had sent to All Safe, notifying it that Mr. Lemann had not been authorized by its co-owner to enter into the contract for the installation of the alarm.

trial court simply determined that Rosalee's sole cause of action was against Mr. Lemann, the other co-owner. The trial court suggested that third parties that do business with one co-owner should not be subject to a suit during a dispute between the co-owners. However, neither the trial court nor All Safe cited any authority for the proposition that a cause of action against the other co-owner should be the sole cause of action, or that the existence of a cause of action against a co-owner should preclude a cause of action against a third party.

In its arguments at the hearing and in its brief to this court, Rosalee suggests that All Safe may initially have been justified in installing the alarm based on Mr. Lemann's assertions of ownership;³ however, Rosalee contends that, once All Safe was notified of its claim to the property and the fact that Mr. Lemann was using the alarm to deny it access, All Safe should have removed the alarm. According to Rosalee's brief to this court, All Safe's failure to do so made it liable for Rosalee's inability to access its property under theories of trespass and conspiracy.

The tort of trespass is defined as the unlawful physical invasion of the property or possession of another. Britt Builders, Inc. v. Brister, 618 So.2d 899, 903 (La. App. 1st Cir. 1993). A trespasser is one who goes upon the property of another without the other's consent. Id. Damages are recoverable even though the tortfeasor acts in good faith. Id. Rosalee alleges that All Safe went on its property to install an alarm without its permission and that the use of this alarm system has caused it to lose the use of its property. If the installation of the alarm system is found to be an act of management, then these allegations appear to satisfy the elements of a cause of action in trespass.

Since the question of whether the installation of an alarm system in the house is an act of preservation or an act of management is one of fact, that issue is not properly before the court on the trial of the objection of no cause of action. Under these circumstances, as we read the petition and the letter attached, Rosalee has stated a

³ All Safe contends that it cannot remove the alarm because it would be in breach of its contract with Mr. Lemann if it did so; however, this claim appears to be in the nature of an affirmative defense and is not appropriately considered in a hearing on an exception of no cause of action.

cause of action for trespass. Therefore, we believe the trial court erred in sustaining the exception of no cause of action.

DECREE

For the foregoing reasons, we reverse the judgment of the trial court, which sustained the defendant's peremptory exception pleading the objection of no cause of action. The matter is remanded to the trial court for further proceedings. All costs of this appeal are assessed to All Safe Alarms, L.L.C.

REVERSED AND REMANDED.