

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

MAURICE H. OLIVIER	*	DOCKET NO.: 06-5948
	*	
VERSUS	*	JUDGE: ZAINEY
	*	
STATE FARM INSURANCE	*	SECTION: A
COMPANY AND DAVID	*	
PERRET, SR.	*	MAGISTRATE: WILKINSON
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**MEMORANDUM IN SUPPORT OF**  
**MOTION FOR SUMMARY JUDGMENT**

MAY IT PLEASE THE COURT:

Defendants, David Perret, Sr., and State Farm Fire and Casualty Company (“State Farm”) move for Summary Judgment in the instant matter because the claims stated by Plaintiff, Maurice Olivier, against Perret have no merit, are barred by peremption under Louisiana law, and do not provide plaintiff any basis for relief against Perret. The claims against State Farm are derivative at best, and should also be dismissed. For these reasons and the reasons stated below, the Motion for Summary Judgment should be granted and plaintiff’s lawsuit should be dismissed.

**I. Introduction.**

Because plaintiff did not file suit until (a) more than three years after the Defendant allegedly acted negligently in not selling him flood insurance, and (b) more than one year after plaintiff realized or should have realized that he had no flood insurance, the plaintiff's claims against Perret are barred under Louisiana Revised Statute 9:5606. Further, Perret committed no act of negligence for which plaintiff can recover.

Plaintiff names State Farm as a defendant, but pleads no wrongdoing on the part of State Farm. Plaintiff's only claims are against Perret, and if Perret is to be dismissed, State Farm should be dismissed as well.

## **II. Facts**

At the time of Hurricane Katrina, Plaintiff Maurice Olivier leased a townhouse residence located at 913 Old Metairie Drive, in Metairie, Louisiana.<sup>1</sup> He moved into this townhouse as a renter in 2003 after selling a house.<sup>2</sup> He contacted the office of his State Farm agent, David Perret, Sr., and spoke to Patty Dodgen, the agent's staff person who handled the files of customers whose last names began with the letters K through Z.<sup>3</sup> They discussed renters and flood insurance. Dodgen took down plaintiff's information and called him back with quotes on both homeowners and flood insurance.<sup>4</sup> Plaintiff purchased renters insurance for this residence on March 28, 2003.<sup>5</sup> This renters policy is the equivalent of a homeowners policy--covering wind-related risks, but excluding water

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<sup>1</sup> Plaintiff's Petition, Paragraph No. III.

<sup>2</sup> See Petition for damages, Paragraphs III-IV.

<sup>3</sup> See Exhibit B.

<sup>4</sup> See Exhibit B.

<sup>5</sup> See Exhibit A, Application for Insurance; Exhibit B, Affidavit of Patty Dodgen.

damage caused by flood.<sup>6</sup> Plaintiff declined to purchase flood insurance.<sup>7</sup> He explained to Dodgen that he was living on a budget and the price of both policies did not fit into his budget.<sup>8</sup> He also informed Dodgen that if a flood were predicted, he would move his belongings to the second floor of the townhouse.<sup>9</sup> The renters insurance application was submitted and dated March 28, 2003.<sup>10</sup> That policy was issued April 11, 2003, effective March 28, 2003.<sup>11</sup>

Plaintiff filed the instant lawsuit on August 24, 2006, more than three years after this interaction. David Perret, Sr. and State Farm Fire and Casualty Company were named as defendants. The lawsuit was filed more than one year from the issuance of the policy to Olivier and more than one year after plaintiff's receipt and payment of two policy renewals in February, 2004 and February, 2005.

### **III. Law and Argument**

#### **1. Summary Judgment**

Federal Rule of Civil Procedure No. 56 states that "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." FRCP 56(b). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with

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<sup>6</sup> See Exhibit C, Renter's Insurance Policy #18-EF-2264-8.

<sup>7</sup> See Exhibit B.

<sup>8</sup> See Exhibit B.

<sup>9</sup> See Exhibit B.

<sup>10</sup> See Exhibit A; Exhibit B.

the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FRCP 56(c). The United States Supreme Court has held that:

the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial. The moving party is “entitled to a judgment as a matter of law” because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986).

The moving party is “not required to ‘produce evidence negating the existence of a material fact’; rather, TRI’s burden was ‘only [to] point out the absence of evidence supporting the nonmoving party’s case.’” *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5<sup>th</sup> Cir. 1992) (quoting *Latimer v. Smithkline & French Laboratories*, 919 F.2d 301, 303 (5<sup>th</sup> Cir.1990)). If the moving party makes this showing, “the nonmovant must come forward with evidence which would be sufficient to enable it to survive a motion for directed verdict at trial.” *Transco Leasing Corp. v. United States*, 896 F.2d 1435, 1444 (5<sup>th</sup> Cir.1990).

2. David Perrett, Sr. did not commit negligence.

Under Louisiana law, an insurance agent has a duty to use reasonable diligence in placing the insurance requested, to advise regarding recommended coverage and gaps in coverage and to promptly notify the client if he fails to obtain the requested insurance. *See Offshore Production Contractors, Inc., v. Republic Underwriters Insurance Co.*, 910 F.2d 224 (5<sup>th</sup> Cir. 1990); *Karam v. St. Paul Fire & Marine Insurance Co.*, 281 So.2d 728

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<sup>11</sup> See Exhibit B.

(La. 1973); *Graves v. State Farm Mutual Auto Insurance Co.*, 2001-1243 (La. App. 3<sup>rd</sup> Cir. 6/26/02), 821 So.2d 769; *Cambre v. State Far, Indemnity Co.*, 404 So.2d 511 (La. App. 4 Cir. 1982).

Plaintiff alleges Perret's office failed to procure flood insurance for the contents of his apartment. On the contrary, the affidavit of Patty Dodgen<sup>12</sup> shows that flood insurance was offered and quoted to plaintiff. Plaintiff declined to purchase it. The affidavit establishes that Perret's office committed no act of negligence entitling plaintiff to recovery.

### 3. Plaintiff's Claims against Perret are Barred by Peremption

However, even if there was negligence on the part of Perret, which is denied, the claims against Perret are nevertheless barred by peremption. Louisiana's law regarding insurance agent malpractice, Revised Statutes § 9:5606, establishes a both a three year preemptive period and a one-year preemptive period for claims by an insured against an insurance agent. That statute provides, in pertinent part:

No action for damages against any insurance agent ... whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide insurance services shall be brought unless filed ... 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.**

(Emphasis added). The preemptive period started running on the date of the act of negligence alleged by plaintiff, which occurred at the time of the purchase of the renter's

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<sup>12</sup> See Exhibit B.

insurance policy, in March, 2003. A peremptive period cannot be stopped or interrupted once it starts.<sup>13</sup> This period -- and plaintiff's right to sue -- expired in March, 2006, before the lawsuit was filed.

Furthermore, R.S. 9:5606 also provides that a cause of action against an insurance agent is preempted unless the "action for damages against any insurance agent ... arising out of an engagement to provide insurance services [is] filed ... 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." La R.S. 9:5606.

The plaintiff should have realized he did not have flood insurance by reading his policy or when he received his renewal notice for the renter's insurance only. The first such renewal notice was mailed to plaintiff in February, 2004. The second such renewal notice was mailed in February, 2005. An insured is responsible for reading his policy and presumed to know its terms. *See Dobson, et al, v. Allstate Insurance Co.*, 2006 WL 2078423 (E.D. La 7/21/2006) (Vance, J.) (citing *Motors Ins. Co. v. Bud's Boat Rental*, 917 F.2d 199, 205 (5<sup>th</sup> Cir. 1990); *Stephens v. Audubon Ins. Co.*, 665 So.2d 683, 686 (La. App. 2<sup>nd</sup> Cir. 12/6/95) (citing *Matthews v. Business Men's Assur. Co. of America*, 478 So.2d 634, 637 (La. App. 2<sup>nd</sup> Cir. 1985); *Perkins v. Shelter Ins. Co.*, 540 So.2d 488 (La.App. 1st Cir.1989)). Plaintiff paid these

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<sup>13</sup> Furthermore, it is clear that the intent of this statute is that three years after the "act, omission, or neglect," the cause of action is extinguished, regardless of when the negligence was discovered and even if a plaintiff could not have brought her claim before the three-year period expired. *Reeder v. North*, 701 So.2d 1291, 1297 (La. 1997); see also *Dobson v. Allstate Ins. Co.*, 2006 WL 2078423, at \*6 (E.D.La. July 21, 2006). The Louisiana Supreme Court, dealing with an analogous provision of Louisiana's medical malpractice statute (La. R.S. 9:5605) has pointed out that the "Legislature was aware of the pitfalls in this statute but decided, within its prerogative, to put a three-year absolute limit on a person's right to sue for legal malpractice, just as it would be within its prerogative to not allow legal malpractice actions at all." *Reeder v. North* 701 So.2d 1291, 1297 (La. 1997)(citing May 29, 1990

renewal notices. The lawsuit was filed on August 24, 2006, more than one year after the February 2004 and 2005 renewal notices were received. The policy and notices put plaintiff on constructive notice that he did not purchase all of the insurance coverage he now claims he did,<sup>14</sup> and his failure to read the policy or renewal notices does not prevent the one-year preemptive period from running.

In general, renewals of insurance policies do not operate to restart preemption. *Southern Athletic Club, LLC v. Hanover Insurance Company, et al*, 2006 WL 2583406 [at] \*3 (E.D. La. 2006)(citing *Dobson v. Allstate Ins. Co.*, 2006 WL 2078423 [at] \*8 (E.D.La. 2006)). However, renewals can be the basis of separate torts if the complained of conduct constitutes separate and distinct acts, which give rise to immediately apparent damages. *Biggers v. Allstate Ins. Co.*, 886 So.2d 1179, 1182, 04-282 (La. App. 5 Cir. 10/26/04). The inquiry is whether the actions of the insurance agent at the time of renewal can be construed to constitute an act separate from the initial policy procurement.

Here, there are no allegations that the Plaintiff relied on any specific statements or actions by [the agent] regarding his coverage at the yearly renewal periods. Thus, there is no evidence of renewed reliance after the original placement of the insurance, making this case distinguishable from those in which this court found that the plaintiffs may have relied on the insurance agent's statements at the time of the policy renewals or due to periodic changes in the policy. *See, Fidelity Homestead Ass'n v. Hanover Ins. Co.*, 2006 WL 2873562 (E.D.La.)(J. Berrigan); *Three X, L.L.C. v. Lexington Ins. Co.*, 2006 WL 3142276 (E.D.La.) (J. Berrigan); *Giardina, et al v. Allstate Ins. Co., et al*, 06-6451 (E.D.La. 11/22/2006)(J. Berrigan). Therefore, any claims against [the agent] are preempted by Louisiana Revised Statute § 9:5606.

*Gremillion v. SFFCC, et al.*, 06-9071, p. 5 (E.D.La. 2/8/07)(Berrigan, J.). Similarly, in the present case, plaintiff does not allege negligence of the agent outside of the initial policy procurement; thus there are no allegations of separate acts to restart any preemptive period.

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Minutes of the Civil Law and Procedure Committee of the Louisiana House of Representatives, House Bill No. 1338).

<sup>14</sup> The Louisiana Supreme Court, in *Campo v. Correa*, 828 So.2d 502, 510-511, 2001-2707 (La. 6/21/02) stated that “[a] prescriptive period will begin to run even if the injured party does not have actual knowledge of facts that would entitle him to bring a suit as long as there is constructive knowledge of same. Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start running of prescription.”

This suit was filed after all applicable preemptive periods had expired, and the suit is thus *too late* to raise a cause of action for any act or omission occurring at the origination of the policy. As such, any cause of action against the individual agent based on acts arising at the time of the policy issuance is barred. For these reasons, both the one- and three-year preemptive periods of La. R.S. 9:5606 apply in this case to bar plaintiff's cause of action against Perret.

4. There are no Independent Claims against State Farm.

Plaintiff names State Farm as a Defendant, but does not actually plead any causes of action against it. Plaintiff's allegations concerning State Farm are as follows:

I.

Made Defendants herein:

State Farm Insurance Company, a foreign insurance company authorized to do and doing business in Louisiana; [...]

IV.

Prior to leasing the residence located at 913 Old Metairie Drive, Metairie, Louisiana, Mr. Olivier had been a homeowner, and had insured against loss carried by wind and flood, through policies of insurance provided by State Farm through Mr. Perret's office. In this regard, Mr. Olivier has been a loyal State Farm customer for over twenty-five years.

[...]

VI.

As a result of the request, Mr. Perret, issued Mr. Olivier a standard policy of Renter's Insurance through State Farm. [ . . . ]

VIII.

After the Hurricane, Plaintiff promptly made a claim to State farm for the damage sustained to the contents of the leased premises. However, State Farm subsequently informed Mr. Olivier that, contrary to what he had been previously told, he did not have the same full coverage, as the policy of Renter's Insurance did not provide coverage for contents loss caused by flood.

IX.

Upon information and belief, State farm had, and has, the ability to provide a policy of flood insurance to a renter who desires coverage for the contents of the premises he or she leases. [...]

X.

Defendants held themselves out as experts in the field of insurance, and plaintiff employed them in reliance of their expertise to recommend and secure appropriate coverage for his residence.

XI.

As a result of the Defendants negligence and/or breach of duty, Plaintiff, Maurice Olivier, did not have coverage for loss of contents caused by flood damage ....

XII.

As a result of the Defendants negligence and/or breach of duty, Plaintiff has sustained extensive damages including but not limited to loss of furnishings and/or contents ....

Plaintiff does not plead that State Farm committed any act, error, or omission apart from what Plaintiff pleads against Perret. Plaintiff does not plead how State Farm was supposedly negligent. Plaintiff does not charge that State Farm, independent of Perret, was asked to obtain any insurance coverage for plaintiff. At best, plaintiff's allegations against State Farm are derivative of the allegations against Perret, though even that is being generous.

However, because Perret must be dismissed, either because he committed no negligence or because the claims against him are time-barred, State Farm must also be dismissed. Quite simply, if Perret is dismissed, there is no claim for relief remaining against State Farm.

#### **IV. Conclusion**

Plaintiff's lawsuit alleges an act of negligence against David Perret and his staff occurring at the time of his purchase of a renter's policy in March 2003. Plaintiff did not file suit within three years of that time. Plaintiff also did not file suit within one year of receiving the policy or within one year of receiving either renewal notice, any of which gave

him constructive notice that he had no flood insurance. The lawsuit against Perret is barred by the peremptive periods stated in La. R.S. 9:5606.

David Perret and his office committed no act of negligence, as established by the affidavit of Patty Dodgen. There is no genuine issue of material fact sufficient to deny summary judgement. However, even if plaintiff were able to introduce an issue of fact sufficient to prevent summary judgment on the negligence issue, the claims against Perret are still time-barred and summary judgment dismissing Perret on the issue of peremption would still be appropriate.

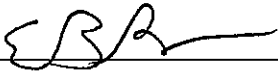
Further, as Plaintiff has stated no independent claim against State Farm, State Farm is entitled to dismissal as well.

WHEREFORE, Defendants David Perret, Sr., and State Farm Fire and Casualty Company prays that this court grant the Motion for Summary Judgment and dismiss them from this case with prejudice.

Respectfully submitted:

**CERTIFICATE OF SERVICE**

I do hereby certify that I have on this  
1st day of March, 2007,  
served a copy of the foregoing pleading on  
counsel for all parties to this proceeding, by  
mailing same by United States mail,  
properly addressed, and first class postage  
prepaid.

  
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