Judgment rendered September 30, 2015.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 50,116-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

AMANDA ADCOCK — Plaintiff-Appellant

Versus

SHANE WOOTEN, KELLER WILLIAMS REALTY PARISHWIDE PARTNERS & PARISHWIDE PARTNERS, LLC — Defendants-Appellees

* * * * *

Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 2013-3275

Honorable C. Wendell Manning, Judge

* * * * *

RICHARD L. FEWELL, JR. — Counsel for Appellant

BREITHAUPT, DUNN, DUBOS, SHAFTO & WOLLESON, LLC
By: P. Scott Wolleson
Russell Alan Woodard, Jr. — Counsel for Appellees

* * * * *

Before LOLLEY, PITMAN & GARRETT, JJ.

PITMAN, J.

Plaintiff Amanda Adcock appeals the judgment of the trial court denying her motion for summary judgment in a suit brought against Defendants, Shane Wooten, Keller Williams Realty Parishwide Partners and Parishwide Partners, LLC, based on unfair trade practices, fraud and misrepresentation in a real estate transaction, and granting Defendants' motion for summary judgment raising the issue of peremption and dismissing Plaintiff's suit. For the following reasons, we reverse the judgment of the trial court and remand for further proceedings.

FACTS

Plaintiff owned a home in West Monroe, Louisiana, mortgaged to JP Morgan Chase ("Chase"). She lost her job and was unable to make the monthly mortgage payments to Chase, which instituted foreclosure proceedings against her on August 3, 2011. She filed for Chapter 13 bankruptcy on November 11, 2011, to halt foreclosure and listed the home as a part of the bankruptcy estate. At the time she filed for bankruptcy, Plaintiff owed Chase $195,842.29.

In January 2012, Shane Wooten, a real estate agent with the local Keller Williams Realty agency, contacted Plaintiff about listing the home for sale with him and told her that it could be taken out of the bankruptcy estate.

In March 2012, Plaintiff wrote a letter to Chase to initiate a short sale process. Mr. Wooten was able to secure Chase's cooperation to have the residence removed from the bankruptcy estate; and, on April 16, 2012, an order was issued by the bankruptcy court removing it from the estate. The

bankruptcy court also ordered that, if the sale of the home exceeded the amount owed to Chase, Chase was to forward the proceeds to the bankruptcy trustee for distribution to Plaintiff's other creditors.

On June 22, 2012, Tracy Randall Ginn, the spouse of Jerri Ginn, who was a Keller Williams Realty employee, offered to buy Plaintiff's house for $185,000 plus $5,000 in closing costs. Plaintiff accepted that offer on June 25, 2012, and Mr. Wooten submitted the contract to Chase for its approval, which was required before the sale could be completed. Chase was slow to approve the contract, and the foreclosure proceedings continued, with a sheriff's sale being scheduled for October 10, 2012.

On the day of the scheduled sheriff's sale, Harold Book, a member of Alans, LLC, contacted Plaintiff personally and offered her $202,250 for her house. Plaintiff notified Mr. Wooten that she had been offered over $202,000 for her house, but he emailed her the next day, October 11, 2012, and advised her to reject the offer because the contract with Mr. Ginn was already pending. In that email, Mr. Wooten stated, "[U]nfortunately, we can only accept 1 offer at a time, we will have to reject until I know more on the primary offer." On October 12, 2012, Chase faxed a letter to Mr. Wooten approving the proposed short sale to Mr. Ginn.

The sale from Plaintiff to Mr. Ginn took place on October 19, 2012. Plaintiff alleged that Mr. Wooten gave her a check for $2,000 from his account just prior to the closing, although this payment to her is not accounted for anywhere on the HUD closing statement and obviously was not disbursed by the title company. At the closing, the payoff of

$167,593.76 for the first mortgage was made to Chase, and Mr. Wooten and Keller Williams Realty received a commission of $11,100 on the sale. That same day, at the same attorney's office, Mr. Ginn sold the property to Mr. Book, through Alans, LLC, for $202,000; and the proceeds from that sale, as reflected on the HUD-1 statement, were used to pay off Mr. Ginn's lender and the closing costs, with the remainder paid to Mr. Ginn.

On October 18, 2013, Plaintiff filed suit against Defendants alleging the above facts and asserting a claim against them under La. R.S. 51:1402, et seq., the Louisiana Unfair Trade Practices Act ("LUTPA"). She alleged that she had suffered an ascertainable loss of money as a result of the use or employment by another person of an unfair or deceptive method, act or practice. She further claimed that, as a result of Defendants' unethical conduct, she had suffered general and special damages from loss of profit as evidenced by the fact that Defendants immediately sold the property (the purchase of which they had just negotiated for $185,000) for $202,000 to the same person who had previously made that purchase offer to her. She also sought an award for attorney fees and costs, as well as treble damages in accordance with La. R.S. 51:1409.

Both Plaintiff and Defendants filed motions for summary judgment. Plaintiff's motion asserted that there are no genuine issues of material fact and that she is entitled to judgment as to both liability and damages. In support of her motion, she offered her own affidavit; the affidavit of Harold Book; a copy of the email wherein Mr. Wooten advised her to reject Mr. Book's offer; the settlement statements and deeds for the sale of the

house from her to Mr. Ginn and then from Mr. Ginn to Alans, LLC; and the records of the Louisiana Secretary of State showing Mr. Wooten's connection to Ouachita Capital, LLC, which financed Mr. Ginn's purchase of her property.

Plaintiff argued that these documents establish that Defendants are guilty of fraud, misrepresentation, deception and unethical conduct and prove that there are no genuine issues of material fact as to the amount of damages she is owed, asserting that, had she sold her house to Mr. Book for his offer of $202,000 (assuming the payoff to Chase was $167,593.76), she would have received a profit of $22,286.24. She also asserted the amount that would have been assessed as treble damages if they were so awarded.

Defendants filed a motion for summary judgment in opposition seeking judgment declaring that Plaintiff was not entitled to the damages sought for a variety of reasons, including that she would have been unable to prove the facts necessary for her to recover under the LUTPA. They also raised the issue of peremption of Plaintiff's claim and asserted that any conceivable right of action under the LUTPA for any of Defendants' acts occurring before October 18, 2012, was extinguished and barred by peremption. Specifically, Defendants argued that Plaintiff had attached to her petition a copy of the email from Mr. Wooten, which, arguably, established her cause of action as arising on October 11, 2012. They asserted that her petition was not filed until October 18, 2013, and, therefore, claimed her cause of action had perempted under the LUTPA.

The trial court held a hearing on the cross-motions for summary judgment and found that the exception of peremption was properly raised and agreed with Defendants that Plaintiff's suit was perempted, finding that the one-year period set forth in La. R.S. 51:1409(E) began to run on October 11, 2012, the date Mr. Wooten sent the email to Plaintiff telling her to reject Mr. Book's offer, instead of on October 19, 2012, the date of the two sales of the property. Having found the matter perempted, the trial court pretermitted any "incrimination with regard to the competing motions for summary judgment" and sustained the exception, dismissing Plaintiff's claims at her cost.

Plaintiff appeals the denial of her motion for summary judgment and the grant of Defendants' motion for summary judgment based on peremption and the subsequent dismissal of the case at her cost.

DISCUSSION

The sole issue presented by this case is whether Plaintiff's cause of action under the LUTPA perempted as a result of the suit being filed more than one year from the date of Mr. Wooten's email to Plaintiff advising her that the second offer on the property could not be accepted while the first offer from Mr. Ginn was still awaiting approval by Chase. The transmission of this email was cited by Plaintiff as one act upon which her LUTPA claim was based. However, the transmission of the email was not the only act that may have caused her damage. Plaintiff also argued that she was damaged when Defendants completed the second sale on October 19, 2012,

of the same property, but at a much higher price and to a person who had already approached Plaintiff with the higher offer.

Peremption is defined in La. C.C. art. 3458 as a period of time during which a right can be exercised and provides that "[u]nless timely exercised, the right is extinguished upon the expiration of the peremptive period." In *Cote' v. Hiller*, 49,623 (La. App. 2d Cir. 2/27/15), 162 So. 3d 608, it is explained that, although prescription prevents the enforcement of a right by legal action, it does not terminate the natural obligation; peremption, however, extinguishes or destroys the right.

La. R.S. 51:1409 establishes causes of action under the LUTPA and defines the time limits within which actions must be brought. It states in pertinent part as follows:

> A. Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages. If the court finds the unfair or deceptive method, act, or practice was knowingly used, after being put on notice by the attorney general, the court shall award three times the actual damages sustained. In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney fees and costs. Upon a finding by the court that an action under this Section was groundless and brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorney fees and costs.
>
> * * *
>
> E. The action provided by this section shall be prescribed by one year running from the time of the transaction or act which gave rise to this right of action.

Although the LUPTA states that the action provided by the section "shall be prescribed by one year running from the time of the transaction or act which gave rise to this right of action," the language has been interpreted as creating a peremptive, rather than a prescriptive period. See *Glod v. Baker*, 04-1483 (La. App. 3d Cir. 3/23/05), 899 So. 2d 642, *writ denied,* 05-1574 (La. 1/13/06), 920 So. 2d 238. The *Glod* court noted that the general rule is that peremption, as opposed to prescription, cannot be interrupted or suspended; and it, therefore, found that the time period was not tolled or suspended by the alleged continuing tort. The *Glod* court stated:

> The Civil Code itself does not contemplate any exceptions to this rule. Louisiana Civil Code Article 3461 states that "[p]eremption may not be renounced, interrupted, or suspended." The third circuit refused to relax the strict construction of peremption in *Dauterive Contractors, Inc. v. Landry & Watkins*, 01-1112 (La. App. 3d Cir. 3/13/02), 811 So. 2d 1242. Dauterive argued that in case of a continuous tort, prescription does not begin until the conduct causing the damage stops. The third circuit agreed that although "continuous tortious conduct ... may suspend prescription, we note again that the pertinent time limitation in this case is peremptive. Peremption may not be suspended." Id. at 1259 (emphasis added); see also *Bel v. State Farm Mut. Auto Ins*. Co., 02-1292, p. 7 (La. App. 1st Cir. 2/14/03), 845 So. 2d 377, 382 (citing *Saia v. Asher*, 01-1038 (La. App. 1st Cir. 7/10/02), 825 So. 2d 1257), *writ denied*, 03-733 (La. 5/30/03), 845 So. 2d 1057 (finding that where a "time limitation ... is peremptive, and the principle of continuing torts is a suspensive principle, ineffective against the effects of peremption, we find the continuing tort doctrine inapplicable").

Although typically asserted through the procedural vehicle of the peremptory exception, the defense of prescription or peremption may also be raised by motion for summary judgment. *Hogg v. Chevron USA, Inc.*, 09-2635 (La. 7/6/10), 45 So. 3d 991.

Having reviewed this record, we find the trial court was wrong in determining that the LUTPA cause of action perempted one year from the date of the email. We find that any alleged ascertainable loss of money to Plaintiff, and any alleged unfair or deceptive acts or practices, occurred on the date of the two closings, October 19, 2012, which is when the monies were disbursed. If the second sale had not occurred, there would not have been a cause of action at all. Her petition filed on October 18, 2013, was timely.

CONCLUSION

For the foregoing reasons, the judgment of the trial court granting the motion for summary judgment in favor of Defendants, Shane Wooten, Keller Williams Realty Parishwide Partners and Parishwide Partners, LLC, and against Plaintiff, Amanda Adcock, finding that her cause of action asserted under the Louisiana Unfair Trade Practices Act had perempted, is hereby reversed and this matter is remanded for further proceedings. Costs of this appeal are assessed to Defendants, Shane Wooten, Keller Williams Realty Parishwide Partners and Parishwide Partners, LLC.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.