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CONSTRUCTION INDEMNITY CLAIM **GONE BEFORE IT COULD EXIST**

Homeowners, Charles and Charlene Ebinger, took possession of their new home in April of 1997, the certificate of occupancy for which was filed that month. In 2003, the Ebingers filed suit against the general contractor, Venus Construction Corporation ("Venus"), for structural defects of the foundation, cracks in the Sheetrock, and cracks in the tile and wood floors. In 2006, Venus filed a third party demand against Post-Tension Slabs, Inc. ("Post-Tension"), a foundation subcontractor, and Roy Carubba, an engineer (who worked on the foundation). Mr. Carubba filed an exception of peremption, based on La. R.S. 9:5607, which was enacted in 2003 and contained a five-year preemptive period for suits against engineers. Trial court granted the exception, as the third party demand was not filed until nine years after the home was completed. That decision was affirmed in Ebinger v. Venus Construction Corp., 08-379 (La. App. 3 Cir. 10/01/08), 995 So.2d 1224, and no review was sought by the Louisiana Supreme Court. However, this case concerns Venus' third party demand against Post-Tension. The trial court granted Post-Tension's exception of peremption (under La. R.S. 9:2772), but the Third Circuit reversed, holding that the ten-year version of that statute applied. Therefore, the third party demand, filed in 2006, was filed a few months before the ten-year preemptive period had lapsed. The Louisiana Supreme Court reviewed the case and held the claim was preempted. 2010-2516 (La. 07/01/11). [The Ebingers filed suit against Venus under the New Home Warranty Act, La. R.S. 9:3141, which supersedes the peremption statutes cited herein as to the general contractor, Venus.]

Peremption is very different when compared to statutes of limitation or prescription. Peremption establishes the time period during which the cause of action exists, as opposed to the time period during which a claim may be brought (which is prescription or statute of limitations). When the preemptive period has lapsed, it cannot be renounced and the cause of action ceases to exist. (La. C.C. Art. 3458.) Prescription can be renounced, interrupted, and/or suspended (La. C.C. 3464). Secondly, nothing may interrupt or suspend the running of a preemptive period (La. C.C. Art. 3461), although the cause of action is preserved by timely filing suit. Naghi v. Brener, 08-2527 (La. 06/26/09), 17 So.2d 919, 926. Finally, prescription usually runs from the time

plaintiff could reasonably know he has a claim [Gremillion v. Travelers Indemnity Co., 256 La. 974, 204 So.2d 927 (La. 1970)], while the preemptive period in this case runs from occupancy of the building.

The claim against Post-Tension was controlled by La. R.S. 9:2772, which provides that no action against a building contractor can be brought after the applicable preemptive period has run. This statute has broad application, because its specific language extends to "... every demand, whether brought by direct action or for contribution or indemnity or by third party practice. . . ."

La. R.S. 9:2772 was originally enacted in 1964 with a ten-year preemptive period. There have been two amendments to the statute which shortened the preemption period. In 1999, the period was shortened from ten years to seven years. That act specifically stated that it only applied to contracts entered into after the effective date of the act, August 15, 1999. By that language, this amendment could not apply to this case, as the contract and construction took place between 1995 and 1997. However, the statute was also amended in 2003 to again shorten the period from seven years to five years, but this act did not contain a similar "prospective only" clause or limitation.

The court analyzed the nature of Venus' indemnity claim to determine whether or not the ten-year preemptive period (which was in place when the work was done) or the five-year preemptive period (which was in place when suit was filed and when the 2006 third party demand was filed) applied. No claim of indemnification existed until the 2006 third party demand was filed by Venus against Post-Tension. In short, the most recent statute, the five-year preemptive period applied, because it was the statute in place at the time the indemnity claim occurred through the filing of the third party demand. Regardless which version of the statute is used, the beginning point for the application of the statute, as stated in La. R.S. 9:2772(a)(1)(b), is "... after the improvement has been thus occupied by the owner," which none of the amendments changed. As stated, the Ebingers occupied the house in 1997, so that is when the preemptive period began to run.

There is an old adage that indemnification rights don't exist until the party seeking such pays a settlement or is cast in judgment. Reggio v. E.T.I., 07-1433 (La. 12/12/08) 15 So.3d 951, 957. While that may be true with many other types of claims, it is not true if the preemptive statute provides that the preemptive period has run before the claim ever existed. Naghi, supra. In this case, the preemptive period was five years, because that was the statute at the time Venus sought indemnification from Post-Tension. The preemption period began to run at the time the Ebingers occupied their home in 1997. The period lapsed sometime in 2002. Therefore, the cause of action for indemnity no longer existed by the time the original petition was filed (2003) or at the time the third party demand was filed (2006). The Louisiana Supreme Court reversed the Third Circuit Court of Appeal (which had applied the ten-year prescriptive period), and reinstated the district court that had sustained the exception of preemption applying the shorter preemptive period. With preemption, the cause of action no longer existed by the time Venus sought to enforce it.

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