

SUPREME COURT OF LOUISIANA

Ebinger v. Venus Constr. Corp.

65 So. 3d 1279 (La. 2011) · No. 2010-C-2516 · Decided July 1, 2011

SUMMARY

The Louisiana Supreme Court held that the five-year peremptive period in the 2003 version of La. R.S. 9:2772 applied to a construction company's third-party indemnity demand against a subcontractor. The court concluded that the indemnity right was not vested when the amendment became effective because it depended on the underlying litigation and a judgment against the construction company. The court reversed the court of appeal and reinstated the trial court's judgment finding the third-party demand perempted.

CASE DETAILS

COURT	Supreme Court of Louisiana
WRITING FOR THE COURT	Kimball, C.J.
JURISDICTION	Louisiana
DECIDED	July 1, 2011
DOCKET	2010-C-2516
DISPOSITION	reversed
PROCEDURAL POSTURE	Venus Construction Corporation sought review of a Louisiana Third Circuit Court of Appeal decision reversing the trial court's grant of Post-Tension Slabs, Inc.'s exception of peremption. The Supreme Court of Louisiana granted certiorari to resolve the applicability of successive amendments to La. R.S. 9:2772 and an apparent conflict among the courts of appeal.
STANDARD OF REVIEW	De novo review of the legal issues involving statutory interpretation, retroactive application, peremption, and whether the indemnification right was vested.
PRECEDENTIAL VALUE	Published Louisiana Supreme Court opinion; precedential.
PARTIES	Venus Construction Corporation v. Post-Tension Slabs, Inc.

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QUESTIONS PRESENTED

1. When did the preemptive period under La. R.S. 9:2772 begin for Venus's indemnification claim?
2. Which version of La. R.S. 9:2772 governed Venus's third-party demand—the ten-year period in the 1997 version or the five-year period enacted by the 2003 amendment?
3. Was Venus's indemnification right vested before the 2003 amendment became effective?
4. Was Venus's third-party demand against Post-Tension Slabs preempted?

HOLDINGS

1. The preemptive period under La. R.S. 9:2772 began when the owners took possession of the residence or recorded acceptance of the work; because no recorded acceptance appeared in the record, the court assumed that the period began with issuance of the certificate of occupancy on April 22, 1997.
2. The five-year preemptive period enacted by the 2003 amendment to La. R.S. 9:2772 applies to Venus's third-party demand.
3. Applying the 2003 amendment to Venus's third-party demand did not impermissibly impair a vested right because Venus had no vested indemnification right when the amendment became effective.
4. Venus's indemnification cause of action did not accrue, and its indemnification right did not vest, merely when the homeowners discovered construction damage or filed suit; the right remained contingent until Venus was cast in judgment.

KEY QUOTATIONS

“Although cracks in the Ebingers' brick veneer may create a cause of action for the homeowners, it did not create Venus' cause of action for indemnity.” (1286)

“A non-existent claim cannot be adversely affected by a change in the law.” (1287)

“Until Venus has been cast in judgment, it has not suffered damages that can be recovered from Post-Tension through indemnity because liability has not been established.” (1288)

FACTUAL BACKGROUND

Charles and Charlene Ebinger contracted with Venus Construction Corporation in 1995 to build a home in Lafayette, Louisiana, and obtained a certificate of occupancy on April 22, 1997. In 2003, they sued Venus under the New Home Warranty Act, alleging that foundation defects caused cracks and other damage. In September 2006, Venus filed a third-party demand for indemnification against Post-Tension Slabs, the subcontractor that supplied the foundation. Post-Tension asserted that the demand was preempted under the five-year period established by the 2003 amendment to La. R.S. 9:2772.

PROCEDURAL HISTORY

The Ebingers sued Venus in 2003 for alleged construction defects in their home. Venus filed a third-party demand for indemnification against Post-Tension Slabs in September 2006. The trial court granted Post-Tension's exception of peremption under La. R.S. 9:2772. The Third Circuit reversed, holding that the ten-year period in the 1997 version of the statute applied. The Supreme Court reversed the court of appeal and reinstated the trial court's judgment.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The Supreme Court reinstated the trial court's judgment granting Post-Tension Slabs, Inc.'s exception of peremption. No further remand instruction was stated.

CASES CITED

- Bewley Furniture Co., Inc. v. Maryland Casualty Co., 285 So. 2d 216 (La. 1973)
- In re Succession of Faget, 53 So. 3d 414 (La. 2010)
- M.J. Farms, Ltd. v. Exxon Mobil Corp., 998 So. 2d 16 (La. 2008)
- Lott v. Haley, 370 So. 2d 521 (La. 1979)
- Elevating Boats, Inc. v. St. Bernard Parish, 795 So. 2d 1153 (La. 2001)
- Bourgeois v. A.P. Green Indus., Inc., 783 So. 2d 1251 (La. 2001)
- Owens v. Martin, 449 So. 2d 448 (La. 1984)
- Cole v. Celotex Corp., 599 So. 2d 1058 (La. 1992)
- Sawicki v. K/S Stavanger Prince, 802 So. 2d 598 (La. 2001)
- Smith v. Ly, 498 So. 2d 128 (La. App. 5 Cir. 1986)
- Claiborne v. Rheem Mfg. Co., 579 So. 2d 1199 (La. App. 5 Cir. 1991)
- Bailey v. Khoury, 891 So. 2d 1268 (La. 2005)
- Naghi v. Brener, 17 So. 3d 919 (La. 2009)
- Nassif v. Sunrise Homes, 739 So. 2d 183 (La. 1999)
- Howard v. Baker Heritage Hosiery, 683 So. 2d 827 (La. App. 5 Cir. 1996)
- Burns v. McDermott, Inc., 665 So. 2d 76 (La. App. 1 Cir. 1995)
- Ebinger v. Venus Constr. Corp., 995 So. 2d 1224 (La. App. 3 Cir. 2008)
- Metairie III v. Poche Constr., Inc., 49 So. 3d 446 (La. App. 4 Cir. 2010)
- Ebinger v. Venus Constr. Corp., 48 So. 3d 375 (La. App. 3 Cir. 2010)