MUSLOW OIL AND GAS, INC. : NUMBER: 500,133

VERSUS : FIRST JUDICIAL DISTRICT COURT

BIRD, INC., CERTAINTEED

CORPORATION, GS ROOFING

PRODUCTS COMPANY, INC.,

SAINT GOBAIN CORPORATION,

ROASLIE MANUEL AND JOHN COLVIN : CADDO PARISH, LOUISIANA

**REASONS FOR JUDGMENT ON**

**MOTIONS FOR SUMMARY JUDGMENT**

 The Court has thoroughly considered the Motion for Summary Judgment filed by Bird, Inc., Certaineed Corporation, GS Roofing Company, Inc., and Saint Gobain Corporation (“Bird”) on January 7, 2011; the Motion for Summary Judgment filed by Rosalie Manuel (“Manuel”) on January 18, 2011; the oppositions filed by Muslow Oil and Gas, Inc. (“Muslow”) and Louisiana Department of Transportation and Development (“DOTD”) on April 1, 2011; the Reply Memorandum filed by Bird on April 7, 2011; oral arguments of counsel held April 11, 2011 and applicable law. For reasons which follow, this Court concludes that the Motions for Summary Judgment should be denied.

“Delictual actions are subject to a liberative prescription of one year.” La. C.C. art. 3492. This prescriptive period commences when the owner of an immovable “acquired, or should have acquired, knowledge of the damage.” La. C.C. art. 3493. Prescription may be suspended by the jurisprudential doctrine of contra non valentem. There are four situations in which contra non valentem may prevent the running of prescription: (1) a legal cause prevented the filing of suit, (2) some condition coupled with the proceeding that prevented the filing of suit, (3) the defendant committed some act to prevent filing of suit, and (4) the cause of action was not discovered by the plaintiff. *Marin v. Exxon Mobil*, 2009-2368, p. 6 (La. 10/19/10); 48 So.3d 234, 245. Prescription may also be suspended if the delictual action complained of constitutes a continuing trespass or continuing tort. *South Central Bell Telephone Company v. Texaco, Inc.*, 81-3285 (La. 6/21/82); 418 So.2d 531.

1. Actual or Constructive Knowledge of Muslow

The ‘discovery rule’, encompassed by La. C.C. art. 3493 and the fourth category of contra non valentem, suspends prescription until the plaintiff knew, or reasonably should have known of the damage. *Marin, supra* at245. Regarding property damage claims, such as those made here, knowledge sufficient to commence the running of prescription is information “which, if pursued, will lead to the true condition of things.” *Marin, supra* at 246. Further, “a plaintiff will be deemed to know what he could by reasonable diligence have learned.” *Id*. The reasonableness of the plaintiff’s action or inaction must be determined “in light of his education, intelligence and the nature of the defendant’s conduct.” *Id.*

Bird alleges that Muslow gained knowledge of the migration of roofing waste materials onto the Muslow property prior to 1990. Thomas Bozeman, a pasture lessee of Muslow until the 1990s, discovered that the shingle pile had pushed down the fence between the Muslow and Manuel properties and that some shingles had migrated past the fence line. He “considered it a very minor nuisance”[[1]](#footnote-1) but reported the encroachment, as well as his own repair of the fence, to James Muslow. He is unable to recall when this report was made, stating “I don’t know what year that was…I really don’t remember.”[[2]](#footnote-2) The time or contents of this conversation cannot be confirmed as Mr. Muslow is now deceased.

The Louisiana Supreme Court’s most recent ruling on constructive knowledge is in *Marin v. Exxon Mobil Corp*. In that case the Court found that there was sufficient constructive knowledge to place the property owners on notice of possible environmental contamination. One of the plaintiff landowners, Clyde Breaux, approached Exxon with the knowledge that Exxon had dumped waste into the open pits for at least 40 years. He also knew that sugar cane would not grow on the areas surrounding the pits. In 1987 Mr. Breaux requested that Exxon remediate the property. Some time later Exxon informed Mr. Breaux that the pits could not be cleaned up. *Marin, supra* at 248. These notifications are far more obvious evidence of environmental contamination than Mr. Bozeman’s alleged statements in the case at bar and *Marin* is clearly distinguishable.

Assuming that Mr. Bozeman did, in fact, report the migration prior to 1990, Muslow’s failure to investigate further was reasonable under the circumstances. The affected area of the property is covered by thick vegetation and was used primarily for hunting and grazing cattle.[[3]](#footnote-3) A survey of the entire property was not conducted until 2005, when Muslow needed to determine the exact location of boundary lines.[[4]](#footnote-4) In 2005 the shingles had encroached at least 50 feet onto the property[[5]](#footnote-5), rather than the “two to three or four feet”[[6]](#footnote-6) reported by Mr. Bozeman. Further Mr. Bozeman has stated that he informed Mr. Muslow that the fence had been repaired, so Mr. Muslow would have had no reason to believe that any migration of shingles would continue.

1. Continuing Trespass/Continuing Tort

“When the tortious conduct and resulting damages continue, prescription does not begin until the conduct causing the damage is abated.” *South Central Bell Telephone Co., supra.* at 533. There is a distinction between damages caused by multiple acts and damages caused by ongoing actions. To make this determination, the Court must look to the operating cause of the complained of injury to determine if there were “overt, persistent, and ongoing acts” on the part of defendants. *Hogg v. Chevron USA, Inc.*, 2009-2632 (La. 7/6/10); 45 So.3d 991, 1003, 1005. Courts have held that the depositing of waste materials is the operating cause of damage, rather than the failure to remove it. *Hogg, supra.* at 1005.

For example, in *Crump v. Sabine River Authority*, 98-2326 (La. 629/99); 737 So.2d 720, the Louisiana Supreme Court found that the continued presence of a canal on the property of a third party, which drained water from a lake on plaintiff’s property, was not a continuous tort and that the operating cause of the injury was the dredging of the canal. Following the decision in *Crump*, the Third Circuit Court of Appeal found that the failure to remove oilfield waste was not a continuing tort where the deposit of waste had ceased. *LeJeune Brothers, Inc. v. Goodrich Petroleum*, 06-1557 (La. App. 3 Cir. 11/28/07); 981 So.2d 23. In *Hogg*, the Court found that the “presence of gasoline on plaintiff’s property is the continuing effect of prior wrongful conduct,”

and not a continuing tort, since there were no allegations of leaking after the tanks were replaced. *Supra.* at 1006. *Hogg* was followed by *Marin*, which held that the continued migration of groundwater pollution caused by the disposal of oilfield waste was not a continuing tort because the oilfield pits on plaintiff’s land had been closed, thus terminating the operating cause of injury. *Marin, supra.* at 254.

It is undisputed that Bird has not placed any waste materials on the Manuel property since 1970. However, in the Petition and First Amended Petition, Muslow claims that the migration of waste from the Manuel property onto its property is on-going. This continued migration is evidenced by the great discrepancy in the amount of waste present between Mr. Bozeman’s allegations and the observations made by Mr. Bowman during his survey. The deposits of roofing waste materials, placed by Bird, remain on the Manuel property and continue to slide down a hill onto the adjacent Muslow property.[[7]](#footnote-7) These allegations may be distinguished from the previously discussed cases in that the actions complained of, migration of waste from the Mauel property, has not abated.

This case is more similar to cases in which the Court found that remaining presence of garbage on plaintiff’s land constituted a continuing trespass “so long as the offending object remains.” *Patout v. City of New Iberia*, 2001-0151 (La.App. 3 Cir. 4/3/02); 813 So.2d 1248, 1250. The continued flooding of plaintiff’s land due to “constant interference” with drainage has been held to constitute a continuing tort. *Cooper v. Louisiana Department of Public Works*, 2003-1074 (La. App. 3 Cir. 3/3/04); 870 So.2d 315. In *South Central Bell Telephone* the Court found, and the Supreme Court later upheld, that the operating cause was the leaking storage tank and that prescription began to run when the tanks were replaced. *Hogg, supra.* at 1004. In *Hogg, Marin* and *Wagoner*, the Courts found that prescription ran until the leakage ceased. Similarly, in this case the depositing or migration of shingles onto the Muslow property (analogous to the leaking in groundwater contamination cases) has not ceased or abated.

In conclusion, this Court finds that there exists a genuine issue of material fact concerning when Muslow gained actual or constructive knowledge of the encroachment from the

Manuel property. Bird relies solely upon the testimony of Mr. Bozeman, who is unsure of when or what he told Mr. Muslow. This testimony cannot be corroborated because the only other party to the alleged conversation is deceased. Further, there exists a genuine issue of material fact as to whether the encroachment onto the Muslow property continues or has abated. Mr. Bozeman’s report and the findings of the surveyor differ as to the amount of encroachment, which indicates that the migration from the Manuel property continues, thereby constituting a continuing tort. Clearly, the movers are not entitled to summary judgment as a matter of law.

For reasons assigned, the Court concludes that both motions for summary judgment should be denied.

Counsel shall submit formal Judgment in accordance with La. Dist. Ct. R. 9.5.

Signed this 27th day of April 2011 in Shreveport, Caddo Parish, Louisiana.

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 SCOTT J. CRICHTON

 DISTRICT JUDGE

DISTRIBUTION:

Guy Wall and John Frazier, counsel for Muslow Oil and Gas, Inc.

Kenneth Henke and Lawrence Marino, counsel for Louisiana Department of Transportation and Development

Al Hand and Jason Green, counsel for Bird, Inc., Certainteed Corporation, GS Roofing Products Company, Inc. and Saint Gobain Corporation.

Byron Richie, counsel for Rosalie Manuel

1. Bozeman Depo, pg. 18, line 11 [↑](#footnote-ref-1)
2. Bozeman Depo, pg. 19, line 1-2 [↑](#footnote-ref-2)
3. Weiss Depo, pg. 12, lines3-6 [↑](#footnote-ref-3)
4. Bowman Depo, pg. 8, line 11 [↑](#footnote-ref-4)
5. Bowman Depo, pg. 14, line 13 [↑](#footnote-ref-5)
6. Bozeman Depo, pg. 28, line 11 [↑](#footnote-ref-6)
7. Jorden Testimony, Hearing Transcript, pg. 12 [↑](#footnote-ref-7)