

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

CA 06-1520

MOON VENTURES, LLC

VERSUS

KPMG, LLP, ET AL.

EZELL, J., dissenting.

I respectfully disagree with the majority opinion and, for the following reasons, would affirm the decision of the trial court.

The majority correctly notes that this case involves application of La.R.S. 9:5604 as well as legislative enactments found in Title 37 of the Revised Statutes, or the “Louisiana Accountancy Act.” However, I disagree with the conclusion reached as a result of their interpretation of these statutes. Louisiana Revised Statute 9:5604, which contains the time limitations applicable to actions concerning professional accounting liability, provides in pertinent part:

A. No action for damages against any accountant duly licensed under the laws of this state, or any firm as defined in R.S. 37:71, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide professional accounting service shall be brought unless filed in a court of competent jurisdiction **and proper venue** 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.

B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. . . . **The one-year and three-year periods of limitation provided in Subsection A of this Section are preemptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.**

Louisiana Revised Statute 37:102 provides, in pertinent part:

A. All claims against certified public accountants or firms, other than claims validly agreed for submission to a lawfully binding arbitration procedure, shall be reviewed by a public accountant review panel established pursuant to R.S. 37:109.

B. Review of a claim by a public accountant review panel shall not take place unless, within the time limitations provided for in R.S. 9:5604, a claimant files with the society a written request for review of the claim and pays to the society a one hundred dollar filing fee to defray the society's administrative costs incurred in performing the duties imposed on it by this Part.

Louisiana Revised Statute 37:105, as it existed at the time of filing, provides:

A. Except as provided in this Part, **no action against a certified public accountant or firm or his insurer may be commenced in any court before the claimant's request for review has been presented to a public accountant review panel established pursuant to this Part and the panel has issued a written opinion.**

In the same year that the legislature enacted La.R.S. 37:102 and La.R.S. 37:105, it enacted La.R.S. 37:125, which provides:

A claimant's filing with the society of a written request for review and paying to the society of the one hundred dollar filing fee in accordance with R.S. 37:102(B) shall be deemed that claimant's exercise of his right to seek judicial cognizance of the claim or claims described in the written request for review for purposes of R.S. 9:5604.

...

As set forth in *Ascension School Employees Credit Union v. Provost, Salter, Harper & Alford, L.L.C.*, 04-1227, p. 11-12, (La.App. 1 Cir. 6/10/05), 916 So.2d 252, 258-259 (footnotes omitted):

The time periods that govern actions for professional accountant liability are set forth in LSA-R.S. 9:5604 and are preemptive. Thus, if the right to bring such a claim is not exercised within those time periods, the claim is extinguished. *See* LSA-C.C. art. 3468. Overlaid on the requirements of LSA-R.S. 9:5604 are those set forth in Title 37 relative to review panels. Applying principles of statutory construction to harmonize the applicable statutes, we turn to LSA-R.S. 37:125. Therein, the legislature explicitly provided that a claimant is deemed to have exercised its right to bring a claim for professional accountant liability and prevents the extinguishing effect of preemption when it files a request for review by a review panel. Thus, we interpret the applicable statutes to provide that preemption under LSA-R.S. 9:5604 is avoided when a claimant files a request for review of its claim of professional accounting liability within one year of the negligent act, or one year of

discovering the negligent act, but not more than three years after the negligent act. *See* LSA-R.S. 9:5604; LSA-R.S. 37:102; LSA-R.S. 37:125.

Moon Ventures did not and has never filed a request for review of its claim of professional accounting liability. Accordingly, it has never exercised its right to bring a claim under Title 37. Thus, it has failed to avoid preemption under La. R.S. 9:5604. Moon Ventures tries to circumvent this fact by claiming KPMG's action in filing an answer to the suit instead of an exception of prematurity precludes the assertion of an exception of preemption. It claims, and the majority agrees, that KPMG waived its right to the panel by failing to assert the exception of prematurity. I disagree.

Moon Ventures' main claim is that the review panel requirement, and therefore, the exception of preemption, were waived due to the lack of an exception of prematurity. This argument is based mainly on language in *Solow v. Heard*, 05-1028, p.4-5, (La.App. 4 Cir. 4/12/06), 937 So.2d 875, 878, *writs denied*, 06-1680 (La. 10/6/06), 938 So.2d 80, stating that "[t]he jurisprudence has recognized that the parties may waive the panel by failing to assert a dilatory exception of prematurity timely as required by La. C.C. P. art. 926(B), which states '[a]ll objections which may be raised through the dilatory exception are waived unless pleaded therein.'" (Second alteration in original). The *Solow* court cites *Saia v. Asher*, 01-1038 (La.App. 1 Cir. 7/10/02), 825 So.2d 1257 for this premise. However, the language in *Saia* this refers to is a mere footnote stating:

La. R.S. 40:1299.39.1 provides a similar provision for any claims against a state health care provider in that they must be brought before a medical review panel before suit may be commenced in a court. This court and the Louisiana Supreme Court have held the dilatory exception of prematurity is the proper procedural mechanism for a qualified health care provider to invoke when a medical malpractice plaintiff has failed to submit the claim for decision by a medical review panel before filing suit against the provider. *See Spradlin v. Acadia-St. Landry Medical*

Foundation, 98-1977, p. 4 (La.2/29/00), 758 So.2d 116, 119. La C.C.P. art. 926(B) states, “All objections which may be raised through the dilatory exception are waived unless pleaded therein.” The parties have not raised this objection and it is waived.

Id. At 1259, fn 3.

I feel that this language dealing with the Medical malpractice Act (MMA) indicates that the exception of prematurity is waived, not the review panel. Additionally, the Fourth Circuit cases of *Wesco v. Columbia Lakeland Medical Center*, 00-2232 (La.App. 4 Cir. 11/14/01), 801 So.2d 1187, *writs denied*, 01-3304 (La. 3/8/02), 811 So.2d 884, and *Farve v. Jarrot*, 04-1424 (La.App. 4 Cir. 10/13/04), 886 So.2d 594, *writs denied*, 05-7 (La. 3/11/05), 896 So.2d 74, which are more recent than *Saia*, stand for the premise that, based on *LeBreton v. Rabito*, 97-2221 (La.7/8/98), 714 So.2d 1226, in the context of the MMA, a suit filed before a review panel is requested is premature even if no exception of prematurity is filed, and that the failure to file the exception of prematurity does not prevent the assertion of prescription, or here, peremption.

While KPMG did, in fact, waive its right to assert an exception of prematurity, it did not waive the right to the review panel, which may only be waived “[b]y written agreement of both parties.” La.R.S. 37:107. Nor did KPMG waive its right to assert its exception of peremption, which may be raised by a party or by a court “at any time prior to final judgment.” La. C.C. art. 3460. Because Moon Ventures failed to file its complaint with the review panel as required by Title 37 within the three years set out by La.R.S. 9:5604, its claims against KPMG are preempted. Accordingly, I feel the trial court committed no error in its ruling and its decision should be affirmed.

I respectfully dissent.