NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0472

JAMES CARINDER; PAUL AND GWEN GASSER; RONALD AND JUDITH LAICHE; VINCENT J. LIUZZA, III; ANDY AND ISABEL MESSINA; MICHAEL AND CATHY PULASKI; AND RUTH TUFTS

VERSUS

BASF CORPORATION; MASTER WALL, INC.; McMATH CONSTRUCTION, INC.; COVINGTON LAND, LLC; JA-ROY EXTERMINATING SERVICES OF ST. TAMMANY, INC.; MARINER'S ISLAND CONDOMINIUM ASSOCIATION; GLEN DUPUY; COLONY INSURANCE COMPANY; GEMINI SERVICES, INC.; PIAZZA & ASSOCIATES, INC.; AMERICAN CASUALTY COMPANY OF READING, PA; AND ZURICH NORTH AMERICA

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 2007-11478, Division "D"
Honorable Peter J. Garcia, Judge Presiding

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BEFORE: WHIPPLE, PARRO, AND GUIDRY, JJ.

Judgment rendered September 10, 2010

PARRO, J.

McMath Construction, Inc. (McMath) appeals a judgment sustaining an exception raising the objection of *res judicata* and dismissing its cross-claim against Colony Insurance Company (Colony). For the following reasons, we reverse the judgment and remand.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs in this case are the purchasers of all seven of the condominium units in the Mariner's Island Condominium complex in Mandeville, on which McMath was the general contractor during construction. They filed suit in March 2007, naming a number of defendants, including McMath and Glen Dupuy, one of McMath's subcontractors who had applied a synthetic stucco coating to the exterior of the condominiums. During the time period when Dupuy was working on the condominiums, he was insured by Colony under a commercial general liability policy. The plaintiffs in this suit alleged the stucco material was defective and was defectively installed, allowing water intrusion that caused severe damage to the interior and exterior structures of their condominium units.

The plaintiffs' claims against Dupuy under the New Home Warranty Act, for breach of contract, and for general negligence were eventually dismissed on motions for summary judgment. However, McMath had filed a cross-claim against Dupuy and Colony, which remained a part of the lawsuit, seeking indemnity from them if the plaintiffs' claims resulted in a judgment against McMath. In response to that claim, Colony filed an exception raising the objection of *res judicata*, based on this court's judgment in McMath Constr. Co., Inc. v. Dupuy, 03-1413 (La. App. 1st Cir. 11/17/04), 897 So.2d 677 (McMath I), writ denied, 04-3085 (La. 2/18/05), 896 So.2d 40. The district court sustained the exception in a judgment signed November 16, 2009, dismissing McMath's cross-claim against Colony, and this appeal followed.

APPLICABLE LAW

Louisiana Revised Statute 13:4231 provides the general principles regarding *res judicata*, as follows:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

Thus, in order for *res judicata* to preclude a second action, the following elements must be satisfied: (1) the first judgment is valid; (2) the first judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation. North American Treatment Systems, Inc. v. Scottsdale Ins. Co., 05-0081 (La. App. 1st Cir. 8/23/06), 943 So.2d 429, 439, writs denied, 06-2918 and 06-2803 (La. 2/16/07), 949 So.2d 423 and 424. A cause of action that arises after the rendition of the final judgment in the first litigation could not have been asserted earlier and would not be precluded by the judgment. See LSA-R.S. 13:4231, Comments—1990, comment (e).

The party raising the objection of *res judicata* bears the burden of proving the essential facts to support the objection. The doctrine cannot be invoked unless all its essential elements are present. It is strictly construed, and any doubt concerning its applicability is to be resolved against the party raising the objection. Avery v. CitiMortgage, Inc., 08-2052 (La. App. 1st Cir. 5/13/09), 15 So.3d 240, 243.

ANALYSIS

To determine whether the judgment in McMath I is *res judicata* as to McMath's cross-claim against Dupuy and Colony in this litigation, it is necessary to review the factual circumstances and legal conclusions of McMath I. That case involved the same

condominium complex that is the basis of this litigation. In McMath I, McMath filed suit against Dupuy and Colony to recover damages for leaks around windows and doors that were allegedly caused by Dupuy's failure to properly apply a synthetic stucco material to the exterior of the condominiums. Because McMath had halted the interior build-out of the condominium units until the leaks could be fixed, the claims in McMath I did not involve property damage to the interiors of the condominium units as a result of the leaks, but only McMath's repair costs and delay damages due to Dupuy's work and/or product. McMath I, 897 So.2d at 679. Colony filed a motion for summary judgment, claiming its policy did not cover the problems alleged by McMath. After examining the policy in light of the uncontested facts, this court found that McMath's claims alleged an "occurrence" under the Colony policy and fell within the "products-completed operations hazard" (PCOH) coverage purchased by Dupuy, because PCOH coverage included property damage arising out of Dupuy's work when all of the work called for in his contract had been completed, even if the work needed some correction, repair, or replacement. McMath I, 897 So.2d at 681-82. However, we also found that the plain meaning of Exclusion K, which eliminated coverage for property damage to "your [Dupuy's] product," applied to exclude coverage for the claimed damages. Therefore, we affirmed summary judgment in favor of Colony on the coverage issue. In reaching that decision, this court observed that:

> [W]hile damage to property other than the insured's work or product may not be unambiguously excluded under [Exclusions K and L], the evidence in this case shows there was no physical damage to the condominium units, only to Dupuy's work or product. Therefore, the "work" and "product" exceptions would eliminate the coverage that would otherwise be provided under the policy. (Footnote omitted.)

McMath I, 897 So.2d at 683.

The plaintiffs' claims in this litigation involve damage to property "other than the insured's [Dupuy's] work or product." The plaintiffs allege physical damage to their condominium units, as well as severe emotional distress to them, personally. McMath contends that since the plaintiffs' claims relate to personal injuries and property damage to their condominium units that occurred after the units were sold to them, these causes of action against McMath, which form the basis of its cross-claim against Dupuy

and Colony, did not exist in February 2005, when the supreme court denied writs in McMath I and that judgment became final. Therefore, McMath argues that the district court erred in granting the exception of *res judicata* in this case.[1]

Colony argues that there is no new cause of action asserted in this litigation, but merely a different type of damages arising out of the same transaction and occurrence that was the subject matter of the previous suit. It also asserts that those damages were not due to Dupuy's work or product, but were the fault of the ineffective repair efforts of Gemini Services, Inc.[2] and poor supervision by McMath. Finally, Colony claims McMath should have asserted those damages in McMath I, because they either existed or could reasonably have been anticipated by McMath before the judgment in that case became final.

McMath responds that had it made any attempt to amend the previous suit to include potential liabilities to future condominium owners for damages they might have in the future as a result of Dupuy's work, such causes of action would have been dismissed as purely speculative and premature. Therefore, McMath contends the preclusive effect of LSA-R.S. 13:4231 is not applicable to its cross-claim against Dupuy and Colony in this litigation. In particular, McMath cites comment (e) to the statute, which states that a cause of action which arises after the rendition of the final judgment could not have been asserted earlier and would not be precluded by the judgment.

We note that McMath's cross-claim against Dupuy and Colony in this suit was brought because the plaintiffs in this suit asserted claims against McMath arising out of allegedly defective construction of their condominium units. These causes of action arose after the judgment in McMath I became final. McMath's cross-claim against Dupuy and Colony is in the nature of a claim for indemnity, should the plaintiffs succeed in obtaining an award against McMath for their personal injuries and property damages. Based on our examination of McMath I and a comparison of the claims in that suit with

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[1] With reference to the other elements of a *res judicata* claim, McMath does not contest that the judgment in McMath I is a valid and final judgment, that the parties are the same, or that the cause or causes of action asserted in this suit arose out of the transaction or occurrence that was the subject matter of McMath I. See LSA-R.S. 13:4231(2).

[2] Gemini Services, Inc. was a subcontractor hired by McMath to correct the problems caused by Dupuy's work.

the claims involved in this case, we conclude that Colony did not satisfy its burden of proving that the causes of action asserted in this suit by the plaintiffs, which serve as the basis of McMath's cross-claim, existed at the time of final judgment in McMath I. The causes of action alleged by the plaintiffs in this case are precisely the type of claims that this court stated were **not** included in McMath I. Therefore, the district court erred in sustaining the exception raising the objection of *res judicata* in this matter.

CONCLUSION

The judgment of November 16, 2009, sustaining the exception of *res judicata* and dismissing McMath's cross-claim against Colony, is reversed, and this matter is remanded. All costs of this appeal are assessed against Colony.

REVERSED AND REMANDED.