

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1160

ALEJANDRO LICONA

VERSUS

KENNETH AROSTEGUI AND LYNN T. SCHAYOT

Judgment Rendered: March 23, 2012

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2008-14979

Honorable William J. Knight, Judge

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Kenneth Arostegui and
Lynn T. Schayot

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

WELCH, J.

Plaintiff, Alejandro Licona, challenges a judgment awarding him damages in the amount of \$6,000.00 against defendant Kenneth Arostegui and dismissing his lawsuit against defendant, Lynn Schayot, with prejudice. We increase the damage award and affirm.

BACKGROUND

In May 2007, Mr. Licona and Mr. Arostegui entered into a verbal contract of sale, agreeing that Mr. Arostegui would sell Mr. Licona a trailer for the sum of \$15,000.00 on an installment basis. Mr. Licona took possession of the trailer and made monthly payments towards the agreed-to price. In June 2008, Mr. Arostegui seized the trailer from Mr. Licona and sold it to a third party. On September 19, 2008, Mr. Licona filed this lawsuit, seeking to recover damages from Mr. Arostegui. In the petition, Mr. Licona alleged that after he paid \$12,500.00 towards the purchase price of the trailer, he learned that Mr. Arostegui did not have title to the trailer and could not transfer ownership of the trailer to him. Mr. Licona alleged that he demanded that Mr. Arostegui return the purchase price or deliver the property to him, to no avail. Mr. Licona asserted causes of action for fraud, breach of the contract of sale, and unjust enrichment against Mr. Arostegui.

Mr. Arostegui filed a response into the record, claiming that Mr. Licona was aware that the trailer was in his sister's name and that upon completion of payment of the agreed upon sum, the title to the trailer would be transferred to Mr. Licona. Mr. Arostegui alleged that Mr. Licona breached the verbal contract and that as a result, Mr. Arostegui took possession of the trailer.

Thereafter, on October 20, 2009, Mr. Licona filed an amended petition for damages and added Ms. Schayot, Mr. Arostegui's sister and the title owner of the trailer, as a defendant. In the amended petition, Mr. Licona made the following allegations: Ms. Schayot knew of the contract to sell between himself and Mr.

Arostegui; Ms. Schayot knew that the property was not in Mr. Arostegui's name and that Mr. Arostegui could not deliver title to the property; and Mr. Arostegui and Ms. Schayot conspired to enter into a "false contract" in order to defraud Mr. Licona. Mr. Licona further alleged that Ms. Schayot did not intend to transfer the property to him after he paid the sales price and that Ms. Schayot had been unjustly enriched as a result of the fraud.

Mr. Arostegui and Ms. Schayot filed a reconventional demand against Mr. Licona, asserting therein that Mr. Arostegui purchased the subject trailer with money he borrowed from Ms. Schayot, who had obtained the funds from a bank loan and was the record owner on the title. They alleged that at all times Mr. Arostegui had complete authority to use the trailer and to contract to sell the trailer. Mr. Arostegui sought to recover past due payments, the cost to relocate the trailer, the cost of a sofa removed from the trailer, and damages to his reputation. Ms. Schayot alleged that despite Mr. Licona's knowledge that Mr. Arostegui had full authority regarding the trailer, Mr. Licona added her as a defendant to the lawsuit and further alleged fraud and conspiracy with malice and reckless disregard for the truth. She sought to recover damages to her reputation and credit, mental anguish, and consequential damages allegedly resulting from the false allegations in Mr. Licona's petition and the failure to make a good faith effort to investigate the truth of the allegations after notice.

A bench trial was held, during which Mr. Licona's case-in-chief consisted primarily of his testimony and Mr. Arostegui's testimony. Following Mr. Licona's presentation of evidence, Ms. Schayot moved for an involuntary dismissal of the cause of action for fraud and unjust enrichment against Ms. Schayot. The attorney argued that Mr. Licona failed to introduce any evidence of the essential elements of his claim for fraud, namely, misrepresentation of a material fact by Ms. Schayot with the intent to deceive. In response, Mr. Licona's attorney, Gabriel Mondino,

urged that Mr. Arostegui testified that he was acting with Ms. Schayot's authority and that it was reasonable to conclude that all of the actions taken by Mr. Arostegui in relation to the contract for the sale of the trailer were sanctioned by Ms. Schayot. The trial court granted the motion for involuntary dismissal, concluding there was no evidence to link Ms. Schayot to any agreement, direct or indirect, with Mr. Licon. The court further found that there was no evidence presented to indicate that Ms. Schayot committed a fraud on Mr. Licon.

On September 13, 2010, the court entered judgment awarding Mr. Licon the sum of \$6,000.00 against Mr. Arostegui and dismissing Ms. Schayot's defamation claim against Mr. Licon. In written reasons for judgment, the court found that Mr. Licon and Mr. Arostegui entered into an agreement to sell the trailer on a credit basis and that Mr. Licon had paid \$12,500.00 toward the total purchase price. The court rejected Mr. Arostegui's claim Mr. Licon breached the contract. It found instead that Mr. Arostegui breached the contract by improperly seizing the trailer in June 2008, concluding that Mr. Arostegui was not justified in using self-help to obtain possession of the trailer without first giving notice to Mr. Licon. The court awarded damages to Mr. Licon in the amount of \$5,000.00 for the wrongful seizure of the trailer and \$1,000.00 for the "net value" of the trailer on the breach of contract claim. Additionally, with respect to Ms. Schayot's defamation claim, the court concluded that statements were made in the pleadings and in the record that were defamatory *per se*, but ruled that as Mr. Licon did not verify the pleadings and there was no proof of actual knowledge of the defamatory pleadings by him, Ms. Schayot was not entitled to an award of damages as a result of the defamation. The court, however, ordered that a hearing be held in accordance with La. C.C.P. art. 863 to determine whether Mr. Mondino should be sanctioned for failing to dismiss Ms. Schayot from the litigation.

Mr. Licon filed a motion for a new trial for the purpose of determining the

amount of damages due him and liability. In the motion, he alternatively sought an additur or reformation of the verdict. On September 28, 2010, the court denied the motion for a new trial. This appeal, taken by Mr. Licona, followed.¹

MOTIONS

At the outset, we shall address the motions filed by both sides in this appeal. Appellees, Mr. Arostegui and Ms. Schayot, filed a motion to strike and dismiss the appeal on the basis that Mr. Licona appealed the September 28, 2010 denial of his motion for a new trial by the trial court, which they urge is a non-appealable interlocutory judgment.

It is well settled in this circuit that an appeal of a denial of a motion for a new trial will be considered as an appeal of the judgment on the merits when it is clear from the appellant's brief that the appeal was intended to be on the merits. **Nelson v. Teachers' Retirement System of Louisiana**, 2010-1190 (La. App. 1st Cir. 2/11/11), 57 So.3d 587, 589 n.2. It is clear from reading Mr. Licona's brief that he intended to appeal the merits of the September 13, 2010 final judgment awarding damages against Mr. Arostegui and dismissing his claims against Ms. Shayot. Therefore, we will treat the appeal as appropriately taken from the judgment on the merits, and the motion to dismiss the appeal is hereby denied.

Mr. Licona filed a motion to strike portions of appellees' brief, including that portion in which the appellees challenged the September 13, 2010 judgment. In their brief, appellees assigned as error: (1) the trial court's finding that Mr. Licona did not breach the agreement; (2) the court's finding that Mr. Arostegui was not justified in retrieving the trailer; (3) the court's damage calculation; and (4) the court's failure to award Ms. Schayot damages upon finding that Mr. Licona defamed her. Appellees did not appeal these rulings and did not file an answer to

¹ In docket number 2011-CA-1419, a companion case handed down this day, Mr. Licona appealed a judgment rendered by the trial court on November 18, 2011, against Mr. Licona's attorney for sanctions. On December 5, 2011, this court denied a motion to consolidate the appeals, but ordered that the appeals be assigned to the same panel.

the appeal challenging these rulings. Louisiana Code of Civil Procedure article 2133(A) provides that an appellee desiring to have the trial court's judgment modified, revised, or reversed is obligated to timely answer the appeal. All of appellees' assigned errors seek modification, revision, or reversal of the trial court's judgment. Because they did not appeal these rulings or answer the appeal, this court may not review appellees' assigned errors. Therefore, we grant the motion to strike with respect to that portion of appellees' brief referencing and discussing the four alleged errors committed by the trial court. In all other respects, the motion to strike is denied.

DAMAGE CALCULATION

At the outset of the trial, the parties stipulated that: (1) only Ms. Schayot had the legal right to transfer ownership of the trailer property; (2) the title of the trailer property was in the name of Ms. Schayot and not in Mr. Arostegui's name; (3) Ms. Schayot made an application and secured a loan from Central Progressive Bank for the balance of the purchase price of the principal amount of \$16,075.00; (4) Mr. Licona was obligated to pay the sum of \$1,000.00 per month; (5) Mr. Licona never met Ms. Schayot; and (6) Mr. Licona never had any contact or dealings with Ms. Schayot regarding the trailer.

In his first assignment of error, Mr. Licona contends that the trial court erred in its calculation of damages owed to him for the breach of the trailer sales contract. We agree.

The trial court's finding that Mr. Licona and Mr. Arostegui entered into a binding agreement to sell the trailer is not in dispute in this appeal. In calculating damages for the breach of the contract to sell, the trial court made two crucial findings of fact. First, it determined that Mr. Licona paid \$12,500.00 towards the \$15,000.00 purchase price of the trailer. Second, the trial court found that Mr. Licona derived use from the trailer during the time that it was in his possession,

assessing a use value of \$300.00 per month for one year. However, the court awarded Mr. Licona \$1,000.00 on the breach of contract claim, which it found to be the “net value” of the trailer to Mr. Licona. It arrived at this figure by subtracting the “use value” from the “equity” Mr. Licona had in the trailer, determined by the court to be \$4,600.00, representing the difference in the amount Mr. Licona paid towards the purchase price minus the amount Mr. Arostegui sold the trailer for after repossession.

As a general rule, a trial court has discretion in assessing damages. After reviewing the record, we can only conclude that the trial court abused its discretion in awarding breach of contract damages in the amount of \$1,000.00. Damages for breach of contract by the obligor are measured by the loss sustained by the obligee and should afford an obligee full reparation of the damage or injury caused by the obligor’s failure to perform. La. C.C. art. 1995; Saul Litvinoff, *The Law of Obligations* § 4.1, at 67, in 6 Louisiana Civil Law Treatise (1999). Moreover, it is axiomatic that breach of contract damages are designed to place the parties in the same position they would have been in if the contract had not been breached. **Eximco, Inc. v. Trane Company**, 748 F.2d 287, 289 (5th Cir. 1984). In this case, Mr. Licona paid \$12,500.00 towards the purchase price of the trailer. Because Mr. Arostegui breached the contract of sale, repossessed the trailer and sold it to a third party, Mr. Licona is entitled to recover return of the purchase price he paid in the amount of \$12,500.00. The trial court’s determination that Mr. Licona derived benefit from the use of the trailer in the amount of \$3,600.00 has not been challenged in this appeal. Therefore, we find that the proper measure of damages for breach of contract is \$8,900.00, representing the purchase price paid by Mr. Licona minus the reasonable use value of the trailer, and the judgment shall be amended to so reflect.

DISMISSAL OF MS. SCHAYOT FROM THE CASE

Mr. Licona claims that the trial court erred in dismissing Ms. Schayot from the lawsuit, insisting that Ms. Schayot should be held vicariously liable for the acts undertaken by Mr. Arostegui on her behalf and with her authority. The trial court did not make a specific finding of fact in its written reasons regarding the issue of whether an agency relationship existed between Ms. Schayot and Mr. Arostegui. However, in opposition to the motion for involuntary dismissal of the fraud and unjust enrichment claims made on behalf of Ms. Schayot, Mr. Licona's attorney argued that Mr. Arostegui was acting with the apparent authority of Ms. Schayot and it was reasonable to assume that Mr. Arostegui was acting with her permission. The court granted the motion for involuntary dismissal, apparently rejecting Mr. Licona's agency argument.²

Mr. Licona insists that the evidence showed that at all times relevant to his cause of action, Mr. Arostegui was acting on Ms. Schayot's behalf, pointing out that Ms. Schayot testified that she told her brother he could do whatever he wanted with the trailer. We find, however, that the evidence demonstrates that Ms. Schayot's only involvement with respect to the trailer was to assist her brother in financing its purchase. Mr. Arostegui and Ms. Schayot have maintained from the outset of this litigation that Mr. Arostegui had complete authority to use the trailer and to contract to sell the trailer. There is no evidence in the record to show that Mr. Arostegui was acting as Ms. Schayot's agent when he agreed to sell Mr. Licona the trailer or when Mr. Arostegui wrongfully seized the trailer and sold it to a third party. Because there is no basis in the law for holding Ms. Schayot liable for the actions of her brother, the trial court's dismissal of all of Mr. Licona's

² The trial court's original judgment did not contain decretal language dismissing Mr. Licona's claims against Ms. Schayot. On February 17, 2012, this court ordered that the judgment be amended to include the appropriate decretal language in the judgment. On February 23, 2012, the trial court amended the judgment to dismiss Mr. Licona's claims against Ms. Schayot as a result of the court's granting of Ms. Schayot's oral motion for involuntary dismissal at the conclusion of Mr. Licona's case.

claims against Ms. Schayot was proper.

DEFAMATION

In his third assignment of error, Mr. Licona argues that the trial court erred in finding that the allegations in his petition were defamatory *per se*. He contends that because he had probable cause to make the allegations of fraud, and because those claims are privileged because they were made in the course of judicial proceedings, Ms. Schayot's defamation claim must fail.

It is well settled that courts will not decide abstract, hypothetical, or moot controversies and will not render advisory opinions with respect to controversies. **Louisiana State Board of Nursing v. Gautreaux**, 2009-1758 (La. App. 1st Cir. 6/11/10), 39 So.3d 806, 811, writ denied, 2010-1957 (La. 11/5/10), 50 So.3d 806. A "justiciable controversy" is one presenting an existing actual and substantial dispute involving the legal relations of parties upon whom a judgment of the court may effectively operate through a decree of a conclusive character. *Id.* An issue is moot when a judgment or decree on that issue has been deprived of practical significance. *Id.*

A controversy must exist at every stage of the proceeding, including appellate stages. **Gautreaux**, 39 So.3d at 811. In this appeal, there is no justiciable controversy with respect to Ms. Schayot's defamation claim. Ms. Schayot's defamation claim failed in the trial court because the court determined that she did not prove one of the essential elements of a cause of action for defamation. Ms. Schayot did not appeal the dismissal of her defamation claim by the trial court. The trial court's decree on the issue of whether Mr. Licona's pleadings were defamatory in nature has been deprived of any legal significance by the dismissal of the defamation claim. As there is no controversy for this court to address, any judicial pronouncement on the matter would be an impermissible advisory opinion. *Id.*

Therefore, we decline to address this assignment of error.³

CONCLUSION

For the foregoing reasons, the trial court's September 13, 2010 judgment is amended to award damages to Alejandro Licona and against Kenneth Arostegui for breach of contract in the amount of \$8,900.00 and wrongful seizure of the trailer in the amount of \$5,000.00, for a total damage award of \$13,900.00, together with legal interest thereon. As amended, the judgment is affirmed. All costs of this appeal are assessed to Kenneth Arostegui.

AMENDED AND AS AMENDED, AFFIRMED.

³ In his final assignment of error, Mr. Licona challenges the trial court's judgment awarding sanctions against his attorney. This assignment of error is fully addressed in the companion case decided this day, **Licona v. Arostegui**, docketed at 2011-1419.