NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 1000

BURK BAKER

VERSUS

MACLAY PROPERTIES COMPANY

Judgment rendered May 4, 2007.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 375,740
Honorable R. Michael Caldwell, Judge

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MACLAY PROPERTIES COMPANY

* * * * * *

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Hughes, J., concurs.

PETTIGREW, J.

An in-state real estate broker filed this action against an out-of-state broker to recover fees mandated by former state statute and set forth in a cooperative brokerage agreement. The out-of-state broker subsequently reconvened against the in-state broker and put forth a third party demand for declaratory judgment against the State and the state real estate commission alleging that the regulation and statute mandating the fee sharing clause were unconstitutional.

Finding the statute and the regulation to be unconstitutional, the trial court granted summary judgment, and a direct appeal to the state supreme court followed. The supreme court affirmed and remanded this matter to the trial court for further proceedings with respect to the plaintiff's claim of unjust enrichment.

The trial court later granted defendant's motion for involuntary dismissal giving rise to the present appeal. We hereby affirm.

FACTS

In its previous opinion in this matter,[1] our Louisiana Supreme Court found the following facts:

> In late December, 1990 or early January, 1991, Judith Rymes and Irving McGowan contacted Burk Baker on behalf of Maclay Properties Co., a Dallas, Texas corporation engaged in the real estate brokerage and property management business. Maclay was interested in transacting business in Louisiana. Under Louisiana law at that time, a real estate broker was required to be domiciled in Louisiana for at least six months and a real estate salesperson had to be a Louisiana domiciliary. The Louisiana Real Estate Commission allowed out-of-state brokers to engage in business in Louisiana if they entered into cooperating brokerage agreements with Louisiana brokers. Baker had been a licensed real estate broker in Louisiana since 1978.
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> On January 25, 1991, Baker and Maclay entered into a cooperating brokerage agreement under which Baker would act as Maclay's Louisiana broker for a monthly fee of $300. The agreement stated the parties' arrangement "will be in accordance with LA. (sic) statute ref. No. 6301," referring to 3 La.Adm.Code 46:LXVII, Sec. 6301. At that time, Sec. 6301 provided, among other things, that a Louisiana broker acting under a cooperating brokerage agreement receive at least 50 percent of any commissions or fees. This agreement was filed with the Louisiana Real Estate Commission. An earlier draft of the written agreement, which did not make reference to Sec. 6301, was not accepted by the Commission. Under

[1] **Baker v. Maclay Properties Company**, 94-1529 (La. 1/17/95), 648 So.2d 888.

the agreement, Baker became the sponsoring broker for Rymes, Maclay's real estate salesperson in Louisiana.

Maclay paid the $300 monthly fee until it terminated the cooperating brokerage agreement on June 1, 1991. No commissions or fees were paid to Baker. After the agreement had terminated, Baker believed that Maclay managed and closed several property management or lease transactions during the terms [sic] of the agreement. Baker demanded documentation concerning these transactions and payment of 50 percent of the commissions. When Maclay refused to comply, Baker filed suit to recover the brokerage fees mandated in the cooperating brokerage agreement.

Maclay denied that any transactions were pending or completed after the date of the agreement and denied that any commissions or fees were due Baker. Maclay filed a reconventional demand against Baker and a third party demand for declaratory judgment against the State and the Louisiana Real Estate Commission, alleging that the regulation mandating the fee and commission sharing clause in the cooperating brokerage agreement and its statutory basis were unconstitutional. A motion for summary judgment was filed by Maclay asserting that the unconstitutional statute and regulation rendered the fee-sharing clause of the cooperating brokerage agreement a nullity, precluding Baker's recovery under its terms.

The trial court granted summary judgment declaring former LSA-R.S. 37:1437(A) and former 3 La.Adm.Code 46:LXVII, Sec. 6301 to be unconstitutional. Baker's demands were dismissed as unenforceable. A direct appeal was taken to [the Louisiana Supreme] Court. La. Const. Art. 5, § 5(D).

Baker, 94-1529 at pp. 2-5, 648 So.2d at 892-93.

The Louisiana Supreme Court subsequently affirmed the trial court's grant of summary judgment, finding that former La. R.S. 37:1437(A) and former 3 La.Adm.Code 46:LXVII, Sec. 6301 were unconstitutional. The supreme court concluded however that the trial court erred in dismissing all of Baker's claims against Maclay and noted that Baker had also put forth a claim for damages based upon a theory of unjust enrichment. Accordingly, the supreme court remanded this matter to the trial court for a determination of whether Baker was entitled to damages for unjust enrichment.

ACTION OF THE TRIAL COURT

This matter proceeded to trial on the merits of Baker's claim for damages based upon unjust enrichment on January 20, 2006, eleven years after the aforementioned decision by the supreme court. At the close of Baker's case, counsel for Maclay moved for an involuntary dismissal pursuant to La. Code Civ. P. art. 1672(B). Counsel for Maclay urged that Baker had failed to establish the elements essential to recovery in an action for

unjust enrichment. The trial court granted the motion and dismissed Baker's case with prejudice. Baker thereafter appealed to this court.

ISSUES PRESENTED FOR REVIEW

In connection with his appeal in this matter, Baker presents the following issues for review and consideration by this court:

1. Whether the trial court erred in dismissing the supreme court's opinion in this case as dicta; and

2. Whether the trial court erred in dismissing plaintiff's claim on grounds of no proof of compensable loss.

LEGAL PRECEPTS

Louisiana Code of Civil Procedure article 1672(B) provides that in an action tried by the court without a jury, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for an involuntary dismissal at the close of the plaintiff's case on the ground that upon the facts and law, the plaintiff has shown no right to relief. In deciding whether to grant a motion for involuntary dismissal, the trial court's standard is whether the plaintiff has presented sufficient evidence in his case-in-chief to establish a claim by a preponderance of the evidence. Proof by a preponderance of the evidence means that taking the evidence as a whole, the fact or cause sought to be proved is more probable than not. **Foster v. Tinnea**, 96-2718 p. 4 (La. App. 1 Cir. 12/29/97), 705 So.2d 782, 784.

When considering a motion for involuntary dismissal, a plaintiff is entitled to no special inferences in his favor. However, absent circumstances in the record casting suspicion on the reliability of the testimony and sound reasons for its rejection, uncontroverted evidence should be taken as true to establish a fact for which it is offered. **Tyler v. Our Lady of the Lake Hospital, Inc.**, 96-1750 p. 4 (La. App. 1 Cir. 6/20/97), 696 So.2d 681, 684. A trial court's decision to dismiss based on La. Code Civ. P. art. 1672(B) should not be reversed in the absence of manifest or legal error. **Id.**

With these legal precepts in mind, this court must determine whether the trial court erred in concluding that based upon the facts and the law, Baker failed to establish by a preponderance of the evidence any right to relief pursuant to Louisiana law.

DISCUSSION

In its opinion in this matter, the supreme court affirmed the trial court's finding that the contract between Baker and Maclay was an absolute nullity; and for this reason, Baker's claim for the fees and commissions set forth therein was unenforceable. The supreme court further noted that despite the absence of a contract, Baker had, through a supplemental and amending petition, set forth an alternative claim for *actio de in rem verso* or unjust enrichment. **Baker**, 94-1529 at p. 17, 648 So.2d at 896.

The supreme court thereafter set forth the five requirements for a showing of unjust enrichment, or *actio de in rem verso*. These requirements are: (1) there must be an enrichment, (2) there must be an impoverishment, (3) there must be a connection between the enrichment and the resulting impoverishment, (4) there must be an absence of "justification" or "cause" for the enrichment and impoverishment, and (5) there must be no other remedy at law available to plaintiff. **Baker**, 94-1529 at p. 18, 648 So.2d at 897. See also, La. Civ. Code art. 2298. An action for unjust enrichment is allowed only when the plaintiff has no other remedy at law. **Morphy, Makofsky & Masson, Inc. v. Canal Place 2000**, 538 So.2d 569, 572 (La. 1989).

Following remand, the trial court, in its transcribed oral reasons for judgment, in pertinent part opined:

> The original agreement between Mr. Baker and Maclay provided that – and I'm referring to Plaintiff's Exhibit Number Three and Subpart Number Four, which says, "Maclay will pay all expenses that arise out of our agreement, and will indemnify you totally against any legal actions that might come from your association with us." So as far as any risks were concerned, this was handled in the indemnity agreement that was entered into. And as Mr. Baker testified, he insisted upon that from the beginning; and that was included in the agreement.
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> And I don't see any pecuniary impoverishment on the part of Mr. Baker. There has been no testimony about that. And Plaintiff's Exhibit Five indicates that he was paid through the end of July the three hundred dollars per month that the agreement called for, and he supposedly had advanced the fees for Ms. Frantz. But her letter of July 1 indicates those fees had not been advanced and were, in fact, being paid directly by Maclay at the time of that July 1 letter. So, again, there has been no showing of any actual pecuniary loss to Mr. Baker.
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> The question is whether any potential liability he may have faced under his agreement is compensable in this action. And despite the comments by Justice Watson in the supreme court decision here, I just

> don't see any. There may have been some potential for some personal liability and risk but, in fact, none was experienced by Mr. Baker whatsoever. I'm sure he did spend time worrying about this; and as a conscientious broker, I know he did. But I just don't see that that's compensable under an unjust enrichment cause of action. And for that reason I am going to grant the motion for an involuntary dismissal dismissing plaintiff's claims at plaintiff's costs.

Finding no manifest error in the trial court's decision to dismiss Baker's claim for unjust enrichment based on La. Code Civ. P. art. 1672(B), we conclude that the issues raised by Baker in the instant appeal are without merit.

CONCLUSION

For the above and foregoing reasons, the trial court's judgment granting Maclay's motion for an involuntary dismissal of Baker's remaining claim regarding unjust enrichment is hereby affirmed. All costs associated with this appeal shall be assessed against plaintiff, Burk Baker.

AFFIRMED.