NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0812

DARRYL D. SMITH

VERSUS

PRESERVATION PROPERTIES DEVELOPMENT, L.L.C.

Judgment Rendered: FEB 1 4 2007

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On Appeal from the 21st Judicial District Court
In and For the Parish of Tangipahoa
Trial Court No. 2002-001126, Division "G"

Honorable Ernest G. Drake, Jr., Judge Presiding

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Darryl D. Smith

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Counsel for Defendant/Appellant
Preservation Properties
Development, L.L.C.

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

This appeal by defendant-appellant, Preservation Properties Development, L.L.C., concerns a judgment of September 12, 2005 that denied its motion for attorney fees against plaintiff-appellee, Darryl D. Smith. Appellant seeks a remand so that a hearing may be held on its motion. Appellee has also presented an assignment of error in its brief seeking dismissal of the appeal. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL POSTURE

This appeal arises out of a suit brought by plaintiff Darryl D. Smith, a potential buyer and option holder regarding commercial property in Hammond, Louisiana that was owned by John and Jeanne Gewalt individually. Mr. and Mrs. Gewalt were also members of the defendant entity, Preservation Properties Development, L.L.C. (Preservation). On November 2, 2001 Mr. Smith signed two separate 120-day option agreements on the property in question, one with Preservation (the Preservation option) and one with Mr. and Mrs. Gewalt individually (the Gewalt option).

When Mr. Smith attempted to exercise the Preservation option in March 2002, he learned from a title search that Preservation was not the owner of record, but that Mr. and Mrs. Gewalt individually were the true owners. By that time, the Gewalt option had lapsed and the Gewalts refused to sell to Mr. Smith. In April 2002, Mr. Smith sued Preservation (but not Mr. and Mrs. Gewalt as individuals) seeking to enforce the Preservation option and demanding damages. It seems from the facts in the record that neither party recalled the existence of the Gewalt option during this time and for some time after litigation ensued.

Counsel for both parties appeared in court on July 26, 2005, at which time the Gewalt option seems to have resurfaced. At that time, based on the Gewalt option's appearance, Mr. Smith's attorney moved to dismiss the matter, which the judge granted. Mr. Smith's counsel agreed to accept responsibility for court costs. At that time, counsel for Preservation, Douglas D. Brown, sought attorney fees against Mr. Smith, alleging that Mr. Smith filed the lawsuit frivolously because he knew all along that Mr. and Mrs. Gewalt individually were the true owners of the property and thus that the Preservation option was unenforceable from the outset.

The judge then related for the record that in reviewing the matter for trial, he discovered the potential existence of the unexercised and lapsed Gewalt option, which created difficulty for Mr. Smith's claims against Preservation and clearly motivated Mr. Smith's counsel's motion to dismiss. The judge then declined Mr. Brown's request for attorney fees, noting that it did not appear that the actions of Mr. Smith or his attorney in prosecuting the matter were frivolous, fraudulent, in bad faith, or taken with the aim of harassing or antagonizing the Gewalts. After introducing the various documents into the record as exhibits, Mr. Brown added that his concerns as to the lawsuit were not intended to critique Mr. Smith's attorney, but rather Mr. Smith himself, who, according to Mr. Brown, "may have very well known that the lawsuit had no merit and yet urged [its] filing nonetheless without disclosing same to his attorney."

The judge concluded that he understood Mr. Brown's concerns, but expressed doubt that Mr. Smith would have gone to the trouble and expense of three years' litigation, for which he necessarily paid his own attorney, had he known in advance that it would result in "a very expensive exercise in futility." In a judgment dated September 12, 2005, the court dismissed the

matter, assigned all costs to Mr. Smith, and denied Mr. Brown's motion for attorney fees. Preservation has appealed from this judgment.

LAW AND DISCUSSION

Preservation argues that the trial court erred in denying its motion for attorney fees without (1) providing a hearing on the matter as required by Louisiana Code of Civil Procedure Article 863, (2) considering the factors enumerated in Article 863, or (3) considering the factors enumerated in **Sanchez v. Liberty Lloyds**, 95-0956, p. 6 (La. App. 1 Cir. 4/4/96), 672 So.2d 268, 271, *writ denied*, 96-1123 (La. 6/7/96), 674 So.2d 972. Mr. Smith argues in response that while he does not dispute the court's denial of Preservation's motion for attorney fees, he finds a due process violation in Preservation's attempt to raise the issue orally and not in writing, thus depriving Mr. Smith of proper notice and the chance to prepare for a defense of the motion.

Preservation's first and second assignments of error challenge the trial court's decision to deny the motion for attorney fees without a hearing or consideration of the elements of Article 863, which sets forth requirements for valid pleadings:

> B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact; that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a court determines that a violation has occurred, it may impose an appropriate sanction, including reasonable attorney fees. LSA-C.C.P. Art. 863(D). But it may not impose such a sanction without conducting a hearing

"at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of the sanction." LSA-C.C.P. Art. 863(E).

Preservation argues that the trial court could not have properly considered whether Mr. Smith's lawsuit violated the requirements of Article 863 without a hearing that would have provided Preservation an opportunity to present evidence in support of its claims. While the article is clear that a court cannot impose Article 863 sanctions without a hearing, it is not as clear whether a court may decline to impose sanctions without a hearing.

Assigning attorney fees contradicts the "American Rule" that a prevailing party may not recover attorney fees. *See* **Alyeska Pipeline Service Co. v. Wilderness Society**, 421 U.S. 240, 257, 95 S. Ct. 1612, 1621, 44 L. Ed. 2d 141 (1975). An exception to this rule, codified in Article 863, is that a party may recover attorney fees from the other party if the other party exercised bad faith in instituting the litigation and forcing the claiming party to defend itself against a frivolous claim; the goal is to correct abuse of the litigation process. *See* **Lane Memorial Hosp. v. Gay**, 2003-0701, p. 6 (La. App. 1 Cir. 2/23/04), 873 So.2d 682, 686. The trial court has significant discretion to impose sanctions pursuant to Article 863. That decision "will not be reversed unless it is manifestly erroneous or clearly wrong." **Hessick v. Petro Publications, Inc.**, 96-0034, p. 7 (La. App. 1 Cir. 11/8/96), 684 So.2d 466, 471, *writ denied*, 97-0332 (La. 3/21/97), 691 So.2d 89.

Article 863 requires a hearing prior to imposition of sanctions, which is reasonable since imposing sanctions represents a departure from the American Rule and is justified by a litigant's exceptional abuse of the judicial process. The article's language, however, does not require a hearing upon a motion for sanctions and the facts herein do not warrant that we address this issue. The trial court expressed its reasons for declining to

award attorney fees to Mr. Smith, namely that both parties were somewhat in the wrong and that Mr. Smith would not likely have incurred the expense of three years' litigation had he not believed sincerely in his cause of action; these reasons are neither manifestly erroneous nor clearly wrong. Preservation's first and second assignments of error concerning Article 863 are without merit.

Preservation's third assignment of error alleges that the trial court erred in failing to consider the jurisprudential factors concerning whether an attorney has satisfied Article 863's duty to conduct an "objectively reasonable inquiry into the facts and the law" of a matter, as set forth in **Sanchez**, 95-0956 at p. 6, 672 So.2d at 271-72:

> Among the factors to be considered in determining whether reasonable factual inquiry has been made are:
>
> 1) The time available to the signer for investigation;
>
> 2) The extent of the attorney's reliance on his client for the factual support for the document;
>
> 3) The feasibility of a prefiling investigation;
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> 4) Whether the signing attorney accepted the case from another member of the bar or forwarding attorney;
>
> 5) The complexity of the factual and legal issues; and
>
> 6) The extent to which development of the factual circumstances underlying the claim requires discovery.
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> The factors for determining whether reasonable legal inquiry was made include:
>
> 1) The time available to the attorney to prepare the document;
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> 2) The plausibility of the legal view contained in the document;
>
> 3) The pro se status of the litigant; and
>
> 4) The complexity of the legal and factual issues raised. (citations omitted)

We note that these factors are illustrative and neither all-encompassing nor required by Article 863. Preservation's argument in this assignment of error appears to be that Mr. Smith's counsel did not sufficiently consider the matter as presented by Mr. Smith prior to engaging in the lawsuit and that a "reasonable inquiry" into the matter would have revealed the valid but unexercised and lapsed Gewalt option, the existence of which negated Mr. Smith's claim to enforce the Preservation option.

Our review of the record, including the trial judge's comments, convinces us that the judge considered the actions of both parties and found no bad faith or inexcusable negligence on the part of Mr. Smith's counsel. It seems that the unexercised Gewalt option somehow dropped off *both* parties' radars during the course of the litigation over the Preservation option; had the Gewalt option been discovered sooner by either side, the litigation would likely have terminated far earlier. But error alone does not amount to the sort of abuse that Article 863 intends to combat. In **Sanchez**, this court noted that counsel error had indeed occurred, but instructed that a court considering sanctions should keep in mind that "hindsight should not serve as the basis for imposing sanctions." **Sanchez**, 95-0956 at p. 8, 672 So.2d at 272. The trial court's conclusions were reasonable and within its discretion, thus we find no manifest error. This assignment of error is without merit.

As we conclude that appellant's assignments of error are without merit and a hearing on Mr. Brown's motion for sanctions was not required by law, we need not address appellee's assignment of error claiming that the trial court violated due process by considering Mr. Brown's oral motion for sanctions without allowing Mr. Smith's counsel proper notice or the opportunity to prepare a defense. Nor did appellee answer the appeal.

CONCLUSION

For the above and foregoing reasons, we affirm the September 12, 2005 judgment that dismissed plaintiff-appellee Darryl D. Smith's cause of action and denied defendant-appellant Preservation Properties Development, L.L.C.'s motion for attorney fees. Costs of this appeal are to be assessed against defendant-appellant Preservation Properties Development, L.L.C.

AFFIRMED.