**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

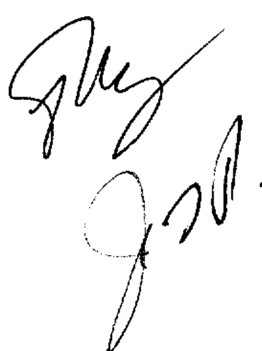
FIRST CIRCUIT

2009 CA 2181

DAVID J. ROBICHAUX, JR., AND LEONA GAUDET ROBICHAUX

VERSUS

LEON J. LANOUX AND NORA S. LANOUX AND COUNTRYPLACE MORTGAGE, LTD.



**Judgment Rendered: June 11, 2010**

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Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Docket Number 109,169

Honorable Ashly Bruce Simpson, Judge

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BEFORE: CARTER, C.J., GUIDRY, AND PETTIGREW, J.J.

### *Affirmative Defenses*

In its second assignment of error, CountryPlace contends that the trial court erred in finding that the Robichauxes were not estopped from enforcing the set back restrictions and/or in not finding that the Lanouxes detrimentally relied upon representations or omissions made by Mr. Robichaux and/or not finding that the Robichauxes failed to mitigate their damages. The Robichauxes, however, contend that the Lanouxes' affirmative defenses are not properly before this court because they were not pled in their answer to the Robichauxes' petition.

A defendant is required to affirmatively set forth in his answer any matter constituting an affirmative defense upon which he will rely. La. C.C.P. art. 1005. The purpose of the requirement that certain defenses be affirmatively pled is to give the plaintiff fair and adequate notice of the nature of the defense and, thereby, prevent last minute surprise to the plaintiff. Hebert v Anco Insulation, Inc., 00-1929, p. 12 (La. App. 1st Cir. 7/31/02), 835 So. 2d 483, 492, writs denied, 02-2956, 02-2959 (La. 2/21/03), 837 So. 2d 629.

In their answer, the Lanouxes asserted all affirmative defenses available to them, and in its answer, CountryPlace adopted all defenses available to the Lanouxes. The Lanouxes, however, did not specifically plead detrimental reliance or estoppel as required by La. C.C.P. art. 1005, nor did they affirmatively plead mitigation of damages. See The Cadle Company v. Dumesnil, 610 So. 2d 1063 (La. App. 3rd Cir. 1992), writ denied, 613 So. 2d 992 (La. 1993). Therefore, arguably, these defenses were not properly raised. However, because evidence on detrimental reliance or estoppel and mitigation of damages was admitted at trial without objection, we will address these issues on appeal. See Sonnier v. Boudreaux, 95-2127, pp. 6-7 (La. App. 1st Cir. 5/10/96), 673 So. 2d 713, 717.

**GUIDRY, J.**

CountryPlace Mortgage, Ltd. (Appellant) appeals a final judgment enjoining Leon J. Lanoux and Nora S. Lanoux (the Lanouxes) from placing their mobile home within one hundred feet of the servitude of Burma Road in compliance with the Act of Sale entered into with David J. Robichaux and Leona Gaudet Robichaux (the Robichauxes). For the reasons that follow, we affirm the trial court's judgment.

## FACTS AND PROCEDURAL HISTORY

This suit arises out of the sale of immovable property. On April 17, 1995, the Robichauxes [1] executed an Act of Sale whereby they sold a tract of land situated in Lafourche Parish to the Lanouxes. The sale was recorded in the conveyance records in Lafourche Parish on April 26, 1995. A document entitled Exhibit A was attached to the Act of Sale. "Exhibit A" contained a description of the property and listed certain set back restrictions. The restriction at issue, in the present case, prohibited the Lanouxes from placing a mobile home within one hundred feet of either Burma Road or St. Charles By-Pass Road.

In June of 2007, the Lanouxes purchased a new mobile home and placed it within one hundred feet of Burma Road in violation of said restrictions. Prior to purchasing the mobile home, on March 31, 2007, the Lanouxes employed R & T Sewer Systems to install a sewer system on the property, and on April 16, 2007, the Lanouxes employed Leblanc Brothers Ready-Mix, Inc. to lay a foundation on the property. On May 2, 2007, Mr. Robichaux sent a certified letter to Mr. Lanoux requesting that he comply with all the restrictions, and he attached a copy of the Act of Sale and the restrictions to the letter. The record does not disclose exactly

[1] Leona Gaudet Robichaux was not present at the sale. She gave her husband power of attorney, and he executed the Act of Sale on her behalf.

when Mr. Robichaux discovered that the Lanouxes were making improvements on the property. The Lanouxes failed to comply with Mr. Robichaux's request.

Thereafter, on April 28, 2008, the Robichauxes filed suit against the Lanouxes and CountryPlace,[2] the company that mortgaged the Lanouxes' mobile home, seeking to enjoin the Lanouxes from placing the mobile home within the restricted area. After a trial on the merits, the trial court rendered judgment in favor of the Robichauxes, enjoining the Lanouxes from placing their mobile home within one hundred feet of the servitude of Burma Road. CountryPlace has appealed the trial court's judgment.

## ASSIGNMENTS OF ERROR

On appeal, CountryPlace raises two assignments of error. CountryPlace contends:

1. The trial court abused its discretion under the facts of this case by ordering injunctive relief.
2. The trial court erred in finding that plaintiff failed to mitigate his damages and/or the trial court erred in finding that the plaintiff was not estopped from enforcing the set back restriction and/or that the Lanouxes' detrimentally relied upon various representations or omissions by Mr. Robichaux.

## STANDARD OF REVIEW

The issuance of a permanent injunction is reviewable under the manifest error standard. City of Baton Rouge/Parish of East Baton Rouge v. 200 Government Street, LLC, 08-0510, p. 5 (La. App. 1st Cir. 9/23/08), 995 So. 2d 32, 36, writ denied, 08-2554 (La. 1/9/09), 998 So. 2d 726. The manifest error standard of review applies to all factual findings, including a finding relating to the factual (as opposed to legal) sufficiency of the evidence to warrant application of a legal theory or doctrine. This standard of review also applies to mixed questions of law and fact, such as the issue of whether the facts found by the trier of fact trigger

[2] CountryPlace acknowledges that it was properly brought into the suit.

application of a particular legal standard. Barnett v. Saizon, 08-0336, p. 6 (La. App. 1st Cir. 9/23/08), 994 So. 2d 668, 672.

In order to reverse a factual determination by the trier of fact, the appellate court must apply a two-part test: (1) the appellate court must find that a reasonable factual basis does not exist in the record for the finding; and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). Further, when factual findings are based upon determinations regarding the credibility of the witnesses, the manifest error standard demands great deference to the trier of fact's findings. Barnett, 08-0336 at p. 6, 994 So. 2d at 672.

## DISCUSSION

### *Injunctive relief*

In its first assignment of error, CountryPlace argues that the trial court abused its discretion by ordering injunctive relief. To support its argument, CountryPlace relies on Weingarten, Inc. v. Northgate Mall, Inc, 404 So. 2d 896, 897 (La. 1981), wherein the court held:

> In view of the great disparity between the cost of specific relief and the damages caused by the contractual breach, the magnitude of the economic and energy waste that would result from the building's destruction, the substantial hardship which would be imposed on individuals who are not parties to the contract or to this litigation, and the potential negative effect upon the community, the circumstances and nature of this case do not permit specific performance.

In Weingarten, Inc., the defendant erected a four million dollar building that encroached on property leased to plaintiff by the defendant, breaching the lease agreement between it and plaintiff. Plaintiff responded to the defendant's breach by filing suit seeking preliminary and permanent injunctive relief. The Louisiana Supreme Court found that although specific performance is the preferred remedy for breach of a contract, it may be withheld by the court when specific relief is

impossible, when the inconvenience or cost of performing is greatly disproportionate to the damages caused, when the obligee has no real interest in receiving performance, or when the latter would have a substantial negative effect on the interests of third parties. Weingarten, Inc., 404 So. 2d at 897. In Weingarten, Inc., the court nevertheless underscored that unless exceptional conditions prevail, anything which has been done in violation of a contract may be undone, including the destruction of a building. Weingarten, Inc., 04 So. 2d at 902.

In the present case, CountryPlace contends that the expenses incurred by the Lanouxes to install a sewer system, lay the foundation, and to lift and re-install the mobile home will equal, if not exceed, the cost of purchasing the tract of land from the Robichauxes.[3] CountryPlace also contends that it is questionable as to whether Mr. Robichaux still has an interest in the set back restrictions. Additionally, CountryPlace urges that the Lanouxes may be sued by Palm Harbor Homes, the seller of the mobile home, for not terminating the installation of the mobile home upon receiving the letter from Mr. Robichaux. Based on these facts, CountryPlace insists that injunctive relief is inappropriate. We disagree.

Upon an obligor's failure to perform an obligation to do, the granting of specific performance is at the discretion of the court. See La. C.C. art.1986. Under Louisiana's civil law system, specific performance is the preferred remedy for breach of contract. An obligee enjoys the right to demand, insofar as is practicable, the specific performance of the obligation. An obligee has a right to specific performance for breach of contract except when it is impossible, greatly disproportionate in cost to the actual damage caused, no longer in the creditor's

[3] The Lanouxes purchased the tract of land from Mr. and Mrs. Robichaux for $9,300.00. It cost the Lanouxes $4,019.73 to lay the concrete slab and $2,250.00 to install the sewer system. The record does not reveal the cost to lift and re-install the mobile home.

interest, or of substantial negative effect upon the interests of third parties. The remedy of specific performance may, under some circumstances, be enforced by injunction. The petitioner must have a substantive right to specifically enforce an obligation in order for an injunction to be used as a procedural remedy to enforce the obligation. Charter School of Pine Grove, Inc. v. St. Helena Parish School Bd., 07-2238, p. 14 (La. App. 1st Cir. 2/19/09), 9 So. 3d 209, 222.

The evidence presented by CountryPlace does not show a great disparity between the cost of specific relief and the damages caused by the contractual breach. CountryPlace has not shown that substantial hardship will be imposed on individuals who are not parties to the contract or to this litigation. CountryPlace has not shown that removing the mobile home is impossible or impractical under the circumstances. Finally, CountryPlace has not shown that exceptional conditions prevail so as to necessitate denying injunctive relief. See Weingarten, Inc., 404 So. 2d at 897 and Charter School of Pine Grove, Inc., 07-2238 at p. 14, 9 So. 3d at 222.

Furthermore, the trial court found that the Act of Sale was a valid and enforceable contract. A contract is the law between the parties. Thibodaux v. Arthur Rutenberg Homes, Inc., 04-1500, p. 4 (La. App. 1st Cir. 12/22/05), 928 So. 2d 80, 84. The trial court also found that the Lanouxes breached the contract by placing the mobile home within one hundred feet of Burma Road. Mr. Robichuax testified that his interest in the restrictions is to ensure that the main entrance, where the Lanouxes' property is located, is not impaired by any type of construction. Evidently, the trial court felt that Mr. Robichaux's interest in the restrictions was valid. Accordingly, the trial court's decision to grant the Robichauxes injunctive relief is not manifestly erroneous.

## *Affirmative Defenses*

In its second assignment of error, CountryPlace contends that the trial court erred in finding that the Robichauxes were not estopped from enforcing the set back restrictions and/or in not finding that the Lanouxes detrimentally relied upon representations or omissions made by Mr. Robichaux and/or not finding that the Robichauxes failed to mitigate their damages. The Robichauxes, however, contend that the Lanouxes' affirmative defenses are not properly before this court because they were not pled in their answer to the Robichauxes' petition.

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In their answer, the Lanouxes asserted all affirmative defenses available to them, and in its answer, CountryPlace adopted all defenses available to the Lanouxes. The Lanouxes, however, did not specifically plead detrimental reliance or estoppel as required by La. C.C.P. art. 1005, nor did they affirmatively plead mitigation of damages. See The Cadle Company v. Dumesnil, 610 So. 2d 1063 (La. App. 3rd Cir. 1992), writ denied, 613 So. 2d 992 (La. 1993). Therefore, arguably, these defenses were not properly raised. However, because evidence on detrimental reliance or estoppel and mitigation of damages was admitted at trial without objection, we will address these issues on appeal. See Sonnier v. Boudreaux, 95-2127, pp. 6-7 (La. App. 1st Cir. 5/10/96), 673 So. 2d 713, 717.

### *Estoppel and Detrimental Reliance*

The doctrine of equitable estoppel may be defined as the effect of the voluntary conduct of a party whereby he is precluded from asserting rights against another who has justifiably relied on such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct. Founded on good faith, the doctrine is designed to prevent injustice by barring a party, under special circumstances, from taking a position contrary to his prior acts, admissions, representations, or silence. Dupont v. Hebert, 06-2334, p. 7 (La. App. 1st Cir. 2/20/08), 984 So. 2d 800, 806, writ denied, 08-0640 (La. 5/9/08), 980 So. 2d 695.

The theory of detrimental reliance, also referred to as promissory or equitable estoppel, is based upon La. C.C. art. 1967, which provides, in pertinent part, that "[a] party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying." The doctrine of detrimental reliance is designed to prevent injustice by barring a party from taking a position contrary to his prior acts, admissions, representations, or silence. To establish detrimental reliance, a party must prove three elements by a preponderance of the evidence: (1) a representation by conduct or words; (2) justifiable reliance; and (3) a change in position to one's detriment because of the reliance. It is difficult to recover under the theory of detrimental reliance, because estoppel is not favored in our law. Barnett, 08-0336 at pp. 9-10, 994 So. 2d at 674.

To support its claims for estoppel and detrimental reliance, CountryPlace relies on the Lanouxes' testimony that they were not aware of the set back restrictions until they received the May 2nd letter from Mr. Robichaux requesting that they comply with the restrictions attached to the Act of Sale. The Lanouxes also relied on Mr. Lanoux's testimony that prior to the sale Mr. Robichaux did not

inform him that there would be any restrictions on the property. To further support its claims, CountryPlace relies on Mr. Robichaux's testimony that he did not place markers on the property to indicate boundaries or the restrictions prior to the sale.

Additionally, CountryPlace argues the Lanouxes were justified in believing, to their detriment, that there were no restrictions. CountryPlace bases this argument on the Lanouxes' assertion that their copy of the Act of Sale did not contain the restrictions and the fact that they claim that Mr. Robichaux did not inform them of the restrictions prior to the sale. For these reasons, CountryPlace insists that the Robichauxes should be estopped from seeking injunctive relief. We disagree.

At the trial, Mr. Lanoux testified that Mr. Robichaux did present him with a map and instructed him to place his mobile home in a certain area on the property. Furthermore, Mr. Robichaux testified that in a conversation that preceded the sale, he explained to the Lanouxes that there would be a mild set of restrictions on the property. Furthermore, at the trial on the merits, the Robichauxes introduced into evidence the recorded copy of the Act of Sale, which included the restrictions. Additionally, Judy Morvant, the notary who notarized the sale documents, testified that the restrictions were attached to the Act of Sale when the Lanouxes executed the documents. To counter that evidence, the Lanouxes introduced into evidence a copy of the Act of Sale without the restrictions. In its reasons for judgment, the trial court found that the restrictions were attached to the Act of Sale. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. Guillory v. Lee, 09-0075, p. 15 (La. 6/26/09), 16 So. 3d 1104, 1117.

In light of the trial court's findings, we cannot say that Mr. Robichaux failed to inform the Lanouxes that there were some restrictions on the property.

Therefore, CountryPlace has failed to prove by a preponderance of the evidence that Mr. Robichaux represented by his conduct that no restrictions existed, and the Lanouxes were justified in believing that no restrictions existed. Accordingly, we find that CountryPlace has failed to state a cause of action against the Robichauxes for estoppel or detrimental reliance.

### *Mitigation of Damages*

It is well settled in the jurisprudence that an injured party has a duty to take reasonable steps to mitigate damages. La. C.C. art. 2002; Morton Bldg., Inc., v. Redeeming Word of Life Church, 01-1837, p. 12 (La. App. 1st Cir. 10/16/02), 835 So. 2d 685, 692, writ denied, 02-2733 (La. 1/24/03), 836 So.2d 46.

CountryPlace contends that the Robichauxes failed to mitigate the Lanouxes' damages. CountryPlace's contentions are based on the fact that Mr. Robichaux sent the May 2nd letter requesting that the Lanouxes comply with the restrictions after the Lanouxes purchased the mobile home. However, the record does not reveal when Mr. Robichaux learned that the Lanouxes were planning to place their mobile home in the restricted area. Furthermore, as previously stated, in its reasons for judgment, the trial court found that the restrictions were attached to the Act of Sale when the Lanouxes executed the documents. Therefore, CountryPlace cannot show that Mr. Robichaux's failure to send the May 2nd letter before the Lanouxes purchased the mobile home constitutes a failure to mitigate damages. Accordingly, CountryPlace has failed to state a cause of action for failure to mitigate damages.

## CONCLUSION

For the above reasons, we affirm the trial court's judgment enjoining the Lanouxes from placing their mobile home within one hundred feet of Burma Road.

All costs of this appeal are assessed against appellant, CountryPlace Mortgage Ltd.

**AFFIRMED.**