NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0992

DIEP PHAM AND BC FOOD MART, INC.

VERSUS

THAO V. NGUYEN, THANH H. NGUYEN, ANDY D. NGUYEN, AND JACKIE P. DO

Judgment Rendered: May 6, 2011

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On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
Docket No. 554,861

Honorable R. Michael Caldwell, Judge Presiding

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Michael P. Bienvenu
Baton Rouge, LA

Counsel for Plaintiff/Appellant
BC Food Mart, Inc.

Arthur R. Thomas
Baton Rouge, LA

Counsel for Defendants/Appellees
Andy D. Nguyen and Jackie P. Do

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

This is an appeal from a district court's partial grant of a motion to enforce a settlement. For the reasons that follow, we dismiss the appeal and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

This action arises out of a 2005 lease of immovable property located at 1200 North Ardenwood in Baton Rouge, which allegedly contained a right of first refusal by the lessors, Thao Nguyen and Thanh Nguyen ("the Nguyens"), in favor of the plaintiffs/lessees, Diep Pham and BC Food Mart, Inc., who operated a convenience store on the premises. In September or October of 2006, the Nguyens forwarded correspondence to the plaintiffs to notify them that a $240,000 purchase offer had been received from third parties (which the plaintiffs claimed was a false representation). The plaintiffs declined to purchase the property at that price. In January of 2007 the Nguyens sold the property to the defendants, Andy Nguyen[1] and his wife, Jackie Do, for $165,000,[2] without first offering the property to the plaintiffs. The plaintiffs contended that they did not find out about the sale until Andy Nguyen and Jackie Do requested them to sign a new lease for their continued operation of the convenience store on the premises.

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[1] Andy Nguyen testified that he was not related to Thao and Thanh Nguyen.

[2] A copy of an act of sale between the sellers, Thao Nguyen and Thanh Nguyen, and the purchasers, Andy Nguyen and Jackie Do, was submitted into evidence and stated the sale price of the property was $165,000; however, Andy Nguyen and Jackie Do contend that they paid a total price of $240,000 for the property, by paying $75,000 to the Nguyens (purportedly by the issuance of three personal checks to the Nguyens totaling $75,000), and financing the remaining $165,000 balance. It was asserted that because the appraisal of the property was less than the $240,000 price, the lender required the sale documents to have a stated purchase price of only $165,000. While the cash sale deed for $165,000 was filed into the conveyance records of East Baton Rouge Parish and is thus effective as to third parties pursuant to the Public Records Doctrine, the mortgage granted to the lender does not appear in the record before us and the copies of the three checks filed into the record are of the fronts only and do not appear to have been negotiated.

The plaintiffs filed the instant suit, seeking to enforce the right of first refusal clause in their lease with the Nguyens.[3] Thereafter, the Nguyens filed for bankruptcy,[4] but settlement negotiations continued between BC Food Mart, Andy Nguyen, and Jackie Do. Allegedly, Andy Nguyen and Jackie Do later agreed to settle the case and sell the property to BC Food Mart for $175,000. The purported compromise had been reached through the negotiations of counsel for the parties.

Upon being informed of the terms of the settlement, Andy Nguyen and Jackie Do terminated their attorney's services and hired new counsel. BC Food Mart was informed that Andy Nguyen and Jackie Do did not wish to proceed with the settlement. Whereupon, BC Food Mart filed a motion to enforce the settlement.

Following a hearing on the matter, the district court rendered judgment in favor of BC Food Mart, granting the motion to enforce, in part, against Andy Nguyen only, decreeing there was "a contract to sell" between BC Food Mart and Andy Nguyen "for the sale of 1200 N. Ardenwood, Baton Rouge, Louisiana[,] for $175,000." The judgment, signed March 11, 2010, was designated final for purposes of appeal, in accordance with LSA-C.C.P. art. 1915(B)(1), by order of the district court in July, 2010.

BC Food Mart has appealed the judgment, contending the district court erred in failing to fully enforce the settlement agreement and render judgment against Jackie Do, and in decreeing only that a contract to sell

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[3] A stipulated judgment was signed on July 13, 2007, following the filing of exceptions of no right and/or no cause of action by the Nguyens, which dismissed the claims of Diep Pham. BC Food Mart continued the suit as the sole plaintiff.

[4] In a subsequent motion filed by BC Food Mart, it was alleged that the Nguyens had filed for bankruptcy protection in the United States Bankruptcy Court for the Middle District of Louisiana, under case number 09-10434; however, no official document or stay order to substantiate this fact appears in the record of this case on appeal.

exists, rather than ordering that Jackie Do and Andy Nguyen proceed with the sale.

LAW AND ANALYSIS

On appeal, BC Food Mart contends that the correspondence between the parties' attorneys constituted a binding and enforceable compromise agreement. BC Food Mart further contends that counsel for Jackie Do and Andy Nguyen, who negotiated the compromise on their behalf, had the requisite legal authority to do so, having received direct authorization from Andy Nguyen, who, in turn either: had express authority from Jackie Do; was clothed with the apparent authority of Jackie Do; or was the managing spouse of the community obligation, in accordance with LSA-C.C.P. art. 735.[5] BC Food Mart also asserts that counsel for Jackie Do and Andy Nguyen had apparent authority to settle the case on their behalf, citing LSA-C.C. art. 2989.[6] Jackie Do maintains that she did not authorize her attorney to enter into a compromise on her behalf.

Prior to reaching the issues presented, we first examine whether this matter is properly before this court on appeal. It is the duty of a court to examine subject matter jurisdiction *sua sponte*, even when the issue is not

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[5] Louisiana Code of Civil Procedure Article 735 provides:

> Either spouse is the proper defendant, during the existence of the marital community, in an action to enforce an obligation against community property; however, if one spouse is the managing spouse with respect to the obligation sought to be enforced against the community property, then that spouse is the proper defendant in an action to enforce the obligation.
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> When doubt exists whether the obligation sought to be enforced is a community obligation or the separate obligation of the defendant spouse, that spouse may be sued in the alternative.
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> When only one spouse is sued to enforce an obligation against community property, the other spouse is a necessary party. Where the failure to join the other spouse may result in an injustice to that spouse, the trial court may order the joinder of that spouse on its own motion.

[6] Louisiana Civil Code Article 2989 provides:

> A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.

raised by the litigants. **McGehee v. City/Parish of East Baton Rouge**, 2000-1058, p. 3 (La. App. 1 Cir. 9/12/01), 809 So.2d 258, 260. See also LSA-C.C.P. art. 2083.[7]

In this case, the judgment rendered by the district court declared only that "a contract to sell" existed between BC Food Mart and Andy Nguyen "for the sale of 1200 N. Ardenwood"; it did not award any further relief to BC Food Mart. A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final. A judgment that does not determine the merits, but only preliminary matters in the course of the action, is an interlocutory judgment. A judgment that determines the merits in whole or in part is a final judgment. LSA-C.C.P. art. 1841.

Herein, the judgment of the district court was either interlocutory in nature or a partial final judgment, as the trial on the main demand (i.e., the defendants' liability with respect to the right of first refusal) had not yet taken place. If the judgment appealed herein is interlocutory, it is not appealable. See LSA-C.C.P. art. 2083(C) and 1960 Revision Comments. If the judgment is a partial final judgment, it may be appealable in accordance with LSA-C.C.P. art. 1915, as discussed hereinafter. We find it unnecessary to resolve the issue, as the result is the same.

In the present case, the district court's judgment was designated final for purposes of appeal, pursuant to LSA-C.C.P. art. 1915(B), upon the

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[7] Louisiana Code of Civil Procedure Article 2083 provides, in pertinent part:

> A. A final judgment is appealable in all causes in which appeals are given by law, whether rendered after hearing, by default, or by reformation under Article 1814.
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> * * *
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> C. An interlocutory judgment is appealable only when expressly provided by law.

motion of BC Food Mart. In his order so designating, the district court judge stated that he had "expressly determined, based on the reasons set forth in the foregoing motion, that there [was] no just reason for delay." BC Food Mart's motion to designate the judgment as final asserted that because no judgment was rendered against Jackie Do, a trial would be required to determine her liability on the main demand, and that such a trial would be obviated by an appellate determination that the motion to enforce settlement should have been granted as to Jackie Do. Further, BC Food Mart contended that if a trial on the merits were held as to Jackie Do, and thereafter the March 11, 2010 judgment against Andy Nguyen were appealed, along with the final judgment rendered in connection with the trial on the merits, the judgment against Andy Nguyen could be reversed and a trial on the merits would then be required, as to him, on remand. BC Food Mart also cited judicial efficiency and economy, along with noting the possibility of inconsistent rulings as to Andy Nguyen and Jackie Do, as reasons for designating the March 11, 2010 judgment final for appeal purposes. The district court's statement, on granting BC Food Mart's motion to designate the judgment as final, essentially adopted these reasons as his own.

Even though a court designates a judgment as final under LSA-C.C.P. art. 1915(B), that designation is not determinative of an appellate court's jurisdiction. The appellate court's jurisdiction to decide an appeal hinges on whether the certification was appropriate. See **Templet v. State ex rel. Department of Public Safety and Corrections**, 2005-1903, p. 6 (La. App. 1 Cir. 11/3/06), 951 So.2d 182, 185. The proper standard of review for an order designating a judgment as final for appeal purposes, when accompanied by explicit reasons, is whether the trial court abused its

discretion. **R.J. Messinger, Inc. v. Rosenblum,** 2004-1664, p. 13 (La. 3/2/05), 894 So.2d 1113, 1122. See also **Motorola, Inc. v. Associated Indemnity Corporation**, 2002-1351, p. 13 (La. App. 1 Cir. 10/22/03), 867 So.2d 723, 730 (en banc).

Historically, our courts have had a policy against multiple appeals and piecemeal litigation. Article 1915 attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties. Thus, in considering whether a judgment is properly designated as final, pursuant to Article 1915, a court must take into account judicial administrative interests as well as the equities involved. Factors to be considered by a trial court, although not exclusive, when determining whether a partial judgment should be certified as appealable, include: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; and (4) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. Nevertheless, the overriding inquiry for the trial court is whether there is no just reason for the delay. **Templet v. State ex rel. Department of Public Safety and Corrections**, 2005-1903 at pp. 6-7, 951 So.2d at 185-86 (citing **R.J. Messinger, Inc. v. Rosenblum,** 2004-1664 at pp. 13-14, 894 So.2d at 1122-23).

Our review of the matter leads us to conclude that, while the eventualities suggested by BC Food Mart and adopted by the district court as reasons for designating the judgment against Andy Nguyen final for appeal

purposes are possible, it is also possible that, upon further proceedings prior to or in connection with the trial on the merits of the main demand, which sought enforcement of BC Food Mart's right of first refusal, the matter might be resolved without the necessity of appellate review. We particularly observe, as supportive of this conclusion, the purposeful failure of the district court to order Andy Nguyen to take any affirmative action with respect to the court's ruling that he entered into "a contract to sell" with BC Food Mart in settlement of the underlying litigation between the parties. The March 11, 2010 judgment rendered against Andy Nguyen adjudicated only some aspects of his liability with respect to the purported settlement agreement and did not address the merits of the main demand. Issues remain with respect to: what type of relief may be granted for the breach of the alleged contract on the main demand (see LSA-C.C. art. 2485, and Revision Comment (b), citing LSA-C.C. arts. 1986-1988, 1994-2012, and 2013-2024);[8] whether the agreement denominated by the trial court as "a contract to sell" is enforceable, since it affects community property[9] and there was,

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[8] The right to a specific performance is not absolute and may be denied in favor of damages, particularly where the rights of others are affected. See **Thompson v. Thompson**, 211 La. 468, 507, 30 So.2d 321, 334 (1947); **Southern Savings Association v. Langford Land Company**, 372 So.2d 713 (La. App. 4 Cir.), writ denied, 374 So.2d 659 (La. 1979). See also **Charter School of Pine Grove, Inc. v. St. Helena Parish School Board**, 2007-2238 (La. App. 1 Cir. 2/19/09), 9 So.3d 209.

[9] We note that the fact that community property is at issue in the present case makes it distinguishable from the facts presented in **Dozier v. Rhodus**, 2008-1813 (La. App. 1 Cir. 5/5/09), 17 So.3d 402, writ denied, 2009-1647 (La. 10/30/09), 21 So.3d 294, which BC Food Mart relied upon in its motion to enforce settlement. Furthermore, we question the continued viability of the **Dozier v. Rhodus** holding in light of 2007 La. Acts, No. 138, effective August 15, 2007 (see **Roccaforte v. Wing Zone, Inc.**, 2007-2451, p. 4 n.2 (La. App. 1 Cir. 8/21/08), 994 So.2d 126, 129 n.2), which added LSA-C.C. art. 3073, providing: "When a compromise effects a transfer or renunciation of rights, the parties shall have the capacity, and the contract shall meet the requirement of form, prescribed for the transfer or renunciation." Because **Dozier v. Rhodus** dealt with a July, 2007 compromise agreement, LSA-C.C. art. 3073 was not applicable. However, the purported compromise agreement at issue in the present case was confected in April of 2009; therefore, LSA-C.C. art. 3073 would apply. When Article 3073 is read in conjunction with LSA-C.C. art. 2993 (which requires that "when the law prescribes a certain form for an act, a mandate authorizing the act must be in that form"), the authorization from Andy Nguyen and Jackie Do to their attorney to settle this case by transferring their rights in the immovable property at issue was required to have been in the form prescribed by LSA-C.C. arts. 2440 and 3073 (i.e., "by authentic act or by act under private signature").

allegedly, no concurrence by one spouse as required by LSA-C.C. art. 2347(A)[10] (see also LSA-C.C. art. 2353[11]); and whether a separate enforceable contract may result from within the context of settlement negotiations when no compromise was reached (see LSA-C.C. art. 3081).[12]

Consequently, we find that the matters presented on appeal could be disposed of via further action by the parties and/or the district court, rendering an appeal unnecessary, and we conclude the district court abused its discretion in designating the March 11, 2010 judgment final for purposes of appeal. Because we conclude the district court improperly designated the

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[10] Louisiana Civil Code Article 2347(A) provides, in pertinent part: "The concurrence of both spouses is required for the alienation, encumbrance, or lease of community immovables."

[11] Louisiana Civil Code Article 2353 provides, in pertinent part: "When the concurrence of the spouses is required by law, the alienation, encumbrance, or lease of community property by a spouse is relatively null unless the other spouse has renounced the right to concur."

[12] We also question the severability of the settlement agreement in its enforcement against one defendant, Andy Nguyen, when the consent of his co-defendant and spouse, Jackie Do, could not be obtained. Since the written correspondence that allegedly constituted the settlement agreement did not contain a severability provision, which would give effect to any one or more provisions should another portion of the agreement be declared invalid, the entire agreement might have been invalidated by the failure of all parties to agree to the negotiated settlement. See **State v. Sprint Communications Company, L.P.**, 2003-1264, pp. 9-10 (La. App. 1 Cir. 10/29/04), 897 So.2d 85, 92-93, writs denied, 2005-1180, 2005-1190 (La. 12/9/05), 916 So.2d 1056, 1057, wherein it was held that a negotiated settlement could not be enforced as to some parties where the consent of other parties to the agreement could not be obtained. While we recognize that the **Sprint** case dealt with a settlement in a class action setting, and that class actions are subject to specialized legislation and jurisprudence, the underlying rationale (that parties should not be required to accept a settlement that modifies the agreement they negotiated and agreed to (see **Evans v. Jeff D.**, 475 U.S. 717, 726, 106 S.Ct. 1531, 1537, 89 L.Ed.2d 747 (1986)) is equally applicable to non-class action settlements. In the instant case, Andy Nguyen ostensibly agreed to a settlement of the lawsuit that comprehended the inclusion of his wife in the agreement and would encompass a joint sale of the property at issue. When the consent of Mr. Nguyen's wife could not be obtained, was his consent thereby affected? The provisions of the alleged settlement agreement are contained in the April 24, 2009 letter, written by Andy Nguyen and Jackie Do's former counsel to BC Food Mart's counsel, which stated, in pertinent part, as follows:

> 1) BC Food Mart, Inc. would settle, dismiss, waive, and release with prejudice all claims they may have against Thao Nguyen, Thanh Nguyen, Andy Nguyen, and Jackie Do relating in any way to the property located at 1200 N. Ardenwood, Baton Rouge, LA;
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> 2) In exchange for this settlement, dismissal, waiver, and release, Andy Nguyen and Jackie Do would sell the property located [at] 1200 N. Ardenwood, Baton Rouge, Louisiana to BC Food Mart, Inc. for $175,000.

If this "settlement" is only partially enforced, as to Andy Nguyen, would Thao Nguyen and Thanh Nguyen be dismissed? What would the price for Andy Nguyen's share of the property be? BC Food Mart would probably not consider half of $175,000 to be a fair price for Andy Nguyen's share of the property, since it would have to continue to litigate the action as to Jackie Do, and if unsuccessful, would have to deal with her as a potentially hostile co-owner, or file another action for partition of the property. The creation of such questions militates against a finding of the severability of the "settlement" insofar as it applied to Jackie Do.

March 11, 2010 judgment at issue herein as a final judgment pursuant to LSA-C.C.P. art. 1915(B), the appeal should be dismissed for lack of appellate jurisdiction.

CONCLUSION

For the reasons assigned herein, this appeal is hereby dismissed for lack of appellate jurisdiction and the case is remanded to the district court for further proceedings consistent with the foregoing. Assessment of appeal costs shall await final disposition of this matter.

APPEAL DISMISSED; REMANDED.