NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1254

ELI KFOURY

VERSUS

LARRY COUPEL AND NATALIE COUPEL

Judgment Rendered: FEB 11 2011

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On Appeal from the Twenty-Third Judicial District Court
In and for the Parish of Assumption
State of Louisiana
Docket No. 31161

Honorable Guy C. Holdridge, Judge Presiding

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Martin Triche Napoleonville, Louisiana	Counsel for Plaintiff/Appellee Eli Kfoury
Michael Zerlin Thibodaux, Louisiana	Counsel for Defendants/Appellants Larry and Natalie Coupel

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

The defendants appeal the trial court's judgment denying their motion for new trial. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

This case is a possessory action filed by Eli Kfoury against Larry and Natalie Coupel on August 20, 2008. In the petition, Mr. Kfoury alleged that he had been in peaceful possession of a certain tract of land located in Assumption Parish for at least 30 years. He also alleged that the Coupels, who own property adjacent to Mr. Kfoury's property, had disturbed his possession and, in other litigation, had asserted that they owned a road on Mr. Kfoury's property.

On March 5, 2009, Mr. Kfoury filed a supplemental petition, praying for injunctive relief to enjoin the Coupels from further interfering with his rights of possession during the pendency of the proceedings, as well as asserting claims for damages associated with their alleged interference with Mr. Kfoury's property rights. On April 15, 2009, the date the injunctive relief hearing was scheduled to be heard, the parties reached a compromise settlement and placed it on the record.

Prior to placing the agreement on the record, the trial court instructed the parties, who were all present and represented by counsel, to "listen very closely; all parties listen very closely to what's being said because once we enter the stipulation, it's going to be recorded and you are going to be bound by it. Make sure everybody listens and if you have any questions after, ask any questions." Thereafter, the parties, through counsel, stipulated:

> Mr. Harold Terracina [a land surveyor retained by Mr. Kfoury] and Mike Mayeaux [a land surveyor retained by the Coupels]...will go out and work and mark and identify the eastern boundary line of the west half of the southeast quarter, section 35, township 13, south range 13 east as well as the line westward to the lake. They will utilize the Humble/Exxon surveys and other related material to perform their work. The boundary will be established as to—that boundary, once established will be the extent of the possession and ownership of Kfoury family...but will include but not limited to [sic] the launch on the rear road and the appurtenances will be deemed to be in the possession owned by the Kfoury family once that line is marked.

Additional stipulations were read into the record and formed part of the agreement reached between the parties. Mr. Kfoury's attorney indicated that "we'll reduce that to writing as well as attaching any and all surveys provided by Mr. Terracina confirmed by Mr. Mike Mayeaux." After the stipulations were entered, the trial court confirmed the parties' understanding and willingness to enter into the agreement. Although a written judgment was contemplated, no written judgment was submitted to the trial court following the hearing.

Thereafter, Mr. Terracina completed a purported property survey and established a boundary line. No survey was ever prepared on behalf of the Coupels nor did Mr. Mayeaux confirm the survey completed by Mr. Terracina.

On June 8, 2009, Mr. Kfoury filed a Motion and Order to Enforce Settlement Agreement. Therein, Mr. Kfoury alleged that the Coupels, who were no longer represented by counsel, indicated that they would not honor any settlement agreement that had been read into the record. Following a hearing on July 15, 2009, the trial court signed a judgment enforcing the terms of the settlement agreement rendered in open court on April 15, 2009, and adopting the boundary established by Mr. Terracina's survey.

On July 17, 2009, the Coupels filed a Motion for New Trial, asserting that there was no enforceable settlement agreement in place, that Mr. Terrancina's survey had not been approved by Mr. Mayeaux as contemplated by the parties, and that the Coupels had not been allowed to present evidence relative to Mr. Kfoury's failings in executing his duties under the purported settlement agreement. On February 18, 2010, the trial court signed a judgment denying the Coupels' motion for new trial. The Coupels have appealed, asserting that the trial court erred in denying their motion for new trial.[1]

DISCUSSION

[1] A motion for new trial should be granted when the judgment is clearly contrary to the law and evidence and, in any case, if there is good ground therefor. LSA-C.C.P. arts. 1972 and 1973. Louisiana jurisprudence is clear that a new trial should be ordered when the trial court, exercising its discretion, is convinced by its examination of the facts that the judgment would result in a miscarriage of justice. **David v. Meek**, 97-0523, p. 3 (La.App. 1 Cir. 4/8/98), 710 So.2d 1160, 1162. The granting or denying of a motion for new trial rests within the wide discretion of the trial court and its determination should not be disturbed absent a clear abuse of discretion. **Id.**

At the outset, we note that a judgment denying a motion for new trial is interlocutory and nonappealable. However, the supreme court has directed us to consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits as well when it is clear from the appellant brief that the appellant intended to appeal the merits of the case. **Reno v. Perkins Engines, Inc.**, 98-1686, p. 2 (La.App. 1 Cir. 9/24/99), 754 So.2d 1032, 1033, writ denied, 99-3058 (La. 1/7/00), 752 So.2d 863 (citing **Smith v. Hartford Acc. & Indem. Co.**, 254 La. 341, 348-49, 223 So.2d 826, 828-29 (1969), and **Fruehauf Trailer Co. v. Baillio**, 252 La. 181, 190, 210 So.2d 312, 315 (1968)). It is obvious from the Coupels' brief that they intended to appeal the judgment on the merits, as well as the denial of the motion for new trial, so we must treat this case as an appeal of both judgments. See **Reno**, 98-1686 at p. 2, 754 So.2d at 1033-34.

Relative to the judgment on the merits, we note that LSA-C.C. art. 3071 defines compromise as "a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship." Compromises are favored in the law, and the burden of proving the invalidity of a compromise is on the party attacking the agreement. **Gaubert v. Toyota Motor Sales U.S.A., Inc.**, 99-2569, p. 8 (La.App. 1 Cir. 11/3/00), 770 So.2d 879, 884.

The Coupels assert that while they agreed to a compromise as recited in open court at the hearing on April 15, 2009, the parties and the trial judge intended the agreement to be reduced to writing, which the Coupels contend required the document to be reviewed and signed by both parties and submitted to the court for the judge's signature. The Coupels aver that instead a document in the form of a judgment, which had not been approved by the Coupels, was submitted to the trial court for signature. Absent a written agreement signed by both parties, the Coupels contend that the compromise was not effective. In support, the Coupels cite **Bourgeois v. Franklin**, 389 So.2d 358, 361 (La. 1980), where the court held that an agreement of compromise rendered in open court was required to be reduced to writing to serve as proof of the agreement

and the acquiescence therein. We note that at the time **Bourgeois** was decided, the second paragraph of LSA-C.C. art. 3071 provided that a transaction or compromise "must be reduced into writing," but it did not address agreements rendered in open court. However, the second paragraph of Article 3071 was amended by 1981 La. Acts 782, § 1, effective July 28, 1981, and read:

> This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding. The agreement recited in open court confers upon each of them the right of judicially enforcing its performance, although its substance may thereafter be written in a more convenient form.

The second paragraph of LSA-C.C. art. 3071 was later removed from the article by 2007 La. Acts 138, §1, but its substance was preserved in LSA-C.C. art. 3072, which was added by the same act and provides:

> A compromise shall be made in writing or recited in open court, in which case the recitation shall be susceptible of being transcribed from the record of the proceedings.

See LSA-C.C. art. 3072, comment (a). Accordingly, when a compromise is recited in open court, there is no requirement that it be reduced to writing in order for the agreement to be effective and binding. However, because a writing was contemplated and the parties were unable to agree upon the specific terms, either party had the right to petition the court to request that the agreement be reduced to writing in accordance with the terms recited in open court.

The Coupels also contend that there were conditions contained within the agreement that were not met by the parties. The Coupels note that the agreement required Mr. Terracina to mark the boundaries using the Humble/Exxon surveys and other related material, and the survey had to be confirmed by Mr. Mayeaux. Also, the agreement required that "any and all surveys provided by Mr. Terracina confirmed by Mike Mayeaux" be attached to the written settlement agreement.

We note that attached to the July 21, 2009 written judgment, which reflected the parties' agreement rendered in open court, was "Exhibit A"—a drawing by Mr. Terracina establishing a boundary line for the area at issue.

However, the Coupels assert that Mr. Terracina did not conduct a proper survey of the property prior to drafting the sketch. In connection with this argument, the Coupels note that the trial court did not allow Willard Cointment, a professional land surveyor, to testify at the hearing on the motion to enforce the settlement agreement regarding the survey submitted by Mr. Terracina.[2]

Nonetheless, we note that the trial court allowed David Waitz, another land surveyor retained by the Coupels, to testify at the hearing on the motion for new trial. Mr. Waitz admitted that he had not contacted Mr. Terracina and did not know whether the boundary established by Mr. Terracina was correct or not. Mr. Waitz indicated that he did not perform a survey of the property, but was retained by the Coupels to "look at what [Mr. Terracina] did." Moreover, the record establishes that Mr. Terracina, in determining the boundary line, utilized various reference maps, specifically including a map from Humble Refinery Company dated January 16, 1953. Accordingly, we do not find that the trial court was manifestly erroneous in finding that Mr. Terracina performed a survey and determined a boundary as contemplated by the parties' agreement recited in open court.

The Coupels contend that even if Mr. Terracina completed a survey as intended by the agreement, the survey was not confirmed by Mr. Mayeaux as the parties had agreed. We note that good faith governs the conduct of the obligor and the obligee in whatever pertains to an obligation. LSA-C.C. art. 1759. Louisiana Civil Code article 1983 requires that contracts be performed in good faith. A party to a contract has an implied obligation to put forth a good faith effort to fulfill the conditions of the contract. **Bloom's Inc. v. Performance Fuels, L.L.C.**, 44,259, 44,452, p. 5 (La.App. 2 Cir. 7/1/09), 16 So.3d 476, 480, writ denied, 09-2003 (La. 11/20/09), 25 So.3d 800, (citing **Payne v. Hurwitz**, 07-0081 (La.App. 1 Cir. 1/16/08), 978 So.2d 1000).

[2] Nothing in the record or in the briefs suggests that the Coupels proffered Mr. Cointment's testimony.

Both Mr. Kfoury and the Coupels had an implied obligation to act in good faith in fulfilling the obligations set forth in their agreement. Mr. Kfoury, in accord with the parties' agreement recited in open court, paid Mr. Terracina to complete a survey and determine a boundary for the property at issue. On the other hand, at the hearing on the motion for new trial, Mr. Coupel insisted that the parties had never made an agreement, despite the compromise recited in open court. Also, the Coupels chose to terminate Mr. Mayeaux, without having him confirm the boundary established by Mr. Terracina and/or complete his own survey. Mr. Coupel testified that he never hired anyone else to perform a survey after he terminated Mr. Mayeaux.

At the hearing on the motion for new trial, the trial court indicated:

> Mr. Coupel, I've given you six or seven months, I've been giving you month after month, if you wanted to get a new surveyor to go out and survey the property, I've given you that option every time.
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> ***
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> We went through this and if you wanted to dispute Mr. [Terracina's] map, if you wanted to dispute it, you could get a surveyor to go out with him and get it done. That was the agreement we reached.

In light of the foregoing, we cannot conclude that the trial court erred in deeming the conditions set forth in the agreement fulfilled. See **Bloom's Inc. v. Performance Fuels, L.L.C.**, 44,259, 44,452, p. 8, 16 So.3d at 481 ("Although defendant had ample time within which to obtain a title opinion and a survey on the subject property..., the evidence shows that defendant did not do so. Therefore, under C.C. art. 1772, these conditions are deemed fulfilled and plaintiff is entitled to specific performance.")

For the foregoing reasons, we conclude that the trial court did not err in enforcing the settlement agreement and adopting the boundary established by Mr. Terracina's survey, and it did not abuse its discretion in denying the Coupels' motion for new trial. Costs of this appeal are assessed to the Coupels.

AFFIRMED.