

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 2286

FAIRWOOD VILLAGE CORPORATION

VERSUS

FAIRWOOD COUNTRY CLUB

Judgment Rendered: June 10, 2011.

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On Appeal from the  
19<sup>th</sup> Judicial District Court,  
In and for the Parish of East Baton Rouge,  
State of Louisiana  
Trial Court No. 550,458

The Honorable Wilson Fields, Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

**CARTER, C. J.**

Fairwood Village Corporation (Village) appeals the trial court's judgment granting Fairwood Country Club's (Country Club) motion for involuntary dismissal of Village's breach of contract claim. We affirm.

**FACTS AND PROCEDURAL HISTORY**

Village instituted this breach of contract suit against Country Club. Village alleges Country Club failed to keep its agreement to maintain a lake adjacent to property that Village purchased. The matter proceeded to trial and, after Village rested its case, Country Club moved for and the trial court granted an involuntary dismissal under La. Code Civ. Proc. Ann. art. 1672(B). Village now appeals.

**DISCUSSION**

***Motion for Involuntary Dismissal***

Louisiana Code of Civil Procedure Annotated 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 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. *Jackson v. Capitol City Family Health Center*, 04-2671 (La. App. 1 Cir. 12/22/05); 928 So. 2d 129, 131. 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 his claim by a preponderance of the evidence. *Id.* 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. *Id.*

When considering a motion for involuntary dismissal, a plaintiff is entitled to no special inferences in his favor. *Id.* 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. *Id.* A trial court's decision to dismiss based on La. Code Civ. Proc. Ann. 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 under the facts and law, Village failed to show by a preponderance of the evidence any right to relief under Louisiana law.

#### *Assignment of Rights*

Village claims it was validly assigned rights granted in a "Purchase Agreement." The "Purchase Agreement" was entered into by Country Club and Hebert Engineering Corporation (Hebert Engineering). Hebert Engineering's president, Terry Hebert, formed Village<sup>1</sup> after entering the "Purchase Agreement." Pursuant to the "Purchase Agreement," Country Club agreed to sell Hebert Engineering a portion of its property situated next to a lake owned by Country Club. In an attachment to the "Purchase Agreement," Country Club agreed to maintain the lake, which it did until it sold the property on which the lake is situated to another developer. The third party developer filled in a portion of the lake, prompting Village's allegations that Country Club failed to keep its agreement to maintain the

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<sup>1</sup> Village purchased the property from Country Club in December 2002. Hebert signed the "Act of Cash Sale" on behalf of Village. This was the first time Hebert signed a document related to the property on Village's behalf.

lake. However, without a valid assignment of rights from Hebert Engineering to Village, Village has no right of action against Country Club.<sup>2</sup>

According to Louisiana Civil Code Annotated article 2642, all rights may be assigned, with the exception of those pertaining to obligations that are strictly personal. The assignee is subrogated to the rights of the assignor against the debtor. *Id.* Article 2643 further provides that the assignment of a right is effective against the debtor and third persons only from the time the debtor has actual knowledge, or has been given notice of the assignment. La. Civ. Code Ann. art. 2643. At trial, Village did not call Country Club's president, Dowling, to testify. As the trial judge noted, without Dowling's testimony, a question remained as to whether Country Club knew or should have known of an assignment of rights from Hebert Engineering to Village.

There was also no evidence that Country Club had any notice of an assignment. While no particular form of notice is required, it is necessary that the debtor be informed that his former creditor has divested himself of all rights to the thing assigned. *Fidelity National Bank of Baton Rouge v. Calhoun*, 08-1685 (La. App. 1 Cir. 3/27/09); 11 So. 3d 1119, 1125. Dowling and Hebert signed an agreement the same day they signed the "Act of Cash Sale." This agreement purported to make rights flow through from the "Purchase Agreement" to the "Act of Cash Sale." However, the signatures on the agreement did not indicate on which company's behalf

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<sup>2</sup> On May 15, 2008, Country Club filed the peremptory exception raising the objection of no right of action and a motion for summary judgment. Both were denied. Country Club then applied for supervisory writs, which this court denied. Denial of supervisory review is merely a decision not to exercise the extraordinary powers of supervisory jurisdiction, and does not bar reconsideration of, or a different conclusion on, the same question when an appeal is taken from a final judgment. *Diamond B Construction Company, Inc. v. Department of Transportation and Development*, 02-0573 (La. App. 1 Cir. 2/14/03); 845 So. 2d 429, 434. A prior "determination" in a pre-trial writ application is not necessarily binding on a subsequent appeal. *Id.*

Hebert and Dowling signed. Village failed to prove that Hebert signed the agreement on its behalf such that Country Club would have notice of an assignment.

Moreover, there is a notice provision in the "Purchase Agreement," which states that the purchaser may not assign the agreement without the seller's consent. Obtaining Country Club's consent would necessarily require giving it notice. The "Purchase Agreement" states that all notices required by the agreement must be in writing. The "Purchase Agreement" constituted the law between the parties, and its terms should be enforced according to their plain meaning. *Levin v. May*, 03-2205 (La. App. 1 Cir. 9/17/04); 887 So. 2d 497, 505. There is no evidence that Hebert Engineering executed any documents assigning its rights to Village, providing notice to Country Club, or requesting Country Club's consent.

We find no error in the trial court's finding that Hebert Engineering failed to validly assign its rights to Village. Because there was not a valid assignment of rights, Village has no right of action in this case. Therefore, it was proper for the trial court to grant the dismissal of the suit.

#### **DECREE**

Fairwood Village Corporation failed to show by a preponderance of the evidence any right to relief under Louisiana law. The trial court's judgment is affirmed. Costs of this appeal are assessed to plaintiff/appellant, Fairwood Village Corporation.

**AFFIRMED.**