

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CW0810

GREGORY M. FOSHEE

VERSUS

KEVIN J. ENGLAND AND KIMBERLY A. ENGLAND

Judgment Rendered: DEC 23 2008

Appealed from the Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 553,522

Honorable R. Michael Caldwell, Judge

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Welch Jr. concurs without reasons.

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REPLY JEW*

McCLENDON, J.

The defendants appeal a judgment of January 18, 2008, in which the trial court found that their contract with the plaintiff for a real estate lease with option to purchase had been properly and timely terminated by the plaintiff.¹ The judgment further concluded that errors of fact pertaining to a compromise agreement between the parties caused the compromise agreement to fail.² For the following reasons, we convert the petition for an appeal to an application for a supervisory writ, deny the writ, affirm the judgment, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Lease Purchase Contract Provisions

In February of 2005, the plaintiff, Gregory Foshee, entered into a Real Estate Lease Purchase Contract with the defendants, Kevin and Kimberly (Kim) England. The contract provided for the sale by Foshee of his house in Parkview Oaks South Subdivision in Baton Rouge to the Englands for the total sales price of \$132,000.00. The contract required the Englands to pay Foshee \$975.00 per month, in the form of two checks, due on the first of the month. One check was to be paid in the amount of \$34.00 to Foshee, and the second check, for the balance, was to be paid directly to Hibernia Direct Payment Program, beginning on April 1, 2005. The contract provided that it would terminate if the property did not satisfy the lender's underwriting requirements for a loan to the Englands. Additionally,

¹ The judgment determining that the lease purchase agreement was properly and timely terminated is a partial judgment that does not adjudicate all of the issues in the case. The trial court did not designate it as a final judgment pursuant to La. Code Civ. P. art. 1915(B). Therefore, pursuant to La. Code Civ. P. art. 2083, it is not appealable. This Court, in its discretion, chooses to exercise its supervisory jurisdiction, pursuant to LSA-Const. Art. 5, §10(B), to review the judgment. The Englands filed their motion for appeal of the January 18, 2008 trial court judgment on February 14, 2008, which is timely for filing a writ application pursuant to Rule 4-3 of the Louisiana Uniform Rules – Courts of Appeal.

² The judgment determining that the compromise agreement is null is an interlocutory judgment, pursuant to La. Code Civ. P. art. 1841. According to La. Code Civ. P. art. 2083, the judgment is not appealable. This Court, in its discretion, chooses to exercise its supervisory jurisdiction, pursuant to LSA-Const. art. 5, §10(B), to review the judgment. The Englands filed their motion for appeal of the January 18, 2008 trial court judgment on February 14, 2008, which is timely for filing a writ application pursuant to Rule 4-3 of the Louisiana Uniform Rules – Courts of Appeal.

the agreement was subject to the Englands' obtaining financing for the purchase. The provisions of the option to purchase portion of the contract provided, in pertinent part, that "[t]he sale shall be closed and the deed delivered within sixty (60) days from the execution of this Agreement by all parties..." and that a "[l]ease agreement shall be executed at closing for a lease period not to extend beyond 04-30-07."³ According to the contract, if the Englands failed to comply with these provisions, they would be in default and Foshee would be entitled to enforce specific performance, seek such other relief as may be provided by law, or both, or terminate the contract, thereby releasing all parties from the contract. Likewise, if Foshee failed to comply with the contract provisions, he would be in default, and the Englands would be entitled to the same remedies available to Foshee.⁴

The Englands took possession of the house in April of 2005, and it appears from the testimony of the parties that they and Foshee viewed the agreement as a

³ In pertinent part, the contract provisions are as follows:

3. PURCHASE PRICE AND MONTHLY PAYMENTS: The Total Sales Price shall be **\$132,000.00** payable as follows: **LOAN PROCEEDS AT THE ACT OF SALE ON OR BEFORE 4/30/07**. Cash or certified funds due at closing: \$124,800.00 which includes, \$300.00 of each monthly payment made for the next 2 years which shall be granted towards the purchaser(s) equity to be used as down payment. Should this agreement terminate for any reason, the \$300.00 going towards purchaser(s) equity shall be considered non-refundable. Monthly payments shall be in the amount of \$975.00 including escrows until the act of sale. Monthly payments shall be made payable in the form of Hibernia Direct Payment Program to: HIBERNIA, ACCOUNT NO. 0010007029, address of Payment Department, P. O. Box 481, Baton Rouge, LA 70821-0481 on or before the 1st day of every month starting APRIL 1, 2005 and ending on APRIL 30, 2007. The payment is as follows: \$941.00 payment to Hibernia Direct Payment Program starting April 1, 2005 and \$34.00 paid directly to GREGORY M. FOSHEE no later that [sic] the 1st of each month, starting April 1, 2005, at his residence in Florida. Actual address is unknown at this time.

* * *

7. CLOSING COSTS & DATE: The sale shall be closed and the deed delivered within sixty (60) days from the execution of this Agreement by all parties, except Seller shall have a reasonable length of time (60 days) within which to perfect title or cure defects in the title to the said property. The Seller agrees to pay the cost of deed preparation and a mortgagee's title insurance policy, all other closing costs shall be paid by Purchaser. Lease agreement shall be executed at closing for a lease period not to extend beyond 04-30-07.

⁴ The lease purchase agreement was not recorded in the mortgage and conveyance records.

lease of Foshee's house to the Englands for two years, at the end of which term the Englands could choose to exercise an option to purchase the house if they had complied with the provisions of the contract during the two-year term.

Late Rental Payments and Repairs to Leased Property

Upon moving into the house, the Englands noticed moisture and mildew in the utility room resulting from a leaking washing machine. With Foshee's authorization, they withheld a portion of the rent to reimburse themselves for repairs made to the utility room.⁵ From the beginning, they did not make monthly rental payments timely. In January of 2007, Foshee sent the Englands a notice of eviction by certified mail. When the Englands questioned Foshee about the notice, Foshee sent them an e-mail, dated January 28, 2007, advising that late payments would not be tolerated and asking them to move out of the house. According to the e-mail, Foshee had called the mortgage company on January 17, 2007, and learned that the monthly payment, due on the first of the month, had not been received. Foshee paid the mortgage company from his own checking account. Furthermore, Foshee stated in the e-mail that he had recently discussed the late payment problem with Kim England, after a late payment in November of 2006, and told her that he was concerned about his credit rating. He stated that the contract clearly provided that payments were due on the first of each month and that he felt Kim England was taking advantage of him. Foshee concluded in the e-mail that there was a long history of late payments, and he believed it best that the Englands vacate the house.

Rule to Evict and Terminate the Contract

Prior to Foshee's written complaint to the Englands in January of 2007, there had been only verbal communications pertaining to late payments between the parties. Prior to Foshee's filing the instant lawsuit, the Englands asked Foshee if

⁵ According to Foshee's testimony, he authorized the Englands to withhold only one check for \$34.00 for reimbursement. Kimberly England testified, however, that she withheld the \$34.00 monthly payment for approximately four months for reimbursement.

they could purchase the house for \$124,800.00. On March 22, 2007, Foshee filed a “Rule to Evict Occupant and Terminate Contract,” in which he asserted that, pursuant to the provisions of the contract, the Englands were required to make timely payments on the lease for 24 months, after which time they would be entitled to purchase the property at the price stated in the contract. Foshee asserted that the payments were never timely made over the two-year period, beginning with the first payment, due on April 1, 2005, and paid on April 7, 2005. He alleged that in addition to late payments, the Englands wrote checks on September 1, 2006 and January 7, 2007, which were returned by their bank due to insufficient funds. As a consequence, Foshee was required to pay the lender late charges and fees for checks drawn on insufficient funds. To avoid an adverse action threatened by his lender in January of 2007, Foshee was forced to make an electronic payment, in the amount of \$1,010.44, to cover the payments, along with accumulated late charges, fees for checks drawn on insufficient funds, and wire transfer fees. Subsequently, an additional check to the lender from the Englands was returned by the Englands’ bank for insufficient funds.

Foshee prayed in the March 22, 2007 rule to evict that the court find that the contract had terminated and that the eviction notice was sufficient to require the Englands to vacate the property. The Englands filed an answer and reconventional demand stating that Foshee had verbally agreed that they would repair the mold and mildew in the utility room walls and, in exchange, they would not have to pay the monthly \$34.00 for the months of April through August of 2005. Furthermore, the Englands asserted that they were late on their first payment in April of 2005, pursuant to an understanding with Foshee, because he was unable to give them possession of the house on the first of the month. They moved into the house on either April 2 or 3, 2005. They claimed they reasonably relied on Foshee’s silence regarding late payments each month. In their reconventional demand, the

Englands stated that they would like to exercise their option under the contract to purchase the house, and they claimed that they are entitled to compensation for the unjust enrichment to Foshee resulting from extensive repairs they made to the house.

May 7, 2007 Hearing

On May 7, 2007, a hearing was held to determine whether the contract was terminated and whether the Englands would be required to vacate the house. Foshee testified that it was agreed between the parties that the Englands were to pay monthly rent to Foshee's lender. Foshee stated that he received notice from his lender in October of 2006 that his account was almost two months in arrears. He testified that he made the payment, along with penalties and fees, to the lender on January 17, 2007. He stated that the intention of the parties to the contract was that the house was to be leased to the Englands, and if they complied with the terms of the contract, they would have the option to purchase the house at the end of two years. According to Foshee, the monthly payments were always late. Foshee stated that when the Englands moved into the house, it was in good condition, and there was no agreement that the Englands would do repairs to the house. He testified at the hearing that after Kim England told him about the damage to the utility room, he agreed to allow her to repair it and, in exchange, did not require the payment of \$34.00 for one month. He admitted at the hearing that he had recently become aware that the Englands "put in a lot of work on the house." Foshee acknowledged that as of the date of the hearing, the mortgage loan was paid up to date.

Kim England testified at the hearing that her intention in entering the contract was to purchase the house from Foshee. She stated that an attorney did not help her in connection with the contract, and that she found the contract on the internet. She testified that when she moved into the house, she found extensive

damage to the sheetrock and flooring in the utility room. She stated that she replaced the sheetrock and insulation in the walls, installed new tile flooring, and painted the room. Kim England testified that she did all the work herself, with help from her father, and that she did not save the receipts for the materials used. She stated that there were additional problems, with plumbing and termites. She testified that the carpet was very dirty and unsalvageable. She testified that she had to pull it up, clean the floor underneath and install new flooring. She stated that the repairs created a strain on her finances. However, she did not communicate this to Foshee or ask for his help in paying for most of the repairs, beyond the initial communication about the utility room mildew. She indicated that she believed she was allowed to keep the \$34.00 monthly payment for the months of April through August of 2005 to offset the cost of repairs to the utility room. Kim England testified that she did not know that the payments were due on the first of the month and believed she had a grace period of fifteen days in which to make payments. However, she admitted that she paid late fees to the lender, indicating she was aware that the payments were overdue. Furthermore, some of the payments were made later than the fifteenth of the month.

Stipulation of Compromise Agreement

The trial judge took the matter under advisement and asked to meet with both counsel. On May 7, 2007, counsel for the parties advised the court that they had reached a compromise agreement regarding the matters presented to the court in the earlier hearing. That day they agreed to a "stipulation" that provided the Englands would be allowed to remain in the house until June 30, 2007, and would not be required to make the June mortgage payment. They would receive a total of \$9,000.00 for the repairs and improvements they made to the house. Foshee would pay them the first installment of \$4,500.00 within two weeks and an additional \$4,500.00 on June 30, 2007, after they moved out and Foshee had the opportunity

to inspect the house. Foshee would pay the June mortgage note, and the parties would waive all further claims against each other.

Rule to Show Cause

When Foshee failed to pay the Englands pursuant to the terms of the stipulation, they filed a rule to show cause why Foshee should not be found in breach of the agreement and held in contempt of court. Foshee filed a motion to deposit funds in the court registry and countered that he had been misled regarding the repairs the Englands made to the house.

On August 13, 2007, the trial court heard and ruled on the matter and signed the judgment on August 22, 2007. The trial judge found Foshee to be in contempt of court in failing to abide by the compromise agreement. However, the judge stated that he would not impose any penalty upon Foshee until a later date. The judge ordered that Foshee and his attorney would be allowed to inspect the house by August 16, 2007. If the premises were found to be in the condition the Englands represented, Foshee would be required to place the \$4,500.00 in the court registry and, additionally, reimburse the Englands for any mortgage payments they may have made for the months of June through August of 2007. The court ordered that, if all was accomplished accordingly, then the Englands would be required to vacate the property by September 10, 2007. The minutes of the court reflect that if the delays in meeting the terms of the compromise agreement were the result of Foshee's failure to abide by the agreement, the court would impose a penalty at the next hearing. Likewise, the court indicated that if the delays were caused by the Englands, the court would address the matter separately. The court assigned the deferred penalty issue for review on September 17, 2007.

Contempt Hearing

At the September 17, 2007 hearing, Foshee's counsel informed the court that he and his client inspected the house and found that the property was not in the

condition represented by the Englands. Foshee's counsel told the court that the full \$9,000.00 had been deposited into the court registry and that Foshee had reimbursed the Englands for all rent paid for the months of June through August of 2007, as ordered by the court. The Englands had vacated the premises on September 10, 2007. Foshee's counsel told the judge that upon inspection of the house, he and his client found that it was not in the condition they were led to believe it was in by Kim England's testimony in earlier proceedings.

Foshee testified that a bathroom was gutted and the walls, toilet, bathtub, and wash basins were removed. There was no flooring in the bathroom, and the flooring in the den was the original linoleum floor that was under the carpet. The linoleum floor in the den, as well as the laminate floor in the kitchen, were damaged and needed to be replaced. The back patio cover had been removed from the house, and all of the front yard landscaping was gone. Foshee testified that he had never authorized the removal of the patio cover or the landscaping, and he had never authorized the gutting of the bathroom.

Foshee's counsel introduced into evidence photographs of the rooms, confirming his description of their condition. He further introduced into evidence, without objection, an estimate from Home Care for the repairs to the kitchen and for new flooring in two rooms. The estimate totalled \$8,855.00. Upon cross-examination, Foshee admitted that one room had termite damage when the Englands moved into the house and that it would be necessary to tear down the wall of the room in order to remove the termite damage. Furthermore, Foshee admitted that there was a small amount of water damage in the utility room near the washing machine. He admitted that the water damage necessitated the removal of the flooring in the utility room. He stated, "It [the house] was in a working condition when they [the Englands] moved into the house; but, yes, they repaired it to a better state than it was originally." Upon redirect examination, Foshee

testified that when the Englands first moved into the house, the bathroom that is now gutted was a complete, functioning bathroom. He further testified that the patio cover and shrubbery were also in good condition.

Kim England testified that the reason the bathroom was gutted was because of the termite damage. She stated that the studs in the walls of the bathroom had to be repaired. She testified that the water damage in the utility room leaked into the kitchen, and the kitchen wall and trim had to be repaired. Additionally, she had to lift the kitchen floor and remove mold that was underneath the floor. Kim England further testified that she had to remove the holly bushes because of the pointed leaves, which posed a danger to her young daughter. She testified that she removed the crepe myrtle tree because its roots had caused the plumbing damage in the laundry room. She testified that the patio cover had been damaged by Hurricane Katrina, along with some roof shingles, which her husband repaired. She stated that the patio cover had to be removed because of the damage. Finally, she testified that the den carpet was badly stained and smelled bad. Consequently, she removed the carpet and cleaned the linoleum underneath it. She testified that Foshee told her she could pull up the carpet.

The trial court found that the full repairs, as understood by the court and by Foshee, had not been done. Accordingly, the court concluded that there was error of fact that negated the compromise agreement. The court noted that, before the compromise agreement was declared null, the court could not rule on any amount Foshee should pay to the Englands to reimburse them for the work done on the house. The court advised the parties that it could not nullify the compromise agreement until a party filed a motion to nullify it. The court found that Foshee was not in contempt of court for failing to pay the Englands, since the house was found to be in disrepair. The Englands' counsel did not raise the issue of the termination of the contract or whether they were entitled to move back into the

house or to demand specific performance under the contract and purchase the house.

Motion to Nullify Compromise Agreement

Foshee filed a motion to nullify the compromise agreement, urging that he would not have entered into the compromise agreement if he had known that the house was in disrepair. In open court on November 19, 2007, the court repeated that the repairs had not been completed as represented by Kim England and stated that because there was a failure of consideration or an error of fact, the compromise agreement was null and void. The court added that, because of the nullity of the compromise agreement, the issue of eviction was still pending and Foshee was entitled to have the \$9,000.00 he had placed in the court registry. Once again, counsel for the Englands did not indicate at the hearing that the Englands wanted to move back into the house or purchase it.

Trial Court Judgment

Foshee's counsel submitted a written judgment, which the trial court signed on January 18, 2008, stating that the lease purchase agreement had been properly and timely terminated by Foshee. The judgment further provided that Foshee had reimbursed the Englands for their mortgage payments for June through August of 2007. The judgment provided that because the repairs had not been made as represented, the compromise agreement was null and vacated, and the \$9,000.00 in the court registry was to be released to Foshee.

The Englands appeal the January 18, 2008 judgment, urging that Foshee's repeated acceptance of late rental payments altered the terms of the lease purchase agreement such that the Englands were not in breach of the contract when they made late payments to the lender. The Englands further argue on appeal that Foshee's acceptance of rental payments, after the date on which they received a notice of eviction, vitiated the notice of eviction. Furthermore, they assert that, in

any event, they are entitled to a judgment compensating them for their costs of repairs to the house, pursuant to their reconventional demand claim of unjust enrichment.

DISCUSSION

The Englands urge on appeal that the trial court incorrectly concluded that they had misrepresented to the court and to Foshee the extent of the repairs they made to the house. However, we find no manifest error by the trial court in factually concluding that there was, at least, a misunderstanding between the parties regarding the extent of the repairs. Pursuant to La. Civ. Code art. 3082, a compromise agreement may be rescinded for error, fraud, and other grounds for the annulment of contracts. Accordingly, we find the trial court did not err in vacating the compromise agreement.

Currently, the issues of eviction and unjust enrichment are not before this Court for review because the trial court has not ruled on them. The trial court noted in the November 19, 2007 hearing that since the compromise agreement was null, the issues of eviction and unjust enrichment were once again pending. We note that our review herein of this interlocutory ruling, pursuant to our supervisory jurisdiction, does not preclude our review of a final, appealable judgment in this case after the trial court rules on the remaining issues.

Termination of Lease Purchase Agreement

The final issue in this appeal is the Englands' claim that the trial court erred in ruling that Foshee had properly and timely terminated the lease purchase agreement. According to the testimony of the parties, their understanding of the lease purchase agreement was that if the Englands complied with the provisions of the contract throughout the two-year term of the lease, they would be entitled to exercise their option to purchase the house from Foshee. It is undisputed that the Englands were late in making virtually all of the mortgage payments, despite the

requirement in the contract that all payments should be made on the first of the month. The Englands argue that by accepting the late payments, Foshee allowed the provisions of the contract to be altered.

The Englands cite **Housing Authority of St. John the Baptist Parish v. Shepherd**, 447 So.2d 1232 (La. App. 5th Cir. 1984), in which the appellate court held that the defendant's landlord waived the right to strict enforceability of the lease rental provisions of the contract of lease and would not be entitled to evict its tenant because of late rental payments. The landlord housing authority had a pattern of allowing tenants to pay their rent late, and written warnings to tenants to pay their rent on time had not been enforced. Furthermore, the defendant tenant had no notice that the landlord intended to begin strict enforcement of timely rental payments. In order to hold a lessee to the explicit terms of the lease after a waiver, the lessor must give advance notice of his intention to enforce the lease strictly in the future. **Housing Authority of St. John the Baptist Parish**, 447 So.2d at 1235-1236.

The **Housing Authority** case is distinguishable from the instant case because it pertains to the issue of eviction rather than termination of a contract. In the instant case, the lease purchase contract was intended to remain in effect for only a two-year term. The sole question in the instant case is whether the Englands complied with all of the provisions of the contract during the two-year term, entitling them to exercise the option to purchase the property. While, arguably, the requirements of the contract may have been altered to some extent by the repeated acceptance of late payments, we find, nevertheless, that the Englands did not sufficiently comply with the provisions of the contract. They were aware that payments made late to Foshee's lender resulted in late fees and the possibility of damage to Foshee's credit rating. Foshee testified that he told the Englands that he expected them to make the payments timely. After Foshee was required to send

his own money to the lender to pay arrears, he notified the Englands that he was not willing to tolerate late payments and checks drawn on a bank account with insufficient funds.

While the Englands may have been entitled to offset rent for repairs made to the house, they failed to prove at the hearings that they initially demanded that Foshee make the repairs before doing so themselves. The record reflects that they did not discuss with Foshee the need for most of the repairs or give him the opportunity to make the repairs. Pursuant to La. Civ. Code art. 2691, during the term of the lease, the lessor is required to make all repairs that become necessary to maintain the thing in a condition suitable for the purpose for which it was leased. Pursuant to La. Civ. Code art. 2694, if the lessor fails to perform his obligation to make necessary repairs within a reasonable time after demand by the lessee, the lessee may cause them to be made. The lessee may then demand immediate reimbursement of the amount expended for the repair or apply that amount to the payment of rent, but only to the extent that the repair was necessary and the expended amount was reasonable.

It is not clear from the record that the Englands actually intended to exercise the option to purchase the house and were able to obtain financing for its purchase, as required by the contract. Regardless, we find that the two-year term of the contract has expired and that, due to the Englands' failure to comply with all of the terms of the contract, they may not exercise the option to purchase the house. Accordingly, we agree with the trial court that Foshee timely and properly terminated the contract.

CONCLUSION

For all the foregoing reasons, we convert the petition for an appeal to an application for a supervisory writ, deny the writ, affirm the January 18, 2008 judgment of the trial court, and remand for further proceedings consistent with this

opinion. The defendants, Kevin J. England and Kimberly A. England, are assessed with all costs.

PETITION FOR APPEAL CONVERTED TO APPLICATION FOR SUPERVISORY WRIT; WRIT DENIED; JUDGEMENT AFFIRMED; REMANDED.