

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

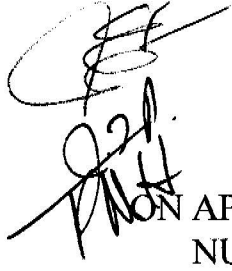
2010 CA 1438

MARTIN D. MORAN, PAULA MORAN, GERALD BRACKMAN,
KATHLEEN BRACKMAN, REDWOOD CREEK CONSERVANCY,
LLC AND HOLCOMB RESOURCES, INC.

VERSUS

HNS PROPERTIES, LLC, CONESTOGA-ROVERS & ASSOCIATES,
INC., SAURAGE COMPANY, INC. D/B/A SAURAGE REALTORS
AND CHARLES JONES

DATE OF JUDGMENT: MAR 25 2011

 ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 556206, DIV. 24, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE R. MICHAEL CALDWELL, JUDGE

* * * * *

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Redwood Creek Conservancy, LLC
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* * * * *

BEFORE: KUHN, PETTIGREW AND HIGGINBOTHAM, JJ.

Disposition: AFFIRMED.

KUHN, J.

Plaintiffs-appellants, Martin D. Moran, Paula Moran, Gerald Brackman, Kathleen Brackman, Redwood Creek Conservancy, LLC (Redwood), and Holcomb Resources, Inc. (Holcomb Resources), appeal the trial court's grant of summary judgment in favor of defendant-appellee, HNS Properties (HNS), dismissing their claims against this defendant. For these reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are undisputed. In July 2005, Holcomb Resources, of which Mr. Moran was president, and HNS executed an option to purchase 136.2 acres, located in East Feliciana Parish near Slaughter, Louisiana. The terms of the option agreement stipulated that Holcomb Resources "shall have the right during the Option Period to make such investigation and studies with respect to the property [it] deem[ed] appropriate." HNS agreed that it would permit representatives of Holcomb Resources to enter upon the property "for the purposes of conducting soil tests, borings, percolation tests, and any other tests, inspections, surveys, or examinations" that Holcomb Resources desired, which expressly included "such other tests, inspections, or examination [Holcomb Resources] may request to determine subsurface or topographic conditions" of the property.

Pursuant to these terms, Holcomb Resources hired Conestoga-Rovers & Associates (CRA) to perform site inspections, tests, and evaluations of the property. In August 2005, CRA issued its report to Holcomb Resources, indicating the property showed "[p]ositive evidence of all three diagnostic characteristics for jurisdictional wetlands" and that approximately 134 acres appeared to meet the technical criteria for wetlands based on guidance issued by the U.S. Corps of

Engineers (COE). On September 29, 2005, COE issued a jurisdictional determination stating that it considered the entirety of the property to be wetland which fell within COE's jurisdiction under federal law.

On October 6, 2005, HNS sold the property for \$511,875 to Redwood, a company formed by Mr. Moran and his investors to hold the land. On October 15, 2005, Redwood submitted its application to COE requesting an assessment of the potential of establishing a mitigation bank on the property. COE subsequently rescinded its original jurisdictional determination, finding instead that only a smaller portion of the 136 acres was wetland subject to COE's jurisdiction. COE ultimately concluded that the proposed site was not a good candidate for a mitigation bank for a number of reasons, including that some areas on the site had been cleared and/or filled without obtaining COE authorization (the unauthorized activities) and decided not to approve Redwood's request. Plaintiffs subsequently filed this lawsuit seeking to rescind the sale of the property sold to it by HNS.¹

HNS filed a motion for summary judgment averring entitlement to dismissal from the lawsuit. The trial court agreed and this appeal followed.²

DISCUSSION

On appeal, plaintiffs assert the trial court erred because outstanding issues of material fact precluded summary judgment. Specifically, they maintain that on their claim for rescission based on redhibition, whether the effects of the unauthorized activities constituted a defect was a material issue of fact. And insofar as their claim

¹ CRA and its representative, Charles Jones, as well as the Saurage Company d/b/a Saurage Realtors were also named as defendants.

² Contemporaneously with HNS's motion for summary judgment, Saurage Company also filed its own motion seeking dismissal from the litigation, which the trial court granted. That dismissal has not been appealed.

for rescission based on error, they urge that HNS knew or should have known that Redwood purchased the property because it was wetland and, therefore, its only value was its potential use as a mitigation bank.

The seller warrants the buyer against redhibitory defects, or vices, in the thing sold. La. C.C. art. 2520. A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale. *Id.* A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price. *Id.* But the seller owes no warranty for defects in the thing that were known to the buyer at the time of the sale, or for defects that should have been discovered by a reasonably prudent buyer of such things. La. C.C. art. 2521.

Plaintiffs' claim for rescission of the sale was based on the assertion that the unauthorized activities constituted a redhibitory defect that rendered the property useless. The evidence submitted by HNS established that when plaintiffs' agent, CRA, tested, examined, and evaluated the property, the areas affected by the unauthorized activities, i.e., where the trees had been cleared and where the road had been constructed, were apparent and obvious. Indeed, the road was noted on a map attached to plaintiffs' August 2005 request to COE for wetland delineation. The evidence also showed that on September 9, 2005, prior to the October 2005 sale from HNS to plaintiffs, the property was described as "single family residential property" and appraised at a value of \$515,000. Nothing in the appraisal purported

to include as part of the property's valuation its potential use as a mitigation bank. The evidence submitted by HNS at the summary judgment hearing supported a finding that the unauthorized activities did not render the value of the property useless, and plaintiffs' competent evidence did not rebut that showing.³ Accordingly, the trial court correctly dismissed plaintiffs' claim for rescission of the sale based on redhibitory defect.

A valid obligation requires, among other factors, consent. La. C.C. art. 1927. Consent may be vitiated by error, fraud, or duress. La. C.C. art. 1948. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party. La. C.C. art. 1949.

A contract may be invalidated for unilateral error as to a fact which was a principal cause for making the contract, but only when the other party knew or should have known that it was a principal cause. Unilateral error does not vitiate consent if the reason for the error was the complaining party's inexcusable neglect in discovery of the error. *See* La. C.C. art. 1949; *Durand v. Bd. of Trustees of Sheriffs' Pension & Relief Fund*, 1996-2409, p. 7 (La. App. 1st Cir. 11/7/97), 704 So.2d 12, 15, *writ denied*, 1997-3005 (La. 2/6/98), 709 So.2d 745.

Plaintiffs assert that the sale from HNS to Redwood should be rescinded based on their unilateral error in believing that the property was suitable for a

³ Mr. Moran's affidavit suggested that the property could not be developed commercially or residentially because of the COE designation of portions of the property as federally-protected wetland. Based on that assertion, Mr. Moran attests that the property 'has no commercial value' on February 26, 2010. The affidavit does not establish that Mr. Moran is competent to render an opinion as to the commercial value of the land. *See* La. C.C.P. art. 967A. Moreover, the September 9, 2005 appraisal based its valuation of \$515,000 on the residential value of the land and plaintiffs purchased the property utilizing that appraisal. Thus, the competent evidence established that the unauthorized activities did not render the property useless.

mitigation bank. They maintain that HNS, through its representative, Henry Norman Saurage, knew or should have known that Redwood wanted the land to utilize as a mitigation bank.

HNS submitted excerpts of Mr. Saurage's deposition testimony denying actual knowledge that the property was wetland or for what purpose plaintiffs intended to use it. Plaintiffs offered no evidence to contradict that testimony. Thus, they suggest that HNS should have known that the property was wetland and that, therefore, HNS should be imputed with knowing that they wanted the property to use as a mitigation bank and urge that this constitutes an outstanding issue of fact which precludes summary judgment.

The undisputed evidence shows that under the option agreement, plaintiffs had the right to conduct soil tests, borings, percolation tests, and any other tests, inspections, surveys, or examinations desired, including any other tests, inspections, or examination they may request "to determine subsurface or topographic conditions." Through their agent, CRA, plaintiffs exercised that right. Thus, they had detailed knowledge of the subsurface and/or topographic conditions of the property. Plaintiffs have offered, and the record contains, no evidence that shows Mr. Saurage, or HNS, had superior knowledge to them.

Thus, the record supports a finding that any error about whether the property was appropriate for a mitigation bank was due to plaintiffs' inexcusable neglect in discovering the suitability of the property for the purpose for which they intended to use it. As such, their unilateral error does not vitiate their consent to purchase the property, regardless of whether Mr. Saurage should have known that the property was wetland and that plaintiffs' purpose in acquiring the property was to establish a

wetland mitigation bank. Accordingly, the trial court correctly dismissed their claim for rescission based on their unilateral error.

DECREE

For these reasons, the trial court's judgment is affirmed. Appeal costs are assessed against Plaintiffs-appellants, Martin D. Moran, Paula Moran, Gerald Brackman, Kathleen Brackman, Redwood Creek Conservancy, LLC, and Holcomb Resources, Inc.

AFFIRMED.