

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0010

**MARY MICHELLE STECHA DUVIC WIFE OF/AND
FRANK ROGER DUVIC, III**

VERSUS

**JANICE NEBEL LeBLANC McCUEN WIFE OF/AND
GEORGE B. McCUEN AND STATE OF LOUISIANA**

Judgment Rendered: JUN 10 2011

On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 2009-15606

Honorable Allison H. Penzato, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

In this property dispute, plaintiffs appeal a partial summary judgment in favor of the defendants, denying the plaintiffs' requests to traverse the defendants' property and for an injunction prohibiting the defendants from denying plaintiffs use of the defendants' property. The judgment also granted defendants' request for a declaration that defendants' own the property at issue. Because we conclude that this partial summary judgment was improperly certified as a final appealable judgment, we dismiss the appeal and remand the matter for further proceedings in the trial court.

FACTS AND PROCEDURAL HISTORY

In 2007, Mary Michelle Stecha Duvic and Frank Roger Duvic purchased immovable property located in St. Tammany Parish, identified as Lot 3 in Serenity Oaks Estates Subdivision in Slidell, Louisiana. The southern property line of the Duvic property is Bayou Bonfouca. The eastern property line is Lot 2 of Serenity Oaks Estates Subdivision, owned by Janice Nebel LeBlanc McCuen and George Bradley McCuen. After their purchase, the Duvics constructed a docking facility, including two boat slips, dock, and bulkheads on their south property line.

On September 21, 2009, the Duvics filed a Petition for Removal of Encroachment and Damages, for Declaratory Judgment and for Injunction, naming the McCuens and the State of Louisiana as defendants. In their petition, the Duvics alleged that the McCuens improperly and illegally denied and obstructed the Duvics' use of their boat slip, which borders the McCuen property, and denied and obstructed access from their boat slip to and from Bayou Bonfouca. The Duvics also requested a declaratory judgment that the water-covered property at issue is state-owned.¹ The Duvics sought removal of the asserted encroachment, damages, and an injunction against the McCuens restraining them from prohibiting the Duvics from using their boat slip.

¹ The state responded to the Duvics' petition by filing exceptions of no right of action and no cause of action. The Duvics subsequently filed a motion to dismiss the state, without prejudice, which was signed by the trial court on March 10, 2010.

Thereafter, the McCuens answered the petition and filed a reconventional demand against the Duvics, alleging trespass, encroachment and the illegal removal of a portion of the McCuen's bulkhead.² The McCuens sought a judgment 1) declaring that they own the property at issue, 2) preventing the Duvics from trespassing on their property, 3) for the costs of replacing the bulkhead, including damages and attorney fees, and 4) requiring the Duvics to cut their bulkhead down to one foot to match the McCuens bulkhead and preventing the Duvics from placing fill on their property over the one-foot mark as required by the subdivision plan.

On August 19, 2010, the McCuens filed a motion for partial summary judgment, requesting that the trial court:

1. Deny the Duvics' requests for declarations that the southwestern-most portion of the McCuen property is part of the state-owned Bayou Bonfouca or is otherwise a navigable waterway subject to public use;
2. Deny the Duvics' alternative request for a declaration that the Duvics are entitled to traverse the McCuen property under a theory that the property line between the Duvic and McCuen property somehow constitutes a publicly usable bank of Bayou Bonfouca;
3. Deny the Duvics' request for an injunction prohibiting the McCuens from denying the Duvics' use of the McCuen property;
4. Grant the McCuens' request for a declaration that they own the property at issue and are entitled to peaceful enjoyment of same;
5. Order that the Duvics be prohibited from trespassing on the McCuen property;
6. Grant the McCuens a judgment against the Duvics for the costs of replacement of the McCuens' bulkhead and for all other damages; and
7. Grant the McCuens a judgment that the Duvics be required to remove the encroaching portion of the Duvics' bulkhead erected on the McCuen

² Although the McCuens called their pleading and subsequent amendments a "counterclaim," the Louisiana Code of Civil Procedure provides for a reconventional demand and their claims against the Duvics will be referred to as such hereafter. See LSA-C.C.P. art. 1031.

property, to restore the McCuen property to its previous condition, and for any other associated damages.

The McCuens also filed various exceptions, including the peremptory exceptions raising the objections of no right of action and no cause of action. Additionally, the Duvics filed an exception raising the objection of prescription to the reconventional demand of the McCuens. The matters were all heard on September 8, 2010.³ The trial court took the partial summary judgment motion under advisement and on September 13, 2010, issued Reasons for Judgment, granting the motion in part and denying the motion in part. In partially granting the summary judgment, the trial court concluded that the Duvics failed to produce factual support sufficient to satisfy their evidentiary burden of proof at trial that they were entitled to traverse the McCuens' property or that they were entitled to an injunction prohibiting the McCuens from denying the Duvics use of the McCuen property. The court also determined that the McCuens were entitled to judgment as a matter of law recognizing that they owned the property at issue. The trial court denied the summary judgment as to the McCuens request for an injunction prohibiting the Duvics from trespassing on the McCuens property, finding that the McCuens failed to produce sufficient proof for injunctive relief. On September 30, 2010, the trial court signed a judgment in accord with the written reasons and, stating that there was no just reason for delay, certified the judgment as a final appealable judgment. This appeal by the Duvics followed.

DISCUSSION

Initially, we note that the McCuens' motion sought only partial summary judgment. Since the summary judgment only concerned some of the claims in this matter, we must consider whether this judgment was properly certified as final and appealable under LSA-C.C.P. art. 1915B.

Louisiana Code of Civil Procedure Article 1915B provides:

³ The trial court granted the Duvics' exception of prescription. The trial court also sustained the exception of no right of action and denied as moot the exception of no cause of action.

(1) When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories, whether in an original demand, reconventional demand, cross-claim, third party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

(2) In the absence of such a determination and designation, any order or decision which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties and shall not constitute a final judgment for the purpose of an immediate appeal. Any such order or decision issued may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

The purpose of article 1915 is to prevent multiple appeals and piecemeal litigation and to promote judicial efficiency and economy. **R.J. Messinger, Inc. v. Rosenblum**, 04-1664, p. 13 (La. 3/2/05), 894 So.2d 1113, 1122. 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. **Id.**

In this matter, although the trial court designated the judgment as final, the trial court failed to provide reasons to support this designation. When the propriety of the certification is not apparent and the trial court has failed to give reasons for its certification, we review the case *de novo* to determine whether the certification was proper. **Id.**, 04-1664 at pp. 13-14, 894 So.2d at 1122. The following list of factors, although not exclusive, may be used by trial courts when considering whether a partial judgment should be certified as appealable:

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 obligated 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.

Id., 04-1664 at p. 14, 894 So.2d at 1122.

However, the overriding inquiry for the trial court is whether there is no just reason for delay. Courts of appeal, when conducting *de novo* review in matters where the trial court fails to give explicit reasons for the certification, can consider these same criteria. **Id.**, 04–1664, p. 14, 894 So.2d at 1122–23.

In considering the factors set forth in **Messinger**, we note that the partial judgment granted the McCuens' request for a declaration that they own the property at issue and denied the Duvic's request for a declaration that they are entitled to traverse the McCuen property. The September 30, 2010 judgment on appeal, however, was not determinative of the entirety of the claims between the parties. Issues regarding the bulkheads remain, including claims of encroachment, trespass, and damages related to the construction of the bulkheads, as well as claims regarding the correct size of the Duvic's bulkhead and amount of fill dirt on the Duvic's property. To permit an appeal of such a judgment would encourage multiple appeals and piecemeal litigation. We conclude that an effective remedy is available to the parties once the trial court renders a final judgment. Accordingly, based on our *de novo* review of this matter and consideration of the **Messinger** factors, we find that the trial court's designation of this judgment as final was improper.

CONCLUSION

Because we conclude that the September 30, 2010 judgment in this matter was improperly certified as a final appealable judgment, we dismiss the appeal and remand this matter to the trial court for further proceedings. Costs of this appeal are to be borne by the Duvics.

APPEAL DISMISSED; REMANDED.