NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 CA 1495

MELISSA BAXTER ZIEGLER

VERSUS

VICKI PANSANO, ET AL

Judgment Rendered: JUN 30 2009

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 2005-14107

The Honorable Larry J. Green, Judge Presiding

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

Kuhn, J. concurs

Guidry, J. concurs.

GAIDRY, J.

In this case, a potential purchaser of property sued the potential seller, the potential purchaser's own real estate agent, and the potential seller's real estate agent after the seller unilaterally cancelled the purchase agreement following Hurricane Katrina. After the trial court dismissed her claims against the seller and the seller's real estate agent and granted only a portion of the relief sought against her own real estate agent, the plaintiff appealed. The plaintiff's real estate agent also appealed. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Melissa Baxter Ziegler, and defendant, Vicki Pansano, entered into a purchase agreement on August 10, 2005, wherein Pansano agreed to sell and Ziegler agreed to buy property located at 610 Bentwood Drive in St. Tammany Parish, Louisiana ("Bentwood property") for the sum of $158,000.00. In accordance with the terms of the purchase agreement, Ziegler deposited with Pansano's real estate agent, Stephen Wilson, the sum of $500.00. Prior to signing the purchase agreement on the Bentwood property, Ziegler had also contracted to sell her own home ("Choctaw property"). Although Ziegler's financing for the purchase of the Bentwood property was contingent upon the sale of the Choctaw property, the purchase agreement on the Bentwood property did not contain a predication clause conditioning the closing of the Bentwood property on the closing of the Choctaw property. In both the sale of the Choctaw property and the purchase of the Bentwood property, Ziegler was represented by real estate agent Janine Raymond.

The purchase agreement on the Bentwood property provided that the closing would be held on or before September 27, 2005. The purchase agreement also contained the following language:

CURATIVE WORK/REPAIRS

> In the event curative work in connection with the title is required, and/or if repairs are a requirement for obtaining the loan(s) upon which this agreement is conditioned, the parties agree to and do extend the date for passing the Act of Sale to a date not more than fifteen (15) days following completion of curative work/repairs; but in no event shall such extension exceed sixty (60) days without the written consent of all parties.
> . . .

DEADLINES

> Time is of the essence and all deadlines are final except where modifications, changes, or extensions are made in writing and signed by all parties.

On August 22, 2005, Raymond prepared and Ziegler signed an amendment to the purchase agreement changing the closing date on the Bentwood property to September 12, 2005. The amendment was delivered by Raymond to Wilson's office on August 23, 2005, and was then signed by Pansano. Wilson then delivered the fully-executed amendment to Raymond. Although Raymond denied ever receiving a signed copy of the amendment, Wilson testified that after leaving the signed amendment at her office, he called her and confirmed that she had in fact received it. Furthermore, Raymond testified that she believed that the closing date had in fact been changed to September 12, 2005. However, despite the fact that the purchase agreement provided that the closing was to be performed by the purchaser's choice of notary, Raymond failed to communicate this change in the closing date to the title company, Stewart Title, or Kirk Frosch, the closing attorney, prior to September 12, so that they could complete the necessary paperwork for that date.

On August 29, 2005, Hurricane Katrina struck. Although there was hurricane damage in St. Tammany Parish, neither the Bentwood property nor the Choctaw property was damaged.

Raymond returned to St. Tammany Parish on September 5, 2005 after having evacuated from the storm to Arkansas. Although her real estate office was damaged by the hurricane and her home phone and fax machine were not working at that time, she testified that her cell phone worked and she had everything she needed to conduct business from her home. She began corresponding with Wilson via cell phone regarding the closing on the Bentwood property once she returned home. Raymond testified that the week prior to the September 12 closing, she and Wilson discussed moving the closing date back to the original September 27 date provided in the purchase agreement, even though there was no damage to the Bentwood property. She testified that on September 9, 2005, Wilson told her that Pansano was agreeable to moving the closing date, and she denied being told that she needed to prepare anything in writing to change the date. Raymond then contacted Ziegler, who had still not returned home from evacuation, to tell her that the closing on the Bentwood property was being pushed back to September 27, and there was no need for her to be present on September 12.

Raymond claimed that in addition to her verbal agreement with Wilson to push back the closing date, there were other obstacles to closing on September 12; *i.e.*, the lack of a termite certificate as required by the purchase agreement, the existence of liens on the Bentwood property, and the closure of the bank due to Hurricane Katrina. However, Frosch testified that the liens would not have necessarily have prevented the closing from happening because he could just withhold money to cover the liens. There was also testimony that the termite company was on standby and could have

provided the certificate in a very short period of time once notified of a closing date. Finally, although the Hibernia branch where Ziegler applied for her loan did not reopen until September 12, Hibernia had other offices that were open and handling closings for the closed branches on that date.

Wilson's testimony about the changing of the closing date after Hurricane Katrina differed from Raymond's. He testified that when he spoke to Raymond on September 9, she told him that Ziegler might need an extension of the September 12 closing date because the Choctaw property had no electricity and the prospective purchasers were hesitant to close on the property without electricity. Wilson testified that he informed Raymond that the purchase agreement on the Bentwood property was not predicated on the sale of the Choctaw property, and that she would need to prepare something in writing so that he could present it to Pansano to see if she would be willing to move the closing date. On September 11, the day before the closing was supposed to take place, Wilson testified that he sent several text messages to Raymond's cell phone asking when and where the closing would take place, but he did not receive a response. Wilson denied ever being told that there existed curative work or repairs which would delay the closing.

On September 13, 2005, Pansano executed a cancellation of the purchase agreement on the Bentwood property based on Ziegler's "failure to go to Act of Sale (9/12/05)." Pansano then entered into a purchase agreement on the Bentwood property with a new purchaser, Perry Nicosia, for a purchase price of $160,000.00. The cancellation document was faxed to Raymond on September 14, 2005, but Ziegler refused to sign the cancellation, and on September 19, 2005, Ziegler filed a petition seeking specific performance from Pansano of the original purchase agreement on

the Bentwood property. Ziegler asserted in her petition that her performance under the purchase agreement on September 12, 2005, had been made impossible by Hurricane Katrina. Ziegler also filed a notice of lis pendens.

After receiving the cancellation notice from Wilson, Raymond scheduled a closing with Stewart Title for September 23, 2005, on the Bentwood property, although there was never anything in writing by the parties, as required by the purchase agreement, agreeing to this date, and Raymond did not notify Wilson and Pansano of the time or location of the closing. Wilson testified that he first heard of the September 23 closing when he was contacted by Stewart Title. At this time, he informed Stewart Title that there was no longer a contract between Ziegler and Pansano and they would not be attending the closing. Ziegler appeared at the purported closing on September 23 in an attempt to "call the sale." Frosch testified that although he scheduled a closing on September 23 at Ziegler's request, the parties could not have proceeded with the closing on that date even if Pansano had appeared because Ziegler had not yet closed on the sale of the Choctaw property, which was a requirement for her loan from Hibernia. Angelle Belk, the Hibernia Bank loan officer handling Ziegler's loan, confirmed that the loan was contingent upon the sale of the Choctaw property and the Bentwood property closing would not have been able to proceed on September 12 or 23, even if Pansano had been present and all other issues resolved on those dates. The closing on the Choctaw property did not take place until September 27.

Nicosia intervened in Ziegler's suit, claiming that Ziegler's petition was a frivolous lawsuit filed in an attempt to interfere with his purchase agreement and seeking damages for intentional infliction of emotional distress, dismissal of Ziegler's petition for specific performance, and

cancellation of the lis pendens. Pansano filed a reconventional demand against Ziegler, seeking attorney's fees and costs under the purchase agreement for Ziegler's breach, as well as forfeiture of Ziegler's deposit. Both Raymond and Wilson were also brought into the suit via supplemental and amending petitions and third-party demands.

A bench trial was held on the matter on September 17 and 18, 2007, after which the court dismissed Ziegler's claims against Wilson and Pansano's claims against Raymond and Wilson with prejudice. The court found Ziegler to be in default of the purchase agreement, concluding that Hurricane Katrina was not a fortuitous event sufficient to forgive Ziegler's default under the contract or Raymond's failure in her responsibility to her client. Specifically, the court found that Raymond could have obtained a written extension of the closing date prior to September 12, that Pansano acted in good faith in cancelling the purchase agreement when the September 12 closing date came and went without receiving anything in writing regarding an extension of the closing date, and that Ziegler's failure to predicate her offer on the Bentwood property on the closing of the Choctaw property prevented her from being able to perform her obligations under the purchase agreement on September 12 or 23. As a result, the court found that Pansano was entitled to retain Ziegler's $500.00 deposit, to offer the property for sale to the Nicosias or any other prospective purchaser, and to the cancellation of the lis pendens. For her breach of the purchase agreement, the court ordered Ziegler to pay Pansano $40,000.00 in attorney's fees. The court further found that Raymond's breach of the duty she owed to her own client made her fifty-percent at fault for Ziegler's default of the purchase agreement; as such, the court ordered Raymond to pay Ziegler $20,000.00 (one half of the attorney's fees owed by Ziegler to

Pansano), plus an additional $27,900.00 (one half of Ziegler's attorney's fees) as damages.

On appeal, Ziegler asserts that the trial court erred in: dismissing her claims against Pansano and Wilson; finding that she was in default of the purchase agreement; awarding $40,000.00 in attorney's fees to Pansano; allocating fault equally between her and Raymond; granting the cancellation of the lis pendens; assessing costs to her and Raymond; finding no liability by Pansano and Wilson for the breach of the purchase agreement; failing to award her requested damages against Pansano, Wilson, and Raymond; and failing to grant her specific performance of the purchase agreement.

In her appeal, Raymond alleged the trial court erred in: finding that Ziegler was in default of the purchase agreement; finding that Ziegler's default was caused in part by Raymond's actions; finding that Pansano was not in default of the purchase agreement; finding that Raymond was fifty-percent liable for Ziegler's default; ordering Raymond to pay Ziegler's attorney's fees; and assessing costs to Ziegler and Raymond.

DISCUSSION

Default of the Purchase Agreement

Both Ziegler and Raymond argue that Ziegler was not in default of the purchase agreement when she failed to close on September 12 because Hurricane Katrina made performance of the contract impossible. Louisiana Civil Code article 1873 provides that "[a]n obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible." A fortuitous event is one that, at the time the contract was made, could not have been reasonably foreseen. La. C.C. art. 1875. Our jurisprudence uses the terms "fortuitous event" and "force majeure" (irresistible force) interchangeably. La. C.C. art. 1873, Revision Comments-

1984, (c). "Force majeure" is defined as "[a]n event or effect that can be neither anticipated nor controlled" and includes such acts of nature as floods and hurricanes. Black's Law Dictionary 673-74 (8th ed. 2004). It is essentially synonymous with the common law concept of "act of God," and the latter term has also found its way into our jurisprudence. See *Saden v. Kirby*, 94-0854, p. 8 (La. 9/5/95), 660 So.2d 423, 428; *Bass v. Aetna Ins. Co.*, 370 So.2d 511, 513 n. 1 (La. 1979); and *A. Brousseau & Co. v. Ship Hudson*, 11 La.Ann. 427 (La. 1856).

Hurricane Katrina was undoubtedly a force majeure. However, as this court discussed in *Payne v. Hurwitz*, 2007-0081 (La. App. 1 Cir. 1/16/08), 978 So.2d 1000, this is only part of the contractual defense of impossibility of performance. To relieve an obligor of liability, a fortuitous event must make the performance of the obligation truly impossible. La. C.C. art. 1873, Revision Comments-1984, (d). Nonperformance of a contract is not excused by a fortuitous event where it may be carried into effect, although not in the manner contemplated by the obligor at the time the contract was entered into. In other words, if the fortuitous event prevents the obligor from performing his obligation in the manner contemplated at the time of contracting, he must pursue reasonable alternatives to render performance in a different manner before he can take advantage of the defense of impossibility. An obligor is not released from his duty to perform under a contract by the mere fact that such performance has been made more difficult or more burdensome by a fortuitous event. The fortuitous event must pose an insurmountable obstacle in order to excuse the obligor's nonperformance. *Payne*, 2007-0081 at pp. 8-9, 978 So.2d at 1005.

The determination of whether performance under the purchase agreement was truly impossible in this case due to Hurricane Katrina was a

factual one. The trial court rejected this argument and expressly concluded in its reasons that:

> [I]t should also be noted that west St. Tammany Parish suffered little damage relative to the eastern part of the Parish, New Orleans and worse yet, St. Bernard Parish. . . .
>
> Good faith, timeliness and attention to responsibility are all key elements in the analysis of the obligations of the respective parties to this transaction. While Hibernia and Stewart Title's Mandeville offices were closed on the 12th, their Baton Rouge offices were up and running and doing closings. However, [Pansano] was left in a vacuum, not knowing whether [Ziegler] still wanted to go forward or wished to cancel the Contract. [A note left by Pansano at Ziegler's Choctaw residence inquiring as to Ziegler's intentions regarding the closing] had gone unanswered until the closing day had passed. Several days before the 12th, [Pansano's] agent insisted on a written amendment to the Contract to present to his client. None was forthcoming. The Court finds that Katrina was not a fortuitous event sufficient to forgive [Ziegler's] default or [Raymond's] failure in her responsibility to her client. [Pansano] was justified in cancelling the Contract and entering into the subsequent contract with [Nicosia]. [Footnote omitted.]

Ziegler and Pansano next argued that Ziegler was not in default of the purchase agreement when Ziegler failed to appear for closing on September 12 because there existed curative work or repairs, *i.e.*, liens on the property, the lack of a termite certificate, and the repair of a window and air conditioner, which would have automatically extended the closing date under the "curative work/repair" clause of the purchase agreement. In response to this argument, the trial court found that these items were not the cause of the failure of the closing. The window and air conditioner repairs were minor and could have been addressed on a day's notice, and the termite certificate "was time sensitive relative to the closing date and therefore it would have been fruitless for Seller to order one too early in time." Finally, the court noted that the Seller was not made aware of any curative work needed due to the liens on the Bentwood property until after the September 12 closing date had passed, due to Raymond's failure to notify Stewart Title

or Frosch of the September 12 closing date. The court found that notice of some sort that Ziegler intended to invoke the "curative work/repair" clause to extend the closing date was important, and was not provided.

The trial court likewise rejected Ziegler's assertion that the amendment moving the closing date from September 27 to September 12 was void because Raymond never received a fully-executed copy of the amendment and that the closing date was changed back to September 27 by verbal agreement of Wilson and Raymond. The court found that Raymond's testimony was not as credible as Wilson's, and that based on the evidence before it, the closing date on the Bentwood property was September 12.

The court found that what ultimately prevented the parties from closing on September 12 was not Hurricane Katrina, liens on the property, lack of a termite certificate or air conditioner repairs, but rather Ziegler's failure to include a predication clause in the purchase agreement, since her financing could not go through until the closing on the Choctaw property. We find no error in the trial court's factual conclusions that Ziegler was the party in default of the purchase agreement on the Bentwood property. Although Hurricane Katrina made performance of some aspects of the obligation more difficult, performance was not made impossible under the contract, if Raymond and Ziegler had simply acted in good faith, responsibly, and in a timely fashion.

Realtor's Breach

On appeal, Raymond argues that she did not breach any duty owed to Ziegler as her real estate agent. A real estate broker is a professional who holds himself out as trained and experienced to render a specialized service in real estate transactions. The broker stands in a fiduciary relationship to his client and is bound to exercise reasonable care, skill, and diligence in the

performance of his duties. *Hughes v. Goodreau*, 2001-2107, p. 13 (La. App. 1 Cir. 12/31/02), 836 So.2d 649, 660, *writ denied*, 2003-0232 (La. 4/21/03), 841 So.2d 793. A realtor has a fiduciary duty to his client, and a breach of that duty to the client is actionable under La. C.C. art. 2315. *Id.*

The evidence in the record certainly supports the trial court's conclusion that Raymond failed to exercise reasonable care, skill, and diligence in the performance of her duties in representing Ziegler. Raymond's actions in failing to notify Frosch and Stewart Title of the change in the closing date to September 12 (so that they could speed up their preparations), failing to secure another change in the closing date in writing prior to September 12, and advising Ziegler that she need not appear on September 12 for the closing, despite her failure to get this change in writing, were all breaches of this duty. Furthermore, Raymond's testimony that closing on September 12 or getting the change in the closing date in writing were made impossible by Hurricane Katrina were simply not credible. We find no error in the trial court's conclusion that Raymond breached the duty she owed to Ziegler, as a realtor.

Attorney's Fees

Ziegler's only argument in brief relating to attorney's fees hinges on her argument that she was not the party in default of the purchase agreement. Since we have held that the trial court did not err in finding Ziegler to be in default of the purchase agreement, this assignment of error is likewise without merit.

Like Ziegler, Raymond also makes the argument that she should not be responsible for any attorney's fees because the trial court erred in finding any liability on her part. As with Ziegler's assertion, since we find no error

in the trial court's finding of fault, we find no merit in this assignment of error.

Damages

Raymond next argues that she cannot be liable for attorney's fees for her breach of the fiduciary duty owed to Ziegler because there was no statutory or contractual provision providing for the recovery of attorney's fees. While generally Louisiana law does not permit an award of attorney's fees absent statutory authority or contractual provision, *Killebrew v. Abbott Laboratories*, 359 So.2d 1275, 1278 (La.1978), this award is not for an attorney's fee in the traditional sense. See *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 790, 269 So.2d 239, 245 (1972) and *Ross v. Sheriff of Lafourche Parish*, 479 So.2d 506, 513 (La. App. 1 Cir. 1985). A realtor's liability for a breach of the fiduciary duty owed to her client includes the amount the client incurred in defending the underlying litigation as well as general damages. *Hughes*, 2001-2107 at p. 14, 836 So.2d at 660. See *Avengo v. Byrd*, 377 So.2d 268, 274 (La. 1979); see also *Ramp*, 263 La. at 790, 269 So.2d at 245 and *Ross*, 479 So.2d 513.

As an item of damages, the court did not award against Raymond the entire amount of Ziegler's attorney's fees, nor did it award any general damages requested by Ziegler. The court found that most of the general damages claimed by Ziegler either related to her loan, which she could have protected had she predicated her offer on the sale of the Choctaw property, expenses she would have incurred anyway had the sale gone through, or the effects of Katrina on the population as a whole. The trial court limited Ziegler's recovery of damages for Raymond's breach of her fiduciary duty to $27,900.00, representing half of the attorney's fees estimated that Ziegler

incurred. We find no abuse of discretion in the trial court's award of damages to Ziegler from Raymond stemming from the breach.

Costs

The general rule is that costs are to be paid by the party cast in judgment. La. C.C.P. art.1920; *Stockstill v. C.F. Industries, Inc.*, 94-2072, p. 28 (La. App. 1 Cir. 12/15/95), 665 So.2d 802, 822, *writ denied*, 96-0149 (La. 3/15/96), 669 So.2d 428. However, the trial court is vested with great discretion to assess costs against any party in a manner deemed equitable by the trial court. La. C.C.P. art. 1920; *Stockstill*, 94-2072 at p. 28, 665 So.2d at 821. The trial court may even assess costs against a party who prevails to some extent on the merits. *Stockstill*, 94-2072 at p. 28, 665 So.2d at 821-22. The trial court's assessment can be reversed only upon a showing of an abuse of that court's discretion. *Steadman v. Georgia-Pacific Corporation*, 95-1463, p. 15 (La. App. 1 Cir. 4/6/96), 672 So.2d 420, 428, *writ denied*, 96-1494 (La. 9/20/96), 679 So.2d 440.

Both Ziegler and Raymond assert that the trial court erred in its assessment of costs. Both base this argument on their assertion that the trial court's ruling that they were responsible for the default of the purchase agreement should be reversed. Since we have found that the trial court did not err in its allocation of fault between Ziegler and Raymond, we find no abuse of discretion in its assessment of costs.

DECREE

For the above reasons, the judgment of the trial court is affirmed. Costs of this appeal are to be borne equally by Raymond and Ziegler.

AFFIRMED.