

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 2168

MICHAEL DAVID LEMAN

VERSUS

HEATHER COOK LEMAN

Consolidated with

2009 CA 2169

HEATHER COOK LEMAN

VERSUS

MICHAEL DAVID LEMAN and FRED G. LAKE

Consolidated with

2009 CA 2170

HEATHER COOK LEMAN

VERSUS

MICHAEL DAVID LEMAN, ABC INSURANCE COMPANY, MELVIN G.

RIPP, JR., DEF INSURANCE COMPANY, FRED G. LAKE and GHI

INSURANCE COMPANY

Judgment rendered: MAY - 7 2010

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On Appeal from the 22<sup>nd</sup> Judicial District Court

Parish of St. Tammany, State of Louisiana

Case Numbers: 2006-15654 c/w 2007-15352 c/w 2008 14644; Division "L"

The Honorable Dawn Amacker, Judge Presiding

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Kenneth H. Hooks, III  
H. Price Mounger, III  
Baton Rouge, La.

Counsel for Appellant  
Heather Cook Leman

Frank G. DeSalvo  
Robert P. Blackburn  
New Orleans, La.

Frank P. Tranchina, Jr.  
Tracy E. Gold  
Covington, La.

Counsel for Appellee  
Michael David Leman

BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

*Gaidry, J. concurs.*

*PMC = McCleendon, J. concurs.*

## **DOWNING, J.**

Heather Cook Leman appeals a judgment sustaining her ex-husband, Michael David Leman's, peremptory exception of res judicata and dismissing Mrs. Leman's underlying lawsuit with prejudice. The judgment also denied Mrs. Leman's motion to dismiss Mr. Leman's motion to transfer her action and overruled her dilatory exception of prematurity. For the following reasons, we affirm the judgment of the trial court.

### **PERTINENT FACTS AND PROCEDURAL HISTORY**

Heather Cook Leman and Michael David Leman's were married in 2001 and ended in divorce in July 2007 in the 22<sup>nd</sup> Judicial District Court (JDC) (St. Tammany Parish). In January 2007, in connection with their divorce proceedings, Mr. and Mrs. Leman agreed to a consent judgment entitled, "Partition of Community Property and Confirmation of Separate Property" (Consent Judgment), which was signed by the parties and the trial court.

Pertinently, Mrs. Leman filed a petition in the 24<sup>th</sup> JDC (Jefferson Parish) in September 2007 for damages, to nullify "Exhibit 'A'," and for a writ of sequestration. "Exhibit 'A'" is a document entitled "Donation Making Community Property Separate Property" (Donation), which was executed in March 2005. In this action, Mrs. Leman sued the attorney and the accountant who had formerly provided professional services to both spouses, in addition to Mr. Leman.

In October 2007 Mr. Leman filed an exception to venue in the 24<sup>th</sup> JDC. The trial court overruled the exception. Mr. Leman then sought writs with the Louisiana Fifth Circuit Court of Appeal. In July 2008 the Fifth Circuit granted Mr. Leman's writ, reversing the trial court's ruling on the exception of venue. The Fifth Circuit severed the claims against Mr. Leman and transferred them to the 22<sup>nd</sup> JDC for St. Tammany Parish. The Louisiana Supreme Court denied Mrs. Leman's writ application seeking review of that ruling. The record indicates that the clerk

of court for the 24<sup>th</sup> JDC prepared a true and correct copy of its proceedings, which was subsequently filed in the 22<sup>nd</sup> JDC.

In September 2008, in the 22<sup>nd</sup> JDC, Mr. Leman filed a motion to transfer and consolidate Mrs. Leman's claims into the existing divorce proceedings, which the trial court granted on October 20, 2008. Also in September 2008, prior to consolidation, Mr. Leman filed an exception of *res judicata* in response to Mrs. Leman's "Petition for Damages and to Declare Exhibit 'A' a Nullity and for Writ of Sequestration," asserting that the January 2007 consent judgment settled their differences. The trial court heard this exception on October 20, 2008, but the presiding judge retired before issuing a ruling.

Mrs. Leman had also filed a "Motion to Dismiss and Exception of Prematurity," asserting that the matter was not properly transferred to the 22<sup>nd</sup> JDC because the proper procedures were not followed. The trial court minutes reflect that these matters were also heard on October 20, 2008.

In February 2009, Mr. Leman filed a "Motion for Ruling on Pending Matters." The trial court rendered judgment in May 2009 on Mr. Leman's exception of *res judicata* and on Mrs. Leman's "Motion to Dismiss and Exception of Prematurity." The trial court denied Mrs. Leman's motion and exception. It sustained Mr. Leman's exception of *res judicata*, dismissing her suit for damages, nullity of "Exhibit 'A'," and writ of sequestration with prejudice.

Mrs. Leman now appeals, asserting five assignments of error, as follows:

1. The trial court erred by denying a motion to dismiss a lawsuit which was transferred by a clerk of court without an order of any district court following the grant of an exception of venue by the 5<sup>th</sup> Circuit Court of Appeal.
2. The trial court erred by granting an exception of *res judicata* to Appellant's suit which alleges fraud, duress and coercion in the formation and contents of a document made a consent judgment signed by the trial court. The nullity of a final judgment may be demanded for vices of either form or substance, as provided in LSA-C.C.P. articles 2001 through 2006.

3. The trial court erred by granting an exception of *res judicata* without providing an opportunity to the appellant to remove any one of the alleged elements which formed the basis of the grant of the exception of *res judicata*.
4. The trial court erred by concluding, without factual or legal support, that a consent judgment partitioning community property is a compromise between the parties pursuant to Louisiana Code of Civil Procedure article 3071 and, pursuant to LSA-C.C. article 3080, not subject to subsequent actions.
5. The trial court erred, without factual or legal support, that the null act of donation was confirmed and ratified in a consent judgment, when that consent judgment did not qualify as an authentic act.

## DISCUSSION

### *Venue*

Citing La. C.C.P. art. 2251, Mrs. Lemman contends in her first assignment of error that the proceedings in the 22<sup>nd</sup> JDC are premature and should be dismissed.

Louisiana Code of Civil Procedure art. 2251 provides as follows:

A judgment can be executed only by a trial court.

A party seeking to execute a judgment of an appellate court must first file a certified copy with the clerk of the trial court. This filing may be made without prior notice to the adverse party.

Mrs. Lemman argues that since the 24<sup>th</sup> JDC trial court did not order the execution of the transfer, the suit was not properly transferred. Here, at Mr. Lemman's request and upon payment of fees, the 24<sup>th</sup> JDC clerk sent the record to the 22<sup>nd</sup> JDC, apparently on the authority of the Louisiana Fifth Circuit's transfer order. Mrs. Lemman argues that, consequently, Mr. Lemman improperly filed a new lawsuit naming her as the plaintiff. Therefore, she suggests that this matter be dismissed so that it can be properly transferred from the 24<sup>th</sup> JDC. We disagree.

While Mrs. Lemman's arguments suggest a reasonable interpretation of La. C.C.P. art. 2251, this court has held that, "[w]hen an action is brought in a court of improper venue, an appellate court has the discretion to dismiss the action or, in the interest of justice, transfer it to a court of proper venue." (Emphasis added.) **Daniels v. Rachal**, 610 So.2d 967, 969 (La.App. 1 Cir. 1992). The **Daniels** court

relied on La. C.C.P. art. 121 in making its decision.<sup>1</sup> That article provides that “[w]hen an action is brought in a court of improper venue, the court may dismiss the action, or in the interest of justice transfer it to a court of proper venue.”

Here, the Fifth Circuit ordered the transfer of the matter to the 22<sup>nd</sup> JDC as follows: “we . . . transfer these claims to the 22<sup>nd</sup> Judicial District Court for the Parish of St. Tammany.” Accordingly, we conclude the matter was properly transferred to the 22<sup>nd</sup> JDC by the authority of the Fifth Circuit. This assignment of error is without merit.

### *Res Judicata*

Mrs. Leman next argues that the trial court erred in sustaining the exception of res judicata because no court has yet considered her claims of fraud, duress and coercion in the formation of the Donation, the provisions of which were made part of the Consent Judgment. In her petition for damages, to nullify “Exhibit ‘A’,” and for a writ of sequestration, however, Mrs. Leman does not directly challenge the Consent Judgment. Rather, she seeks to have the Donation annulled. In brief, she states that her strategy was to annul the Donation in the 24<sup>th</sup> JDC suit and thereafter attack the Consent Judgment in the 22<sup>nd</sup> JDC action.

As such, she attempts to collaterally attack the Consent Judgment. “A collateral attack is defined as an attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling it.” (Emphasis added.) **Knight v. Sears, Roebuck & Co.**, 566 So.2d 135, 137 (La.App. 1 Cir. 1990). A judgment that is an absolute nullity may be attacked collaterally. *See Id.*

A final judgment obtained by fraud or ill practices, however, is not an absolute nullity. **Smith v. LeBlanc**, 06-004, p. 6 (La.App. 1 Cir. 8/15/07), 966 So.2d 66, 71. Accordingly, such grounds must be asserted in a direct action and not raised collaterally. **Knight**, 566 So.2d at 137. The nullity must be properly

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<sup>1</sup> In **Daniels**, we followed technically proper procedure by ordering the clerk of court in one parish to transfer the case at issue to another. **Daniels**, 610 So.2d at 969.

decreed within the time prescribed. **Smith**, 06-004 at p. 6, 966 So.2d at 71. *See* La. C.C.P. arts. 2001 – 06. Article 2004 provides that a final judgment obtained by fraud or ill practices may be annulled, but requires that the action be brought within one year of the discovery of the fraud or ill practices. The one-year period is preemptive, not prescriptive. **Knox v. West Baton Rouge Credit, Inc.**, 08-1818, p. 7 (La.App. 1 Cir. 3/27/09), 9 So.3d 1020, 1025. *See also* **Naghi v. Brener**, 08-2527, pp. 10-11 (La. 6/26/09), 17 So.3d 919, 925-26, where the supreme court explains why a preempted claim cannot be added to a petition and relate back to the date of filing. Article 2006 requires that an action to annul be brought in the trial court.

Here, Mrs. Leman has not instituted any action for the express purpose of annulling the Consent Judgment, which was rendered in the 22<sup>nd</sup> JDC. Rather, her action was filed in the 24<sup>th</sup> JDC in September 2007 to specifically challenge the Donation. Mrs. Leman made her allegations of fraud and ill practices in that lawsuit in connection with the Donation. Therefore, the grounds for fraud and ill practices were discovered by her at the latest in September 2007. Further, appeal delays have run on the Declaratory Judgment, which was rendered in January 2007.

Accordingly, the Consent Judgment is final and its provisions are res judicata, regardless of the validity of the underlying actions on which it is based. *Cf. Ortiz v. Ortiz*, 01-1252 (La.App. 5 Cir. 5/15/02), 821 So.2d 35 (particularly n.2). Further, while La. C.C.P. art. 934 provides that if the grounds of the objection of res judicata may be removed by amendment of the petition, such amendment should be allowed, Mrs. Leman has argued no permissible amendment that would cure the objection, and we can conceive of none. Article 934 further states that if the grounds of the objection cannot be so removed, the action shall be dismissed. Therefore, Mrs. Leman's second and third assignments of error are without merit.

### *Remaining Assignments of Error*

In her fourth assignment of error, Mrs. Leman challenges the trial court's determination that the Consent Judgment had res judicata effect because the Consent Judgment constituted a compromise pursuant to La. C.C. art. 3071 that cannot be contested pursuant to La. C.C. art. 3080. Article 3080 provides that "[a] compromise precludes the parties from bringing a subsequent action based upon the matter that was compromised." Because of our conclusions above, we need not determine whether the Consent Judgment's res judicata effect also arises from a binding compromise. We therefore pretermitt discussion of this assignment of error.

In her fifth assignment of error, Mrs. Leman challenges whether the Donation could be confirmed in the Consent Judgment, which was not conected by an authentic act. As discussed above, however, this argument is a collateral attack on the Consent Judgment and, as such, cannot be maintained without Mrs. Leman having filed a petition for nullity. Accordingly, we pretermitt discussion of the merits of this assignment of error as well.

Even so, we observe that Mrs. Leman's arguments challenging the Donation on contract principles have a basis in Louisiana jurisprudence. Mrs. Leman cites **Stroscher v. Stroscher**, 01-2769, p. 5 (La.App. 1 Cir. 2/14/03), 845 So.2d 518, 524, among other cases, for the proposition that a consent judgment is a bilateral contract between the parties that must be based on consent. **Stroscher** states: "Thus, a consent judgment, as opposed to other final judgments rendered against a party without their consent, may be annulled for an error of fact or of the principal cause of the agreement." *Id.* See also **Richardson v. Richardson**, 02-2415, p. 4 (La.App. 1 Cir. 7/9/03), 859 So.2d 81, 84, where this court observed: "A 'consent judgment' is, in effect, a bilateral contract between the parties which gets its binding force from the consent the parties gave, rather than from adjudication by the courts." It is not unreasonable to construe these and similar true statements to

conclude that the law may allow consent decrees to be attacked on contractual grounds.

These and similar statements, however, need context that may not be readily apparent: a consent judgment's binding force also arises from the fact that it is a valid, enforceable judgment that must be obeyed. *See Black v. Comfort*, 08-239, 996 So.2d 1187, 1190 (La.App. 5 Cir. 10/28/08). Accordingly, as discussed above, the Consent Judgment before us can only be challenged in a direct action instituted for the express purpose of annulling it.

### **DECREE**

For the foregoing reasons, we affirm in all respects the trial court judgment sustaining Mr. Leman's exception of res judicata and dismissing with prejudice Mrs. Leman's suit for damages, nullity of "Exhibit 'A'," and writ of sequestration. Costs of this appeal are assessed to Mrs. Heather Cook Leman.

**AFFIRMED**