NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 0435

RONALD K. STOESSELL, ALFRED LLOYD STOESSELL, MARILYN S. SEIFERT, J. KENT JACKSON, JANET JACKSON, PRESTON T. PRIETO, MARIE ELISE PRIETO, ROBERT T. DOOLITTLE, JR., AND ERNEST PRIETO

VS.

THOMAS D. D'LUCA

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JUDGMENT RENDERED: DEC 21 2007

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ON APPEAL FROM THE
TWENTY-SECOND JUDICIAL DISTRICT COURT
DOCKET NUMBER 2005-11684, DIVISION I
PARISH OF ST. TAMMANY, STATE OF LOUISIANA

THE HONORABLE REGINALD T. BADEAUX, JUDGE

****

ALEX J. PERAGINE ROBIN C. DUNFORD COVINGTON, LA	ATTORNEY FOR PLAINTIFFS/APPELLEES RONALD K. STOESSELL, ALFRED LLOYD STOESSELL, MARILYN S. SEIFERT, J. KENT JACKSON, JANET JACKSON, PRESTON T. PRIETO, MARIE ELISE PRIETO, ROBERT R. DOOLITTLE, JR. ERNEST PRIETO AND BENJAMIN V. DOOLITTLE
MAURICE LeGARDEUR COVINGTON, LA	ATTORNEY FOR DEFENDANT/APPELLEE GOLDEN PROPERTIES, L.L.C.
WILLIAM J. JONES, JR. COVINGTON, LA	ATTORNEY FOR DEFENDANTS/APPELLEES MARGERY M. HANISEE, DAVID M. MOORE AND CLAY C. PRIETO
ROY E. BLOSSMAN ROBERT S. STASSI TAYLOR C. MOORE NEW ORLEANS, LA	ATTORNEYS FOR DEFENDANT/APPELLANT THOMAS D. D'LUCA AND ATTORNEYS FOR INTERVENOR/APPELANT HELENBIRG PROPERTIES, L.L.C.

BEFORE: GAIDRY, MCDONALD AND MCCLENDON, JJ.

- Gaidry, J. concurs
Mc Clendon, J. concurs

MCDONALD, J.

This is an appeal of a summary judgment declaring that an option to purchase land was null and void. We affirm.

On April 8, 2005, the plaintiffs, Ronald K. Stoessel, Alfred Lloyd Stoessel, Marilyn S. Seifert, J. Kent Jackson, Janet Jackson, Preston T. Prieto, Marie Elise Prieto, Robert T. Doolittle, Jr., and Ernest Prieto filed suit for declaratory and other relief, naming as defendants Thomas D. D'Luca, Clay C. Prieto, Margery M. Hanisee, David M. Moore, and Golden Properties, L.L.C. The plaintiffs asserted that they were among the heirs of Ernest Prieto, which included real estate located in St. Tammany Parish. They further asserted that on March 28, 2002, the heirs of Ernest Prieto, including the plaintiffs, executed the second page of a document titled "Option to Purchase and Sell Real Property."

Plaintiffs alleged that the first page of the document was provided to them approximately two years after the document's execution, that it may have been substituted for an original first page of the document, and that they executed the second page of the document without receiving or reviewing any other page. They explained that they:

> intended to grant to defendant an option to purchase the lots within squares 17 through 28 of the Helenbirg Lots and Farm Plats by Ned R. Wilson dated 6/84, that was (i) subject to a stipulated time of twenty four (24) months from the Document's execution within which the offer contained in that option must be accepted by Defendant; and (ii) without any condition that Plaintiffs provide Defendant with a permit from the U.S. Army Corp. of Engineers.

They further asserted that the first page of the document contained conditions regarding permits that were previously rejected by some or all of the plaintiffs, that defendants failed to accept within 24 months the offer contained in the option to purchase, and that plaintiffs notified defendants of

the failure on March 29, 2004. Plaintiffs contended that the option had expired and was unenforceable. Alternately, they argued that the option was for a perpetual or indefinite term, or that it was a suspensive condition, and thus was null, void and unenforceable.

Mr. D'Luca filed an answer generally denying the allegations of the petition, and asserting that the petition failed to state a claim upon which relief could be granted. He alleged that a valid and enforceable contract granting him an option to purchase the subject property was executed in writing, that the contract was unambiguous, that the stipulated term was clear, that the term had not yet expired, and the option had not yet been exercised. Mr. D'Luca also claimed that the option was valid and enforceable within the stipulated time of 24 months from his receipt of the U.S. Army Corps of Engineers permits from the sellers. Further, he asserted that the sellers had not provided him with any permit, and to his knowledge, no permit had been obtained; thus, the stipulated term in the option contract had not yet expired. He emphasized that the plaintiffs, by failing to make diligent efforts to obtain U.S. Army Corps of Engineers permits for the subject property or by refusing to cooperate with him in the acquisition of the permit, had breached the option contract and breached their duties of good faith. In the alternative, he asserted that plaintiffs and Clay C. Prieto, Margery M. Hanisee, David M. Moore and Golden Properties, LLC, were liable in solido to him for damages, and that he had assigned his rights in the option contract to Helenbirg Properties, LLC. Mr. D'Luca asked for judgment in his favor declaring a valid and enforceable option contract, ordering specific performance of the option contract, or alternatively, awarding damages and dismissing plaintiff's petition.

Helenbirg Properties, LLC filed a petition of intervention, naming as defendants-in-intervention the plaintiffs, along with Clay C. Prieto, Ms. Hanisee, Mr. Moore and Golden Properties, LLC. Helenbirg Properties, LLC asserted that it was intervening to unite with Mr. D'Luca in resisting the plaintiff's demands and to oppose plaintiffs and co-defendants in intervention, seeking declaratory relief as to the rights and obligations of the parties to the option contract, and specific performance or damages in connection with its breach. Helenbirg Properties, LLC alleged that Mr. D'Luca had assigned it his rights under the option contract, and asked for a declaratory judgment that the option contract was valid and enforceable, for specific performance of the contract, or in the alternative, a judgment awarding Mr. D'Luca or Helenbirg Properties, LLC damages, dismissing plaintiffs' petition for declaratory relief.

Golden Properties, LLC answered plaintiffs' petition, alleging that the time period to exercise the option contract had passed without the option being exercised; no formal written extension was signed; and that no placing in default or demand for specific performance was instituted by the parties.

Ms. Hanisee, Mr. Moore and Clay C. Prieto answered the plaintiffs' petition, claiming that Clay C. Prieto, Ms. Hanisee, Mr. Moore and Golden Properties, LLC, were not direct heirs of Ernest Prieto, but rather, successors to the heirs of Ernest Prieto. Further, they asserted the document itself was the best evidence of the dates each signed it and that the document as initialed on page two did not require any permit, and page two was controlling.

Thereafter, plaintiffs moved for summary judgment against the defendants, asking for a declaratory judgment that the terms of the option agreement relied upon by defendants did not meet the requirements of a

valid option, and a declaration that the option contract was illegal, null and void.

After a hearing on the motion for summary judgment the trial court ruled in favor of the plaintiffs, granted the motion for summary judgment, declared the option contract was null and void, and dismissed all other claims. Mr. D'Luca and Helenbirg Properties, LLC (hereafter the appellants) appealed that judgment and make the following assignments of error:

1. The trial court committed error in granting the motion for summary judgment under the standards set forth in La. C.C.P. art. 966.

2. In granting the motion for summary judgment, the trial court committed reversible error in finding that the Plaintiffs/Appellees were entitled to judgment as a matter of law finding that the option contract was invalid for lack of a stipulated term.

3. Alternatively, in granting the motion for summary judgment, the trial court committed reversible error in failing to find the existence of a genuine issue as to material fact under La. C.C.P. art. 966 based on the pleadings, answers to interrogatories, admissions on file, and affidavits.

On appeal, summary judgments are reviewed de novo under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 750.

Essentially, the appellees (plaintiffs, Ms. Hanisee, Mr. Moore, Clay C. Prieto and Golden Properties, LLC) argue that the uncertainty of whether and when the Corps of Engineers would issue a permit invalidates the option. The appellants counter that the issuance of a permit is merely a suspensive condition, which is by definition uncertain, and that an option to purchase may validly contain such a condition.

Louisiana Civil Code article 1767 provides for conditional obligations:

> A conditional obligation is one dependent on an uncertain event.
>
> If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive.
>
> If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, the condition is resolutory.

Louisiana Civil Code article 1778 provides a time period for performance of an obligation:

> A term for the performance of an obligation is a period of time either certain or uncertain. It is certain when it is fixed. It is uncertain when it is not fixed but is determinable either by the intent of the parties or by the occurrence of a future and certain event. It is also uncertain when it is not determinable, in which case the obligation must be performed within a reasonable time.

Louisiana Civil Code article 1778 Revision Comments (a) - 1984 provide in part that "The Louisiana jurisprudence has repeatedly asserted that where no time is fixed, an obligation must be performed within a reasonable time."

Louisiana Civil Code article 2620 provides:

> An option to buy, or an option to sell, is a contract whereby a party gives to another the right to accept an offer to sell, or to buy, a thing within a stipulated time.
>
> An option must set forth the thing and the price, and meet the formal requirements of the sale it contemplates.

In **MKM, LLC v. Rebstock Marine Transport, Inc.**, 99-0431 (La. App. 1st Cir. 9/7/00), 773 So.2d 776, writ denied, 00-2797 (La. 12/8/00), 776 So.2d 460, this court held that an option to purchase conditioned upon the successful outcome of litigation concerning the property was valid and enforceable, despite the fact that this result, the fulfillment of the suspensive condition, was uncertain and had no fixed date. Based upon this decision, it

is clear that an option to purchase may contain a suspensive condition. Where that condition is given no fixed time period, the court may establish a reasonable time for its completion. See La. C.C. art. 1773 and Revision Comments - 1984.

In this case, the contract calls for the permit to be "provided by Seller or at purchasers [sic] option." This allows either party to apply for the permit, rather than obligating one party alone to do so. As of April 8, 2005, the date the original petition was filed, over three years after the execution of the contract, neither party had applied for the permit. We find that three years is more than a reasonable time period to begin the process by applying for a permit from the Corps of Engineers. Thus, we find the suspensive condition was unfulfilled and the option is no longer enforceable.

For the foregoing reasons, the trial court judgment, finding that the option to purchase land is null and void, is affirmed. Costs are assessed against the appellants. This memorandum opinion is issued in compliance with the Uniform Rules, Courts of Appeal Rule 2-16.1.B.

AFFIRMED.