

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 2227

TV & APPLIANCE TOWN, INC.

VERSUS

**ADVANTAGE FINANCIAL SERVICES OF WALKER INC.,
MARGARET LEBLANC AND MARK PERRILLOUX**

Judgment Rendered: May 8, 2009

**Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number C470593**

Honorable Janice Clark, Judge Presiding

**Steven E. Adams
Baton Rouge, LA**

**Counsel for Plaintiff/Appellant,
TV & Appliance Town, Inc.**

**Scott Perrilloux
Hammond, LA
and
J. Chandler Loupe
Baton Rouge, LA**

**Counsel for Defendants/Appellees,
Advantage Financial Services of
Walker, Inc. and Mark Perrilloux**

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

WHIPPLE, J.

This is an appeal from a judgment of the trial court granting defendants' motion for involuntary dismissal and dismissing with prejudice plaintiff's claims. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On March 20, 2000, TV and Appliance Town, Inc. ("TV and Appliance Town") filed suit against Advantage Financial Services of Walker, Inc. ("Advantage Financial"); Margaret LeBlanc, the office manager for Advantage Financial at the pertinent time; and Mark Perrilloux, the president of Advantage Financial. In its petition, TV and Appliance Town described a business arrangement it had been engaged in with Advantage Financial beginning in 1997. According to the petition, pursuant to the parties' arrangement, TV and Appliance Town would forward credit applications from its prospective customers to Advantage Financial for approval of financing. If Advantage Financial agreed to finance any particular sale, it would withhold 10% of the proceeds of the loan, which would then be placed in a reserve account. The purpose of the reserve account, according to the allegations of the petition, was to reimburse Advantage Financial for any accounts generated through TV and Appliance Town that were not timely paid.

TV and Appliance Town further alleged that in late 1999, it had eighty-four contracts, totaling approximately \$135,503.08, pending at Advantage Financial's office, for which merchandise had already been delivered to customers as per the parties' standard arrangement and the representations of defendants. However, according to the allegations of the petition, Advantage Financial was inordinately delaying the funding of these contracts.

TV and Appliance Town further averred that it met with LeBlanc, the office manager of Advantage Financial, about the delay in funding of the contracts and that, on November 11, 1999, LeBlanc signed a document listing all eighty-four contracts and acknowledging that the contracts were in her possession and had been approved by Advantage Financial to purchase.

Nonetheless, according to the petition, Perrilloux, the president of Advantage Financial, then attempted to coerce TV and Appliance Town into paying an additional 10% reserve (for a total reserve of 20%) as a condition to funding the remaining loans. TV and Appliance Town averred that Perrilloux then promised to pay all the money due on the contracts if a 15% reserve could be applied. However, according to the allegations of the petition, since that time, Advantage Financial had paid only approximately \$51,000.00 of the amounts due under the contracts, leaving a balance of approximately \$84,000.00.

In the petition, TV and Appliance Town further alleged that while Advantage Financial had returned some of the unpaid contracts, it still had in its possession twenty-nine contracts that it refused to return, deny, or pay. Additionally, TV and Appliance Town averred that it had requested that Perrilloux return the funds in the reserve account, which it believed had built up to approximately \$80,000.00, but that Perrilloux advised TV and Appliance Town that the reserve was "all dried up." TV and Appliance Town also contended that the reserve funds may have been improperly applied to delinquent accounts for other individuals not covered by the reserves.

Based on these allegations, TV and Appliance Town asserted claims for breach of contract, fraud, detrimental reliance, and conversion. It further asserted a claim of negligence based on Perrilloux's alleged failure to

exercise due care and supervision over Advantage Financial employees and office operations, and failure to incorporate fiscal practices within Advantage Financial that would have deterred or prevented the alleged improper financial practices and misconduct.

Thereafter, on May 9, 2001, the trial court rendered judgment, confirming a preliminary default, against LeBlanc in the amount of \$166,700.00. Defendants, Advantage Financial and Perrilloux then answered the petition, generally denying the allegations set forth therein.

The matter eventually proceeded to a bench trial on July 1, 2008, against Advantage Financial and Perrilloux. In its case in chief, TV and Appliance Town presented the testimony of James Martin, TV and Appliance Town's owner, who testified that all eighty-four contracts in dispute had been approved by LeBlanc by phone, but that the balance owed on some of those contracts had not been paid. TV and Appliance Town also offered into evidence a document prepared by Martin and signed by LeBlanc, wherein LeBlanc acknowledged that she had the eighty-four listed applications and contracts in her possession and that she had approved the purchase of those contracts by Advantage Financial; and a December 17, 1999 letter from Perrilloux to Martin, wherein Perrilloux outlined the status of twenty-eight contracts from TV and Appliance Town and stated that he was returning those contracts to Martin.

The parties also jointly introduced the deposition of LeBlanc, wherein she acknowledged that she had signed the document prepared by Martin, which listed the names of eighty-four applicants. However, in deposition, LeBlanc stated that she thought that by signing the document, she was acknowledging that she had received the eighty-four applications and that

they were in her possession, not that she had approved all eighty-four applications.

At the close of TV and Appliance Town's case in chief, defendants moved for involuntary dismissal. In support of the motion, defense counsel argued that TV and Appliance Town was seeking payment for eighty-four contracts, but had not introduced any of those contracts into evidence. Defense counsel further argued that there was no evidence as to the terms of those contracts or the amounts due.

After hearing argument from both counsel, the trial court granted the motion for involuntary dismissal and, by judgment dated July 4, 2008, dismissed TV and Appliance Town's case against Advantage Financial and Perrilloux in its entirety.¹ From this judgment, TV and Appliance Town appeals, contending that the trial court erred in granting the motion for involuntary dismissal.

DISCUSSION

Louisiana Code of Civil Procedure article 1672(B) provides the basis for an involuntary dismissal at the close of a plaintiff's case in an action

¹During argument on the motion, plaintiff's counsel indicated to the court that Martin did have the pink copies of the contracts at issue. The court then recessed the matter for a few hours to allow TV and Appliance Town to produce the copies of the contracts. During the recess, Martin apparently produced copies of contracts, but defense counsel objected to their introduction into evidence. Defense counsel noted that this matter had been pending for nine years, that he had requested copies of the contracts in discovery to no avail, that Martin had previously testified in deposition that he had copies of only those contracts returned to him by Perrilloux, and that TV and Appliance Town had not listed the contracts as exhibits in the pretrial order. Thus, defense counsel argued that allowing plaintiff's counsel to admit the contracts into evidence after the close of TV and Appliance Town's case would cause prejudice to the defense.

The court then granted the motion for involuntary dismissal without allowing the introduction of the contracts. On appeal, TV and Appliance Town have not assigned error to the trial court's implicit ruling excluding this evidence.

tried by the court without a jury. In determining whether involuntary dismissal should be granted, the appropriate standard is whether the plaintiff has presented sufficient evidence on his case-in-chief to establish his claim by a preponderance of the evidence. Robinson v. Dunn, 96-0341 (La. App. 1st Cir. 11/8/96), 683 So. 2d 894, 896, writ denied, 96-2965 (La. 1/31/97), 687 So. 2d 410. Unlike a directed verdict in a jury case, the judge is free to evaluate the evidence and render a decision based upon a preponderance of the evidence, without any special inferences in favor of the party opposed to the motion. Robinson, 683 So. 2d at 896.

On a motion for involuntary dismissal, the trial court is only required to weigh and evaluate all of the evidence presented up to that point and grant a dismissal if the plaintiff has failed to establish his claim by a preponderance of the evidence. McCurdy v. Ault, 94-1449 (La. App. 1st Cir. 4/7/95), 654 So. 2d 716, 720, writ denied, 95-1712 (La. 10/13/95), 661 So. 2d 498. Proof by a preponderance simply means that, taking the evidence as a whole, the evidence shows the fact or cause sought to be proved is more probable than not. McCurdy, 654 So. 2d at 720. A dismissal based on LSA-C.C.P. art. 1672(B) should not be reversed by an appellate court in the absence of manifest error. Robinson, 683 So. 2d at 896.

In the instant case, as stated above, TV and Appliance Town sets forth numerous causes of action in its petition based on Advantage Financial's failure to pay funds to TV and Appliance Town allegedly due on contracts which purportedly were approved for financing by Advantage Financial. Turning first to its breach-of-contract claim, TV and Appliance Town contends that it established that it had a contract with Advantage Financial, that it had released merchandise pursuant to that agreement, and that it was unable to retrieve the property or the sums due since the finance contracts

were assigned to Advantage Financial and were not returned to TV and Appliance Town. Conceding that it did not offer any of the finance contracts at issue into evidence, TV and Appliance Town argues that the document listing all eighty-four contracts and signed by LeBlanc nonetheless was competent evidence as a “summary” pursuant to LSA-C.E. art. 1008.²

The burden of proof in an action for breach of contract is on the party claiming rights under the contract. The existence of the contract and its terms must be proven by a preponderance of the evidence. Bond v. Allemand, 632 So. 2d 326, 329 (La. App. 1st Cir. 1993), writ denied, 94-0718 (La. 4/29/94), 637 So. 2d 468. Moreover, the party claiming rights under a contract has the burden of proving by a preponderance of the evidence its own performance under the terms of the contract. See Martin v. T. L. James & Co., Inc., 237 La. 633, 642, 112 So. 2d 86, 89 (1958).

In the instant case, Martin testified as to the general business arrangement between TV and Appliance Town and Advantage Financial, whereby he would fax a credit application to LeBlanc and she would call him back with an approval or rejection of the application. After a customer’s application was approved, Martin would then insert the figures given to him by Advantage Financial into the finance contract and have the customer sign the contract. LeBlanc would then pay TV and Appliance

²Louisiana Code of Evidence article 1008 provides as follows:

When the admissibility of other evidence of contents of writings, recordings, or photographs under these articles depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Article 104. However, when an issue is raised (1) whether the asserted writing ever existed, or (2) whether another writing, recording, or photograph produced at the trial is the original, or (3) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Town the amount financed by the customer under the specific finance contract, less the agreed-upon reserve. Martin's testimony as to this general business arrangement between the parties was corroborated by the testimony of LeBlanc.

Nonetheless, the evidence of record is simply insufficient to establish by a preponderance of the evidence the existence of the eighty-four specific contracts allegedly entered into by the parties or their precise terms. While the parties do not dispute that the finance contracts ultimately entered into by TV and Appliance Town's customers were written contracts, copies of the contracts at issue were not offered into evidence. Thus, the record lacks any competent evidence as to: (1) the contractual rights and obligations, if any, of TV and Appliance Town and Advantage Financial under any of these alleged contracts; (2) the specific amount financed under each alleged contract; (3) the amount of the reserve withheld under each contract; and, (4) the amount accordingly owed to TV and Appliance Town under each alleged contract.³

Moreover, we find no merit to TV and Appliance Town's argument that the list prepared by Martin and signed by LeBlanc, showing eighty-four contracts allegedly approved by Advantage Financial, was sufficient to establish the existence and terms of the alleged contracts in dispute. We recognize that the document contains a list of eighty-four names, a list of dates on which some contracts were allegedly entered into, and the alleged amount of each contract. According to the document, the eighty-four contracts approved for purchase by Advantage Financial totaled

³Martin testified at trial that while the standard reserve amount agreed to by the parties was 10% of the contract price, there were many applications approved by LeBlanc at a higher reserve percentage, given the level of risk involved. Martin further testified that he had agreed to allow Perrilloux to withhold a 15% reserve on some of the alleged contracts at issue.

\$135,503.08. Further, LeBlanc did sign this document in an after-hours meeting with Martin in the parking lot of a fast-food restaurant.

However, LeBlanc later testified that she felt pressured by Martin to sign the document and that she thought she was simply acknowledging that Advantage Financial had received, and had in its possession, credit applications for all of the customers listed. According to LeBlanc's testimony, she did not understand that by signing the document, she was acknowledging or agreeing that Advantage Financial had approved eighty-four finance contracts for purchase by Advantage Financial.

Considering this evidence and the record as a whole, we cannot conclude that the trial court erred in finding that TV and Appliance Town failed to establish the nature and extent of any right to recover under these alleged contracts. Even disregarding LeBlanc's testimony and assuming that Martin's testimony together with the list signed by LeBlanc was sufficient to establish the **existence** of the alleged contracts at issue, there is simply no proof of the **precise terms** of any of the alleged contracts or TV and Appliance Town's rights under any of these contracts.

Additionally, even if TV and Appliance Town had proven the existence of the eighty-four contracts and the specific terms of each contract, it nonetheless also failed to present specific, competent evidence to establish Advantage Financial's alleged breach under each of the alleged contracts in dispute. Rather, TV and Appliance Town offered only the testimony of Martin. Martin thought the amount that TV and Appliance Town was owed under the alleged contracts at issue was \$84,000.00, but that he "could be wrong," and the list prepared by Martin and signed by LeBlanc, listing the total amount allegedly financed in the eighty-four contracts as \$135,503.08. Thus, no evidence was offered to establish the specific contracts for which

payment was allegedly due or the precise amounts TV and Appliance Town was contending were due. Accordingly, we find no error in the trial court's grant of Advantage Financial's motion for involuntary dismissal as to TV and Appliance Town's contract claims.

On appeal, however, TV and Appliance Town also contend that the trial court erred in failing to address its alternative causes of action in tort. As stated above, TV and Appliance Town listed numerous other causes of action in its petition, including claims in contract and tort. Because TV and Appliance Town does not, in brief to this court, specifically state which of its other listed causes of action it contends were wrongfully dismissed, we will, in the interests of justice, address them all. For the reasons set forth below, we conclude that TV and Appliance Town also failed to prove by a preponderance of the evidence its entitlement to relief under any of these alternative theories.

Fraud

Turning first to TV and Appliance Town's claim of fraud, we conclude that it failed to offer any evidence of fraud by either Advantage Financial or Perrilloux. A contract is formed by the consent of the parties, LSA-C.C. art. 1927, but consent may be vitiated by error, fraud, or duress. LSA-C.C. art. 1948. "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction." LSA-C.C. art. 1953.

There are three basic elements to an action for fraud against a party to a contract: (1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act

must relate to a circumstance substantially influencing the victim's consent to the contract. Shelton v. Standard/700 Associates, 2001-0587 (La. 10/16/01), 798 So. 2d 60, 64.

In the instant case, TV and Appliance Town offered no evidence of any fraudulent misrepresentation by Perrilloux or Advantage Financial with regard to the eighty-four alleged contracts. Moreover, while it contended that LeBlanc, as an agent of TV and Appliance Town, acknowledged the existence of the eighty-four contracts in dispute, LeBlanc testified about her apparent confusion as to what she was acknowledging in the document prepared by Martin and that she felt pressured by Martin to sign the document at the meeting after hours in the parking lot of a fast-food restaurant.

Additionally, TV and Appliance Town, through the testimony of Martin, did not suggest at trial that LeBlanc's acknowledgement of the contracts was a fraudulent misrepresentation. Rather, it relied upon her acknowledgement to support its contention that the contracts had been validly entered into by the parties. However, TV and Appliance Town simply failed to prove by competent evidence the existence and terms of those contracts and likewise failed to carry its burden in proving fraud.

Conversion

Turning next to TV and Appliance Town's claim of conversion, conversion is an intentional tort and consists of an act in derogation of the plaintiff's possessory rights. Aymond v. State, Department of Revenue and Taxation, 95-1663 (La. App. 1st Cir. 4/4/96), 672 So. 2d 273, 275. The tort of conversion occurs when one wrongfully commits an act of dominion over the property of another in denial of or inconsistent with the owner's rights. Aymond, 672 So. 2d at 275.

TV and Appliance Town asserted that Advantage Financial refused to return the sums retained as “reserves” on the individual contracts because the fund was “all dried up” and that Advantage Financial had misused the funds by applying the funds to other delinquent accounts. However, TV and Appliance Town failed to prove that the agreement of the parties envisioned a return of the reserve withheld by Advantage Financial to TV and Appliance Town. Martin testified that when he first spoke with LeBlanc about Advantage Financial financing customer sales for TV and Appliance Town, he offered Advantage Financial a 10% reserve on each account in order to have more “border line” customers approved. However, with regard to the return of any reserves to TV and Appliance Town, LeBlanc testified that the parties had never agreed that any reserve withheld would ever be paid back to TV and Appliance Town. Accordingly, TV and Appliance Town failed to prove its entitlement to those funds. Additionally, there was no specific, competent evidence offered as to any other funds held by Advantage Financial in derogation of TV and Appliance Town’s rights.

Detrimental Reliance

Turning next to TV and Appliance Town’s claim of detrimental reliance, the doctrine of detrimental reliance is designed to prevent injustice by barring a party from taking a position contrary to his prior acts, admissions, representations, or silence. To prevail on a detrimental reliance claim, Louisiana law does not require proof of a formal, valid, and enforceable contract. Rather, in determining whether a claim for detrimental reliance has been established, the focus is on whether the party proved three elements by a preponderance of the evidence: (1) a representation by conduct or word; (2) justifiable reliance; and (3) a change in position to one’s detriment because of the reliance. LSA-C.C. art. 1967; Suire v.

Lafayette City-Parish Consolidated Government, 2004-1459 (La. 4/12/05),
907 So. 2d 37, 59.

While Martin testified that he relied upon LeBlanc's representations that each of the eighty-four finance contracts had been approved for purchase by Advantage Financial, LeBlanc denied that she had in fact approved all of the contracts. Additionally, TV and Appliance Town failed to establish that it changed its position to its detriment by relying upon the document later signed by LeBlanc, in that Martin testified that all merchandise had been delivered for all of the contracts listed prior to his preparation of the document for LeBlanc's signature.

Most significantly, however, as discussed above, TV and Appliance Town failed to establish by a preponderance of evidence the damages it allegedly suffered. The only evidence offered as to the amount of money allegedly owed to TV and Appliance Town was Martin's testimony that he believed the amount was \$84,000.00, but that he "could be wrong." TV and Appliance Town offered no evidence of other damages or of payments made on the various contracts or which contracts allegedly had not been paid. Accordingly, it failed to prove by a preponderance of the evidence its claim for damages for detrimental reliance as well.

Negligence

Finally, with regard to the negligence claim asserted against Perrilloux, TV and Appliance Town contended in its petition that Perrilloux was negligent in failing to incorporate corrective measures or fiscal practices to deter or prevent improper actions detailed in the petition and in failing to supervise the employees and office operations of Advantage Financial. The specific improper actions detailed in the petition included unsound financial practices, misapplying payments by customers to other customers' accounts,

improper loan insurance claim practices, utilizing reserve funds in a manner other than agreed upon by TV and Appliance Town, approving more loans than Advantage Financial could fund, and other acts of negligence and misconduct to be established at trial. However, TV and Appliance Town failed to prove any of these alleged improper acts at trial. Moreover, TV and Appliance Town offered no evidence regarding any supervisory responsibilities Perrilloux may have had as to certain employees of Advantage Financial or how those responsibilities were not carried out. Accordingly, it also failed to prove its negligence claim by a preponderance of the evidence.

Considering the foregoing and the record as a whole, we find no manifest error in the trial court's decision to grant Advantage Financial's motion for involuntary dismissal.

CONCLUSION

For the above and foregoing reasons, the July 4, 2008 judgment of the trial court, dismissing TV and Appliance Town's case in its entirety, is affirmed. Costs of this appeal are assessed against plaintiff/appellant, TV and Appliance Town.

AFFIRMED.