

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1351

WATERWAY DEVELOPMENT, L.L.C.,
GLENN SOILEAU, CARLOTTA SOILEAU, AND EUGENE FORCHT

VERSUS

RONALD BABB, JEFFREY SCHOTT, LISA SCHOTT,
MICHAEL RUSK AND CHRISTINE RUSK

JMM

Judgment Rendered: December 22, 2010

APPEALED FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF POINTE COUPEE
STATE OF LOUISIANA
DOCKET NUMBER 40,920, DIVISION "B"

THE HONORABLE J. ROBIN FREE, JUDGE

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

JMS - *McCleendon J. concurs*
Whipple, J. concurs

McDONALD, J.

This appeal is of a trial court judgment granting an involuntary dismissal with prejudice of the plaintiffs' action seeking to annul a prior judgment rendered in the Eighteenth Judicial District Court.

The prior judgment was rendered in a suit filed as a Petition to be Maintained in Possession and for Damages by the defendants in the matter before us, Ronald Babb, Jeffrey Schott, Lisa Schott, Michael Rusk, and Christine Rusk.¹ The lawsuit was a complex property matter, potentially involving issues of reclamation, and was bitterly litigated. The matter was scheduled for trial on December 4 and 5, 2006.

After postponing the trial for a day, Glenn and Carlotta Soileau, plaintiffs in this matter, were present in court with an expert and witnesses, prepared to go to trial on December 5, 2006. Their attorneys were conferencing with attorneys for the opposition in chambers. According to Mrs. Soileau, a map had been given to their attorney, representing a portion of the disputed area that the Soileaus were willing to concede to the other parties in order to put an end to the controversy. After conferring in chambers², the attorneys returned to court and agreed they had reached a settlement, which was read as a stipulation and judicial confession into the record, and was intended to be reduced to judgment. On January 8, 2007, an attorney for the plaintiffs in the previous suit, circulated the proposed judgment to counsel for all parties, as well as to Mr. and Mrs. Soileau individually. The judgment was subsequently signed by the trial court judge on February 1, 2007.

¹ The suit was entitled Ronald Babb, et al. v. Waterway Development, L.L.C. and Thomas Foshee, III. Waterway Development is a Louisiana limited liability company whose members are Glenn Soileau, Carlotta Soileau, and Eugene L. Forcht.

²The record indicated that the attorneys conferred in chambers, returned to the courtroom and consulted their clients, then returned to conference in chambers. On reentering the courtroom, the stipulation was recorded, without further consultation with the clients.

On February 15, 2007, a motion for new trial was filed alleging that “Defendants (appellants here) did not know what they were agreeing to.” The motion also alleged that the boundary line that was to be drawn based on the December 5, 2006 stipulations had not been drawn, and the petitioners sought a judicial determination of the boundary rather than that agreed to in court on December 5, 2006. The judge denied the motion. In addition to adopting the reasons stated in the brief of the plaintiffs (appellees here) for denying the motion for new trial, the judge noted:

This Court reviewed the transcript of said hearing [on December 5, 2006] and finds it disingenuous for Waterway to suggest that there was “NO meeting of the minds.” Waterway was competently represented by two attorneys throughout the hearing, and both of their clients on behalf of Waterway were in the courtroom the entire hearing. Moreover, this Court presided over this matter having observed the many conversations between Counsel and their respective clients together with this Court in detailing the negotiations, clearly dictated on the record.

At no time was there any rush in this matter. This matter was set to begin trial on Monday morning and was postponed due to extensive negotiations between the parties until Tuesday morning. The parties negotiated all morning until the Court session began at 1:00 pm or later. There was never any indication that anyone did not fully understand the agreement between the parties. If Waterway was in fact misled, it was never told to their attorneys at the hearing and it most certainly was not conveyed to this Court.

Even accepting the argument that the attorneys were advised at the hearing that the Soileaus had some concerns, regardless of what happened at the December 5, 2006 hearing, a judgment confirming the parties’ stipulations was circulated, and signed on February 1, 2007. That judgment was not appealed, and is a final judgment.

On August 6, 2007, a Petition to Rescind Judgment was filed. This petition sought to annul the February 1, 2007 judgment on the basis of fraud and ill practices. It was also alleged that plaintiffs did not hear the recitation in court on December 5, 2007, and therefore there was no basis for the agreement necessary to form a binding compromise. A judgment obtained through fraud or ill practices

may be annulled if brought within one year of the discovery by the plaintiff in the nullity action of the fraud or ill practice, as provided in La. C. C. P. art. 2004.

After a hearing on August 18 and 19, 2009, which included extensive testimony, the defendants' motion for involuntary dismissal was granted, and the plaintiffs' suit was dismissed with prejudice. A Motion for New Trial was filed, and denied on March 29, 2010. This appeal timely followed.

Initially, we note defendants' objection to consideration of any argument by plaintiffs that does not conform to Rule 2.12.4 of the Uniform Rules, Louisiana Courts of Appeal. While we recognize the problem presented to defendants in responding to arguments without specific record supports, sanctions for violation of this rule are discretionary, and, in the interest of justice, we decline to disregard any of the plaintiffs' arguments.

However, we find arguments urged by plaintiffs on appeal to be without merit for several reasons. We are particularly mindful of the caution necessary when examining a suit of this nature. "It is imperative that courts review a petition for nullity closely as an action for nullity based on fraud or ill practices is not intended as a substitute for an appeal or as a second chance to prove a claim that was previously denied for failure of proof. The purpose of an action for nullity is to prevent injustice which cannot be corrected through new trials and appeals." *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 2001-0149 (La. 10/16/01), 800 So.2d 762, 766.

The allegation that there was no agreement to the December 5, 2006 stipulation, because plaintiffs did not hear what was being said, does not provide a basis for an action for nullity. Whether the recitation was heard is between the plaintiffs and their attorney, and does not involve any fraud or ill practices on the part of the defendants' attorneys. Further, as noted above, that stipulation was confirmed by a proposed judgment circulated, and not signed by the court until

February 1, 2007. Any misunderstanding of what transpired on December 5, 2006, should have been addressed before the signing of the judgment, or during the time allowed for a new trial or an appeal.

Plaintiffs make one allegation of action taken by defendants' attorneys that could form a basis for an action for nullity if it was material to their decision to compromise. Apparently, immediately prior to filing the original suit on November 21, 2005, some of the plaintiffs purchased an ownership interest in the common ground property at issue. Prior to that purchase, all that they had was a right of passage. This sale was not recorded in the public record until June 2009. However, as plaintiffs and all interested parties were aware of the sale and the suit was converted to a petitory action, the fact of the sale, allegations in the original possessory action, and the lack of recordation was not relevant to the judgment ultimately rendered and subject to attack in this case.

After careful review of the record, and considering the applicable law, we find no error by the trial court in dismissing plaintiffs' claims. Accordingly, the judgment is affirmed. This opinion is issued in accordance with Uniform Rules, Louisiana Courts of Appeal, Rule 2.16.1.B. Costs are assessed to plaintiffs, Glenn Soileau, Carlotta Soileau and Eugene L. Forcht.

AFFIRMED.