

**NOT DESIGNATED FOR PUBLICATION**

JACKSON & MCPHERSON, L.L.C.

NO. 03-CA-1158

VERSUS

COURT OF APPEAL,  
FIFTH CIRCUIT

FIFTH CIRCUIT

EVELYN JENKINS AND  
SARAH JENKINS

FILED FEB 10 2004

COURT OF APPEAL

STATE OF LOUISIANA

  
CLERK

ON APPEAL FROM THE 24<sup>TH</sup> JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 590-003, DIVISION "I"  
HONORABLE JO ELLEN GRANT, JUDGE PRESIDING

FEBRUARY 10, 2004

**SOL GOTHARD  
JUDGE**

Panel composed of Judges Sol Gothard,  
Marion F. Edwards, and Clarence E. McManus

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**AFFIRMED**

Defendants, Evelyn Jenkins and Sarah Jenkins, appeal from a decision of the trial court granting summary judgment in favor of plaintiff, Jackson & McPherson, LLC. For the reasons that follow, we affirm the judgment of the trial court.

Defendants refinanced their mortgage, including debt consolidation.

Plaintiff was the settlement agent for the refinance. Option One, the mortgage holder, provided a written payoff statement and plaintiff paid the payoff amount via wire transfer of \$73,151.14. This amount was substantially more than needed for the payoff. Option One applied the \$59,664.73, necessary to pay off the mortgage and mailed the overage of \$13,486.41 directly to the defendants.

Defendants were entitled to \$844.50, which was the difference between the actual payoff amount and the payoff amount listed on the settlement statement. However, the remaining \$12,641.91 belonged to the plaintiff. After defendants failed to comply with plaintiff's request for repayment, plaintiff instituted this suit for damages and writ of sequestration. The court ordered that \$10,906.70, and then

\$749.17, be sequestered from defendants' account at Iberia Bank. These funds were subsequently transferred to the Sheriff of Jefferson Parish.

Thereafter, the trial court rendered summary judgment in favor of plaintiff for \$12,641.91 plus costs and interest from date of judicial demand, and special damages of \$2,475.00. The court further ordered that the Sheriff of Jefferson Parish deliver the funds tendered by Iberia Bank, less the Sheriff's cost and commission, to be applied and credited to the amount of the judgment.

In this appeal defendants allege that the trial court erred in granting summary judgment prior to a ruling on their exception of nonjoinder of an indispensable party. The trial court denied the exception, ruling that it was moot.

La. C.C.P. art. 641<sup>1</sup> provides that "indispensable parties to an action are those whose interests in the subject matter are so interrelated, and would be so directly affected by the judgment, that a complete and equitable adjudication of the controversy cannot be made unless they are joined in the action." *Pecoraro v. The Napoleon Room, Inc.*, 95-00511 (La. App. 5 Cir. 12/13/95), 666 So.2d 1151, 1154.

In this case, we see no error in the trial court's ruling. The record before us reflects that an equitable adjudication of the controversy could be made without joining Option One and William J. Guess, an accountant with plaintiff's firm who allegedly made the overpayment, as parties. The sole issue presented to the court

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<sup>1</sup> A person shall be joined as a party in the action when either:

- (1) In his absence complete relief cannot be accorded among those already parties.
- (2) He claims an interest relating to the subject matter of the action and is so situated that the adjudication of the action in his absence may either:
  - (a) As a practical matter, impair or impede his ability to protect that interest.
  - (b) Leave any of the persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations.

was whether plaintiff had overpaid Option One, whether Option One had returned that overpayment to defendants instead of to plaintiff, and whether defendants failed to remit that overpayment to plaintiff, and were therefore in possession of funds owned by plaintiff. The resolution of these issues did not require the joinder of either Option One or William J. Guess. Thus, we find no merit to defendants' exception of nonjoinder of an indispensable party. Accordingly, any error in the trial court's failing to rule on the merits of the exception is harmless.

Defendants next allege that the trial court erred in granting summary judgment as there are material issues of fact remaining. Defendants appear to argue that plaintiff failed to present sufficient proof that the money in defendants' possession was plaintiff's money, by failing to provide defendants with proof of payment of creditors and obligations. In addition, defendants appear to argue that plaintiff was comparatively negligent in defendants' actions in failing to return the overpayment.

Appellate courts review summary judgments de novo, using the same criteria applied by the trial court to determine whether a summary judgment is appropriate. A summary judgment is appropriate when there remains no genuine issue as to material fact and the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966. Summary judgments are now favored in the law and the rules should be liberally applied. The summary judgment procedure shall be construed to accomplish the ends of just, speedy, and inexpensive determination of allowable actions.

The mover bears the burden of proof. Once the mover has made a prima facie showing that the motion shall be granted, the burden shifts to the adverse party to present evidence demonstrating that material factual issues remain.

When a summary judgment movant makes a prima facie showing that its motion should be granted, the burden shifts to the nonmovant to present evidence demonstrating that material factual issues remain and that he will be able to satisfy his evidentiary burden of proof at trial.

*Suzanne Turk as Curatrix for Katherine Agnes Graffagnino v. Conner*, 03-791 (La. App. 5 Cir. 12/9/03), \_\_\_ So.2d \_\_\_, \_\_\_.

As was stated *infra*, the sole issue presented was whether defendants were in possession of funds belonging to plaintiff. The undisputed facts show that plaintiff had the responsibility of paying the defendants' mortgage, that because of clerical error plaintiff wired an amount in excess of the mortgage balance by \$13,486.41, and that the mortgage holder mailed that overage directly to the defendants. The undisputed facts further show that \$844.50 of that overage rightfully belongs to defendants, while the remaining \$12,641.91 belongs to plaintiff. Finally, the undisputed facts show that defendants failed to remit to plaintiff the overage in their possession, prompting sequestration of those funds and the filing of this lawsuit. As the trial court correctly noted the issue of whether plaintiff paid the remaining creditors is irrelevant in this matter. Likewise, whether plaintiff was negligent in its payment of the excess amount, or whether Option One was negligent in mailing the overage to defendants is irrelevant. We find no error in the trial court's ruling granting summary judgment in this matter.

Finally, plaintiff/appellee in brief request damages for frivolous appeal. However, plaintiff has not answered the appeal as required by La. C.C.P. art. 2133 nor has it appealed. Thus, we cannot entertain this motion. *United Companies Lending Corp. v. Falterman*, 95-61 (La. App. 5 Cir. 5/30/95), 656 So.2d 1090.

In accordance with this opinion, we affirm the judgment of the trial court in favor of plaintiff. All costs of this appeal are assessed against defendants.

**AFFIRMED**



EDWARD A. DUFRESNE, JR.  
CHIEF JUDGE

SOL GOTHARD  
JAMES L. CANNELLA  
THOMAS F. DALEY  
MARION F. EDWARDS  
SUSAN M. CHEARDY  
CLARENCE E. MCMANUS  
WALTER J. ROTHSCHILD

JUDGES

**Court of Appeal**  
**FIFTH CIRCUIT**  
**STATE OF LOUISIANA**  
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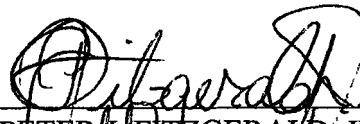
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JERROLD B. PETERSON  
DIRECTOR OF CENTRAL STAFF

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**CERTIFICATE**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY FEBRUARY 10, 2004 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

  
PETER J. FITZGERALD, JR.  
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