

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0823

PLEASURE BEACH, L.L.C.

VERSUS

DARRYL SMITH

Judgment Rendered: December 21, 2007

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On appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2005-14552

Honorable Larry J. Green, Presiding

* * * * *

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* * * * *

BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

Hughes, J., concurs with the result.

Handwritten initials: JW, WJW

GUIDRY, J.

In this action seeking specific performance of a contract to purchase and sell immovable property, the defendant, Darryl Smith, appeals from the judgment of the trial court, which granted a motion for summary judgment filed by plaintiff, Pleasure Beach, L.L.C, and ordered Darryl Smith to purchase the subject property within thirty days from the signing of the judgment. For the reasons that follow, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

On June 15, 2005,¹ Darryl Smith and Pleasure Beach, L.L.C. (Pleasure Beach) entered into an agreement to purchase and sell real property consisting of approximately 145 acres in St. Tammany Parish. According to the agreement, Mr. Smith was to purchase the property from Pleasure Beach for \$640,000.00 within thirty days following expiration of a ninety-day inspection period. On October 12, 2005, Pleasure Beach forwarded a letter to the closing attorney indicating that it had not received instructions from the attorney as to the date and time for the sale. The letter further indicated that if Mr. Smith did not purchase the property at issue by October 12, 2005, he would be in default under the terms and conditions of the purchase agreement. Because it was Pleasure Beach's understanding at that time that Mr. Smith did not wish to go forward with the purchase, the letter concluded by stating that it was to serve as a formal notice of default.

Thereafter, on October 25, 2005, Pleasure Beach filed a petition for specific performance and damages, requesting that the court issue a judgment ordering Mr. Smith to purchase the subject property for the price outlined in the purchase agreement, and to pay legal interest, attorney fees, and ancillary damages. Mr. Smith answered Pleasure Beach's petition and raised four defenses to the action, including failure of cause, unmerchantability of title, change in value of the

¹ The purchase agreement is dated June 14, 2005, but was not signed by the parties until June 15, 2005.

property, and extension of the inspection period. On September 7, 2006, Pleasure Beach filed a motion for summary judgment, asserting that Mr. Smith's defenses were without merit and that Pleasure Beach was entitled to summary judgment as a matter of law.

Following a hearing on Pleasure Beach's motion, the trial court rendered judgment in favor of Pleasure Beach, granting its motion and ordering Mr. Smith to purchase the subject property within thirty days of the date of signing of the judgment and awarding legal interest from the date of judicial demand until paid on the purchase price of \$640,000.00, plus reasonable attorney's fees and costs. Mr. Smith now appeals from this judgment, asserting that the trial court erred in granting Pleasure Beach's motion for summary judgment and in failing to consider any of his defenses to Pleasure Beach's claim for specific performance of the purchase agreement.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. Schwehm v. Jones, 03-0109, p. 4 (La. App. 1st Cir. 2/23/04), 872 So. 2d 1140, 1143. The motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); Independent Fire Insurance Company v. Sunbeam Corporation, 99-2181, 99-2237, p. 7 (La. 2/29/00), 755 So. 2d 226, 230-231. An appellate court reviews the district court's decision to grant or deny a motion for summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Lieux v. Mitchell, 06-0382, p. 9 (La. App. 1st Cir. 12/28/06), 951 So. 2d 307, 314, writ denied, 07-0905 (La. 6/15/07), 958 So. 2d 1199.

On a motion for summary judgment, the initial burden of proof is on the moving party. However, on issues for which the moving party will not bear the burden of proof at trial, the moving party must only point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the nonmoving party must produce factual support sufficient to satisfy its evidentiary burden of proof at trial; if the nonmoving party fails to do so, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2); Schwehm, 03-0109 at p. 5, 872 So. 2d at 1144.

In seeking summary judgment, Pleasure Beach asserted that based on the evidence presented, it was entitled to specific performance of the purchase agreement. Particularly, Pleasure Beach asserted that the terms of the purchase agreement provide that Mr. Smith was to purchase the property from Pleasure Beach for \$640,000.00 within thirty days following expiration of a ninety-day inspection period. However, at the conclusion of this time period, Mr. Smith refused to purchase the subject property. Pleasure Beach attached a copy of the purchase agreement to its motion for summary judgment.² The purchase agreement not only detailed the conditions outlined above, but also provided that the seller was entitled to seek specific performance of the contract if the purchaser failed to comply with the terms of the contract within the time periods specified. Additionally, Pleasure Beach attached answers to request for admissions wherein Mr. Smith admitted that he entered into the purchase agreement, he refused to purchase the property, and he was placed in default by a letter from Pleasure Beach dated October 12, 2005.

² We note that the purchase agreement is not attached to an affidavit, nor is it sworn to or certified. However, both Pleasure Beach and Smith offered identical copies of the purchase agreement into evidence, and neither party disputes its authenticity. Accordingly, this agreement is of sufficient evidentiary quality to be given weight on a motion for summary judgment. See Boland v. West Feliciana Parish Police Jury, 03-1297, p. 6 (La. App. 1st Cir. 6/25/04), 878 So. 2d 808, 814, writ denied, 04-2286 (La. 11/24/04), 888 So. 2d 231.

Contracts have the effect of law as between the parties. La. C.C. art. 1983. Accordingly, reviewing the purchase agreement and evidence submitted by Pleasure Beach, it would appear that Pleasure Beach established a prima facie case for its entitlement to specific performance. However, as stated above, Mr. Smith raised several defenses to Pleasure Beach's claim for specific performance of the purchase agreement, including lack of consent due to failure of cause, unmerchantability of title, difference in value of property pre and post Hurricane Katrina, and extension of the inspection period by Executive Order of the Governor of Louisiana.

Our review of the record indicates that Pleasure Beach pointed out facts sufficient to suggest that Mr. Smith would be unable to prove one or more of his defenses to its claim for specific performance. Therefore, the burden shifted to Mr. Smith to come forward with evidence to establish that he would be able to satisfy his evidentiary burden of proof at trial on at least one of his defenses to defeat Pleasure Beach's claim for specific performance. See La. C.C.P. art. 966(C)(2).

In opposition to the motion for summary judgment, Mr. Smith re-urged his defenses to the purchase agreement, particularly that Pleasure Beach was not entitled to specific performance of the agreement because there was a failure of cause. In order for a contract to be valid, there must be consent of the parties. La. C.C. art. 1927. However, consent may be vitiated by error, fraud, or duress. La. C.C. art. 1948. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party. La. C.C. art. 1949.

Cause is the reason why a person obligates himself. Error may concern a cause when it bears on the nature of the contract or any other circumstance that the parties regarded, or should have in good faith regarded, as a cause of the obligation. La. C.C. art. 1950. deGravelles v. Hampton, 94-0819, pp. 3-4 (La.

App. 1st Cir. 3/3/95), 652 So. 2d 647, 649, writ denied, 95-0826 (La. 5/5/95), 654 So. 2d 332.

In arguing that there was a failure of cause, Mr. Smith asserts that the parties contemplated the subject property being developed for commercial purposes, which due to the nature of the property, required reclamation of land from Lake Ponchatrain and dredging of the Lake to obtain fill. In support of this defense, Mr. Smith introduced his affidavit wherein he states that he purchased the property for commercial development, with the same goal as Pleasure Beach and in the same manner as was presented to him by Pleasure Beach, by dredging the lake to obtain fill for the lots. Mr. Smith also stated that Pleasure Beach, particularly Mr. Curt Burns, was aware of the reason for the purchase.

Additionally, Mr. Smith offered the affidavit of Robert G. Barrilleaux, a registered land surveyor and civil and environmental engineer. According to Mr. Barrilleaux, the subject property can only be utilized if it is filled, and the proposed reclamation to the 1924 shoreline would require permits from the U.S. Army Corps of Engineers and other agencies, including the Louisiana State Department of Natural Resources. In his professional experience, these types of permits are difficult or impossible to obtain for this type of project and after reviewing the previous applications for such permits and responses thereto, it was his opinion that any such development as contemplated would not be capable of being permitted.

Based on the foregoing evidence, reasonable minds could differ as to whether there is a failure of cause of the purchase agreement.³ Accordingly,

³ We note that Pleasure Beach asserted many facts and attached several documents purporting to support these facts to its original memorandum in support of its motion for summary judgment and its rebuttal memorandum. These facts and documents mostly address Mr. Smith's knowledge and his exercise of due diligence during the inspection period. Additionally, several documents purport to show that the commercial use contemplated by the parties is viable. However, none of the documents or facts referenced or attached to the memoranda are sworn to or certified, nor are they attached to a deposition or affidavit. Accordingly, they are not of sufficient evidentiary

because Mr. Smith established that he would be able to satisfy his evidentiary burden of proof at trial and accordingly, that there is a genuine issue of material fact as to one of his defenses, the trial court erred in granting summary judgment in favor of Pleasure Beach and in ordering specific performance of the purchase agreement.⁴

CONCLUSION

For the foregoing reasons, the judgment of the trial court, granting summary judgment in favor of Pleasure Beach and ordering specific performance of the purchase agreement, is reversed, and this matter is remanded to the trial court for further proceedings. All costs of this appeal are to be borne by the appellee, Pleasure Beach, L.L.C.

REVERSED AND REMANDED.

quality as to be afforded any weight on the motion for summary judgment. See Boland, 03-1297 at pp. 5-6, 878 So. 2d at 813. Further, though Pleasure Beach details deposition testimony in its memorandum in support of its motion for summary judgment addressing this issue, there are no copies of these depositions or excerpts from said depositions attached to the memorandum or otherwise made a part of the record.

⁴ Because we find Mr. Smith established a defense to Pleasure Beach's claim for specific performance, we pretermitted a discussion of Mr. Smith's other defenses.