NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0227

ITZEL HARRIOTT TALBOT

VERSUS

ADRIAN TALBOT

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany
State of Louisiana
Docket No. 2005-13303, Division "A"
Honorable Raymond S. Childress, Judge Presiding

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered December 23, 2008

McClendon J. Dissents.

PARRO, J.

The defendant, Adrian D. Talbot, appeals the trial court's judgment on the defendant's "Motion to Compel Itzel Talbot to Attend Road Home Closing." In the judgment, the trial court ordered that the parties shall each receive 50% of the proceeds awarded pursuant to the Louisiana Road Home Grant (Road Home). For the reasons set forth below, we dismiss this appeal and remand the case for further proceedings in the trial court.

FACTS AND PROCEDURAL HISTORY

Itzel Harriott Talbot (Ms. Talbot) and Adrian D. Talbot (Mr. Talbot) were married on March 31, 1997.[1] On July 15, 2005, Ms. Talbot filed by facsimile transmission a petition for divorce pursuant to LSA-C.C. art. 103. In the petition for divorce, Ms. Talbot sought: joint custody of the minor children of the marriage, designating her as the primary domiciliary parent; interim spousal support; an order granting her the use of the family home and a vehicle; an injunction prohibiting the disposal of community property; and an injunction preventing Mr. Talbot from abusing her. Mr. Talbot answered, seeking a reciprocal injunction as to the community property. He later filed another answer and a reconventional demand seeking a divorce, joint custody, and a partition of the community property pursuant to LSA-R.S. 9:2801.

A minute entry in the record reflects that a judgment of divorce was rendered on April 4, 2006.[2] Because the record on appeal was designated by the parties, there are no rulings in the record as to custody, support, and/or other relief sought by the parties.

The record contains a "Motion to Compel Itzel Talbot to Attend Road Home Closing" filed by Mr. Talbot. Mr. Talbot sought an order requiring Ms. Talbot to appear at a closing on June 25, 2007, at First American Title in Slidell, Louisiana, and/or at such time and place as might be designated by the Road

[1] Ms. Talbot contends they were married in Slidell, Louisiana, while Mr. Talbot contends they were married in the state of Virginia.

[2] However, a minute entry dated September 11, 2006, shows that evidence was heard that date and a judgment of divorce was granted.

Home program, and to then and there execute and deliver all documents necessary to obtain any Road Home grants awarded to the parties. Alternatively, if the court declined to execute such an order on an ex parte basis, Mr. Talbot sought a rule to show cause. He agreed that the grant awarded to the parties could be deposited in the registry of the court or in a joint, interest-bearing "AND" account titled in both of their names, pending partition of the community property. In his memorandum to the court in support of his motion, Mr. Talbot alleged that despite her agreement to do so, Ms. Talbot failed to appear for the closing of their $150,000 Road Home grant on June 15, 2007, without advising Mr. Talbot that she would not appear.

The trial judge denied the ex parte order but set the matter for a hearing. The hearing was held on August 28, 2007, and the judge rendered a ruling in open court. On September 10, 2007, the trial judge signed a judgment ordering that Mr. Talbot should immediately provide Ms. Talbot with a copy of the application tendered to the Road Home program by him. The judgment continues:

> IT IS FURTHER ORDERED that after review of the application and upon Itzel Talbot's concurrence that the application is accurate both parties shall appear at the closing on Friday, August 31, 2007 to complete the closing.
>
> IT IS FURTHER ORDERED that the parties shall each receive 50% of the proceeds awarded in the Louisiana Road Home Grant. The granting authority shall provide each party with a check in the amount of $75,000.00. In the event the check cannot be so issued, the check shall be deposited into the trust account of counsel and shall be disbursed by counsel directly to the parties in the amount of $75,000.00 each.

Notice of the judgment was sent on the same day. Thereafter, Mr. Talbot filed a "Motion to Certify Judgment for Immediate Appeal Under La. C.C.P. Art. 1915(B) and for Suspensive Appeal." On October 9, 2007, the trial judge certified the judgment entered on September 10, 2007, as immediately appealable and granted Mr. Talbot a suspensive appeal.

Mr. Talbot only appeals that portion of the judgment that orders that each party shall receive 50% of the proceeds of the Road Home grant. Mr. Talbot

contends that the trial court's failure to require deposit of the grant proceeds into the registry of the court effected a prohibited, piecemeal partition of the Talbots' property.

APPELLATE JURISDICTION

This court, on its own motion, noting that the judgment appealed from appears to be a non-appealable ruling, previously issued a rule to show cause why the appeal should or should not be dismissed. This rule was referred to this panel, to be ruled on at the same time as the petition for an appeal was being considered.

Louisiana Code of Civil Procedure article 1841 provides:

> A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.
>
> A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.
>
> A judgment that determines the merits in whole or in part is a final judgment.

The parties concede that the proceeds of the Road Home grant are community property.[3] Therefore, it appears the trial court ruled on a partial allocation of community assets. Thus, the judgment rendered by the trial court regarding the allocation of some community property is a partial one. We must therefore address the jurisdictional issue of whether the partial judgment is a final judgment for the purposes of the appeal.

Whether a partial judgment is appealable is determined by examining the requirements of LSA-C.C.P. art. 1915. Louisiana Code of Civil Procedure article 1915(B)(1) provides that when a court renders a partial judgment as to "one or more but less than all of the claims, demands, issues, or theories" presented in an action, that judgment shall not constitute a final judgment "unless it is designated as a final judgment by the court after an express determination that

[3] Counsel for the parties signed a joint "Motion to Deposit Funds in the Registry of the Court" pending the earlier of the resolution of the appeal or partition of the parties' community property. The motion denotes that the proceeds of the Road Home grant program are "community property."

there is no just reason for delay." This provision attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties. R.J. Messinger, Inc. v. Rosenblum, 04-1664 (La. 3/2/05), 894 So.2d 1113, 1122.

The Louisiana Supreme Court has held that the trial court's failure to state the explicit reasons for its determination that there is no just reason for delay does not allow the appellate court to summarily dismiss an appeal of a judgment that has been designated as final under LSA-C.C.P. art. 1915(B). R.J. Messinger, 894 So.2d at 1122. Instead, the supreme court held that when, as here, the trial court has designated a partial judgment as final under LSA-C.C.P. art. 1915(B)(1) without giving express reasons why there is no just reason to delay the appeal, the appellate court should make a *de novo* determination of whether the designation was proper. Id.

Although the overriding inquiry for the trial court is whether there is no just reason for delay, courts of appeal, when conducting *de novo* review in matters where the trial court fails to give explicit reasons for the designation, can consider the same criteria used by the trial court. These criteria include the following non-exclusive list of factors:

> (1) The relationship between the adjudicated and unadjudicated claims;
>
> (2) The possibility that the need for review might or might not be mooted by future developments in the trial court;
>
> (3) The possibility that the reviewing court might be obliged to consider the same issue a second time; and
>
> (4) Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

R.J. Messinger, 894 So.2d at 1122.

Mr. Talbot requested, in the court below, an order compelling Ms. Talbot to attend the Road Home grant closing and for deposit of the grant proceeds into the registry of the court pending partition of the community property. In this appeal, Mr. Talbot is asserting error by the trial court in ordering an immediate,

equal distribution of the grant money to the parties, without first partitioning all the community assets and liabilities and adjusting the parties' reimbursement claims, in accordance with LSA-R.S. 9:2801.

In response to this court's show cause order concerning the appealability of this judgment, Mr. Talbot provides information not contained in the record before this court. He states that the parties' community property included their former residence, which sustained extensive damage during Hurricane Katrina. Their community property therefore included an entitlement to a Road Home compensation grant in the amount of $150,000, the maximum award under the program. He further contends that the Road Home grant was conditioned upon at least one of the parties residing in the home upon which the grant was based. He adds that he is in corporeal possession of the residence and would use the grant proceeds for its repair, thus fulfilling the residency requirement. Mr. Talbot additionally argues that there is a risk that Ms. Talbot might spend the grant proceeds allocated to her and then, upon the final partition of the community property, be unable to pay any reimbursement claims for work done to the house.

We note, however, that the record before us does not support these claims. There was no testimony or evidence adduced at the hearing on the motion to compel, and no descriptive lists concerning the community property were filed. Mr. Talbot attaches to his show cause brief as Exhibit "A" a copy of the Talbots' Road Home covenants and as Exhibit "B" a copy of the "Disaster Recovery Initiative", promulgated by the U.S. Department of Housing and Urban Development, detailing the Road Home program. However, these documents are not contained in the record on appeal, nor do we have a motion to supplement the record pending before us. There also is no indication that the trial court was presented with these documents; indeed, the Road Home covenants comprise part of the closing documents, which occurred *after* the trial court's hearing.

The record on appeal is that which is sent by the trial court to the appellate court and includes the pleadings, court minutes, transcripts, jury instructions (if applicable), judgments, and other rulings, unless otherwise designated. Lee v. Twin Brothers Marine Corporation, 03-2034 (La. App. 1st Cir. 9/17/04), 897 So.2d 35, 37. An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. Tranum v. Hebert, 581 So.2d 1023, 1026 (La. App. 1st Cir.), writ denied, 584 So.2d 1169 (La. 1991). Accordingly, we are not permitted to consider the exhibits attached to Mr. Talbot's show cause brief.

Mr. Talbot also asserts that he was denied due process in that Ms. Talbot did not file a motion requesting the affirmative relief she obtained nor did she formally respond to his motion. Accordingly, he contends he was denied the right to notice and of a meaningful opportunity to be heard on the issue of immediate distribution of the grant proceeds. The transcript contained in the record does not reveal that Mr. Talbot raised this objection in the trial court.[4]

In her brief in this appeal, Ms. Talbot contends that the September 10, 2007 judgment contains no language that partitions the grant proceeds or that suggests the parties are relieved of the duty to account for the grant proceeds they receive. She further contends that prior to the hearing from which this judgment emanated, the trial court presided over a four-day relocation and custody trial, where facts regarding the parties' community assets and who controlled those assets were presented by both parties. Thus, she contends that although neither party has filed a descriptive list in these proceedings, the trial court had ample information regarding the property issues.

[4] We note, nevertheless, that this argument lacks merit. The instant action was before the trial court on a rule to show cause, a summary proceeding. An answer is not normally required in a summary proceeding. See LSA-C.C.P. art. 2593. A rule to show cause obliges one only to show, and not to plead, cause. See Cookmeyer v. Cookmeyer, 354 So.2d 686, 694 (La. App. 4th Cir. 1978). The fourth circuit in Cookmeyer declined to disregard the husband's claims, because they were not pleaded either as affirmative defenses or in reconvention to the wife's rule. Moreover, we note that in the instant case, Mr. Talbot's memorandum in support of his motion indicates that Ms. Talbot had previously taken the position that she wanted to "split the proceeds." Thereafter, they were unable to resolve the issue, and Mr. Talbot filed a motion to compel, so it should not have come as a surprise to him at the hearing that she would assert her position to split the grant proceeds.

Although no specific written request for use of monetary assets was filed by Ms. Talbot, we believe the trial court's judgment merely allocated community property pending the partition of the community. See LSA-R.S. 9:374(E).[5] To permit an appeal of such a judgment would encourage multiple appeals and piecemeal litigation. Moreover, on the record before us, we do not find support for Mr. Talbot's claim that he may not have an effective remedy if his appeal is delayed pending a complete partition of the parties' community property. Accordingly, we find that the trial court's designation of the judgment as final was improper, and we dismiss Mr. Talbot's appeal and remand this case to the trial court for further proceedings consistent with this opinion.[6] Costs of this appeal are assessed to Adrian Talbot.

APPEAL DISMISSED; REMANDED.

[5] Louisiana Revised Statute 9:374(E)(1) provides:

> In a proceeding for divorce or thereafter, upon request of either party, where a community property regime existed, a summary proceeding may be undertaken by the trial court within sixty days of filing, allocating the use of community property, including monetary assets, bank accounts, savings plans, and other divisible movable property pending formal partition proceeding, pursuant to R.S. 9:2801.

[6] The proper procedural vehicle to contest an interlocutory judgment that is not immediately appealable is an application for supervisory writs. However, in this matter, no application for supervisory writs was filed, nor was the motion for appeal filed within the 30-day period applicable to supervisory writs contained in the Uniform Rules – Louisiana Courts of Appeal, Rule 4-3.