NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0561

SUCCESSION OF
SILVER EVER "POLLY" DEES NEWMAN FELKER

On Appeal from the 21st Judicial District Court
Parish of St. Helena, Louisiana
Docket No. 18625, Division "B"
Honorable Bruce C. Bennett, Judge Presiding

Shaan M. Aucoin
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Hammond, LA

Attorney for Appellees
Co-Administrators of the Succession of
Silver Ever "Polly" Dees Newman Felker

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Attorney for Appellant
Kenneth Felker

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered October 29, 2010

PARRO, J.

Kenneth Felker, the surviving spouse of Silver Ever "Polly" Dees Newman Felker, appeals a judgment that ordered him to reimburse the co-administrators of her succession $3,750 for attorney fees expended to evict him from a house that was her separate property and to pay rent in the amount of $8,500 for ten months that he lived in the house after the co-administrators demanded that he vacate the property, but denied his claim for reimbursement for his portion of community funds used to pay the mortgage on the house. For the following reasons, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Mrs. Felker died intestate on February 28, 2003, survived by her spouse, Kenneth Felker, and six adult children from a previous marriage. Two of her children, Calvin Ray Newman and Judy Ann Newman, were appointed co-administrators of the succession. A sworn detailed descriptive list was filed by the co-administrators. In August 2004, the co-administrators filed a motion seeking a judgment homologating the sworn detailed descriptive list, ordering the return of the decedent's separate property to the succession, fixing a bond for the surviving spouse's usufruct over community property, and ordering the eviction of the surviving spouse from the home he had shared with the decedent, which was her separate property. Mr. Felker filed a sworn detailed descriptive list and a traversal of the co-administrators' sworn detailed descriptive list. He also filed a petition seeking a periodic allowance from the succession representatives and the marital portion of his wife's succession.[1] In March 2007, the decedent's children filed a petition for partial possession of her separate immovable property, and a judgment of partial possession concerning that property was rendered in their favor.

After numerous continuances, a bench trial was held on all pending matters on August 3, 2009. A judgment was rendered accepting the sworn detailed descriptive

[1] See LSA-C.C. arts. 2432-2437.

lists as to the valuation of community movables, recognizing certain property as Mr. Felker's separate property, recognizing Mr. Felker's spousal usufruct over community movables, and ordering him to post bond within 30 days for the value of any movables over which he wished to exercise his usufruct. The succession was ordered to reimburse Mr. Felker $800 for funeral expenses and $600 for decking materials purchased to improve the separate property of the decedent; his request for reimbursement of his portion of community funds used to pay the mortgage note on the house was denied. The judgment ordered Mr. Felker to reimburse the co-administrators $3,750 for attorney fees and costs that they incurred in connection with eviction proceedings to have him removed from the house, which was his wife's separate property, and to pay $8,500 for the fair rental value of that property for the ten-month period from March 2004, when demand was made on him to vacate the premises, through January 2005, when he vacated the home.

Mr. Felker has appealed the judgment, alleging that the court erred by ordering him to reimburse the co-administrators $3,750 in attorney fees for the eviction proceeding and $8,500 in fair rental value for staying in the house. He also assigns as error the court's failure to award him reimbursement for his portion of mortgage payments on his wife's separate property that were made with community funds.

DISCUSSION

A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. Morris v. Safeway Ins. Co. of Louisiana, 03-1361 (La. App. 1st Cir. 9/17/04), 897 So.2d 616, 617, writ denied, 04-2572 (La. 12/17/04), 888 So.2d 872. The supreme court has posited a two-part test for the appellate review of facts in order to affirm the factual findings of the trier of fact: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trier of fact; and (2) the appellate court must further determine that the record establishes that the finding is not clearly wrong (manifestly erroneous). Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no

reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. See Stobart v. State, through Dep't of Transp. and Dev., 617 So.2d 880, 882 (La. 1993); Moss v. State, 07-1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ denied, 08-2166 (La. 11/14/08), 996 So.2d 1092.

Reimbursement of Attorney Fees

This court must review the trial court's factual finding that $3,750 in attorney fees was spent by the co-administrators to evict Mr. Felker from their mother's separate property, and therefore, Mr. Felker should reimburse these costs to the co-administrators. The only evidence concerning these fees was from Calvin Ray Newman. The trial transcript shows the following colloquy between Mr. Newman and counsel representing the co-administrators:

> Q. Okay. And then there's another claim for attorney's fees and costs related to the eviction proceedings. Is it true that you did actually have to file official eviction proceedings to actually get the home?
>
> A. That is correct.
>
> Q. And what did you arrive at? If the detailed descriptive list shows that the succession incurred attorney's fees and costs at approximately $3,708.50; does that sound about right?
>
> A. Yes.
>
> Q. And how did you arrive at that? Did you first –
>
> A. From bills from the attorneys.
>
> Q. And did you have to [hire] counsel?
>
> A. Yes.
>
> Q. And who did you first hire?
>
> A. We started with Clifton Speed.
>
> Q. And do you know about how much the attorney's fees were?
>
> A. Eleven hundred-and-twenty-some-odd dollars.

Q. And did that successfully get the eviction done?

A. No, Ma'am.

Q. And did you thereafter have to incur additional attorney's fees?

A. Yes, Ma'am.

Q. And the balance of the claim that you made then would have been related to the hiring of additional counsel?

A. Yes, Ma'am.

Q. And was that Cashe, Coudrain & Sandage?

A. Yes, Ma'am.

On cross-examination by Mr. Felker's attorney, the following discussion ensued:

Q. Did you have to go to court and have Mr. Felker removed?

A. Yes, Sir.

Q. You actually went to a court and had an eviction hearing?

A. No, we didn't make it that far.

* * *

By the Court:

Q. You heard Mr. Speed say that he's willing to waive his fees. Is that the $1120 you were talking about?

A. I'm not sure.

* * *

Q. So you really haven't incurred those fees, if he's willing to waive them and withdraw his claim?

A. That would seem correct to me, yes, Sir.

Q. Then that [is] something the estate has not incurred. The 3,750, is that what was paid to Cashe, Lewis, Moody & Coudrain?

A. Yes, Sir.

Q. And you wrote a check for that?

A. My sister's taking care of the finances with them, Your Honor. I can't tell you exactly.

Q. All right. But this is something that you or one of the other heirs paid in connection with running the estate?

A. Yes, Sir.

Q. And that's why you call it a claim for reimbursement?

A. Yes, Sir.

* * *

Q. ... But at any rate, you chose to use outside funds outside of the estate to hire counsel in the amount of $3,750.

Now, in your agreement with the attorney, what did that cover, just this eviction, or did [it] cover –

A. No, Sir.

Q. It covered everything; the succession?

A. Your Honor, there's a lot more than just $3,000-and-some-odd dollars. I think Judy maybe could give you a better estimate of that.

That was only the amount that we as a family, the siblings themselves, have spent just to do the eviction. There's much more money.

Q. Okay, that was my question.

A. Yes, Sir.

Judy Newman was not called to verify or clarify the amounts paid in attorney fees by the co-administrators for the eviction or any other legal services. There is no invoice from the law firm of Cashe, Coudrain & Sandage showing the amounts that may have been paid or the services that may have been rendered for those payments by the co-administrators. Nor, strangely, does the record contain the amended sworn detailed descriptive list, on which the reimbursement claims were "detailed with specificity," according to the co-administrators' brief to this court. The record does include a claim filed by their former attorney, Mr. Speed, for the balance of his attorney fees in the amount of $1,113.29, which were apparently waived. Mr. Speed's claim was accompanied by a detailed description of the services rendered, time spent, and amounts charged from April 20, 2004, through December 3, 2004.

Based on the evidence in the record, we conclude that the trial court had some evidentiary basis to support the finding that attorney fees of $3,708.50 (but not $3,750) may have been expended to evict Mr. Felker from the decedent's separate property. However, after examining the record in its entirety, we are forced to conclude that this

finding was clearly wrong. The succession was opened on June 3, 2004, with the filing of a petition for appointment of co-administrators. Mr. Speed was the attorney for the co-administrators at that time. His billing records show that on August 11, 2004, he prepared an eviction letter to Mr. Felker and sent the letter by certified mail. On August 18, 2004, he drafted pleadings to bring a rule against Mr. Felker. On August 26, 2004, a pleading was filed that included a "Motion to Evict Surviving Spouse from the Separate Immovable Property of the Decedent's Estate and Succession." On October 6, 2004, Mr. Speed's records show that he attended court for the "eviction, etc. rule." The court's minutes show that the case was on the docket and Mr. Speed was present, but the matter was continued subject to reassignment. On November 17, 2004, Mr. Speed withdrew from representation, and in December, a motion to reset the hearing on the eviction rule and other pending matters was filed on behalf of the co-administrators by their new attorneys, the Cashe, Coudrain & Sandage law firm. According to Mr. Newman, Mr. Felker left the home in January 2005, before any hearing was held on the motion to evict. Other than the motion to reset the hearing date, there were no other pleadings filed by the co-administrators' new counsel before Mr. Felker vacated the premises.

Virtually all of the legal work concerning the eviction was done by Mr. Speed, who waived the balance of his fee. Mr. Felker left the home within one month after the new attorneys entered the litigation. In light of the fact that only one pleading concerning the eviction was filed by the Cashe, Coudrain & Sandage firm, plus the fact that neither the amended sworn descriptive list nor an invoice from the firm are in the record, we conclude that the record in its entirety demonstrates that the court was manifestly erroneous in ordering Mr. Felker to pay the co-administrators $3,750 for attorney fees incurred to evict him from his wife's separate property. That portion of the judgment will be reversed.

Rental Payment

Mr. Newman testified that ten months of rental payments were due, because the

co-administrators had told Mr. Felker to vacate the house in March or April 2004, and he did not leave until January 2005. Mr. Newman said he arrived at the rental amount of $850 per month by checking the classified advertisements in the local newspaper a few days before the August 2009 trial. There were very few rentals listed, but he did find advertisements for a two-bedroom, one-bath home and a three-bedroom, one-bath home in the area. One of those rented for $650 per month and the other for $350 per month. Because the decedent's property included a four-bedroom house, plus two acres and a shop, he increased the estimated rental to $850 per month.

This testimony does not provide a reasonable factual basis for the finding of the trial court. There was no testimony or other evidence concerning rental values in the area five years before trial, which was when Mr. Felker was occupying the residence. Therefore, this award will also be reversed.

Reimbursement of Mortgage Payments

Mr. Felker sought reimbursement of a portion of the mortgage payments that were made with community funds from the date of the couple's marriage in 1991 until April 2002, when the mortgage note on Mrs. Felker's separate property was paid off. He testified that they paid about $200 per month and identified six cancelled checks for $200 each that were paid on the mortgage note to the Bank of America. However, he stated that he had no idea how much of the $200 paid each month was for principal and how much was for interest, nor did he know the interest rate on the loan.

With regard to this issue, the applicable version of Louisiana Civil Code article 2364 provided:

> If community property has been used to satisfy a separate obligation of a spouse, the other spouse is entitled to reimbursement upon termination of the community property regime for one-half of the amount or value that the property had at the time it was used.

Under this provision, Mr. Felker was entitled to reimbursement to the extent that the mortgage payments reduced the principal balance on the mortgage note, but was not entitled to reimbursement of one-half of the community funds used to pay the interest on the mortgage note. See Loyacono v. Loyacono, 618 So.2d 896, 898 (La. App. 5th

Cir. 1993); Parker v. Parker, 517 So.2d 264, 266 (La. App. 1st Cir. 1987). However, because Mr. Felker did not establish what portion of the monthly payments were payments on the principal balance, he did not meet his burden of proof for this claim. Therefore, we find no error in the court's denial of reimbursement to Mr. Felker for his share of community funds used to pay the mortgage note on his wife's separate property.

CONCLUSION

Based on the foregoing, we reverse the portions of the judgment ordering Mr. Felker to pay the co-administrators $3,750 in attorney fees and $8,500 in rental payments. In all other aspects, the judgment is affirmed. Each party is to bear its own costs for this appeal.

REVERSED IN PART; AFFIRMED IN PART.