NOT DESIGNATED FOR PUBLICATION

WFK
J.T.P.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0766

U.S. BANK NATIONAL ASSOCIATION, F/K/A FIRST NATIONAL BANK ASSOCIATION TRUST, ACTING SOLELY IN ITS CAPACITY AS TRUSTEE FOR EQCC HOME EQUITY LOAN TRUST 1991-1

VERSUS

PHILLIP VINCENT MARANTO, ET UX

Judgment rendered: OCT 2 9 2010

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On Appeal from the 18th Judicial District Court
Parish of West Baton Rouge, State of Louisiana
Suit No. 34,013; Division B
The Honorable J. Robin Free, Judge Presiding

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Charles K. Watts **Mark C. Garrison** **Baton Rouge, Louisiana**	**Counsel for the Petitioner/** **Defendant-in-Intervention/Appellee** **U.S. Bank National Association F/K/A First National Bank Association Trust, Acting Solely In Its Capacity as Trustee for EQCC Home Equity Loan Trust 199-1**
Dale M. Maas **Baton Rouge, Louisiana**	**Counsel for Defendant/Intervenor/Appellant** **Vincent Joseph Maranto**

BEFORE: KUHN, PETTIGREW AND KLINE, JJ.[1]

[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

KLINE, J.

Vincent Maranto appeals a summary judgment granted in favor of U.S. Bank National Association (U.S. Bank). The judgment declared valid an act of donation of immovable property from Maranto to his father and dismissed Maranto's petition for intervention. For the following reasons, we affirm the judgment of the trial court.

PERTINENT FACTS AND PROCEDURAL HISTORY

Maranto donated certain immovable property to his father in 1998 by a document entitled, "Act of Donation." This document was not in authentic form. Subsequently, Maranto's father and mother mortgaged the donated property and executed a promissory note. Funds from the mortgage were used to pay off two prior mortgages that encumbered the property and that Maranto owed.

Subsequently, Maranto's father died. In 2004, U.S. Bank filed a petition for executory process, seeking to foreclose on the mortgage for default and nonpayment of the promissory note. Maranto then filed a petition for intervention, seeking to avail himself of a declaration that his own act, being the 1998 donation to his father, was null and invalid. He thus seeks to be recognized as the owner of the property, to have the mortgage in favor of U.S. Bank be declared null and invalid, and to have the mortgage erased and cancelled from the conveyance records.

On U.S. Bank's motion,[2] the trial court granted summary judgment in favor of U.S. Bank and against Maranto. The trial court ordered that the 1998 Act of Donation between Maranto and his father be declared valid and lawful. Accordingly, it dismissed Maranto's petition for intervention with prejudice.

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[2] The record reflects that Maranto had previously filed a motion for summary judgment seeking a ruling that the donation at issue was invalid. That motion, for reasons unknown, was never heard. We observe that the validity of the donation was the common, determinative issue of both motions. Since we affirm the trial court's judgment, this issue is resolved by the final judgment under consideration, and Maranto's petition for intervention is dismissed with prejudice.

Maranto now appeals, asserting two assignments of error relative to the issue of validity of the donation, to wit:

1. The charge being [$35,089.90] and the value of the property of $70,000.00 being greater than the charges plus one-half, and with the charges being even less than two-thirds the value of the property, by law, the Trial Court erred in granting the Summary Judgment and in not applying donation rules to require an authentic act for this donation to be valid and erred in not ultimately invalidating both the donation and the mortgage on the same property.

2. The evidence and stipulation being that the Act of Donation from Vince Maranto to his father ... was not in authentic form, such transaction was null and the Trial Court erred in accepting the donation and subsequent mortgage as valid and thereby dismissing the Intervention.

DISCUSSION

Appellate courts review a trial court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Waguespack v. Richard Waguespack, Inc.**, 06-0711, p. 2 (La.App. 1 Cir. 2/14/07), 959 So.2d 982, 984. The motion should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966B. In the matter before us, no factual issues are in dispute. Accordingly, we determine whether U.S. Bank was entitled to entry of summary judgment as a matter of law.

Validity of Donation

All parties concede that the donation is not in proper authentic form to effect a valid gratuitous donation. When the act of donation was executed in 1998, La. C.C. art. 1536, governing donation *inter vivos* of immovable property, provided as follows:[3]

[3] Louisiana Civil Code art. 1541, effective January 1, 2009, now governs these donations. This article provides as follows:

> An act shall be passed before a notary public and two witnesses of every donation *inter vivos* of immovable property or incorporeal things, such as rents, credits, rights or action, under penalty of nullity.

The document was not witnessed by the required two witnesses.

The trial court, however, concluded from the undisputed facts of the case that the donation was an onerous donation. Rules applicable to *inter vivos* donations do not apply to onerous donations if certain conditions are met. La. C.C. art. 1526 (in effect in 1998).[4] Article 1526 provided as follows:

> In consequence, the rules peculiar to donations *inter vivos* do not apply to onerous and remunerative donations, except when the value of the object given **exceeds by one-half** that of the charges or of the services. (Emphasis added.)

Here, the value of the property donated was $70,000.00. Maranto's two mortgages were charges imposed on the donee that had to be paid off. These charges equaled $35,089.80. In concluding that the donation was valid, the trial court applied Art. 1526 pursuant to the Louisiana Supreme Court's directions in **Moore v. Sucher**, 234 La. 1068, 102 So.2d 459 (1958). In **Moore**, 234 La. at 1074, 102 So.2d at 461 the supreme court ruled as follows:

> It will thus be seen that the charge here imposed on the donee exceeds one-half of the value of the object given. This being true, the act here under attack has more of character of an onerous contract than of a donation.

Maranto argues that the trial court misapplied Art. 1526 and that the trial court was bound to follow **Whitman v. Whitman**, 206 La. 1, 18 So.2d 633 (1944). In **Whitman**, 206 La. at 22, 18 So.2d at 640, the supreme court observed as follows:

> We have found from the evidence that the services rendered by the donee in this instance, in compliance as far as he could comply with the obligations imposed upon him by the donation, greatly exceeded two-thirds of the value of the property donated; which is the same as to say that the value of the property donated did not amount to one

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> A donation inter vivos shall be made by authentic act under the penalty of absolute nullity, unless otherwise expressly permitted by law.

[4] Louisiana Civil Code art. 1526 was amended effective January 1, 2009. The terms and effect of this amendment are discussed below.

> and one-half times the value of the services rendered by the donee. He did not wilfully violate his obligation to provide a home for and support his mother.

Maranto cites two First Circuit cases issued subsequent to **Moore** that adopt the **Whitman** interpretation: **Clarke v. Brecheen**, 387 So.2d 1297 (La. App. 1 Cir. 1980) and **Succession of Danos**, 359 So.2d 679 (La. App. 1 Cir. 1978).

Under the **Moore** analysis, the donation at issue is onerous and valid, since the rules applying to inter vivos donations do not apply. Under the **Whitman** analysis, the charges do not exceed two-thirds the value of the property, and regular donations rules would apply, rendering the donation invalid. The discrepancy in interpreting Art. 1526 appears to arise from the meaning Louisiana courts have given, or not given, to the phrase, "exceeds by one-half." Article 1526 in effect here provides that the rules peculiar to intervivos donations do not apply except when the value of the object given **exceeds by one-half** that of the charges or of the services.

We are confronted by the inconsistent manner in which the courts have applied Art. 1526. As this court observed in **Succ. of Danos**, 359 So.2d at 681, "the correct mathematical meaning of Article [1526] has been the source of considerable confusion in the jurisprudence." Subseqent to the supreme court's decision in **Moore**, this court followed the **Whitman** formulation in **Clarke** and **Succ. of Danos**. Further, law review articles have discussed the historical discrepancies and have generally concluded that the **Whitman** formula is the more correct application of Art. 1526. *See* Comment, *Personal Services About the Home*, 23 La.L.Rev. 418, 432 n.78 (1963) and J. Denson Smith, *Particular Contracts – Sale*, 19 La.L.Rev. 319, 322-23 (1959).

Another concern is the recent amendment to Art. 1526, effective January 1, 2009. The article now provides:

> The rules peculiar to donations inter vivos do not apply to a donation that is burdened with an obligation imposed on the donee that results in a material advantage to the donor, unless at the time of the donation the cost of performing the obligation is less than two-thirds of the value of the thing donated.

This new articulation appears to codify the **Whitman** formulation, and the comment to the article states that the new language is not intended to change the law. Even so, while this express intent of the legislature serves us well, we must observe that the interpretation of the law belongs to the judiciary, and not the Legislature. **Mallard Bay Drilling, Inc. v. Kennedy**, 04-1089, p. 14 (La. 6/29/05), 914 So.2d 533, 544.

In light of these considerations, this court now faces the issue of whether the trial court ruled appropriately in following the Louisiana Supreme Court's decision in **Moore**, which is its most recent ruling on the interpretation of La. C.C. art. 1526. We conclude that since **Moore** is the supreme court's most recent pronouncement on the interpretation of Art. 1526, we are constrained to follow it. The supreme court's most recent pronouncement is controlling. *See* **Scott v. American Tobacco Co.**, 98-0452, p. 4 (La.App. 4 Cir. 11/4/98), 725 So.2d 10, 12. Further, the supreme court favorably cited the rule as explained in **Moore** the year after deciding it in **Garcia v. Dulcich**, 237 La. 359, 368-69, 111 So.2d 309, 312 (1959). Accordingly, we conclude the trial court did not err in concluding that the donation at issue was valid.

Further, because we have concluded that the onerous donation was a valid one, we find it unnecessary to address the issue of whether Maranto orally transferred the property to his father. We therefore pretermit discussion of this issue.

Finding no merit in Maranto's assignments of error, we affirm the judgment of the trial court, relying on the last expression of the Louisiana Supreme Court in **Moore v. Sucher**, 234 La. 1068, 102 So.2d 459 (1958).

DECREE

For the above reasons, we affirm the judgment of the trial court. Costs of this appeal are assessed to Vincent Maranto.

AFFIRMED