

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1951

RICHARD BERT HOWES

Mr. Guy

VERSUS

LISA BERTONE HOWES

Judgment Rendered: June 7, 2013

**Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Case No. 2011-0003428**

The Honorable Ernest G. Drake, Jr., Judge Presiding

**Brett K. Duncan
Hammond, Louisiana**

**Counsel for Plaintiff/Appellant
Richard Bert Howes**

**Duncan S. Kemp, III
Hammond, Louisiana**

**Counsel for Defendant/Appellee
Lisa Bertone Howes**

BEFORE: GUIDRY, CRAIN, AND THERIOT, JJ.

*Crain, J. concurs in part and dissents in part and will
issue reasons.*

THERIOT, J.

Richard Bert Howes appeals the Twenty-first Judicial District Court's granting of an exception of no cause of action filed by Lisa Bertone Howes, and dismissing his petition for unjust enrichment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Richard and Lisa Howes were married on December 9, 2006, and established their matrimonial domicile in Tangipahoa Parish. Prior to the marriage, Richard and Lisa executed a marriage contract in which they agreed to renounce a community property regime for individual separate property regimes. The marriage contract was filed in the conveyance records of Tangipahoa Parish.

On or about January 10, 2006, prior to the marriage, Richard gave Lisa \$17,000 to settle a community property dispute with her former husband. Once they were married, Richard gave Lisa several sums of money at different times for various reasons, as follows:

1. February 20, 2008, \$2,000 to pay legal fees she owed to an attorney who represented her in the divorce from her former husband;
2. February 28, 2008, \$25,000 to pay legal fees she owed another attorney in conjunction with the same divorce;
3. April 20, 2008,¹ \$3,769 to finish payment on her automobile;
4. April 28, 2008, \$3,133 for payment of her child's private school tuition;²
5. April 2, 2009, \$3,331 for payment of her child's private school tuition;
6. May 12, 2010, \$3,510 for payment of her child's private school's tuition.

The transfers that Richard alleges he made to Lisa total \$57,743.

¹ In the petition for return of unjustly enriched funds, the date of this transfer is given as April 20, 2009; however, this appears to be a typographical error, as the petition lists all the transfers in chronological order.

² According to the petition for divorce, Richard and Lisa Howes had no children together.

Richard filed for divorce pursuant to La. C.C. art. 102 on October 13, 2011, and filed a petition for return of unjustly enriching funds on March 13, 2012. Judgment of divorce was signed on May 29, 2012. In his petition for return of unjustly enriching funds, Richard claims his first transfer to Lisa occurred before they were married and was made “[i]n anticipation of Marriage and Defendant’s continued love and affection.” In all the transfers made during the marriage, Richard claims they were “justified by Defendant’s commitment to a lifetime of Marriage, love, fidelity, and affection.” Because they had separated and sought a divorce, Richard alleges that Lisa has been unjustly enriched by the money transfers from his separate property that he had made to her.

Lisa filed an exception of no cause of action on April 13, 2012, claiming that the transfers made by Richard to her were “gifts” for which justification existed at the time for him to make the gifts to her. The trial court granted the exception, and the judgment was signed on July 10, 2012. In the written reasons for judgment, the court characterized the transfers as donations made by Richard to Lisa that have specific mechanisms for their revocation provided by law. Since other legal remedies exist for the revocation of the transfers, the court found unjust enrichment was not a valid cause of action, as La. C.C. art. 2298 states that unjust enrichment is a subsidiary remedy that shall not be available if other legal remedies exist. Following the trial court’s judgment, Richard filed a motion for the instant appeal on September 19, 2012.

ASSIGNMENTS OF ERROR

Richard Howes alleges the following assignments of error:

1. The trial court erred by granting the peremptory exception of no cause of action as the petition states a well-pleaded claim for unjust enrichment or some other valid cause of action.

2. The trial court erred in finding that Richard Howes was not afforded a legal remedy under unjust enrichment.

STANDARD OF REVIEW

A cause of action, when used in the context of the peremptory exception, is defined as the operative facts that give rise to the plaintiff's right to judicially assert the action against the defendant. The function of the peremptory exception of no cause of action is to test the legal sufficiency of the petition, which is done by determining whether the law affords a remedy on the facts alleged in the pleading. No evidence may be introduced to support or controvert an exception of no cause of action. Consequently, the court reviews the petition and accepts well-pleaded allegations of fact as true. The issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought.

Ramey v. DeCaire, 03-1299, p. 7 (La. 3/19/04), 869 So.2d 114, 118 (citations omitted). This standard of review entitles the appellant to a de novo review of the record. *Aycock v. Chicola*, 09-563, p. 4 (La. App. 3 Cir. 12/16/09), 27 So.3d 1005, 1007. If the allegations of the petition state a cause of action as to any part of the demand, the exception must be overruled. *Pitre v. Opelousas General Hosp.*, 530 So.2d 1151, 1162 (La. 1988).

DISCUSSION

Richard alleges the trial court made an erroneous assumption that some of the allegations in his petition weren't true, when all his allegations must be considered true in evaluating whether the petition states a valid cause of action. Regardless, we will accept all the allegations of Richard's petition as true and correct. See *Kuebler v. Martin*, 578 So.2d 113, 114 (La. 1991).

The petition alleges a total of seven transfers of varying sums of money from Richard to Lisa, all of which Lisa accepted. Richard was at no time under any legal obligation to make any of the transfers. The Louisiana Supreme Court recognizes five requirements for proving unjust enrichment:

(1) there must be an enrichment; (2) there must be an impoverishment; (3) there must be a connection between the enrichment and the resulting impoverishment; (4) there must be an absence of justification or cause for the enrichment and impoverishment; and (5) there must be no other remedy at law available to the plaintiff. *Industrial Companies, Inc. v. Durbin*, 02-0665, pp. 7-8 (La. 1/28/03), 837 So.2d 1207, 1213-14. Clearly, Lisa was enriched, and clearly, Richard was impoverished. The connection between the two is Richard's seven transfers of his separate funds to Lisa. Therefore, requirements one, two and three are satisfied.

Richard claims causes or justifications for the transfers prior to the divorce, yet we cannot tell from the face of the petition if these causes or justifications are anything but subjective on Richard's part. The petition does not aver to any kind of writing or agreement between the two spouses that would establish a "meeting of the minds" as to what the cause or justification of the transfers would be. Richard admits in his petition that due to the divorce, the cause or justification of continued love, fidelity, and affection no longer existed for Lisa to be enriched.³ By taking this statement as being true and correct, the logical conclusion is at the time of the transfers, justification for the enrichment and impoverishment did exist. Therefore, requirement four for a claim of unjust enrichment is not satisfied.

Regardless of requirement four, it is the fifth requirement that becomes crucial in the instant case; namely, whether there was another legal remedy available to Richard for recovery.

³ Paragraph 13 of the petition for return of unjustly enriching funds states the following: "With the parties only days from finalizing their Divorce and in the absence of Defendant's continued love, fidelity and affection, a 'justification' or 'cause' no longer exists for Defendant to be enriched by Petitioner's *fifty seven thousand seven hundred and forty three dollars (\$57,743.00)*."

A donation inter vivos is a contract by which a person, the donor, gratuitously divests himself, at present and irrevocably, of the thing given in favor of another, the donee, who accepts it. La. C.C. art. 1468. The transfer of money from Richard to Lisa was gratuitous, and at the time the transfers were made, Richard meant for the transfers to be irrevocable. Nowhere in the petition is it alleged that Lisa was obligated to repay him at any time. The money was given to Lisa, and she accepted it. The transfers fall within the basic definition of a donation inter vivos.

More specifically, a person may make a donation inter vivos to his future or present spouse in contemplation of or in consideration of their marriage, and such a donation shall be governed by the rules applicable to donations inter vivos in general. La. C.C. art. 1744. What the petition alleges easily fits into this definition of an interspousal donation inter vivos.

The interspousal donation shall be made by a single instrument in authentic form, and shall expressly state the donative intent, and shall be signed by the donor and donee. La. C.C. art. 1747. The trial court noted that no valid written form of a donation existed; however, the trial court ruled that a donation had been made. An interspousal donation inter vivos that is not made in accordance with the rules governing interspousal donations shall be governed solely by the general rules of donations inter vivos. La. C.C. art 1744. Nevertheless, a manual gift of corporeal movables accompanied by real delivery is not subject to any formality. LACC art. 1543. If Richard effected a valid donation inter vivos, the funds immediately and irrevocably became Lisa's separate property. *See Fogg v. Fogg*, 571 So.2d 838, 841 (La. App. 3 Cir. 1990), writ denied, 575 So.2d 372 (La. 1991).

This court has previously ruled in *Fernandez v. Hebert*, 06-1558 (La. App. 1 Cir. 5/4/07), 961 So.2d 404, that a clear donative intent of the donor is the sole requirement for a donation that was not of immovable property. In that case, a donation of stock was purportedly invalid in form because the donor did not physically sign the donation and had her nephew sign the instrument in her place. The nephew's testimony was clear that he had been given verbal authorization and direction by the donor to sign and execute the donation on her behalf. *Id.* at 412. *Fernandez* quotes *Fogg* in stating "[t]he proof must be 'strong and convincing' that the donor intended to give the property." *Id.* at 413. In the instant case, Richard openly admits in the petition that he did give his separate property to Lisa, and he states why. His admissions are strong and convincing evidence of his donative intent.

A donation inter vivos can be revoked or dissolved for nonfulfillment of a suspensive condition, the occurrence of a resolutive condition, or the non-performance of a condition. La. C.C. art. 1556. Richard claims certain conditions, valid or not, were not fulfilled by Lisa after he made the transfers. Simply by the face of the petition, Richard stated a cause for dissolution of a donation inter vivos.

There is enough evidence from the face of the petition that seven donations inter vivos occurred between Richard and Lisa, with Richard being the donor and Lisa being the donee. Donations have their own legal remedies for dissolution in the Louisiana Civil Code, see La. C.C. arts. 1562-67; therefore, other legal remedies exist, and Richard's unjust enrichment claim fails the fifth requirement. Since he is not entitled to the legal remedy of unjust enrichment, and since the petition does not claim any cause of action in the alternative, the trial court was correct in granting Lisa's exception of no cause of action.

CONCLUSION

The trial court identified the transfers between Richard and Lisa Howes as donations inter vivos and correctly sustained the exception of no cause of action, as other legal remedies for dissolution of donations inter vivos exist. The remedy of unjust enrichment is subsidiary in nature and is not available if the law provides another remedy for the impoverishment. La. C.C. art. 2298.

DECREE

The trial court's judgment granting the exception of no cause of action and dismissing the petition of unjust enrichment with prejudice in favor of the appellee, Lisa Bertone Howes, and against the appellant, Richard Bert Howes, is affirmed. Costs of the appeal are assessed to the appellant.

AFFIRMED.

RICHARD BERT HOWES

FIRST CIRCUIT

VERSUS

COURT OF APPEAL

LISA BERTONE HOWES

STATE OF LOUISIANA

2012 CA 1951

CRAIN, J., dissenting in part.



I agree that the trial court was correct in sustaining the peremptory exception raising the objection of no cause of action. However, Louisiana Code of Civil Procedure article 934 provides that “[w]hen the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court.” Thus, I would reverse the trial court’s judgment insofar as it dismisses Richard Howes’ suit and remand with instructions that the trial court allow him leave to amend his petition.