NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 2057

RODNEY C. FALGOUST AND KATHLEEN DOWTY FALGOUST

VERSUS

A. COUVILLION CONSTRUCTION, LLC

DATE OF JUDGMENT: NOV 0 1 2013

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2011-13589, DIV. G, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. CRAIN, JUDGE

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: APPEAL DISMISSED. MOTION DENIED

KUHN, J.

Plaintiffs-appellants, Rodney and Kathleen Falgoust, appeal the trial court's judgment sustaining in part an exception of prescription as to plaintiffs' claims for damages arising from the HVAC system installed in their home purchased from A. Couvillion Construction, LLC (Couvillion) and dismissing those claims. Because we conclude that the judgment is not immediately appealable, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2007, the Falgousts purchased a house located in the Beau Chene Subdivision in Mandeville, Louisiana, from Couvillion. The Falgousts alleged that after the purchase they learned of "major structural" defects in the house. They averred that there were defects in the HVAC system, the plumbing and tub structure, the fireplace and chimney, and in the roof and joist structure and sealing. Based on these defects, and alleging that Couvillion was in bad faith in its sale of the house, they filed suit in June 2011 to recover damages, legal interest, and reasonable attorneys' fees and costs. Alternatively, the Falgousts seek recovery under the New Home Builders Warranty Act (NHWA). See La. R.S. 9:3141-3150.[1]

Couvillion filed an answer, asserting that the house has no defects, and alternatively, that all deficiencies for which it was responsible have been repaired or resolved. In May 2012, Couvillion filed a motion for summary judgment, seeking the dismissal of the lawsuit suggesting that the NHWA applies exclusively to the Falgousts' claims "regarding major structural defects within their home" and asserting that plaintiffs did not comply with its notice provisions. Couvillion also filed a peremptory exception raising the objections of prescription and peremption, urging that the Falgousts filed a suit to recover for "non major" structural defects in

[1] In an amending and supplemental petition, the Falgousts added several subcontractors to Couvillion as additional defendants.

their home well after the applicable prescriptive period had accrued and sought dismissal with prejudice of the Falgousts' claims on this basis as well.

A hearing was held on the motion for summary judgment and the exception, and the trial court signed a judgment on August 21, 2012, expressly denying Couvillion's motion for summary judgment. The trial court's judgment also ordered:

> [T]he Exception of Prescription filed by [Couvillion] is denied in part and granted in part. The Exception of Prescription is granted as to any and all claims made by plaintiffs regarding defects with their HVAC system in their home, and the HVAC claims are hereby dismissed, with prejudice, as they are prescribed as a matter of law. For all other claims of deficiencies made by plaintiffs, there are genuine issues of fact which exist as to the cause of those deficiencies. Therefore, all non HVAC claims are not prescribed, and defendant's Exception of Prescription is denied as to all other claims.

The Falgousts have appealed the dismissal of their claims regarding defects in the HVAC system.

After the appeal was lodged, this court issued a rule to show cause that informed the parties the appealed judgment appeared to be a partial summary judgment that lacked the requisite designation of finality.

In response to this court's order, the appellate record was supplemented with a judgment signed on April 25, 2013.[2] The amended judgment states in pertinent part:

> [H]aving reviewed the Judgment of the Trial Court from which the appeal was taken and having conferred with counsel for both parties to the appeal:
>
> **IT IS ORDERED** that the Judgment rendered ... on August 21, 2012 from which the appeal was taken is hereby designated ... as a final judgment.
>
> **IT IS FURTHER ORDERED** that there is no just reason for delay as to the appeal of that judgment, and that for reasons of judicial economy the judgment is ripe for appeal.

The Falgousts also filed in this court a motion to supplement the appellate record with a document identified as the "CASH SALE OF PROPERTY" from Couvillion to the Falgousts "which document" they suggest "is undisputed" and

[2] The finality designation was made by a successor judge. See La. R.S. 13:4209.

forms Exhibit "H" to answers to interrogatories and responses to requests for production of documents that they filed.

PROPRIETY OF THE APPEAL

Even when a trial court has designated a partial judgment as final under Article 1915(B),[3] that designation is not determinative of appellate jurisdiction. ***Van ex rel. White v. Davis***, 2000-0206 (La. App. 1st Cir. 2/16/01), 808 So.2d 478, 480. This court must still ascertain whether it has jurisdiction to review the partial judgment from which the appeal was taken. See ***R.J. Messinger, Inc. v. Rosenblum***, 2004-1664 (La. 3/2/05), 894 So.2d 1113, 1122. We cannot determine the merits of an appeal unless our appellate jurisdiction is properly invoked by a valid final judgment. ***Texas Gas Exploration Corp. v. Lafourche Realty Co., Inc.***, 2011-0520 (La. App. 1st Cir. 11/9/11), 79 So.3d 1054, 1061, writ denied, 2012-0360 (La. 4/9/12), 85 So.3d 698.[4]

The appellate court is required to conduct a *de novo* determination of whether the designation was proper utilizing the following factors: (1) the relationship between the adjudicated and the unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial

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[3] At the time, La. C.C.P. art. 1915(B) provided:

> (1) When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories, whether in an original demand, reconventional demand, cross-claim, third party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.
>
> (2) In the absence of such a determination and designation, any order or decision which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties and shall not constitute a final judgment for the purpose of an immediate appeal. Any such order or decision issued may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

[4] Subsequent to the trial court's certification, this court issued an interim order maintaining the appeal but noted that the propriety of the La. C.C.P. art. 1915(B) designation is ultimately reserved for this merit panel.

court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; and (4) miscellaneous facts such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. ***R.J. Messinger, Inc.***, 894 So.2d at 1122-23.

In light of these considerations and based on the record before us, we find the trial court abused its discretion in designating the partial summary judgment as final and immediately appealable. The trial court concluded there was no just reason for delaying the appeal of this judgment "for reasons of judicial economy." However, dismissal of the HVAC claims does not substantially shorten the trial time in that it only dispenses with one category of the many defects the Falgousts have alleged. Because Couvillion claims that it has repaired all deficiencies in the home of which it was properly notified by plaintiff (apparently raising a defense that the Falgousts did not provide the required notice within one year after knowledge of the defects in accordance with La. R.S. 9:3145[5]), it is possible that the need for review of the issue raised on appeal might be mooted by future developments in the trial court, since the trial court has not addressed this defense. Under these circumstances, we conclude that allowing an immediate appeal of the partial summary judgment rendered on August 21, 2012 only serves to encourage multiple appeals and piecemeal litigation that causes delay and judicial inefficiency.

Because we have determined that the partial summary judgment dismissing as prescribed one category of the Falgousts' numerous claims is not immediately appealable, the motion to supplement the record is moot and, therefore, denied.

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[5] La. R.S. 9:3145(A) provides, "Before undertaking any repair himself or instituting any action for breach of warranty, the owner shall give the builder written notice, by registered or certified mail, within one year after knowledge of the defect, advising him of all defects and giving the builder a reasonable opportunity to comply with the provisions of [the NHWA]."

DECREE

For these reasons, the appeal is dismissed. All costs of this appeal are assessed against plaintiffs-appellants, Rodney and Kathleen Falgoust.

APPEAL DISMISSED. MOTION TO SUPPLEMENT DENIED.