NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 1460

STEWART TITLE GUARANTY COMPANY

VERSUS

MARCO DELCID AKA MARCO A DELCID-QUINTANO, PATRICIA DELCID AND MAIRA E DELCID

Judgment Rendered: AUG 16 2017

Appealed from the
Twenty-third Judicial District Court
In and for the Parish of Ascension, State of Louisiana
Docket Number 105,023

Honorable Thomas Kliebert, Jr., Judge Presiding

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BEFORE: WHIPPLE, C.J., GUIDRY AND McCLENDON, JJ.

McClendon J. dissents.

WHIPPLE, C.J.

Following a final judgment on the merits in this matter involving a breach of mortgage, plaintiff, as subrogee to the rights of the mortgagee under a mortgage executed by defendant in the capacity of co-signer, appeals, challenging a partial **summary judgment** previously rendered by the trial court, which had limited the defendant co-signer's liability to the value of his interest in the property mortgaged, and challenging the trial court's subsequent **final judgment** awarding plaintiff damages but further reducing defendant's liability to plaintiff by an amount held to be equal to the proportion of the plaintiff's negligence. For the following reasons, we affirm the September 28, 2015 partial summary judgment and the July 8, 2016 final judgment awarding damages.

FACTS AND PROCEDURAL HISTORY

Marco and Maira Delcid were married in 2003. The following year, on February 27, 2004, they purchased a home bearing the address of 37250 Remington Park Avenue in Geismar, Louisiana ("the property"), with the majority of the purchase price obtained through a loan secured by a mortgage on the property.

Marco and Maira were thereafter divorced by judgment rendered on October 9, 2006, and signed on March 28, 2007. On November 30, 2006, in anticipation of a community property settlement whereby Maira was to take ownership of the property, Maira borrowed $213,000.00 from Argent Mortgage Company, LLC, ("Argent") to refinance the loan on the property ("the 2006 note"). Of that loan amount, $190,461.12 was used to pay off the prior mortgage executed by Maira and Marco. Through the refinance, the parties intended that the property and the corresponding note and mortgage would be placed in Maira's name only. However, while Maira alone signed the 2006 note to refinance the property, both she and Marco executed a new mortgage on the property in favor of Argent to

secure the 2006 loan entered into by Maira ("the 2006 mortgage"). Pursuant to the terms of the 2006 mortgage, Marco, in the capacity of borrower and co-signer, was obligated to obtain the approval of Argent prior to transferring his interest in the property and to ensure satisfaction of the 2006 note secured by the 2006 mortgage, to the extent of his interest in the property. Argent later assigned the 2006 note and 2006 mortgage to JP Morgan Chase Bank, N.A. ("Chase").

In connection with the 2006 refinance and mortgage, Stewart Title Guaranty Company ("Stewart Title"), plaintiff herein, underwrote a title insurance policy to Argent. However, the 2006 mortgage was not recorded in the Ascension Parish mortgage records at that time.

Approximately two and one-half years after Maira refinanced the property and Marco and Maira executed the 2006 mortgage, Marco and Maira's former community property was partitioned by judgment dated May 19, 2009, with Maira receiving full ownership of the property. In the judgment of partition, Maira was also assigned "[a]ny and all mortgages" on the property. Then, about seven months later, by Act of Transfer dated January 6, 2010, Maira transferred her entire interest in the property to Marco.[1] However, Marco did not assume any liability in that Act of Transfer for the 2006 note secured by the 2006 mortgage on the property. Rather, Maira remained liable for the note, despite the fact that she was transferring her interest in the property to Marco. The last payment on the 2006 note was on February 2, 2010, and the loan then went into default. Neither Marco nor Maira made any further payments on the 2006 note.

On June 15, 2010, approximately five months after Maira transferred the property to Marco, Marco sold the property to Notoco Holding, LLC, for

[1]As discussed below, the reason for Maira transferring the property to Marco was disputed.

$150,000.00.[2] Despite his obligation under the 2006 mortgage to obtain Chase's approval prior to transferring his interest in the property, Marco did not notify Chase or seek its approval prior to selling the property to Notoco, nor did he use the proceeds of the sale to satisfy the 2006 note secured by the mortgage. Instead, he spent the money.

Meanwhile, in February 2010, Chase had notified Stewart Title that it had discovered that the 2006 mortgage had never been recorded and demanded that Stewart Title secure its mortgage position in the public records. However, while the 2006 mortgage was eventually recorded on August 15, 2011, this did not occur until after Marco had sold the property to Notoco Holding fourteen months earlier. Ultimately, Stewart Title paid its policy limits of $213,000.00 to Chase for the loss of the collateral and thereby became subrogated to Chase's rights under the 2006 note and mortgage.

Stewart Title then instituted this suit against Marco, Maira, and Patricia Delcid, seeking payment of all amounts due and owing under the 2006 note and to enforce its rights under the mortgage. Regarding the extent of liability of the parties, Stewart Title averred that each of the defendants was liable for all amounts due and owing, although on different bases. Regarding Marco's liability, Stewart Title averred that he was liable for all amounts due and owing both as a maker of the 2006 mortgage and by virtue of the fact that the debt it secured was "part of the community of acquets and gains that existed between he [sic] and Maira."[3] Stewart Title also averred that Marco had committed fraud, given his actual

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[2]Although an ownership interest in the property had never been transferred or conveyed to her, Marco's new wife, Patricia Delcid, was also listed as a seller in the sale of the property to Notoco Holding.

[3]As to Maira, Stewart Title averred that she was liable for all amounts as the maker of the 2006 note and mortgage, and as to Patricia, Stewart Title averred that she was liable for all amounts due and owing by taking title to the property subject to the 2006 mortgage, selling it, and retaining the proceeds.

knowledge of the 2006 mortgage, his failure to disclose same at the sale of the property to Notoco Holding, and his retention of the sale proceeds. Thus, Stewart Title sought a finding that Marco had committed fraud.

Stewart Title later filed a motion for summary judgment, seeking judgment in its favor against Marco and Patricia.[4] In support of its motion for summary judgment, Stewart Title argued that Marco was liable to it both under the 2006 note and under the 2006 mortgage. With regard to his alleged liability pursuant to the 2006 note, while only Maira had executed the 2006 note, Stewart Title averred that Maira and Marco were still married at the time the 2006 note and mortgage were executed (although this was actually incorrect) and that more than $190,000.00 of the 2006 loan was used to pay off the prior note Maira and Marco had executed in 2004 to purchase the property, which was a community obligation. Thus, arguing that the obligation was incurred by Maira during the existence of her and Marco's community and was further incurred for the common interest of Marco and Maira (i.e., to satisfy a previous community obligation), Stewart Title averred that the 2006 note was a community obligation and that "[t]here is no doubt that Marco [was] liable on the loan."

Moreover, with regard to Marco's liability pursuant to the 2006 mortgage, Stewart Title contended that both Maira and Marco executed the 2006 mortgage, thus ensuring that the 2006 mortgage encumbered the entirety of the property. Stewart Title further averred that Marco knew about the 2006 mortgage when he sold the property to Notoco Holding, "freely admit[ting]" in his deposition that he signed the 2006 mortgage. Thus, according to Stewart Title, Marco breached his obligations under the 2006 mortgage by selling the property to a third party free

[4]In its motion, Stewart Title averred that on March 8, 2013, Maira had filed for relief pursuant to Chapter 7 of the Bankruptcy Code and, further, that by Order of Discharge entered on June 21, 2013, she was released from all pre-petition debts, including those at issue herein. Thus, Stewart Title asserted that "both practically and legally, Maira Delcid is no longer a part of this case."

and clear of the 2006 mortgage, thereby depriving Stewart Title of the collateral that secured the 2006 note. Accordingly, Stewart Title contended Marco was liable to it for $213,000.00, the amount it paid to Chase pursuant to its title insurance policy, which amount was less than the value of the lost collateral.[5]

Marco and Patricia then filed a cross-motion for summary judgment, seeking dismissal of Stewart Title's claims against them. With regard to Marco's liability, they argued in support of their motion that when Marco signed the 2006 mortgage, the closing agent represented to him that the 2006 note and the 2006 mortgage would be in Maira's name only and that he would have no obligations under either the 2006 note or the 2006 mortgage. Additionally, they contended that Marco, whose native language is not English, did not understand the written terms of the 2006 mortgage and, thus, relied upon the representations of the closing agent. Marco and Patricia also averred (although incorrectly) that at the time the 2006 mortgage was executed, Marco had no interest in the property, and, thus, no liability under the 2006 mortgage, because he and Maira were divorced, their community regime had terminated retroactive to the filing of the petition for divorce, and as part of the divorce, they had agreed that the property would be Maira's separate property (and any related indebtedness her separate obligation).

Following a hearing, the trial court rendered a partial judgment dated March 14, 2014. The trial court denied Stewart Title's motion for summary judgment, finding that Stewart Title was not entitled to judgment in its favor as to its claims against Patricia and that material issues of fact existed as to whether Marco owed or had breached any obligation created by the 2006 mortgage and whether Stewart Title was entitled to damages by virtue of subrogation. Specifically, the trial court found that questions of fact remained as to whether Marco had sought information

[5]While Stewart Title made various arguments in support of its claim against Patricia, its claims against her are not at issue herein.

from Chase concerning the 2006 note and whether Chase had refused to disclose the existence of the 2006 mortgage to Marco.[6] (R. 294, 296, 298).

On April 2, 2015, Stewart Title filed another motion for summary judgment, contending in that motion that it was entitled to judgment in its favor against Marco in the amount of $213,000.00. In support of this second motion, Stewart Title sought to disprove what it contended was the lone defense raised by Marco in opposition to its first motion that the trial court had sustained, i.e., that Marco did not realize that there was a mortgage over the property. According to Stewart Title, additional discovery established that Marco "knew full well" that the property was subject to the 2006 note and mortgage and that upon learning that the 2006 mortgage had not been recorded, he sold the property and kept the money. Thus, Stewart Title contended that Marco had breached the mortgage when he sold the property to Notoco Holding without paying off the underlying 2006 note and, accordingly, that it was entitled to judgment against him in the amount of $213,000.00, plus interest.[7]

Following a hearing on the motion, the trial court rendered a partial judgment dated September 28, 2015, granting in part Stewart Title's motion and finding that Marco was liable for the breach of the 2006 mortgage, "up to the value

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[6]With regard to the cross-motion, the trial court granted in part Marco and Patricia's motion for summary judgment and dismissed with prejudice Stewart Title's claims against Patricia. That judgment was not appealed, and the dismissal of Stewart Title's claims against Patricia Delcid became final.

[7]In opposing this second motion for summary judgment, Marco asserted that he owed no duty and, thus, breached no duty under the terms of the 2006 mortgage. He contended that "even though [he] knew about the 2006 [n]ote and [m]ortgage (as [he] had signed the 2006 [m]ortgage)," that fact did not make him liable under either. Rather, he asserted that initially his only obligation under the 2006 mortgage was to "mortgage, grant and convey" his then-existing 50% interest in the property. However, according to Marco, because the subsequent judgment of partition awarded Maira full ownership of the property and assigned all debt associated with the property to her, at that point, by operation of law, he no longer had any interest in the property to "mortgage, grant or convey" to Chase. He further asserted that when Maira subsequently conveyed her 100% ownership in the property to him, she intended to and did give him the property "free and clear" of the 2006 mortgage. Alternatively, Marco argued that genuine issues of material fact still existed as to whether he sought information from Chase about the 2006 note and whether Chase refused to disclose the existence of the 2006 mortgage to him, issues that should not be disposed of on summary judgment.

of Marco Delcid's one-half interest in th[e] property but subject to further adjustment by virtue of, *inter alia*, the operation of Civil Code Article 2003." However, noting that it was unable to determine the exact quantum of Marco's liability from the evidence before it, the trial court denied in part Stewart Title's motion for summary judgment as to "the balance of the relief requested." This partial judgment was not designated as final for purposes of immediate appeal.

Thereafter, on April 29, 2016 this matter proceeded to trial on the issue of damages owed by Marco for his breach of the 2006 mortgage. The parties submitted the matter for trial on exhibits introduced and stipulated facts set forth in the pretrial order, and the trial court thereafter rendered judgment, dated July 8, 2016, against Marco and in favor of Stewart Title in the amounts of $107,500.00, representing the value of Marco's one-half interest in the property, and $52,440.40, for attorney's fees and costs incurred by Stewart Title as a result of Marco's breach of the 2006 mortgage. The trial court further rendered judgment reducing Marco's liability to Stewart Title, pursuant to LSA-C.C. art. 2003, by $52,440.40, an amount it held to be "equal to the proportion of Stewart Title's negligence compared to the liability of Marco… ."

From this judgment, Stewart Title appeals, contending that the trial court erred as a matter of law in: (1) limiting Marco's liability for his breach of contract to one-half of the value of the property, and (2) finding that Stewart Title was negligent under LSA-C.C. art. 2003 in failing to stop Marco from breaching the contract and selling the property without satisfying the mortgage.

DISCUSSION

Extent of Marco's Liability for Breach of the Mortgage (Assignment of Error No. 1)

In this assignment of error, Stewart Title contends that the trial court erred as a matter of law in limiting Marco's liability for his breach of the 2006 mortgage to

one-half of the value of the property, because Marco's breach of the security instrument caused the loss of the *entire* property. According to Stewart Title, even if Marco was in good faith when he breached the 2006 mortgage, he is liable for all foreseeable damages caused by his breach pursuant to LSA-C.C. art. 1996, and by selling the *entire* property, it was imminently foreseeable that Marco would cause loss of the *entire value* of the property. Thus, Stewart Title contends that Marco's liability for breaching the 2006 mortgage by selling the property without paying off the 2006 note is the entire value of the property. Alternatively, Stewart Title argues that Marco is liable for *all* of its damages, whether foreseeable or not, pursuant to LSA-C.C. art. 1997, as an obligor in bad faith.

As detailed above, whether Marco breached the 2006 mortgage and the extent of Marco's liability to Stewart Title for such breach, which the trial court concluded was "up to the value of Marco Delcid's one-half interest in that property," were issues determined on motion for summary judgment. A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact, and the summary judgment procedure is favored and designed to secure the just, speedy, and inexpensive determination of every action.[8] LSA-C.C.P. art. 966(A)(2). It is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2) & (C)(1).[9]

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[8]Louisiana Code of Civil Procedure article 966 was recently amended by 2015 La. Acts, No 422 § 1, effective January 1, 2016. Since the amended version of article 966 does not apply to any motion for summary judgment pending adjudication or appeal on the effective date of the Act, the prior version of LSA-C.C.P. art. 966 is applicable herein. See 2015 La. Acts, No. 422 §§ 2 & 3.

[9]Now see LSA-C.C.P. art. 966(A)(3) & (4).

The burden of proof is on the mover. LSA-C.C.P. art. 966(C)(2).[10] Only evidence admitted for purposes of the motion for summary judgment shall be considered by the court in its ruling on the motion. LSA-C.C.P. art. 966(F)(2).[11] Summary judgment is appropriate when all the relevant facts are marshalled before the court, the marshalled facts are undisputed, and the only issue is the ultimate conclusion to be drawn from those facts. Willig v. Pinnacle Entertainment, Inc., 2015-1998 (La. App. 1st Cir. 9/16/16), 202 So.3d 1169, 1173.

Summary judgments are reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. Willig, 202 So.3d at 1172.

With regard to damages for breach of contract, generally, an obligor is liable for the damages caused by his failure to perform a contract. LSA-C.C. art. 1994. Damages for breach of contract are measured by the loss sustained by the obligee and the profit of which he has been deprived. LSA-C.C. art. 1995. However, LSA-C.C. art. 1996 limits an obligor's damages as follows: "An obligor in good faith is liable only for the damages that were foreseeable **at the time the contract was made**." (Emphasis added.) Stated differently, the measure of damages is the sum that will place the obligee in the same position as if the obligation had been fulfilled. LAD Services of Louisiana, L.L.C. v. Superior Derrick Services, LLC, 2013-0163 (La. App. 1st Cir. 11/7/14), 167 So. 3d 746, 761, writ not considered, 2015-0086 (La. 4/2/15), 162 So. 3d 392.

At the time the 2006 mortgage was executed, Maira and Marco were divorced, but had not yet partitioned the former community property. Thus, Marco

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[10]Now see LSA-C.C.P. art. 966(D)(1).

[11]Now see LSA-C.C.P. art. 966(D)(2).

owned an undivided one-half interest in the property as a co-owner with Maira. See LSA-C.C. arts. 2356, 2369.1, & 2369.2.

Moreover, pursuant to the terms of the 2006 mortgage, while Marco was listed together with Maira as a "borrower," his liability was more specifically defined as that of a "co-signer," as set forth in section 13 therein, which provides:

> **13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument ***only to mortgage, grant and convey the co-signer's interest in the Property*** under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.
>
> Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

Thus, at the time the mortgage was executed by Marco, Marco agreed only to "mortgage, grant and convey" his interest in the property, which constituted an undivided one-half interest, and pursuant to the terms of the mortgage, his liability was limited as such. Had he fulfilled his obligation under the mortgage, the value of his one-half interest in the property over which he executed the mortgage would have been used to satisfy the underlying indebtedness, the 2006 note, upon Maira's default. Accordingly, "the loss sustained" by Stewart Title and the damages that were foreseeable "**at the time the contract was made**" because of Marco's breach of the mortgage would have been the value of his interest in the property upon which he granted the mortgage, i.e., his undivided one-half interest. See LSA-C.C. arts. 1995 & 1996. Thus, we find no merit to this initial argument by Stewart Title.

Nonetheless, Stewart Title further argues that Marco is liable for *all* of its damages, whether foreseeable or not, pursuant to LSA-C.C. art. 1997, which provides that "[a]n obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform." According to Stewart Title, Marco "was *clearly* in bad faith" when he sold the property and kept the money rather than using the proceeds of the sale to satisfy the indebtedness secured by the 2006 mortgage, thus rendering him liable for all of its damages.

Prior to the 2015 amendments, LSA-C.C.P. art. 966(F)(1) provided that "[a] summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time."[12] In its motion for summary judgment and supporting memorandum, Stewart Title did not mention LSA-C.C. art. 1997. Moreover, while in its supporting memorandum Stewart Title did aver that Marco's actions showed "betrayal" of Maira and "dishonesty," Stewart Title never asserted that it was entitled to recover all of its damages from Marco pursuant to LSA-C.C. art. 1997, based on a bad faith breach of the 2006 mortgage by Marco.[13]

Additionally, when the trial court questioned counsel for the parties at the hearing on the motion as to the extent of Marco's liability and the basis for Stewart Title's argument that Marco was liable for *all* of its damages, the following colloquy occurred:

THE COURT:

What [do] you say about damages?

[COUNSEL FOR MARCO]:

Well, I clearly –

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[12]Now see LSA-C.C.P. art. 966(F).

[13]Additionally, while Stewart Title prayed in its petition that the trial court make a specific finding that Marco had committed fraud, it made no request for such a finding in its motion for summary judgment or supporting memorandum.

THE COURT:

I think he has at least a half interest. Now this other half interest, I don't know about all that assuming the wife's part. I've got to look at it one more time. But I think it's pretty clear he at least gets a half interest.

[COUNSEL FOR MARCO]:

Well, I would say I hope it's clear he has no more than a half interest.

THE COURT:

Well, I'm saying, he has at least something. I didn't get to the next step yet about the whole. But you agree he has a half?

[COUNSEL FOR MARCO]:

At the time he signed the mortgage –

THE COURT:

You didn't agree the last time, but you agree now, huh? You agree he has a half?

[COUNSEL FOR MARCO]:

I agree that he had a half at the time that he signed the mortgage, yes, Your Honor.

THE COURT:

Now, how do you say he gets the other half?

[COUNSEL FOR STEWART TITLE]:

Because they both own the property in division [sic]. These weren't co-owners, each owning 50 percent. These were married partners, each owning 100 percent in division [sic] as community –

THE COURT:

No, no, no. You don't own 100 percent.

[COUNSEL FOR STEWART TITLE]:

I'm sorry?

THE COURT:

You don't own 100 percent in division [sic]. You own 50 percent in division [sic], right?

[COUNSEL FOR STEWART TITLE]:

> Well, when they mortgaged it together, there's not going to be the wife's 50 percent and the husband's 50 percent.

THE COURT:

> Right.

[COUNSEL FOR STEWART TITLE]:

> It's different from the typical articles on co-ownership, not like you and I owned a piece of property together.

THE COURT:

> Why? What's the difference?

[COUNSEL FOR STEWART TITLE]:

> Because co-ownership they each own – because you can't separate the two halves when you're married. A wife can't mortgage her 50 percent; it's all or none; at least, not without the consent of the husband.

Thus, the stated legal basis offered by Stewart Title at the hearing to support its contention that Marco was liable for 100% of its damages was principles applicable to married persons, not any allegation of bad faith breach pursuant to LSA-C.C. art. 1997.

Furthermore, with regard to the issue of Marco's knowledge of the 2006 mortgage, counsel for Stewart Title stated as follows to the trial court:

> The last time you denied it you were concerned about his protestations that he really didn't know about this mortgage. With due respect, I don't think ignorance of a contract that he signed is a defense, but understandably, this is $213,000 at issue, so I can understand the Court maybe wanted to flesh out all of the facts as to who knew when before you entered judgment against [Marco]. So that's what we've done. I've come and showed you that he really did know about the mortgage. In fact, they basically brought it – [the closing agent] told him about the mortgage and the whole deal for the property transfer was for him to be able to take care of that mortgage. So, "I didn't know about the mortgage," that's no longer an issue. ...

Thus, again, while Stewart Title raised the issue of Marco's knowledge of the 2006 mortgage to allay concerns of the trial court, Stewart Title did not assert that it was

entitled to recover 100% of its damages from Marco for a claim of a bad faith breach predicated upon LSA-C.C. art. 1997.

Accordingly, the issue of Marco's potential liability for 100% of Stewart Title's damages pursuant to LSA-C.C. art. 1997 on the basis of his alleged bad faith breach of the 2006 mortgage was simply not an issue set forth in Stewart Title's motion under consideration by the court at that time. See Goodmond v. Department of Transportation and Development (DOTD), 2016-1024 (La. App. 1st Cir. 4/18/17), 2017 WL 1409715 (unpublished) (where plaintiffs' motions for summary judgment did not mention statute relied upon by the trial court in making its ruling, the trial court erred in relying on the statute to render summary judgment in favor of plaintiffs). Thus, we find no merit to Stewart Title's argument that the trial court erred as a matter of law in failing to hold Marco liable for 100% of its damages pursuant to LSA-C.C. art. 1997, as Stewart Title never set forth this issue in its motion or supporting memorandum, such that it was not properly before the trial court.[14]

Application of LSA-C.C. art. 2003 to Reduce Stewart Title's Award
(Assignment of Error No. 2)

Turning to its second assignment of error, Stewart Title further contends that the trial court erred in applying LSA-C.C. art. 2003 to reduce Marco's liability by the fault it attributed to Stewart Title. Pursuant to LSA-C.C. art. 2003, an obligee is not allowed to recover damages if his own bad faith caused the obligor's breach; moreover, "[i]f the obligee's negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence."

As set forth above, while the trial court rendered judgment in favor of Stewart Title, it reduced the award by an amount equal to the attorney's fee award,

[14]Moreover, we note that, as a general rule, appellate courts will not consider issues that were not raised in the pleadings, were not addressed by the trial court, or are raised for the first time on appeal. Stewart v. Livingston Parish School Board, 2007-1881 (La. 5/2/08), 991 So. 2d 469, 474.

an amount which it held to be "equal to the proportion of Stewart Title's negligence compared to the liability of Marco… ." In support of its contention that this reduction constituted error, Stewart Title sets forth four arguments: (1) because Marco breached the 2006 mortgage in bad faith, he cannot avail himself of LSA-C.C. art. 2003; (2) because Marco cannot establish that Stewart Title breached the 2006 mortgage, he is not entitled to relief under LSA-C.C. art. 2003; (3) the failure to record the 2006 mortgage did not cause Marco to sell the property without paying off the underlying loan; and (4) Marco presented no evidence to quantify a reduction in its award in the amount of $52,440.40.

Because, as discussed above, we find that the issue of whether Marco breached the 2006 mortgage in bad faith was not an issue set forth in Stewart Title's motion for summary judgment under consideration by the court at that time and, thus, is not an issue properly before this court, we pretermit consideration of Stewart Title's first argument that Marco's bad faith precludes him from availing himself of the relief set forth in LSA-C.C. art. 2003.

As to Stewart Title's second and third arguments, i.e., that LSA-C.C. art. 2003 should not have been applied by the trial court to reduce its award because Marco cannot and did not establish that Stewart Title breached the 2006 mortgage and because Stewart Title's failure to record the 2006 mortgage did not cause Marco to sell the property without paying off the underlying loan, we likewise find no merit.

The obligation imposed by LSA-C.C. art. 2003, and the limitation on recovery for breach of the obligation set forth therein, "is correlative to the general duty imposed by [LSA-C.C.] art. 1983, which requires '[c]ontracts must be performed in good faith.'" Lamar Constructors, Inc. v. Kacco, Inc., 2015-1430 (La. 5/3/16), 189 So. 3d 394, 397. Regarding burden of proof, the Louisiana Supreme Court has explained that "an obligor cannot establish [that] an obligee has

contributed to the obligor's failure to perform unless the obligor can prove the obligee itself failed to perform duties owed under the contract." Lamar Constructors, Inc., 189 So. 3d at 398. Arguing that Marco, as obligor under the 2006 mortgage, cannot prove that Stewart Title, which was not a party to the mortgage, failed to perform duties owed under the 2006 mortgage, Stewart Title avers that the trial court erred in reducing its damages pursuant to LSA-C.C. art. 2003.

In essence, Stewart Title argues that because there is no contract between it and Marco, the trial court erred in reducing its damages pursuant to LSA-C.C. art. 2003. However, at the outset, we note that Stewart Title has brought this action in subrogation, upon its payment to Chase following Marco's breach of the 2006 mortgage. Subrogation is the substitution of one person to the rights of another. LSA-C.C. art. 1825. When subrogation results from a person's performance of the obligation of another, that obligation subsists in favor of the person who performed it, who may avail himself of the action and security of the original obligee against the obligor, but is extinguished for the original obligee. An original obligee who has been paid only in part may exercise his rights for the balance of the debt in preference to the new obligee. LSA-C.C. art. 1826.

In other words, subrogation is the legal fiction established by law whereby payment by a third person extinguishes an obligation of the original creditor. The third person then steps into the shoes of the original creditor, acquiring the right to assert the action and rights of the original creditor. State Farm Mutual Automobile Insurance Company v. Berthelot, 98-1011 (La. 4/13/99), 732 So. 2d 1230, 1233. However, the subrogee acquires no greater rights than those possessed by its subrogor and is subject to all limitations applicable to the original claim of the subrogor. Gray Insurance Company v. Old Tyme Builders, Inc., 2003-1136 (La. App. 1st Cir. 4/2/04), 878 So. 2d 603, 607, writ denied, 2004-1067 (La. 6/18/04),

876 So. 2d 814. As such, the subrogee's claim is limited by any defenses to the original claim that could have been asserted against the subrogor. See generally Travelers Indemnity Company v. Exxon Pipeline Company, 449 So. 2d 1074, 1076-1077 (La. App. 1st Cir.), writ denied, 452 So. 2d 179 (La. 1984) (contributory fault of subrogor acted as a defense precluding recovery in property damage claim brought by its subrogee against custodian of defective pipeline); see also Bailsco Blades & Casting Inc. v. Fireman's Fund Insurance Co., 31,876 (La. App. 2nd Cir. 5/5/99), 737 So. 2d 164, 167 (subrogee's claim against insurer was subject to defense that subrogor's original claim against insurer would have been barred by policy exclusion).

Stepping into the shoes of Chase, and subject to all the rights and limitations applicable to Chase's claim under the 2006 mortgage, Stewart Title has sued Marco through subrogation for his breach of the 2006 mortgage. Stewart Title is merely substituted to the rights of Chase, and, as such, it acquired whatever rights Chase had against Marco, subject to any defenses Marco could have asserted against Chase. Thus, for Marco's liability to be reduced pursuant to LSA-C.C. art. 2003, Marco had to establish that the actions of Chase (or its predecessor Argent) contributed to the breach of the 2006 mortgage giving rise to Stewart Title's claims herein.

As noted by the Louisiana Supreme Court in Lamar Contractors, Inc., because the provisions of LSA-C.C. art. 2003 are correlative to the general duty imposed upon parties to a contract to perform the contract in good faith, an obligor to the contract cannot establish that the obligee to the contract has contributed to the obligor's failure to perform unless the obligor can prove that the obligee itself failed to perform duties owed under the contract. The obligee to the 2006 mortgage was Chase, in whose shoes Stewart Title stands through subrogation. Thus, to be entitled to a limitation in liability pursuant to LSA-C.C. art. 2003,

Marco was required to demonstrate that Chase failed to perform its obligations under the 2006 mortgage, which in turn contributed to Marco's breach. See Lamar Constructors, Inc., 189 So. 3d at 398.

A mortgage is a nonpossessory right created over property to secure the performance of an obligation. LSA-C.C. art. 3278. Upon failure of the obligor to perform the obligation secured by the mortgage, the mortgagee has the right to cause the property to be seized and sold in the manner provided by law and to have the proceeds applied toward satisfaction of the obligation in preference to the claims of others. LSA-C.C. art. 3279. Mortgages must be recorded with the recorder of mortgages in the parish where the immovable property is located in order to affect third persons. LSA-C.C. arts. 3346(A) & 3347.

The Louisiana public records doctrine is intended to protect third persons against unrecorded instruments by denying the effects of the unrecorded interests, except as between the parties. LSA-C.C. arts. 3338 & 3343; Evans v. City of Baton Rouge, 2010-1364 (La. App. 1st Cir. 2/14/11), 68 So. 3d 576, 580. Thus, the failure to record a mortgage in the mortgage records results in the failure to protect the mortgagor's interest in the property as to those not a party to or personally bound by the mortgage.

As such, the recordation of a mortgage also protects the security interest of the mortgagee, in this instance Chase, from subsequently recorded transactions affecting its preferential ranking and security interests in the property. LSA-C.C. art. 3307(3); see Courshon v. Mauroner-Craddock, Inc., 219 So. 2d 258, 267 (La. App. 1st Cir. 1968), writs refused, 253 La. 760, 761 & 762, 219 So. 2d 778 (1969). Thus, we conclude that it was Chase's obligation as mortgagee to ensure that the 2006 mortgage was properly and timely recorded in the mortgage records in order to protect its ranking interests and protect its interests against any future sale of the property while the indebtedness existed.

Moreover, Chase's failure, and the failure of its predecessor Argent, to timely record the mortgage (either itself or through its agent) certainly contributed to and facilitated the resulting claims arising from Marco's breach. Specifically, had the mortgage been timely recorded, the existence of the 2006 mortgage would have been discovered when Marco attempted to transfer the property to Notoco Holdings, thereby preventing a transfer without prior satisfaction of or accounting for the 2006 note secured by the 2006 mortgage.

Finally, turning to Stewart Title's assertion of error in the amount of reduction of its damages, while Stewart Title contends that Marco presented no evidence to quantify a reduction in its award in the amount of $52,440.40, we note that but for the mortgagor's failure to ensure recordation of the 2006 mortgage (either itself or through its agent Stewart Title), Stewart Title would not have incurred the attorney's fees and expenses it now seeks to recover. Accordingly, we find no abuse of the trial court's discretion in reducing Stewart Title's damages award by this amount, which represents the attorney's fees purportedly incurred herein.

CONCLUSION

For the above and foregoing reasons, the September 28, 2015 partial summary judgment, limiting Marco Delcid's liability to Stewart Title to an amount "up to the value of [his] one-half interest in th[e] property but subject to further adjustment by virtue of, *inter alia*, the operation of Civil Code Article 2003," is hereby affirmed. Moreover, the July 8, 2016 judgment rendered against Marco Delcid and in favor of Stewart Title in the amount of $107,500.00, with legal interest thereon from the date of demand until paid, and in the amount of $52,440.40 for attorney's fees and costs, but further reducing Marco Delcid's liability to Stewart Title by $52,440.40, pursuant to LSA-C.C. art. 2003, for the

"proportion of Stewart Title's negligence" is hereby affirmed. Costs of this appeal are assessed against appellant, Stewart Title Guaranty Company.

AFFIRMED.