

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

*GH
JWS*

2016 CA 1179R

BLAKE AND COURTNEY FREEMAN, INDIVIDUALLY AND ON BEHALF
OF THEIR MINOR CHILDREN

VERSUS

FON'S PEST MANAGEMENT, INC. AND ABC INSURANCE COMPANY

Judgment rendered: OCT 24 2018

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On Appeal from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
No. 164252

The Honorable Randall L. Bethancourt, Judge Presiding

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Kent A. Lambert
Katie L. Dysart
Camalla M. Kimbrough
New Orleans, LA

Attorneys for Plaintiff/Appellant
Wells Fargo Bank, N.A.

Kevin P. Landreneau
Johanna R. Landreneau
Baton Rouge, LA

Attorneys for Defendants/Appellees
Fon's Pest Management, Inc., LIPCA,
Inc., and Certain Underwriters at
Lloyd's of London

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

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HOLDRIDGE, J.

Wells Fargo Bank, N.A., plaintiff and cross-claimant, appeals from a judgment of the trial court granting a motion for summary judgment and dismissing its claim against cross-claim defendants, Fon's Pest Management, Inc., LIPCA, Inc., and Certain Underwriters at Lloyds of London Policy No. LLB-17-17-215000962-02 (collectively, "Fon's") with prejudice. This case is before us on remand from the Louisiana Supreme Court. In an earlier unpublished decision, we dismissed this appeal of a motion for summary judgment dismissing claims against a cross-defendant as moot. In light of its action in a companion appeal, the Supreme Court vacated this court's decision and remanded the case for consideration of the appeal on the merits. Freeman v. Fon's Pest Management, Inc., 2016-1179, 2017 WL 6116648 (La. App. 1 Cir. 12/7/17), vacated, 2018-0035 (La. 4/16/18), 241 So.3d 286 (per curiam). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

The lawsuit underlying this appeal involved property located in Houma, Louisiana. The property was mortgaged by Blake and Courtney Freeman to Wells Fargo on September 4, 2009. The Freemans filed a lawsuit against Fon's and its insurer, seeking damages for injuries sustained from termite treatment to their home.¹ On April 10, 2013, the Freemans amended their petition to name Wells Fargo as a defendant.

On or about October 25, 2013, Wells Fargo proceeded to foreclose on the Freemans' home in a separate proceeding.² Thereafter, on April 30, 2014, Wells Fargo filed a cross-claim in this case against Fon's for damaging the property and sought a declaratory judgment recognizing its superior right to any and all

¹ Fon's also filed a motion for summary judgment against the Freemans, which was granted by the trial court and affirmed by this court. See Freeman, 232 So.3d at 615.

² The foreclosure proceedings were postponed pending this litigation.

proceeds of any claim that the Freemans had against Fon's up to the full amount of indebtedness that remained unpaid under the Freemans' mortgage.³ Fon's answered the cross-claim denying all allegations contained therein.

In response, Fon's filed a motion for summary judgment against Wells Fargo, contending that it "ha[d] produced no evidence that Fon's had a duty or contract with Wells Fargo or that Fon's breached the standard of care and, thus, Wells Fargo's claim against Fon's should be dismissed as a matter of law." Fon's further argued that no genuine issue of material fact existed regarding liability or causation and that it was entitled to summary judgment dismissing Wells Fargo's claim with prejudice.

On June 22, 2015, the trial court heard arguments from both parties on Fon's motion for summary judgment.⁴ On June 26, 2015, the trial court signed a judgment granting Fon's motion for summary judgment and dismissing all of Wells Fargo's claims with prejudice. Wells Fargo then devolutively appealed the June 26, 2015 judgment.⁵

On March 21, 2016, this Court issued, *ex proprio motu*, a rule to show cause whether the appeal should be dismissed due to an absence of a designation as a final judgment pursuant to La. C.C.P. art. 1915(B). On April 13, 2016, the trial court amended the judgment and designated it as a final judgment. The judgment further provided that "Wells Fargo Bank, N.A.'s cross-claims against Fon's Pest Management, Inc., LIPCA, Inc. and Certain Underwriters at Lloyds, London Syndicate are all DISMISSED WITH PREJUDICE[.]" The judgment was also

³ The record reveals that Wells Fargo's declaratory judgment claim was dismissed on June 26, 2015. We note that Wells Fargo did not raise this issue on appeal.

⁴ We note that the record lacks a transcript of the hearing on Fon's motion for summary judgment.

⁵ On May 31, 2016, this Court dismissed Wells Fargo's appeal of the June 26, 2015 judgment as untimely.

designated as a final judgment pursuant to La. C.C.P. art. 1915(B). From this judgment, Wells Fargo now appeals asserting the following two assignments of error:

- I. The Trial Court erred in ruling that Wells Fargo cannot state a cause of action against Fon's because no privity of contract exists between Wells Fargo and Fon's, given that Louisiana jurisprudence expressly provides that a mortgagee can maintain a cause of action against a third party for damages to property which impair the mortgagee's interest in that property.
- II. The Trial Court erred in granting Fon's Motion for Summary Judgment because Wells Fargo provided evidence that the Property was deemed "unfit to occupy" and "environmentally compromised" after it was treated for termites by Fon's, which refutes Fon's contention that it did not breach the standard of care of a Louisiana pest control operator in its treatment of the Property, thereby creating genuine issues of material fact precluding summary judgment.⁶

DISCUSSION

We review the granting or denial of a motion for summary judgment *de novo* under the same criteria governing the trial court's consideration of whether summary judgment is appropriate. LUBA Casualty Insurance Co. v. Hygenic Corporation, 47,395 (La. App. 2 Cir. 9/20/12), 131 So.3d 890, 892. A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, admitted for purposes of the summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).⁷

⁶ Wells Fargo has failed to brief its second assignment of error. Wells Fargo only restates its second assignment of error in the body of the brief. Therefore, we regard Wells Fargo's second assignment of error as abandoned. See Uniform Rules, Louisiana Courts of Appeal, Rule 2-12.4(B)(4); State v. Sealey, 2016-1389 (La. App. 1 Cir. 4/12/17) 2017 WL 1376469 **10.

⁷ Louisiana Code of Civil Procedure article 966 was amended and reenacted by 2015 La. Acts, No. 422, § 1, with an effective date of January 1, 2016. As this motion for summary judgment

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2); Janney v. Pearce, 2009-2103 (La. App. 1 Cir. 5/7/10), 40 So.3d 285, 288-289, writ denied, 10-1356 (La. 9/24/10), 45 So.3d 1078.

As set forth above, Fon's filed a motion for summary judgment alleging that Wells Fargo failed to present evidence to establish that Fon's was liable to it in either contract or tort law. The crux of Fon's argument is that Wells Fargo, the mortgagee, does not have a claim against Fon's, a third party that allegedly damaged the property, because no contractual relationship existed between them. Fon's further argues that Wells Fargo failed to present any evidence at the summary judgment hearing to establish liability or causation pursuant to La. C.C.P. art. 966(C).

Wells Fargo counters that the trial court erred in ruling that it cannot state a cause of action against Fon's because no privity of contract exists between the parties. Wells Fargo argues that by contracting with the Freemans to perform termite control services on the property, Fon's also entered into a relationship with Wells Fargo because it held a security interest in the property. In opposition to the motion for summary judgment, Wells Fargo submitted the mortgage on the

was filed before the effective date, we refer to the former version of the article in this case. *See* 2015 La. Acts, No. 422, §§ 2 and 3.

property, as well as a letter from Michael Wich, the Chief Building Official of Terrebonne Parish. The letter stated that the property was “deemed unfit to occupy” and “unsafe for its inhabitants.”

In order to be entitled to summary judgment, Fon’s, the mover, needed to only demonstrate the absence of factual support for one or more of the essential elements of Wells Fargo’s claim. After a *de novo* review of the record, this Court finds that Wells Fargo has no direct claim against Fon’s either in tort or in contract. Wells Fargo has failed to present any evidence that showed it entered into any type of contract with Fon’s. Because Wells Fargo has no contract with Fon’s and has never hired Fon’s to provide termite services on the property at issue, it has no privity of contract or claim against Fon’s. The fact that Fon’s had a contract with the Freemans, the owners of the property, does not create privity of contract between Wells Fargo and Fon’s. See Pearl River Basin Land & Dev. Co., L.L.C. v. State ex rel. Governor’s Office of Homeland Sec. & Emergency Preparedness, 2009-0084 (La. App. 1 Cir. 10/27/09), 29 So.3d 589, 593.

Wells Fargo also argues that it is entitled to assert a contractual claim as a third party beneficiary even if it had no privity of contract with Fon’s. Because Wells Fargo is not a party to the contract between the Freemans and Fon’s, Wells Fargo can only avail itself of the benefit of the contract if it is a third party beneficiary. See Joseph v. Hospital Service District No. 2 of Parish of St. Mary, 2005-2364 (La. 10/15/06) 939 So.2d 1206, 1211; J.D. Fields & Co., Inc. v. Nottingham Construction Co., LLC, 2015-0697 (La. App. 1 Cir. 11/9/15), 184 So.3d 713, 716.

A contracting party may stipulate a benefit for a third person called a third-party beneficiary. La. Civ. Code arts. 1978 and 1981. Under Louisiana law, such a contract for the benefit of a third party is referred to as a *stipulation pour autrui*.

Paul v. Louisiana State Employees' Group Benefit Program, 99-0897 (La. App. 1 Cir. 5/12/00), 762 So.2d 136, 140. A *stipulation pour autrui* is never presumed, and the intent of the contracting parties to stipulate a benefit in favor of a third party must be made manifestly clear. Id. Moreover, the party demanding performance of an obligation pursuant to a *stipulation pour autrui* bears the burden of proving the existence of this obligation. Id. The most basic requirement of a *stipulation pour autrui* is that the contract manifest a clear intention to benefit the third party; absent such a clear manifestation, a party claiming to be a third party beneficiary cannot meet his burden of proof. Id. at 142.

Based on the allegations stated in its petition, and the evidence submitted with the motion for summary judgment, Wells Fargo has failed to produce factual support that it was the third party beneficiary of a contract between the Freemans and Fon's. There is no evidence showing a clear intent between Fon's and the Freemans to stipulate a benefit in favor of Wells Fargo to create a *stipulation pour autrui*. More importantly, the contract between the Freemans and Fon's is not in the record. Thus, there is no documentary evidence in the record that evidences a *stipulation pour autrui* in Wells Fargo's favor.

Lastly, Wells Fargo cites Old Spanish Trail Credit Union v. Sexton, 2006-613 (La. App. 3 Cir. 11/2/06), 941 So.2d 709, 710, to argue that a mortgage holder may sue a third party for damages to the property that is mortgaged. However, a close reading of Old Spanish Trail Credit Union indicates that the court held that when a party has been damaged by "the conduct of another arising out of a contractual relationship, the former may have two remedies, a suit in contract, or an action in tort."⁸ Id. at 711. Since Fon's conduct did not arise out of a

⁸ In its brief to this court, Wells Fargo's citation of Old Spanish Trail Credit Union omits the language "arising out of a contractual relationship" which ultimately changes the meaning of the quoted statement. Such practice is not condoned by this court.

contractual relationship between Fon's and Wells Fargo, Old Spanish Trail Credit Union gives no support to Wells Fargo's argument. Similarly, Wells Fargo cites no jurisprudential or statutory basis which would allow a mortgagor to bring an action separate and distinct from the action of the owner for damages to the mortgaged property caused by an alleged breach of a contract between the owner and a third party. Wells Fargo may have a claim if it would have purchased the property at a sheriff's sale after a foreclosure (La. C.C.P. art. 2375), if it would have obtained an executory judgment through ordinary process against the Freemans for the amount owed on their note (La. C.C.P. arts. 2631 and 2644), or if it were an insured on the Freemans homeowners' policy. However, none of these facts were pled or alleged in the motion for summary judgment. Therefore, the trial court was correct in granting summary judgment in favor of Fon's and against Wells Fargo. The judgment of the trial court is affirmed.

DECREE

After a thorough *de novo* review of the record, we affirm the April 13, 2016 judgment granting Fon's Pest Management, Inc., LIPCA, Inc., and Certain Underwriters at Lloyds of London Policy No. LLB-17-17-215000962-02 motion for summary judgment and dismissing Wells Fargo's cross-claims with prejudice. All costs of this appeal are assessed to Wells Fargo Bank, N.A.

AFFIRMED.