

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 0367

BRADLEY TREE FARM, LLC

VERSUS

TIMOTHY PERRY

Judgment Rendered: NOV 05 2018

On Appeal from the 20th Judicial District Court
In and for the Parish of East Feliciana
State of Louisiana
No. 43792

Honorable Kathryn E. Jones, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

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JS

PENZATO, J.

This is an appeal by Timothy Perry of a trial court judgment rendered in favor of Bradley Tree Farm, LLC, against Mrs. Phyllis Ann Walker Perry, individually and as trustee of the Timothy Perry Testamentary Trust. For the following reasons, we dismiss this appeal.

FACTS AND PROCEDURAL HISTORY

Bradley Tree Farm, LLC (“Bradley”) owns a 50-acre tract of immovable property in East Feliciana Parish, Louisiana. The property is used as a tree farm and for hunting and is enclosed by a barbed wire fence. The property shares a common boundary along its southern and eastern side with property acquired by Timothy Perry (“Perry”) from the succession of his father. In November of 2014, Bradley discovered that several oak trees had been cut and removed from its property and part of the boundary fence along the common boundary it shared with Perry had been removed. Bradley made demand upon Perry pursuant to La. R.S. 3:4278.1¹ for three times the value of the timber cut and removed from the property and for replacement of the fence that was destroyed. Perry disputed that

¹ Louisiana Revised Statutes 3:4278.1 provides in pertinent part:

A. (1) It shall be unlawful for any person to cut, fell, destroy, remove, or to divert for sale or use, any trees, or to authorize or direct his agent or employee to cut, fell, destroy, remove, or to divert for sale or use, any trees, growing or lying on the land of another, without the consent of, or in accordance with the direction of, the owner or legal possessor, or in accordance with specific terms of a legal contract or agreement.

B. Whoever willfully and intentionally violates the provisions of Subsection A of this Section shall be liable to the owner...of the trees for civil damages in the amount of three times the fair market value of the trees cut, felled, destroyed, removed, or diverted, plus reasonable attorney fees and costs.

C. Whoever violates the provisions of Subsection A of this Section in good faith shall be liable to the owner...of the trees for three times the fair market value of the trees cut, felled, destroyed, removed, or diverted, if circumstances prove that the violator should have been aware that his actions were without the consent or direction of the owner, co-owner, co-heir, or legal possessor of the trees.

D. If a good faith violator of Subsection A of this Section fails to make payment under the requirements of this Section within thirty days after notification and demand by the owner...the violator shall also be responsible for the reasonable attorney fees and costs of the owner....

the fence was the correct boundary line and obtained a survey to establish the boundary line. Perry also tendered to Bradley a check for the actual timber damage. The parties were unable to resolve the dispute, and on October 9, 2015, Bradley filed a boundary action and an action for damages for wrongful timber cutting naming Perry as defendant. In response, Perry filed a motion for summary judgment seeking dismissal of Bradley's petition. In September of 2016, the parties entered into a boundary agreement establishing the common boundary between the Bradley and Perry properties. The agreement indicated that Perry was deceased, and Mrs. Phyllis Ann Walker Perry ("Mrs. Perry") appeared and executed the agreement as the Independent Executrix of his estate.

On February 23, 2017, the matter proceeded to a trial limited to Bradley's claim for wrongful timber cutting pursuant to La. R.S. 3:4278.1. At the start of the trial, Mrs. Perry was identified as Perry's legal representative. She was recognized by the trial court as a party and exempt from a sequestration order. Following the testimony and evidence presented, the trial court took the matter under advisement and, on March 27, 2017, issued reasons for judgment. In its reasons for judgment, the trial court noted that Perry died prior to the trial, his statements had not been preserved by deposition, and information regarding his subjective state of mind was limited to the accounts of other witnesses. Based on the testimony of Mrs. Perry and other witnesses, the trial court determined that while there was insufficient evidence to prove Perry harvested the timber in bad faith, the facts and circumstances established that he should have been aware that his actions were without Bradley's consent or direction, and Perry was therefore liable to Bradley for three times the fair market value of the trees cut and removed. The trial court further concluded that while Perry did appear to make a good faith effort to pay for the damage he caused, the payment he submitted was only for the fair market value of the trees, not triple the value as required by La. R.S. 3:4278.1, and Perry was

therefore liable for reasonable attorney fees and costs. A hearing was held on May 15, 2017, to establish attorney fees and costs.

On June 2, 2017, Bradley filed a motion to substitute Mrs. Perry for her deceased husband as the defendant in this case.² At hearings on September 6, 2017, and November 20, 2017, it was established that Perry died on July 1, 2016, after suit was filed. Mrs. Perry was appointed as executrix of his succession. By judgment of possession signed May 9, 2017, she was discharged as executrix, placed into possession of certain of Perry's assets, and recognized as the sole usufructuary of his residuary estate. The Timothy Perry Testamentary Trust was recognized as the naked owner of his residuary estate. Mrs. Perry is the trustee of that trust.

At the November 20, 2017 hearing, the trial court ruled that Mrs. Perry, in her individual capacity and in her capacity as trustee of the Timothy Perry Testamentary Trust, was the proper party to be substituted for the defendant, Perry, in this case. A judgment was signed on December 7, 2017, ordering that Mrs. Perry, individually and as trustee of the Timothy Perry Testamentary Trust, be declared the successor defendant. The December 7, 2017 judgment further ordered that Mrs. Perry, individually and as trustee of the Timothy Perry Testamentary Trust, pay to Bradley the sum of \$8,291.58 (representing triple damages for tree cutting and removal), attorney fees and costs in the amount of \$15,657.98, expert witness fees in the amount of \$500.00, and court costs in the amount of \$1,247.42, in accordance with the March 27, 2017 reasons for judgment and May 15, 2017 hearing to set attorney fees and costs.

The trial court granted a motion for suspensive appeal of the December 7,

² Pursuant to La. C.C.P. art. 801, when a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party. On ex parte written motion of any other party, the court may order the issuance of a summons to the legal successor to appear and substitute himself for the deceased party. La. C.C.P. art. 802.

2017 judgment purportedly on behalf of the deceased, Perry. Additionally, an appellant's brief was filed with this court, again purportedly on behalf of the deceased, Perry, alleging that:

1. The trial court erred in finding that Perry should have been aware that his actions were without Bradley's consent and therefore subject to triple damages under the provisions of La. R.S. 3:4278.1;

2. The trial court erred in awarding attorney fees under the provisions of La. R.S. 3:4278.1; and

3. The trial court erred in ruling against Perry, who was deceased, and then signing a judgment against Mrs. Perry, individually and as trustee of the Timothy Perry Testamentary Trust, when neither Mrs. Perry nor the Timothy Perry Testamentary Trust were named as defendants in the suit until after the case had been tried and the judgment was ready to be signed.

JURISDICTION

On March 20, 2018, this court, *ex proprio motu*, issued a rule to show cause order noting an apparent defect in the appeal. The rule to show cause order recognized that the December 7, 2017 judgment on appeal ordered that Mrs. Perry, individually and as trustee of the Timothy Perry Testamentary Trust, be declared the successor defendant in the lawsuit. The motion for suspensive appeal filed on January 5, 2018, however, was allegedly filed by Perry, who was no longer a party to the litigation. The parties were directed to show cause by briefs why the appeal should or should not be dismissed for this reason. On May 29, 2018, the rule to show cause was referred to this panel as the panel assigned to hear the appeal.

In response to the rule to show cause order, counsel allegedly representing Perry filed a memorandum arguing that a suspensive appeal was timely taken by Perry and this court can substitute the proper party defendant, citing La. C.C.P. art. 821, *First Homestead Federal Savings & Loan Association v. Henry*, 492 So. 2d

116 (La. App. 1 Cir. 1986), and Rule 2-9, Uniform Rules-Courts of Appeal.³ In addition, Mrs. Perry filed a “Motion to Amend” in this court, seeking to add herself, individually and as trustee of the Timothy Perry Testamentary Trust, as a party to the appeal filed on behalf of Perry. On May 29, 2018, the motion to amend was referred to this panel assigned to hear the appeal.

A party wishing to appeal an adverse judgment must obtain an order of appeal. There can be no appeal absent an order of appeal because the order is jurisdictional; this lack of jurisdiction can be noticed by the court on its own motion at any time. *Noyel v. City of St. Gabriel*, 2015-1890 (La. App. 1 Cir. 9/1/16), 202 So. 3d 1139, 1142, writ denied, 2016-1745 (La. 11/29/16), 213 So. 3d 392. See also La. C.C.P. art. 2088.

A judgment cannot be set aside or changed on appeal except as to those who are parties to the appeal. As a consequence, parties who fail to appeal cannot be heard, on appeal by others, to complain of errors below, and can demand no relief. *Darouse v. Mamon*, 201 So. 2d 362, 364 (La. App. 1 Cir. 1967).

Unlike the facts of *First Homestead*, 492 So. 2d 116, and the code of civil procedure articles and appellate court rules cited therein, this case does not involve a party who died while his case was pending on appeal. See La. C.C.P. art. 801 and *Benware v. Means*, 98-0203 (La. App. 1 Cir. 5/12/00), 760 So. 2d 641, 645, writ denied, 2000-2215 (La. 10/27/00), 772 So.2d 650 (wherein it was observed that “[w]e do, however, **when a motion is properly filed**, have the authority to substitute a party when a party dies **during the pendency of an appeal** as set forth in the Uniform Rules for the Louisiana Courts of Appeal” (emphasis added)). Rather, judgment was rendered in this case against Mrs. Perry, individually and as

³ The substitution of parties in an action pending in a court of appeal is governed by the rules of the appellate court. La. C.C.P. art. 821. Rule 2-9, Uniform Rules-Courts of Appeal, provides that “[t]he rules and procedures for substitution of parties provided by LSA-C.C.P. Arts. 801-807 shall regulate the substitution of parties.”

trustee of the Timothy Perry Testamentary Trust, who was the correct party to appeal the judgment. The suspensive appeal purportedly taken by Perry, a deceased person, was insufficient to invoke this court's jurisdiction. Thus, we have no jurisdiction over this appeal or the motion to amend.⁴

CONCLUSION

For the foregoing reasons, we dismiss the appeal purportedly filed by Timothy Perry and the motion to amend filed by Phyllis Ann Walker Perry. Costs of the appeal are assessed against Phyllis Ann Walker Perry, individually and as trustee of the Timothy Perry Testamentary Trust.

APPEAL DISMISSED; MOTION TO AMEND DISMISSED.

⁴ On May 18, 2018, Mrs. Perry, individually and as trustee of the Timothy Perry Testamentary Trust, filed a motion and order for peremptory exception of res judicata in this court. Mrs. Perry contends for the first time in this motion that the boundary agreement executed in September of 2016 "should have concluded this matter as to all issues which were included in the trial and subsequent Judgment of December 7, 2017." As we have found that we have no jurisdiction over this appeal, we do not have jurisdiction to consider this motion.