

NOT DESIGNATED FOR PUBLICATIONS

GEORGE S. HESNI II AND PEGGY F.
BODENHEIMER

NO. 04-CA-258

VERSUS

FIFTH CIRCUIT

CAROLYN T. HORNYAK, WIFE OF AND
STEPHEN J. HORNYAK AND URSULA H.
RAMM

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 592-200, DIVISION "C"
HONORABLE ALAN J. GREEN, JUDGE PRESIDING

OCTOBER 26, 2004

OCT 26 2004

CLARENCE E. MCMANUS
JUDGE

Panel composed of Judges Sol Gothard,
Susan M. Chehardy and Clarence E. McManus

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COUNSEL FOR PLAINTIFF/APPELLANT

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REVERSED

CEM
Sj
SME

This matter involves a dispute over a right of passage or predial servitude for the property owned by plaintiffs at 407 Huey P. Long Ave in Gretna, Louisiana. The trial court granted summary judgment in favor of defendants, Carolyn & Stephen Hornyak and Ursula Ramm. For the reasons which follow, we reverse the trial court's judgment and remand the matter to the trial court for further proceedings.

Prior to 1987, Carolyn T. Hornyak and Stephen J. Hornyak owned three adjacent properties at 401 Huey P. Long Ave., 405 Huey P. Long Ave. and 407 Huey P. Long Ave. All three properties were zoned for light commercial. A paved back yard area exists behind the three buildings on the properties. The paved area is accessible only by an entrance on 4th Street, which is behind the building on the 401 Huey P. Long Ave. property. In August 1987, the Hornyaks sold 407 Huey P. Long Ave. to Caren Morgan and Kerry Kissel, doing business as Morgan & Kissel. Morgan & Kissel then sold the property to Peggy and Ronald

Bodenheimer and George Hesni, II in March 1998. From July 1987 until August 1998, when they sold the property, Morgan & Kissel executed lease agreements with the Hornyaks for use of the driveway and parking area. After they purchased the property, the Bodenheimers and Hesni allegedly executed lease agreements with the Hornyaks from May 1998 until August 2000 for use of the driveway and parking area.

In February 2002, the Hornyaks erected a fence separating 405 Huey P. Long Ave. from 407 Huey P. Long Ave. This fence obstructed the use of the driveway for the occupants of 407 Huey P. Long Ave. Then in October 2002, the Hornyaks sold the properties at 401 and 405 Huey P. Long Ave. to Ursula H. Ramm.

On March 18, 2003, Peggy Bodenheimer and George Hesni filed a Petition for Declaratory Judgment seeking to declare a predial right of passage over the paved portions of 401 and 405 Huey P. Long Ave. for the benefit of 407 Huey P. Long Ave. Both the Hornyaks and Ramm were named as defendants. The Hornyaks filed an exception of no right of action arguing that they were no longer the owners of the properties referred to in the petition, therefore, no relief can be afforded to the plaintiffs by them. All defendants then filed an exception of prescription alleging that the suit was filed past the prescriptive period of one year. The alleged disturbance, which was the erection of the fence, took place in February 2002. The Petition for Declaratory Judgment was not filed until March 18, 2003. Defendants argued that the action is a possessory action which prescribes after one year. The trial court found the exception of prescription to be well founded and it gave plaintiffs forty-five days to amend their petition to remove the grounds of defendants' exception. The trial court further overruled the exception of no right of action.

Plaintiffs then filed a First Amended Petition for Declaratory Judgment. In this petition, plaintiffs contended a predial servitude came into existence in 1987 when 407 Huey P. Long Ave. was alienated when it was sold to Morgan & Kissel separate of the other two properties. Plaintiffs further alleged that the predial servitude was used for 15 years without interruption until the erection of the fence. Plaintiffs complained that defendants are in possession of their right of passage and have refused their access to Fourth Street, which is a public road. Plaintiffs contend that defendants have no legal cause for that refusal.

Defendants thereafter filed a motion for summary judgment. By this motion, defendants argued first, that the plaintiffs have no right to claim possession of any kind to a real right affecting 401 and 405 Huey P. Long Ave.; second, the plaintiffs have neither a possessory or petitory claim and if they ever had one it prescribed; third, the plaintiffs had limited possession of access to their property across 401 and 405 Huey P. Long Ave. pursuant to a lease agreement which expired; fourth, the plaintiffs cannot prove they acquired an interest by acquisitive prescription; fifth, a property owner has a right to erect a fence on his property; sixth, the plaintiffs have no right to traverse 401 and 405 Huey P. Long Ave.; and finally, the plaintiffs are not “land locked” as they claim.

A hearing on the motion for summary judgment was held on October 29, 2003 and the trial court granted the defendants’ motion for summary judgment and dismissed plaintiffs’ petition. Plaintiffs then filed for supervisory writs with this Court. We declined to exercise supervisory jurisdiction because the judgment is not interlocutory. It is a final, appealable judgment. Plaintiffs thereafter filed a Petition for Appeal.

On appeal, plaintiffs allege that there are genuine issues of material fact as to the existence of leases and whether the parking lot behind 407 Huey P. Long Ave. is enclosed. Plaintiffs also argue that they had support for all elements necessary

for a declaratory judgment and support to establish the existence of a predial servitude in favor of 407 Huey P. Long Ave.

At the trial court hearing on the motion for summary judgment on October 29, 2003, the defendants introduced the lease agreements between the Hornyaks and Morgan & Kissel and the lease agreements between the Hornyaks and Bodenheimer and Hesni. Copies of those lease agreements were allegedly entered as exhibits at this hearing, but with objections by Bodenheimer and Hesni. The plaintiffs argued that they had never seen the lease agreements. Only copies of the lease agreements were allegedly entered as exhibits, not the originals.

The appeal record contains the exhibits from the trial court hearing. A detailed list of the exhibits, which was prepared by counsel for defendants, was included and indicates there are 13 separate lease agreements. A review of these exhibits reveals only 8 complete lease agreements and the first page of a 9th lease agreement. Two of the alleged lease agreements which are missing from the record are lease agreements between the Hornyaks and Hesni and Bodenheimer for May 1998 to April 1999 and the lease agreement between those same parties for September 1999 until August 2000. This is the period of time most relevant to this case.

The trial court found that no genuine issues of material fact exist in this case and granted summary judgment. We do not agree with the trial court's findings. First, there is the issue of the missing lease agreements. If these exhibits were not part of the trial court record then the trial court could not truly decide whether the lease agreements existed between the parties. Second, even if the lease agreements exist, they create an issue of fact as to whether there was a lease between the parties for the driveway, or whether a right of passage or predial servitude existed separate from any lease agreement.

As a result, we find there are genuine issues of material fact and summary judgment was not appropriate in this case. Therefore, we reverse the trial court's granting of the motion for summary judgment in favor of the defendants.

REVERSED

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
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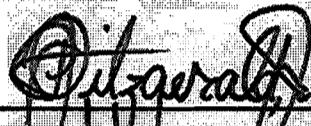
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JUDGES

CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **OCTOBER 26, 2004** TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:



PETER J. FITZGERALD, JR.
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04-CA-258

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