

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0238

PLEASURE BEACH, L.L.C.

VERSUS

DARRYL SMITH



Judgment Rendered: -SEP 13 2010

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2005-14552

Honorable William J. Crain, Presiding

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* * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

GUIDRY, J.

In this action seeking specific performance of a contract to purchase and sell immovable property, the defendant, Darryl Smith, appeals from the judgment of the trial court in favor of plaintiff, Pleasure Beach, L.L.C., ordering specific performance of the purchase agreement and ordering that the sale of the property occur within thirty days of notice of judgment. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 15, 2005, Darryl Smith and Pleasure Beach, L.L.C. (Pleasure Beach) entered into an agreement to purchase and sell real property consisting of approximately 145 acres in St. Tammany Parish. According to the agreement, Smith was to purchase the property from Pleasure Beach for \$640,000 within thirty days following expiration of a ninety-day inspection period. On October 12, 2005, Pleasure Beach forwarded a letter to the closing attorney, indicating that it had not received instructions from the attorney as to the date and time for the sale. The letter further indicated that if Smith did not purchase the property at issue by October 12, 2005, he would be in default under the terms and conditions of the purchase agreement. Because it was Pleasure Beach's understanding at that time that Smith did not wish to go forward with the purchase, the letter concluded by stating that it was to serve as a formal notice of default.

Thereafter, on October 24, 2005, Pleasure Beach filed a petition for specific performance and damages, requesting that the court issue a judgment ordering Smith to purchase the subject property for the price outlined in the purchase agreement and to pay legal interest, attorney fees, and ancillary damages. Smith answered Pleasure Beach's petition and raised four defenses to the action, including failure of cause, unmerchantability of title, change in value of the property, and extension of the inspection period. On September 7, 2006, Pleasure

Beach filed a motion for summary judgment, asserting that Smith's defenses were without merit and that Pleasure Beach was entitled to summary judgment as a matter of law.

Following a hearing on Pleasure Beach's motion, the trial court rendered judgment in favor of Pleasure Beach, granting its motion, ordering Smith to purchase the subject property within thirty days of the date of signing of the judgment, and awarding legal interest from the date of judicial demand until paid on the purchase price of \$640,000, plus reasonable attorney's fees and costs. Smith appealed from the trial court's judgment, and in Pleasure Beach, L.L.C. v. Smith, 07-0823 (La. App. 1st Cir. 12/21/07)(unpublished opinion), writ denied, 08-0641 (La. 5/9/08), 980 So. 2d 696, this court found, based on the evidence contained in the record, that a genuine issue of material fact existed as to whether there was failure of cause of the purchase agreement and reversed the trial court's judgment granting the motion for summary judgment in favor of Pleasure Beach.¹ The matter was remanded to the trial court for further proceedings.

Thereafter, the parties proceeded to trial, following which the trial court signed a judgment in favor of Pleasure Beach and against Smith, ordering specific performance of the purchase agreement and ordering the sale of the property to occur within thirty days of notice of judgment. Smith now appeals from this judgment.

DISCUSSION

In Louisiana, appellate courts review both law and facts. La. Const. Art. V, Sec. 10(B). The applicable standard of review for a factual finding is the

¹ This court specifically noted that Pleasure Beach had asserted many facts regarding Mr. Smith's knowledge, his exercise of due diligence during the inspection period, and the viability of commercial use of the property and had attached several documents purporting to support those facts to its original memorandum in support of its motion for summary judgment and its rebuttal memorandum. However, because these documents were not sworn to or certified, nor were they attached to a deposition or affidavit, we found they were not of sufficient evidentiary quality as to be afforded any weight on the motion for summary judgment. Pleasure Beach, L.L.C. v. Smith, 07-0823 (La. App. 1st Cir. 12/21/07)(unpublished opinion).

manifestly erroneous or clearly wrong standard. To reverse a factfinder's determination under this standard of review, an appellate court must undertake a two-part inquiry: (1) the court must find from the record that a reasonable factual basis does not exist for the finding of the trier of fact; and (2) the court must further determine the record establishes the finding is clearly wrong. Stobart v. State, Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). Ultimately, the issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Stobart, 617 So. 2d at 882. If the factual findings are reasonable in light of the record reviewed in its entirety, a reviewing court may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Stobart, 617 So. 2d at 882-883. Accordingly, where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous. Stobart, 617 So. 2d at 883.

Nonetheless, where documents or objective evidence so contradict a witness's story, or the story itself is so internally inconsistent or implausible on its face that a reasonable factfinder would not credit the witness's story, a reviewing court may well find manifest error. Rosell v. ESCO, 549 So. 2d 840, 844-845 (La. 1989). Where such factors are not present, however, and a factfinder's determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. Rosell, 549 So. 2d at 844-845. The credibility determinations of the trier of fact are subject to the strictest deference under the manifest error-clearly wrong standard. Theriot v. Lasseigne, 93-2661 (La. 7/5/94), 630 So. 2d 1305, 1313.

On appeal, Smith asserts that Pleasure Beach is not entitled to specific performance of the purchase agreement because, the title is not merchantable, there was a failure of cause or mutual error in the cause of the contract, there was a

shortage in acreage, and Pleasure Beach abandoned its rights under the contract by entering into a second purchase agreement with a third party.

Our review of the record reveals that the trial court was presented with conflicting testimony as to the knowledge of the parties during the real estate transaction at issue. As is evident from the trial court's reasons for judgment, it chose to credit the testimony presented by Pleasure Beach, finding that Smith, either directly or through his agents, had knowledge of the dredging and lake bottom ownership issue concerning the property. This is a reasonable determination based on the record in its entirety, and therefore, we find Smith's arguments as to failure of cause, error, and shortage of acreage to be without merit.

Further, with regard to merchantability of title, the trial court found that the portions of the property inundated by water were subject to reclamation, pursuant to La. R.S. 41:1701 *et seq.*, and that had Smith proceeded to sale, he would have acquired those rights from Pleasure Beach, citing La. Const. Art. IX, Sec. 3 and La. R.S. 41:1702. The record supports the finding that Smith was aware that the majority of the land he was purchasing was under water, as evidenced by his visual inspections of the property and his purchase of two similar lots in a separate transaction, and was also aware that the land under Lake Pontchartrain would need to be reclaimed for his intended purpose. Any statutory restriction on reclamation for commercial purposes was, according to the trial court, a feasibility or suitability issue, which Smith should have resolved during the ninety-day inspection period.

The record demonstrates that Smith, a sophisticated buyer who had been in the multi-family real estate business for over twenty years, was given an opportunity to have the land surveyed, met with an engineering firm regarding his proposed project, and met with local governmental officials. At no time did Smith invoke the title curative provisions by notifying Pleasure Beach of any title defects. Rather, he told his agent, Joe Kramer, to proceed with the agreement to purchase.

Further, though Smith cites a letter questioning bridge access after Hurricane Katrina, the access issue was resolved by November 24, 2005, within any purported curative period, and yet Smith still failed to close on the property.

The trial court made clear in its reasons for judgment that “[t]he factual circumstances of this case are critical to the Court’s findings.” From our review of the record, we cannot say that the trial court was manifestly erroneous in finding that the reclamation process would not affect the merchantability of title under the circumstances of this case.

Finally, as to Smith’s argument that Pleasure Beach abandoned its rights under the purchase agreement, because it entered into a second purchase agreement with a third party, the trial court specifically found that neither Smith nor anyone on his behalf ever notified Pleasure Beach of any merchantability of title problems, nor did he or anyone on his behalf ever notify Pleasure Beach that he was invoking the title curative provisions of the purchase agreement. The trial court stressed that the purchase agreement had no provision for title insurance, had no contingency for financing, and had no contingency for obtaining permits, all of which were issues raised in the letter concerning bridge access. Because the title curative provisions were not invoked, and Smith was placed in default on October 12, 2005, any argument that Pleasure Beach had abandoned its rights under the contract by thereafter entering into a purchase agreement with a third party is without merit.

Accordingly, we find no error in the trial court’s determination that Smith failed to establish a defense for his non-performance under the purchase agreement, and that Pleasure Beach is entitled to specific performance. We further adopt and attach hereto the trial court’s written reasons for judgment, which correctly and succinctly set forth the facts and legal issues involved in this case. *See attached written “Reasons for Judgment.”*

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court, ordering specific performance of the purchase agreement. All costs of this appeal are assessed to appellant, Darryl Smith.

We issue this memorandum opinion in compliance with Uniform Rules – Courts of Appeal, Rule 2-16.1B

AFFIRMED.