NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0832

GERALD JOHN ROUSSEAU

VERSUS

REBECCA DUFRENE BADEAUX AND PATRICIA BADEAUX ROUSSEAU

Judgment Rendered: October 29, 2010

Appealed from the
Twenty-third Judicial District Court
In and for the Parish of Assumption, Louisiana
Docket Number 28992

Honorable Alvin Turner, Jr., Judge Presiding

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Leslie J. Clement, Jr. **Thibodaux, LA**	**Counsel for Plaintiff/Appellant,** **Gerald John Rousseau**
Ricky L. Babin **Gonzales, LA**	**Counsel for Defendants/Appellees,** **Rebecca Dufrene Badeaux and** **Patricia Badeaux Rousseau**

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BEFORE: WHIPPLE, McDONALD AND McCLENDON, JJ.

McClendon, J. concurs and assigns reasons.

WHIPPLE, J.

This is an appeal from a judgment dismissing with prejudice plaintiff's petition to rescind the sale, and recover ownership, of certain immovable property. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

By act of cash sale dated March 14, 2002, Gerald John Rousseau, plaintiff herein, and his then-wife, Patricia Badeaux Rousseau, conveyed two pieces of immovable property located in Assumption Parish to Rebecca Dufrene Badeaux, Patricia's mother. The purchase price stated in the act of sale was $126,000.00, for both properties.

Approximately three years later, on May 19, 2005, Mr. Rousseau filed a petition to rescind the sale and to recover ownership of the immovable property, naming Mrs. Rousseau and Mrs. Badeaux as defendants. In the petition, Mr. Rousseau contended that he and Mrs. Rousseau, with whom he was in the midst of divorce proceedings at the time this petition was filed, had executed the act of sale "to effectuate the transfer of the record ownership" to Mrs. Badeaux in order to protect against potential loss of the property because a "third party was contemplating the filing of a lawsuit against [Mr. "Rousseau]." Mr. Rousseau further contended that he understood that the transfer "was not a true sale but was simply a 'paper transaction' to protect his assets" and that the purchase price was never paid.[1] He further contended that when he later requested that Mrs. Badeaux transfer the property back to him, she refused to do so. Thus, Mr.

[1]Mr. Rousseau further contended in his petition that he was "functionally illiterate" and "taking heavy doses of medication," and that, as a result, he did not fully consider the ramifications of transferring the record ownership of the property to Mrs. Badeaux. However, the trial court, after considering the conflicting evidence presented at trial, obviously rejected this contention.

Rousseau contended that because the sale was in fact a simulation, he was entitled to judgment rescinding and dissolving the simulated sale. In a supplemental petition, Mr. Rousseau further alleged that Mrs. Rousseau and Mrs. Badeaux had conspired with each other to defraud him of the ownership of his property, and, thus, he contended that he was entitled to damages and attorney's fees in addition to "the return of the purchase price."[2]

Following a bench trial, the trial court found that Mr. Rousseau had failed to prove that the act of sale transferring the immovable property at issue was a simulation. Thus, the trial court rendered judgment in favor of the defendants, dismissing Mr. Rousseau's claims. From this judgment, Mr. Rousseau appeals, contending that the trial court erred in: (1) requiring Mr. Rousseau to bear the burden of proving that the act of sale was a simulation, instead of shifting the burden to the defendants and requiring the defendants to prove that the sale was not a simulation; (2) failing to consider whether the defendants provided evidence to rebut the presumption that the act of sale was a simulation; and (3) failing to consider whether Mr. Rousseau should be allowed to recover damages and attorney's fees.

DISCUSSION

On appeal, Mr. Rousseau notes that there are two legal presumptions, one codal and one jurisprudential, which may apply in situations where a party seeks to prove a simulation. The codal presumption found in LSA-C.C. art. 2480 provides that when the thing sold remains in the possession of the seller, the sale is presumed to be a simulation. Additionally, he notes

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[2]We are unable to determine precisely what Mr. Rousseau is requesting when he seeks return of the purchase price in that, as one of the sellers, the purchase price would have been paid **to him**, not by him. Additionally, we note that Mr. Rousseau had previously averred in the original petition that the purchase price for the immovable property had never been paid.

that in Smith v. Smith, 239 La. 688, 700, 119 So. 2d 827, 831 (1960), the Louisiana Supreme Court held that where the evidence establishes facts and circumstances that create " highly reasonable doubts" as to the honesty of the sale, a prima facie case of simulation is established and the burden is shifted to the defendant to prove that a valid sale existed.

Notably, while Mr. Rousseau admits that he exercised "little, if any" corporeal possession of the property after the sale, he nonetheless asserts that the codal presumption of simulation should apply. Alternatively, he asserts that the circumstantial evidence established a "highly reasonable doubt" as to the reality of this sale and, thus, that the jurisprudential presumption of simulation should have been applied. Therefore, he contends that the trial court erred in failing to shift the burden to defendants to rebut the presumption of simulation.

Louisiana Civil Code article 2025 defines a simulation as a contract which the parties mutually agree "does not express the true intent of the parties." An absolute simulation is a contract intended to have no effects between the parties. LSA-C.C. art. 2026. "An example of an absolute simulation is an act whereby the parties make an apparent sale when they actually intend that the vendor will remain owner." LSA-C.C. art. 2026, Revision Comments—1984, Comment (a).

In an absolute simulation, sometimes called a pure simulation or a non-transfer, the parties only pretend to transfer the property from one to the other, but in fact both the transferor and the transferee intend that the transferor retain ownership of the property. Scoggins v. Frederick, 98-1814, 98-1815, 98-1816 (La. App. 1st Cir. 9/24/99), 744 So. 2d 676, 685, writ denied, 99-3557 (La. 3/17/00), 756 So. 2d 1141. When this type of simulation is successfully attacked, the true intent of the parties is revealed,

that is, that no transfer has in fact taken place. Peacock v. Peacock, 28,324 (La. App. 2nd Cir. 5/8/96), 674 So. 2d 1030, 1033.

Ordinarily, whether or not a transaction is simulated is a matter to be decided in the light of the circumstances of each case. Milano v. Milano, 243 So. 2d 876, 879 (La. App. 1st Cir. 1971). A simulation may be established through a counterletter, a separate writing that expresses the true intent of the parties. LSA-C.C. art. 2025. However, a simulation also may be proved by indirect or circumstantial evidence since, by its inherent nature, a simulation often only admits of circumstantial proof. Wilson v. Progressive State Bank & Trust Company, 446 So. 2d 867, 869 (La. App. 2nd Cir. 1984).

Nonetheless, with regard to Mr. Rousseau's challenge to the sale of immovable property herein, we note that the law imposes a strict rule of evidence in contests between the **parties** to an alleged simulation—only written proof will suffice to establish the true agreement where one party disputes it. Scoggins, 744 So. 2d at 686. Thus, the apparent transferor may not succeed in attacking a sale as an absolute simulation in the absence of a counterletter. LSA-C.C. art. 2026, Revision Comments—1984, Comment (b); see Sherman v. Nehlig, 154 La. 25, 30, 97 So. 270, 272 (1923); Scoggins, 744 So. 2d at 685.[3] The law requires written proof of the true will

[3]We note that in Sonnier v. Conner, 43,811 (La. App. 2nd Cir. 12/3/08), 998 So. 2d 344, 356-358, writ denied, 2009-0309 (La. 4/3/09), 6 So. 3d 773, the Second Circuit concluded that the purported transferor of immovable property who retained corporeal possession after the alleged sale was entitled to the LSA-C.C. art. 2480 presumption that the sale was a simulation and did not have to produce a counterletter to prove a simulation. However, in the instant case, Mr. Rousseau acknowledged at trial that he had not exercised corporeal possession over either tract of land since the sale at issue, thus negating the application of any presumption of a simulation pursuant to LSA-C.C. art. 2480.

Moreover, even if we were to conclude that, pursuant to LSA-C.C. art. 1848, circumstantial and testimonial evidence were proper herein to prove a simulation, we would find no manifest error in the trial court's determination that Mr. Rousseau failed to carry his burden of proving a simulation. Contrary to Mr. Rousseau's assertion, the evidence presented at trial, while conflicting, was insufficient to establish "a highly

of the parties because the courts have been unwilling to allow themselves to be open to a potential contest of veracities every time property is sold. Scoggins, 744 So. 2d at 686.

Accordingly, the jurisprudence recognizes that in contests between the purported vendor and the purported vendee, no questions of fact are presented, but only questions of law. Scoggins, 744 So. 2d at 686; Ridgedell v. Kuyrkendall, 98-1224 (La. App. 1st Cir. 5/18/99), 740 So. 2d 173, 179. Indeed, in contests between the purported vendor and the purported vendee of immovable property, counterletters are admissible evidence, but the testimony of witnesses is not. LSA-C.C. art. 2026, Revision Comments—1984, Comment (b); Scoggins, 744 So. 2d at 686.

In the instant case, conflicting testimony as to the intent of the parties and the circumstances surrounding the sale was presented at trial. However, Mr. Rousseau was unable to offer into evidence any writing purporting to be a counterletter to the sale in question. Accordingly, we are bound to conclude that no question of fact is presented herein, and Mr. Rousseau failed, as a matter of law, to establish that the act of sale in question was a simulation. For these reasons, we find no merit to Mr. Rousseau's assignments of error.

CONCLUSION

For the above and foregoing reasons, the February 28, 2010 judgment of the trial court, dismissing Mr. Rousseau's claims, is affirmed. Costs of this appeal are assessed against plaintiff, Gerald John Rousseau.

AFFIRMED.

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reasonable doubt" as to the reality of the sale. Thus, no shifting of the burden of proof would have been required or warranted.

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McCLENDON, J., concurs and assigns reasons.

Given plaintiff's failure to establish corporeal possession and his inability to produce any writing expressing the true intent of the parties, I agree with the result reached by the majority. Therefore, I respectfully concur.