

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1694

WALTER J. HORRELL

VERSUS

LISA C. MATTHEWS

—
**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 2006-10962, Division "G"
Honorable William J. Crain, Judge Presiding**
—

**Walter J. Horrell
Covington, LA**

**Plaintiff-Appellant
In Proper Person**

**Kathleen D. Lambert
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New Orleans, LA**

**Attorney for
Defendant-Appellee
Lisa C. Matthews**

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered May 6, 2011

WJH
KL
SM

PARRO, J.

Walter J. Horrell appeals a judgment granting a motion for summary judgment in favor of Lisa C. Matthews, the provisional administratrix of his father's succession, and dismissing his possessory action concerning certain immovable property that was his father's separate property. For the following reasons, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Edward A. Horrell, Sr. (Mr. Horrell) died in New Orleans in 1993, leaving a surviving spouse and five adult children, one of whom is the appellant in this case, Walter J. Horrell (Walter). Lisa C. Matthews was appointed provisional administratrix of Mr. Horrell's intestate succession on July 3, 1997. This appeal is just the latest in a seemingly interminable series of legal skirmishes involving this succession.¹ The suit underlying this appeal is a possessory action filed by Walter on March 7, 2006, concerning immovable property at 711 West 19th Street in Covington, Louisiana, where he and his wife reside. The petition alleged that he had been undisturbed in the actual, physical, corporeal possession of the property for many years, had maintained the property, and had paid taxes and insurance on it. It further alleged that on or about August 11, 2005, Matthews sent him a notice to vacate the property within five days. He sought an injunction to prevent Matthews from instituting eviction proceedings against him,² recognition of his right to maintain possession of the immovable property, reimbursement of all funds he had expended for maintenance of the property, and damages. In an amended petition, he alleged another disturbance when, on two occasions, an individual working for Matthews came onto the enclosed, fenced-in

¹ See Succession of Horrell, 95-1598 (La. App. 4th Cir. 9/11/96), 680 So.2d 725, writ denied, 96-2841 (La. 1/31/97), 687 So.2d 403; Succession of Horrell, 97-2115 (La. App. 4th Cir. 3/25/98), 709 So.2d 1069, writ denied, 98-1023 (La. 5/29/98), 720 So.2d 669; Horrell v. Horrell, 99-1093 (La. App. 1st Cir. 8/15/01) (on rehearing), 808 So.2d 363, writ denied, 01-2546 (La. 12/7/01), 803 So.2d 971; In re Succession of Horrell, 03-0482 (La. App. 4th Cir. 11/12/03), 859 So.2d 318 (table), writ denied, 04-0477 (La. 4/8/04), 870 So.2d 273; Horrell v. Matthews, 06-1838 (La. App. 1st Cir. 8/15/07), 962 So.2d 512 (table), 2007WL2318134 (unpublished); Matthews v. Horrell, 06-1973 (La. App. 1st Cir. 11/7/07), 977 So.2d 62; In re Succession of Horrell, 07-1533 (La. App. 4th Cir. 10/1/08), 993 So.2d 354, writs denied, 08-2880 and 08-2889 (La. 3/6/09), 3 So.3d 482; Horrell v. Barrios, 09-2199 (La. App. 1st Cir. 7/21/10), 41 So.3d 62 (table), 2010WL2844342 (unpublished). A detailed description of the history of this litigation is provided in Matthews, 977 So.2d 62.

² Matthews filed a "Rule to Evict Occupants," which was set for hearing on March 9, 2006, and was temporarily halted by Walter's petition in this case.

property and attempted to get into the house.

Matthews filed an answer, admitting Walter's possession of the property, but claiming he was only a "precarious possessor," because his possession was at all times with the permission of or on behalf of the owner, Mr. Horrell's succession (the succession). She acknowledged sending Walter a notice to vacate the premises. She further contended that any claim for reimbursement of his expenses must be brought in the court with jurisdiction over the succession proceedings. Matthews also filed a reconventional demand, claiming the property was owned by the succession, because Mr. Horrell had obtained his ownership interest in the property through inheritance from his parents. Matthews claimed that by sending the notice to vacate the property, Walter's permission to possess the property had been revoked by and on behalf of the succession. In a third-party demand naming Walter's wife, Edna Horrell, as defendant, Matthews claimed Edna was living with her husband on the property in question and was also a precarious possessor of the property whose permission to continue living there was revoked by the notice to vacate from and on behalf of the property owner, the succession.

Following a hearing on May 17, 2006, concerning Walter's motion for a preliminary injunction, the district court denied the motion and ordered him to file any reimbursement claims he might have with the administratrix of the succession. That judgment was affirmed by this court on appeal. See Horrell, 2007WL2318134 (unpublished).³

After the judgment was rendered at the May 17 hearing, Matthews filed a motion to dismiss her reconventional and third-party demands, which, by asserting the claim of ownership of the property, would have converted the suit to a petitory action. See LSA-C.C.P. art. 3657. Walter and his wife had never been served with these demands, and the court granted the motion to dismiss by an order signed June 21, 2006. On October 11, 2006, Matthews filed a motion for summary judgment, contending that as a matter of law, Walter was not entitled to enjoin the separate eviction proceeding, and that an

³ Matthews' motion to evict Walter and his wife was granted by the trial court on June 13, 2006. That judgment was reversed by this court on appeal. See Matthews, 977 So.2d 62.

eviction proceeding is not a "disturbance" that forms a basis for a possessory action. Walter opposed the motion and also filed a motion to recuse the district court judge who was handling the case. Eventually, the motion to recuse was heard before another judge and was denied on May 9, 2007. By the time the motion for summary judgment was rescheduled for hearing, this court's judgments of August 15, 2007, affirming the denial of injunctive relief, and November 7, 2007, reversing the judgment of eviction, had been rendered. See Horrell, 2007WL2318134 (unpublished), and Matthews, 977 So.2d 62.⁴ A hearing on the motion for summary judgment was finally held on March 4, 2010, and the court signed a judgment granting the motion and dismissing Walter's suit on March 19, 2010. This appeal followed.

Walter contends the district court erred in failing to recognize that the former possessory action had been converted to a petitory action by the defendant's assertion of ownership in the answer, a reconventional demand, and a third-party demand; erred in treating this action as a possessory action, rather than as a petitory action, and in ruling that the assertions of ownership in the answer alone were insufficient to convert the possessory action to a petitory action; and erred in granting the motion for summary judgment and dismissing his action.

APPLICABLE LAW

Succession occurs at the death of a person. LSA-C.C. art. 934. Succession is the transmission of the estate of the deceased to his successors. LSA-C.C. art. 871. In the absence of a valid testamentary disposition, the undisposed property of the deceased devolves by operation of law in favor of his descendants. See LSA-C.C. arts. 880 and 888. Immediately at the death of the decedent, universal successors acquire ownership and possession of the estate. LSA-C.C. arts. 935 and 936. When a person, at his decease, leaves several heirs, each of them becomes an undivided proprietor of the effects of the succession, for the part or portion coming to him, which forms among the heirs a community of property. See LSA-C.C. arts. 797 and 888; see also Matthews,

⁴ Another judgment had also been rendered while this motion was pending, which, among other things, held Walter in contempt of court for refusing to allow Matthews' agents to enter the house in order to inventory and appraise certain movable property belonging to the estate. That portion of the judgment was affirmed on appeal. See In re Horrell, 993 So.2d 354. Also pending was a suit brought by Edna Horrell against the appraiser. See Barrios, 41 So.3d 62.

977 So.2d at 74.

A succession representative is a fiduciary with respect to the succession, and has the duty of collecting, preserving, and managing the property of the succession in accordance with law. LSA-C.C.P. art. 3191. A succession representative is deemed to have possession of all property of the succession. LSA-C.C.P. art. 3211. Prior to the qualification of a succession representative, a successor may exercise rights of ownership with respect to his interests in a thing of the estate as well as his interest in the estate as a whole. If a successor exercises his rights of ownership after the qualification of a succession representative, the effect of that exercise is subordinate to the administration of the estate. LSA-C.C. art. 938. Matthews, 977 So.2d at 74-75.

The petitory action is one brought by a person who claims the ownership, but who is not in possession, of immovable property or of a real right therein, against another who is in possession or who claims the ownership thereof adversely, to obtain judgment recognizing the plaintiff's ownership. LSA-C.C.P. art. 3651; George M. Murrell Planting & Mfg. Co. v. Dennis, 06-1341 (La. App. 1st Cir. 9/21/07), 970 So.2d 1075, 1079. To obtain a judgment recognizing his ownership of immovable property, the plaintiff in a petitory action shall prove that he has acquired ownership from a previous owner or by acquisitive prescription, if the court finds that the defendant is in possession thereof. LSA-C.C.P. art. 3653(1).

The possessory action is one brought by the possessor of immovable property or of a real right therein to be maintained in his possession of the property or enjoyment of the right when he has been disturbed, or to be restored to the possession or enjoyment thereof when he has been evicted. LSA-C.C.P. art. 3655; Poirrier v. Dale's Dozer Service, Inc., 99-2593 (La. App. 1st Cir. 11/3/00), 770 So.2d 531, 535. Although an actual eviction is a disturbance in fact that gives rise to a possessory action, an eviction proceeding is a disturbance in law that asserts the right of ownership in an action or proceeding, which is an exception to the right to institute a possessory action. See LSA-C.C.P. art. 3659. Therefore, an eviction proceeding is not a "disturbance" that will serve as a basis for a possessory action. Jackson v. Campco of Monroe, Inc., 623

So.2d 1380, 1383 (La. App. 2nd Cir. 1993). A precarious possessor—one whose exercise of possession is with the permission of or on behalf of the owner—may not bring the possessory action against the person for whom he possesses. See LSA-C.C. arts. 3437 and 3440; Hirschfeld v. St. Pierre, 577 So.2d 747, 750 (La. App. 1st Cir. 1991). Nor may a precarious possessor acquire the property by acquisitive prescription. See LSA-C.C. art. 3477. When the defendant in a possessory action asserts title in himself, he thereby converts the suit into a petitory action and judicially confesses the possession of the plaintiff in the possessory action. See LSA-C.C.P. art. 3657; see also McCurley v. Burton, 03-1001 (La. App. 1st Cir. 4/21/04), 879 So.2d 186, 191.

A co-owner cannot prevent other co-owners from making use of property owned in indivision. Therefore, that co-owner's possession cannot divest other co-owners of their rights of use and ownership. See LSA-C.C. art. 802; see also Hart v. Weinstein, 98-1398 (La. App. 3rd Cir. 3/3/99), 737 So.2d 72, 74, writ denied, 99-0939 (La. 5/14/99), 745 So.2d 11; Succession of Miller, 95-1272 (La. App. 4th Cir. 5/8/96), 674 So.2d 441, 443-44, writ denied, 96-1717 (La. 10/4/96), 679 So.2d 1390. Furthermore, the possession by a co-owner inures to the benefit of the other co-owners, as owners in indivision cannot acquire title by prescription against one another. Lee v. Jones, 224 La. 231, 237, 69 So.2d 26, 28 (1953); Towles v. Heirs of Morrison, 428 So.2d 1029, 1031 (La. App. 1st Cir. 1983). One exception to the general co-owner rule is allowed. Louisiana Civil Code article 3439 states, in pertinent part, that: "A co-owner, or his universal successor, commences to possess for himself when he demonstrates this intent by overt and unambiguous acts sufficient to give notice to his co-owner." See Southern Natural Gas Co. v. Naquin, 167 So.2d 434, 438 (La. App. 1st Cir. 1964).

DISCUSSION

Walter filed this possessory action, alleging that he had been in actual, physical, corporeal possession of the property at issue for many years and had been disturbed in his quiet and peaceful possession by a notice to vacate sent to him by Matthews, as provisional administratrix of his father's succession. A supplemental and amending petition alleged that an agent of Matthews had disturbed his peaceable possession of

the property by coming onto the enclosed, fenced property and attempting to enter his home on two occasions.

This court may notice *sua sponte* the peremptory exception raising the objection of the failure to disclose a cause of action. See LSA-C.C.P. art. 927. The possessory action is brought by the possessor of immovable property to be maintained in his possession of the property when he has been disturbed. See LSA-C.C.P. art. 3655. To maintain the possessory action, the possessor must allege that he had possession of the immovable property at the time a disturbance occurred; that he or his ancestors in title had such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud; that the disturbance was one in fact or in law, as defined in Article 3659; and that the possessory action was instituted within a year of the disturbance. LSA-C.C.P. art. 3658. A disturbance in fact is an eviction or any other physical act that prevents the possessor of immovable property from enjoying his possession quietly or throws any obstacle in the way of that enjoyment. A disturbance in law is the execution, recordation, registry, or continuing existence of record of any instrument that asserts or implies a right of ownership or to the possession of immovable property, or any claim or pretension of ownership or right to the possession thereof except in an action or proceeding, adversely to the possessor of such property or right. LSA-C.C.P. art. 3659.

When Walter filed this possessory action, there had been no "disturbance" in fact or in law that would serve as a basis for such an action. An eviction proceeding is not a disturbance that would give rise to a possessory action. See LSA-C.C.P. arts. 3658(3) and 3659; see also Jackson, 623 So.2d at 1383. The later amendment of his petition also did not allege a disturbance justifying a possessory action, because the attempted entry onto the property by Matthews' agent was the result of a judicial action or proceeding in which the court handling the succession had appointed a special process server to serve Walter and had ordered Matthews to inventory and appraise certain movables in Walter's home that belonged to his father's estate. See LSA-C.C.P. art. 3659. Also, this court ruled that eviction was not available to Matthews in this case.

Matthews, 977 So.2d 62. Therefore, we conclude, as did the trial court, that Walter failed to allege facts that would form the basis of a possessory action.

Walter argues that these observations concerning the possessory action are no longer relevant, because Matthews converted the matter to a petitory action by asserting in her answer, reconventional demand, and third-party demand that the succession owned the property. See LSA-C.C.P. art. 3657. Therefore, he claims the possessory action was abated and a new action, the petitory action, was initiated by Matthews. Consequently, he contends Matthews had the burden of proving that the succession had acquired ownership from a previous owner or by acquisitive prescription. Matthews, however, argues that the mention of the succession's ownership in the answer was only to establish that Walter was a precarious possessor whose possession was at all times with the permission of or on behalf of the owner, the succession. See LSA-C.C. arts. 3437 and 3438. She also contends that, since she dismissed her reconventional demand and third-party demand before Walter had been served with these pleadings, the matter was never converted to a petitory action.

The trial court found that Matthews' answer to the possessory action was not sufficient to convert this matter to a petitory action, because it was a general denial, with the exception of the allegations concerning his precarious possession. The court further stated that the statements regarding the succession's ownership were necessary assertions as part of Matthews' general denial. We agree with this conclusion. Louisiana Code of Civil Procedure article 3656(A) states that a plaintiff in a possessory action must be one who possesses for himself. A precarious possessor, whose exercise of possession is with the permission of or on behalf of the owner, may not bring the possessory action against the person for whom he possesses. See LSA-C.C. arts. 3437 and 3440; Hirschfeld, 577 So.2d at 750. The statements in Matthews' answer relative to the succession's ownership of the property at issue were necessary to assert that Walter was a precarious possessor whose possession of the property was with the permission of and on behalf of the succession. If those statements were borne out by the evidence, he could not bring the possessory action against the succession.

However, even if Walter were correct and this matter had been converted to a petitory action, it is still the law of this case that the late Mr. Horrell's succession is intestate and that Walter is one of his father's five adult children, all of whom are the heirs to and co-owners in indivision of the Covington property that was their father's separate property. See LSA-C.C. arts. 880 and 888; Matthews, 977 So.2d at 72-73; Horrell, 808 So.2d at 369. Although it is not "owned by" the succession, the property was part of Mr. Horrell's estate and is now part of the succession proceeding, to be administered by the administratrix. See LSA-C.C. arts. 871, 872, and 938(B); Matthews, 977 So.2d at 74. The sworn detailed descriptive lists filed in the succession proceeding establish that Mr. Horrell owned the property before his death and, because it was his separate property and he died intestate, ownership of the property passed immediately to his heirs. See LSA-C.C.P. art. 3653. Until the property is partitioned or a judgment of possession is executed, it remains in the succession and is co-owned in indivision by Mr. Horrell's five children. Therefore, even if we were to accept Walter's claim that this matter was converted to a petitory action by Matthews' pleadings, there is nothing further to prove in order to establish ownership of the property under the current factual evidence in the record.

Based on the undisputed facts that are the law of the case, Matthews was entitled to judgment as a matter of law. Accordingly, we find no error in the district court's judgment granting Matthews' motion for summary judgment and dismissing Walter's case.

CONCLUSION

For the above stated reasons, we affirm the judgment of the district court and assess all costs of this appeal against Walter J. Horrell.

AFFIRMED.