

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1894

SHELLEY R. BRIGNAC

VERSUS

TOWER CREDIT, INC. AND BINNING BONDING
COMPANY, L.L.C. AND STEPHEN BINNING
PROPERTIES, L.L.C.

Judgment Rendered: September 21, 2012

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On Appeal from the
18th Judicial District Court,
In and for the Parish of West Baton Rouge,
State of Louisiana
Trial Court No. 38610

Honorable James J. Best, Judge Presiding

* * * * *

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Properties, L.L.C.

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BEFORE: WHIPPLE, McCLENDON, AND HIGGINBOTHAM, JJ.

DAVE McCleendon, J. dissents.

HIGGINBOTHAM, J.

Plaintiff, Shelley R. Brignac, appeals the trial court's granting of a motion for summary judgment in favor of defendants, Tower Credit, Inc., Binning Bonding Company, LLC, and Binning Properties, LLC. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

In August 2008, as part of her divorce settlement, Shelly R. Brignac acquired her home located at 4464 Rebelle Lane in Port Allen, Louisiana. In order to pay her husband for his equity in the home, she financed the property with American Thrift & Finance Plan, LLC, doing business as State Farm Acceptance (State Farm), by executing a mortgage on the home. The mortgage required monthly payments of \$1,200.00. According to the petition, after making about two payments, Brignac defaulted on her mortgage. Upon Brignac's default in January 2009, State Farm assigned the loan to Tower Credit, Inc. (Tower Credit). After the transfer of the loan to Tower Credit, Stephen Binning, president of Tower Credit, came to Brignac's home to discuss her ability to pay the note. Shortly after, foreclosure proceedings were initiated, and a sheriff's sale date was set for May 8, 2009.

Subsequent oral negotiations took place between Brignac and Binning, and it was agreed that Binning would help Brignac lower her monthly note. Ultimately, a "Cash Sale" and "Bond for Deed" were executed before Deborah Berthelot, notary public, with the holder listed as Binning Bonding Company, LLC (Binning Bonding) a holding company in which Stephen Binning is an officer. In the cash sale, Brignac sold her home to Binning Bonding for \$165, 000.00 with the Bond for Deed allowing her to purchase it back for \$636.66 per month until paid in full. Brignac's remaining balance on the bond for deed was \$70,943.81.

On February 3, 2010, Brignac was notified by Tower Credit that she was in default on the bond-for-deed contract and if the arrears were not paid within 45 days, the bond for deed would be cancelled in accordance with La. R.S. 9:2945.¹ On March 23, 2010, Binning cancelled the bond for deed and Brignac received a five-day eviction notice on April 15, 2010.

On May 27, 2010, Brignac filed suit in the 18th Judicial District Court for rescission of the contract and consequential damages alleging fraud under La. C.C. arts. 3079 and 1953 as well as a claim under the Louisiana Unfair Trade Practices and Consumer Protection Law. She named Tower Credit Inc., Binning Properties, LLC, and Binning Bonding Company, LLC as defendants. Specifically, Brignac alleges Binning misled her into believing he was helping her restructure her loan with Tower Credit, when she was actually selling her home to Binning Bonding. Stephen Binning, executor of the cash sale and bond for deed, was not personally named as a defendant in the matter. However, he has an interest in Tower Credit, Inc., Binning Bonding Company, LLC, and Binning Properties, LLC, all of which have been named as defendants.

On September 17, 2010, the defendants filed a motion for summary judgment contending that there is no genuine issue of material fact, and therefore, Brignac's claims against defendants should be dismissed as a matter of law. Brignac opposed the summary judgment, relying on her affidavit and essentially arguing that there are genuine issues of material fact regarding whether her consent to the contract was vitiated by fraud and that discovery was not complete. The matter was submitted on briefs in lieu of a hearing and was taken under advisement

¹ Louisiana Revised Statute 9:2945 A provides:

If the buyer under a bond for deed contract shall fail to make the payments in accordance with its terms and conditions, the seller, at his option, may have the bond for deed cancelled by proper registry in the conveyance records, provided he has first caused the escrow agent to serve notice upon the buyer, by registered or certified mail, return receipt requested, at his last known address, that unless payment is made as provided in the bond for deed within forty-five days from the mailing date of the notice, the bond for deed shall be cancelled.

by the trial court. In a judgment signed on April 4, 2012, the trial court granted the defendants' motion for summary judgment. It is from this judgment Brignac appeals, citing the following assignments of error:

1. The trial court improvidently granted summary judgment even though the posture of the case had raised serious disputed issues of both fact and law.
2. The trial court granted a summary judgment although there was still outstanding discovery. Plaintiff was attempting to take the depositions of the principals of the defendants' companies, but the court would not allow time for these discovery requests.
3. The trial court took the matter under advisement for almost seven months despite the mandate of La. C.C. P. Art. 966 D that the judgment should be rendered within a reasonable time.²

DISCUSSION

Brignac contends that the trial court erred in granting defendants' motion for summary judgment as there exists genuine issues of material fact. It is her contention that the defendants, specifically Stephen Binning in his capacity with Tower Credit, told her he was restructuring her loan and not that his company, Binning Bonding was purchasing her home. In her affidavit, Brignac stated had she known she was selling her home, she would not have signed the contract and would have looked at other options.

An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Smith v. Our Lady of the Lake Hosp., Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 750. A motion for summary judgment is a procedural device used to avoid a full scale trial when

² Under Rule 2-12.4 of the Uniform Rules, Courts of Appeal, all specifications or assignments of error must be briefed, and the appellate court may consider as abandoned any specification or assignment of error that has not been briefed. This issue was not briefed; therefore, we consider it abandoned.

there is no genuine issue of material fact. **West v. Clarendon Nat'l Ins. Co.**, 99-1687 (La. App. 1st Cir. 7/31/00), 767 So.2d 877, 879. The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2); **Lee v. Grimmer**, 99-2196 (La. App. 1st Cir. 12/22/00), 775 So.2d 1223, 1225. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); **Perry v. City of Bogalusa**, 00-2281 (La. App. 1st Cir. 12/28/01), 804 So.2d 895, 899.

The movants, in this case, defendants, have the burden of proof on the motion for summary judgment. La. C.C.P. art. 966(C)(2). However, because defendants will not bear the burden of proof at trial, their burden does not require them to negate all essential elements of Brignac's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to her claim. **Id.** If defendants meet this initial burden of proof, the burden shifts to Brignac to produce factual support sufficient to establish that she will be able to meet her evidentiary burden at trial. **Id.** If Brignac fails to meet this burden, there is no genuine issue of material fact, and defendants are entitled to summary judgment. La. C.C.P. art. 966.

As provided in La. C.C.P. art. 967(B), Brignac may not rest on the mere allegations of her pleading in response to a properly made and supported motion for summary judgment; rather her response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. If she does not so respond, summary judgment, if appropriate, shall be rendered against her. La. C.C.P. art. 967(B).

Material facts are those that potentially insure or preclude recovery, affect the litigant's success, or determine the outcome of a legal dispute. **Gatlin v. Kleinheitz**, 2009-0828 (La. App. 1st Cir. 12/23/09), 34 So.3d 872, 875, writ denied, 2010-0084 (La. 2/26/10), 28 So.3d 280. Because the applicable substantive law determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Lemann v. Essen Lane Daiquiris, Inc.**, 2005-1095 (La. 3/10/06), 923 So.2d 627, 632. Brignac's claim is based on her contention that her consent to the cash sale and bond for deed was vitiated by fraud.

"Consent may be vitiated by error, fraud, or duress." La. C.C. art.1948. "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction." La. C.C. art.1953. "Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill. This exception does not apply when a relation of confidence has reasonably induced a party to rely on the other's assertions or representations." La. C.C. art.1954. "Error induced by fraud need not concern the cause of the obligation to vitiate consent, but it must concern a circumstance that has substantially influenced that consent." La. C.C. art.1955. "In pleading fraud ..., the circumstances constituting fraud ... shall be alleged with particularity." La. C.C.P. art. 856. However, "[f]raud need only be proved by a preponderance of the evidence and may be established by circumstantial evidence." La. C.C. art.1957.

There are three basic elements to an action for fraud against a party to a contract: (1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause loss or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance

substantially influencing the victim's consent to the contract. **Shelton v. Standard/700 Associates**, 2001-0587 (La. 10/16/01), 798 So.2d 60, 64.

Typically, subjective facts such as intent, motive, malice, knowledge or good faith are inappropriate for summary judgment determination. **Murphy's Lease & Welding Serv. Inc. v. Bayou Concessions Salvage, Inc.**, 780 So.2d 1284, 1289 (La. App. 3rd Cir 2001), writ denied, 793 So.2d 195 (La. 2001). However, summary judgment can be accomplished when there is no issue of material fact concerning the alleged intent. **Carter v. BRMAP**, 591 So.2d 1184, 1189 (La. App. 1st Cir.1991).

Defendants contend that there are no genuine issues of material fact remaining for trial and thus, summary judgment is appropriate. In support of the motion for summary judgment defendants attached the affidavits of Stephen Binning and Deborah Berthelot, the credit sale, and the bond for deed. In his affidavit, Binning stated that on at least two occasions prior to the execution of the cash sale, he explained to Brignac that she would be transferring the property to Binning Bonding. Deborah Berthelot, the attorney who closed the cash sale and bond-for-deed transaction at issue, stated in her affidavit that "she explained the nature of the transaction to Shelly R. Brignac including the fact that the cash sale document transferred the subject property." She further stated that Brignac was given an opportunity to read and ask questions about the documents.

In support of defendants' positions, they extensively cite to the case of **Sonnier v. Boudreaux**, 95-1227 (La. App. 1st Cir. 5/10/96), 673 So.2d 713, as it presents similar facts to the case at bar. The **Sonnier** case concerned an elderly man who developed an infatuation with a nineteen-year-old girl, Ms. Boudreaux. During the course of their relationship, Mr. Sonnier bought a vehicle for Ms. Boudreaux to drive. Paperwork was signed by both parties that specifically referred to Mr. Sonnier as the lien holder of the vehicle. The dispute arose when,

upon the termination of the relationship, Ms. Boudreaux asserted her belief that the vehicle had been given to her as a gift. Ms. Boudreaux claimed she did not realize the content of the documents which she signed. In holding in favor of Mr. Sonnier, the Court stated:

Although the law does not compel people to read or to inform themselves of the contents of instruments which they may choose to sign, except in certain exceptional cases, it holds them to the consequences, in the same manner and to the same extent as though they had exercised those rights. **Ray v. McLain**, 106 La. 780, 31 So. 315 (1901). Signatures to obligations are not mere ornaments, and it is incumbent upon the party signing such obligation to examine it before signing it in ignorance of its contents. **Tweedel v. Brasseaux**, 433 So.2d 133 (La.1983). To overcome the presumption of validity, the burden of proof is upon the party signing the obligation to establish with reasonable certainty that he or she has been deceived. **Id.**

Sonnier v. Boudreaux, 673 So.2d at 717-18.

Assuming that Binning told Brignac that he was restructuring her loan, it would have been easy for Brignac to read the unambiguous agreement which she signed and realize that she was selling her home to Binning Bonding. The cash sale between Brignac and Binning Bonding is entitled at "CASH SALE" at the top and refers to Brignac as the SELLER and Binning Bonding as the PURCHASER. It specifically provided that Brignac as seller "sells and delivers" unto Binning Bonding the property located at 4464 Rebelle Lane in Port Allen. The Bond for Deed refers to the parties in the opposite, with Binning Bonding as the SELLER and Brignac as the PURCHASER. The Bond for Deed set forth that if, and only if, purchaser makes all payments prescribed in the documents, the seller will convey the property back to her. After careful review of the record in this case, we find the truth could have been ascertained without difficulty, inconvenience, or special skill. Brignac has not demonstrated that a relationship of confidence existed between the parties that would have reasonably induced her to rely on Binning's assertions or representation, nor has she alleged particular facts sufficient to

overcome the clear language of the documents which she signed. In reviewing the evidence presented by the defendants, we find they met their burden of pointing out that Brignac would be unable to prove her consent to the contract was vitiated by fraud, including, specifically, that she could not have ascertained the truth without difficulty. Thus, the burden shifted to Brignac to produce factual support sufficient to establish that she would be able to meet her evidentiary burden of proving fraud at trial.

In opposition to the motion for summary judgment, Brignac provided three affidavits including her own. In her affidavit, Brignac says that Binning failed to inform her that he was no longer dealing with her in his capacity as President of Tower Credit and that he told her that he would restructure her loan, when he intended to substitute a cash sale and bond for deed. She stated she asked Binning a couple of questions and he told her that this was the way they had to do it to get her the loan. It is Brignac's contention that Binning withheld certain disclosure documents in an attempt to keep her from understanding and possibly taking alternative action, and that he has essentially stolen her property for payment of less than half of its value. After review of the evidence presented in opposition to the motion for summary judgment, we find Brignac provided no evidence to prove that she could not have ascertained the truth without difficulty or special skill; thus there remain no genuine issues of material fact for trial and summary judgment was appropriate.

In Brignac's second assignment of error she contends that the trial court did not allow her adequate time to obtain her discovery requests, namely the depositions of Binning and Berthelot. The mere contention of an opponent that she lacks sufficient information to defend a motion for summary judgment because of movant's failure to comply with discovery is insufficient to defeat the motion. **Crocker v. Levy**, 615 So.2d 918, 920 (La. App. 1st Cir. 1993). However, when

the plaintiff alleges sufficient reasons why additional evidence to oppose the summary judgment motion could not be produced, it is an abuse of discretion for the trial court to deny the plaintiff's request for a continuance. **Migliore v. Kinsley**, 531 So.2d 1091, 1094 (La. App. 4th Cir. 1988).

It is not an abuse of the district court's wide discretion in discovery matters to entertain a motion for summary judgment before discovery has been completed. It is within the trial court's discretion to render a summary judgment or require further discovery. **Thomas v. Willis-Knighton Medical Center**, 43,176 (La. App. 2d Cir. 4/30/08), 981 So.2d 807, 814, writ denied, 2008-1183 (La. 9/19/08), 992 So.2d 932. While parties must have a fair opportunity to conduct discovery and present their claims, there is no absolute right to delay action on a motion for summary judgment until discovery is complete. **Welch v. East Baton Rouge Parish Metropolitan Council**, 2010-1532 (La. App. 1st Cir. 3/25/11), 64 So.3d 249, 254; **Green v. State Farm General Ins. Co.**, 35,775 (La. App. 2d Cir. 4/23/02), 835 So.2d 2, 6. A suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of material fact, and the plaintiff does not show a probable injustice in proceeding with the suit. **Welch**, 64 So.3d at 254.

Initially, we note that Brignac did not file a motion for continuance or for additional discovery before the district court took defendants' motion for summary judgment under advisement. There was no evidence presented that Brignac had initiated any discovery that had not been answered. Brignac did attach to her opposition to summary judgment a letter to defendants' attorney requesting depositions of Ms. Berthelot and Mr. Binning, as well as the attorney's response stating when they would be available. Their availability was after the due date given by the court for Brignac's summary judgment memorandum, however, there was nothing in the record to indicate she requested more time from the court in

order to complete discovery or did anything further to attempt to take the requested depositions. Further, the letter requesting the depositions was dated three months after the motion for summary judgment was filed. Thus, we find Brignac was given a fair opportunity to present her case. Under these circumstances, the district court did not abuse its discretion in proceeding with the motion for summary judgment, based on the pleadings, documents, and affidavits in the record.

CONCLUSION

In summary, we find that defendants met their burden of pointing out that Brignac could not show that she was unable to ascertain the truth without difficulty, inconvenience, or special skill. Brignac failed to submit proof that she would be able to meet her evidentiary burden of proving fraud. Therefore, defendants are entitled to summary judgment as a matter of law. Accordingly, we affirm the judgment of the trial court. All costs of the appeal are assessed to plaintiff/appellant, Shelley Brignac.

AFFIRMED.