

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 2367

CLAY CROWELL

VERSUS

ANDREW THIBODEAUX & SUCCESSION OF CLAMAE PREVOST
CROWELL & KRISTIE MCADAMS

Judgment Rendered: November 2, 2012

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 524,631

The Honorable Wilson Fields, Judge Presiding

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BEFORE: WHIPPLE, McCLENDON, AND HIGGINBOTHAM, JJ.

 J. McClendon. J. McClendon and Assigns returns.

WHIPPLE, J.

This matter is before us on appeal by plaintiff, Clay Crowell, from a judgment of the trial court dismissing his claims and rendering judgment in favor of defendants, Andrew Thibodeaux and the Succession of John Crowell. For the following reasons, the judgment of the trial court is affirmed.

FACTS AND PROCEDURAL HISTORY

John and Clamae Crowell resided in Pride, Louisiana, on property that they owned for over forty years.¹ Clay Crowell is the only surviving child of John and Clamae Crowell. According to John's deposition testimony, John and Clamae entered an oral agreement with Andrew Thibodeaux to sell the property to Thibodeaux for the purchase price of \$48,000.00.² According to John, pursuant to their agreement with Thibodeaux, Thibodeaux paid the Crowells \$48,000.00 and was put in possession of the eastern half of the property, while John and Clamae retained and exercised a lifetime usufruct over the western half of the property. Clamae Crowell died intestate on May 6, 1997, before the Crowells executed a formal act of sale with Thibodeaux.

On June 24, 2002, John executed an Act of Cash Sale, conveying his interest in the property to Thibodeaux and his wife, Deborah Johnston Thibodeaux, for \$48,000.00 and reserving a lifetime usufruct pursuant to their earlier oral agreement. On March 31, 2004, Thibodeaux filed a petition in Clamae's succession proceeding against John, as the administrator of Clamae's succession, seeking a judgment compelling John to execute the documents necessary to convey Clamae's interest in the property in accordance with the

¹The entire property consisted of three parcels of land identified by legal descriptions in the record herein. For convenience, we refer to same as "the property" herein.

²As will be more fully shown, the deposition was given in an earlier proceeding in which the buyer sought to enforce his rights to perfect a sale against Clamae's succession.

parties' earlier oral agreement.³ After a hearing, judgment was rendered in Clamae's succession suit on May 18, 2004, ordering John, in his capacity as administrator of the Succession of Clamae Crowell, to execute an act of sale or other conveyance for the purpose of formally conveying to Thibodeaux Clamae's interest in the property which they had earlier orally agreed to sell to Thibodeaux and for which Thibodeaux had previously paid the Crowells \$48,000.00. On May 11, 2004, before the rendition of the judgment, John, in his capacity as administrator of Clamae's succession, executed an Act of Cash Sale, formally conveying Clamae's interest in the subject property to Thibodeaux and his wife for \$48,000.00 pursuant to their agreement with Thibodeaux. Shortly thereafter, John Crowell died testate on May 19, 2004.

On September 21, 2004, Clay Crowell filed the suit giving rise to the instant appeal. A separate proceeding entitled "Petition to Annul Judgment and Set Aside Act of Sale,"⁴ named Andrew Thibodeaux, the unopened Succession of Clamae Prevost Crowell, and Kristie McAdams⁵ as defendants therein. Clay filed an amended petition on October 10, 2008, adding the Succession of Clamae Prevost Crowell as a plaintiff in the matter and further adding the Succession of John C. Crowell as a defendant in the proceedings.⁶

In his original petition, Clay alleged that the May 18, 2004 judgment in Clamae's succession proceedings and the May 11, 2004 act of sale conveying

³Clamae's succession proceeding was filed in the Nineteenth Judicial District Court for East Baton Rouge Parish and was assigned Probate Number 79794.

⁴A final judgment obtained by fraud or ill practices may be annulled. LSA-C.C.P. art. 2004. However, such a judgment is not an absolute nullity. Thus, to annul a judgment obtained by fraud or ill practices, a direct action, *i.e.*, a new and separate proceeding, must be brought for that purpose in the court which rendered the judgment. Such a nullity may not be asserted collaterally. Regions Bank v. Cabinet Works, L.L.C., 2011-748 (La. App. 5th Cir. 4/10/12), 92 So. 3d 945, 961, quoting Succession of Schulz, 622 So. 2d 693, 695 (La. App. 4th Cir. 1993), writ denied, 631 So. 2d 1161 (La. 1994).

⁵Kristie McAdams was identified in the petition as the "surety of John Crowell."

⁶John's succession proceeding was filed in the Nineteenth Judicial District Court for East Baton Rouge Parish and assigned Probate Number 84427.

Clamae's interest in the property to Thibodeaux should be annulled, vacated, and set aside for the following reasons:

- a) The Judgment was rendered based upon error, fraud or ill practice.
- b) The Judgment was in error as the testimony of Clamae Crowell was never adduced as required by law to corroborate her agreement to the alleged oral sale of the property to Andrew Thibodeaux.
- c) The deposition testimony of John Crowell claiming Clamae Crowell transferred her interest to the property to Andrew Thibodeaux by oral sale effected before her death is in direct contradiction of the facts asserted by John Crowell in the Detailed Descriptive List signed by him which identified the property as an asset of the Estate of Clamae Crowell as of November 23, 2003.
- d) Clamae Crowell did not [receive] the consideration stated in the Act of Sale.
- e) The Act of Sale should be vacated based on lesion beyond moiety.
- f) Clay Crowell[,] the sole surviving heir of his mother[,] Clamae Prevost Crowell, was an indispensable party to the proceeding.
- g) John Crowell and Andrew Thibodeaux contrived to deny Clay Crowell the inheritance of his mother.
- h) The Detailed Descriptive List was never amended.
- i) Clay Crowell was denied his right of due process by the failure of Andrew Thibodeaux and John Crowell, as administrator, to provide him notice of the proceedings which resulted in the deprivation of the property classified in the Detailed Descriptive List as an asset of the Estate of his mother, Clamae Prevost Crowell.

Thibodeaux responded by filing an answer and reconventional demand against Clay, contending that Clay's allegations of fraud were made without probable cause, causing Thibodeaux to be defamed, for which Thibodeaux sought

an award of damages and attorney's fees pursuant to LSA-C.C.P. art. 2004.⁷

The matter was heard before the trial court herein on January 25, 2011. At that time, the parties entered the following stipulations: that Kristie McAdams be dismissed from the proceedings; that Clay Crowell is the sole surviving heir of John and Clamae Crowell; and that John and Clamae Crowell exercised a usufruct of the property at issue that was granted to them under the oral sale and subsequent cash sale, which usufruct was exercised up until the time of their respective deaths. Additionally, Clay introduced a copy of the June 24, 2002 act of sale from John Crowell to Thibodeaux; a copy of the May 11, 2004 act of sale from the Succession of Clamae Crowell to Thibodeaux; a copy of the "Succession of Clamae Crowell" record; and a copy of the "Succession of John Crowell" record. Thibodeaux introduced the deposition testimony of John Crowell.

After taking the matter under advisement, on April 20, 2011, the trial court orally ruled in favor of the defendants, Thibodeaux and the Succession of John Crowell, adopting the defendants' post trial brief as its reasons for judgment. A written judgment was signed by the trial court on June 13, 2011, which ordered that: (1) Kristie Whitehead McAdams be dismissed from the proceedings with prejudice; (2) all claims by plaintiff, Clay Crowell, against all other defendants in this proceeding be dismissed at plaintiff's costs; (3) all other claims made in this proceeding be dismissed at the costs of the claimant making same; and (4) the

⁷Louisiana Code of Civil Procedure article 2004, entitled, "Annulment for vices of substance; peremption of action," provides as follows:

- A. A final judgment obtained by fraud or ill practices may be annulled.
- B. An action to annul a judgment on these grounds must be brought within one year of the discovery by the plaintiff in the nullity action of the fraud or ill practices.
- C. The court may award reasonable attorney fees incurred by the prevailing party in an action to annul a judgment on these grounds.

Clerk of Court for the Parish of East Baton Rouge cancel and erase from the public records of the parish the inscription of any Notice of Pendency of Action or Notice of Lis Pendens filed or recorded in the public record by or on behalf of the plaintiff, Clay Crowell, pertaining to the real property at issue in this litigation, which property was recognized as being owned by Andrew Thibodeaux.

Clay now appeals contending that the trial court erred in: (1) failing to vacate or nullify the May 11, 2004 act of sale for lack of prior judicial authorization and proper notice; (2) failing to vacate or nullify the act of sale signed on May 11, 2004⁸ by John Crowell, as administrator, and instead ratifying or approving the alleged oral sale by Clamae Crowell of her community interest to Andrew Thibodeaux; (3) failing to vacate or annul the judgment signed in Clamae Prevost Crowell's succession proceeding, which granted an order compelling John C. Crowell to convey all the interest of Clamae Prevost Crowell in the property to Andrew Thibodeaux based on ill practice; and (4) dismissing Clay's damage claim against John Crowell as administrator of the succession of Clamae Crowell.

ACTION OF NULLITY

Louisiana law provides for annulment of judgments. Pursuant to LSA-C.C.P. art. 2004, a final judgment may be annulled if it was obtained by fraud or ill practices. This article is not limited to cases of actual fraud or ill practices, but is sufficiently broad to encompass all situations wherein a judgment is rendered through some improper practice or procedure. Courts must review petitions for nullity closely, as actions for nullity based on fraud or ill practices are not intended as substitutes for appeals or as second chances to prove claims previously denied for failure of proof. The purpose of an action

⁸Although Clay lists the date of the act of sale as "May 4, 2004" in his assignment of error in brief, the date shown on the act of sale is actually May 11, 2004.

for nullity is to prevent injustice that cannot be corrected through new trials and appeals. Belle Pass Terminal, Inc. v. Jolin, Inc., 2001-0149 (La. 10/16/01), 800 So. 2d 762, 766.

The two criteria for determining whether a judgment has been rendered through fraud or ill practices and is subject to nullification are: (1) whether circumstances under which the judgment was rendered show the deprivation of legal rights of the litigant seeking relief; and (2) whether enforcement of the judgment would be unconscionable or inequitable. Belle Pass Terminal, Inc. v. Jolin, Inc., 800 So. 2d at 766. “Ill practice” is any improper practice or procedure which operates, even innocently, to deprive a litigant of some legal right. The “legal right” of which a litigant must be deprived to have a judgment annulled includes the right to appear and assert a defense and the right to a fair and impartial trial. Morton Building, Inc. v. Redeeming Word of Life Church, 2001-1837 (La. App. 1st Cir. 10/16/02), 835 So. 2d 685, 689, writ denied, 2002-2733 (La. 1/24/03), 836 So. 2d 46.

DISCUSSION

Assignment of Error Number One

Clay first contends that his father, as administrator of his mother’s succession, acted improperly in that he failed to obtain judicial approval prior to executing the act of sale and failed to comply with LSA-C.C.P. articles 3281 and 3282.⁹ As such, he contends that the trial court herein erred in failing to nullify

⁹Louisiana Code of Civil Procedure article 3281 provides:

A. A succession representative who desires to sell succession property at private sale shall file a petition setting forth a description of the property, the price and conditions of and the reasons for the proposed sale. If an agreement to sell has been executed in accordance with Paragraph B of this Article, a copy of such agreement shall be annexed to the petition.

B. A succession representative may execute, without prior court authority, an agreement to sell succession property at private sale, subject to the suspensive condition that the court approve the proposed sale.

the May 11, 2004 act of sale for lack of prior judicial authorization and proper notice. Clay contends that because the act of sale was signed on May 11, 2004, i.e., before the trial court in Clamae's succession signed the judgment on May 18, 2004, ordering John to sign an act of sale to convey Clamae's interest in the property to Thibodeaux, the act of sale was invalid as it was not "authorized" by the trial court and the trial court herein erred in failing to so recognize. We disagree.

The fact that the act of sale was executed after the third-party purchaser filed his petition against the succession, but before the trial court therein actually ordered the succession representative to effectuate the sale thereby renders the judgment improper as one obtained by fraud or ill practices because the sale, when perfected, was not "approved" by a court. By ordering the succession representative to execute the formal act of sale or to confect an act of sale, the court in the succession proceeding obviously "approved" such a sale, as the trial court in these proceedings obviously recognized. Moreover, we find Clay's argument and the cases relied upon in support of it, concerning the deleterious effects that may result when a succession representative elects to sell succession

C. The succession representative shall be obligated to file a petition in accordance with Paragraph A of this Article within thirty (30) days of the date of execution of such an agreement to sell.

Louisiana Code of Civil Procedure article 3282 provides that:

Notice of the application for authority to sell succession property at private sale shall be published at least once for movable property, and at least twice for immovable property, in the manner provided by law. A court order shall not be required for the publication of the notice.

The notice shall be published in the parish in which the succession proceeding is pending. When immovable property situated in another parish is to be sold, the notice shall also be published in the parish in which the property is situated. When movable property situated in another parish is to be sold, the notice may be published also in the parish in which the property is situated, without necessity of a court order for the publication; however, the court may order the notice to be published in the parish where the movable property is situated.

The notice shall state that any opposition to the proposed sale must be filed within seven days from the date of the last publication.

property without court authorization unpersuasive and irrelevant, as the facts are clearly distinguishable from the facts of the instant case. Here, the trial court in Clamae's succession rendered judgment ordering John, as administrator of Clamae's succession, to "effectuate" or otherwise execute a sale of Clamae's interest in the property to a third-party purchaser, after the third-party purchaser had filed a petition against Clamae's succession, specifically to force the sale. Clay's argument that the sale should now be set aside in these proceedings because John did not have "court authorization" to follow an "order" pursuant to a judgment of a court, is meritless, considering that the succession representative additionally has a fiduciary duty to manage the "property of the succession in accordance with the law," *i.e.*, a direct order of the court. See LSA-C.C.P. art. 3191.

Further, to the extent that Clay contends that the act of sale should be nullified for lack of proper notice, we note that generally, in the absence of a showing of fraud or ill practice by the purchaser, private sale **by order of the court** in a succession proceeding will not be disturbed. Succession of Lewis, 440 So. 2d 899, 904 (La. App. 2nd Cir. 1983), writ denied, 443 So. 2d 1119 (La. 1984). In Succession of Lewis, when the absent heirs of a succession challenged a private sale to a third party that was ordered by the trial court, and where the trial court failed to appoint an attorney to represent the absent heirs in connection with the sale, the appellate court held that a third-party purchaser does not have to look behind the judicial order commanding the sale to determine the truth of the facts upon which the court has acted, but need only be satisfied that the court has jurisdiction. Succession of Lewis, 440 So. 2d at 904, citing Pete v. Estate of Pete, 253 So. 2d 650 (La. App. 3rd Cir. 1971). The court further held that the **court order to sell** protects a bona fide purchaser from any irregularities contained in the proceeding. Succession of Lewis, 440 So. 2d at 904. Thus, to the extent that

Clay contends that the judgment ordering the sale should be set aside because he was not afforded notice of the sale, inasmuch as the sale was ordered by the court in the succession proceeding, the judgment ordering the sale cannot be disturbed absent fraud or ill practices, which Clay has failed to establish on the record before us.

Accordingly, we find no merit to Clay's first assignment of error.

Assignment of Error Number Two

Clay next contends that the trial court in Clamae's succession erred in failing to vacate or nullify the May 11, 2004 act of sale and, instead, "ratifying or approving the alleged oral sale by Clamae." To the extent that Clay challenges the merits of the legal findings upon which the court in the succession proceeding based its judgment, we note that a court's consideration of law, even if done erroneously, can in no way be construed as an "ill practice." Lieber v. Caddo Levee District Board of Commissioners, 32,551 (La. App. 2nd Cir. 12/8/99), 748 So. 2d 587, 591, writ denied, 2000-0561 (La. 4/7/00), 759 So. 2d 763, cert. denied, 531 U.S. 928, 121 S. Ct. 306, 148 L.Ed.2d 246 (2000).

Further, an action for nullity cannot be substituted for a defense on the merits or a timely appeal. Meldean's, Inc. v. Rivers, 410 So. 2d 837, 840 (La. App. 3rd Cir.), writ denied, 414 So. 2d 376 (La. 1982). Judgments rendered contrary to law are subject to reversal on appeal, but are not thereby subject to an action for nullity. Levy v. Stelly, 254 So. 2d 665, 667 (La. App. 4th Cir. 1971), writ denied, 260 La. 403, 256 So. 2d 289 (1972).

Thus, we also find no merit to this assignment of error.

Assignment of Error Number Three

In his third assignment of error, Clay contends that the trial court herein erred in failing to vacate or annul the May 18, 2004 judgment rendered by the court in Clamae's succession on the basis of ill practice. Specifically, Clay

contends that because he was not served with the lawsuit by Thibodeaux and was not afforded notice of the sale, Thibodeaux and John conspired to pull a “fast one” on him, depriving him of an opportunity to oppose the sale, which he contends is tantamount to an “ill practice.”

Louisiana Code of Civil Procedure article 734 provides that when suit is brought against a succession, the proper party to name is the succession representative.¹⁰ Notably, the heirs or legatees of the deceased are not required to be joined as parties. LSA-C.C.P. art. 734. Moreover, Louisiana law recognizes that a creditor of a succession under administration may submit his claim to the succession representative for acknowledgment and payment in due course of administration. LSA-C.C.P. art. 3241. A succession representative has a fiduciary duty 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.

Considering that service upon Clay of notice of Thibodeaux’s suit against Clamae’s succession was not required, we are unable to conclude that Thibodeaux’s failure to serve Clay or otherwise provide notice to Clay of his suit against Clamae’s succession constitutes an “ill practice.” In accordance with the articles set forth above, Thibodeaux served the succession representative, John, through his attorney of record. The matter was heard before the trial court in the succession proceedings and the court therein ordered John, as the succession representative, to execute the sale. Any failure by John

¹⁰Louisiana Code of Civil Procedure article 734 provides as follows:

Except as otherwise provided by law, including but not limited to Articles 2641 and 2674, the succession representative appointed by a court of this state is the proper defendant in an action to enforce an obligation of the deceased or of his succession, while the latter is under administration. **The heirs or legatees of the deceased, whether present or represented in the state or not, need not be joined as parties, whether the action is personal, real, or mixed.** [Emphasis added.]

to execute the documents necessary to complete or effectuate the sale in accordance with the trial court's order, would then be a breach of his fiduciary duty to manage the succession property in accordance with law. See LSA-C.C.P. art. 3191.

As set forth above, the two criteria for determining whether a judgment has been rendered through fraud or ill practices and is subject to nullification are: (1) whether circumstances under which the judgment was rendered showed the deprivation of legal rights of the litigant seeking relief; and (2) whether enforcement of the judgment would be unconscionable or inequitable. Belle Pass Terminal, Inc. v. Jolin, Inc., 800 So. 2d at 766. Neither of these criteria are established herein.

We do not find that Clay was required to receive notice of Thibodeaux's suit in Clamae's succession proceeding; nor do we find that enforcement of the judgment rendered in Clamae's succession proceeding would be unconscionable or inequitable under the facts of this case. Instead, after thorough review of the entire record herein, we find that Clay has failed to establish any acts of fraud or ill practices requiring that the May 18, 2004 judgment of the trial court be annulled.

We find no merit to this assignment of error.

Assignment of Error Number Four

In his final assignment of error, Clay contends that the trial court erred in dismissing his damage claim against John as administrator of the succession of Clamae. Having found no error in the judgment of the trial court dismissing Clay's petition for nullity, we likewise find no error in the trial court's dismissal of Clay's damage claim against John Crowell, as administrator of the succession of Clamae Crowell.

This assignment also lacks merit.

CONCLUSION

For the above and foregoing reasons, the June 13, 2011 judgment of the trial court is hereby affirmed. Costs of this appeal are assessed to the plaintiff/appellant, Clay Crowell.

AFFIRMED.

STATE OF LOUISIANA

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 McCLENDON, J., concurs and assigns reasons.

Given the procedural history presented, I am bound to concur with the result reached by the majority. I write separately to note that the trial court in the *Succession of Clamae Prevost Crowell* proceedings erroneously ordered John C. Crowell "to execute an Act of Sale, quitclaim or other such conveyance" to transfer Mrs. Crowell's interest in the property at issue to Andrew Thibodeaux. Clearly, the requirements set forth in LSA-C.C. art. 1839 to affect an oral transfer of immovable property were not met. However, an appeal was not taken from said judgment, and an action for nullity based on fraud or ill practices is not intended as a substitute for an appeal. See Wright v. Louisiana Power & Light, 06-1181 (La. 3/9/07), 951 So.2d 1058, 1068. Further, I cannot say that the record is sufficient to establish fraud or ill practice on the part of Mr. Thibodeaux.