

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0519

FRANKLIN REALTY GROUP, LLC

VERSUS

**THE LAKES AT BLUEBONNET, LLC
AND CLAUDE M. PENN, JR.**

Judgment Rendered: November 1, 2013

**Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 593,236**

The Honorable Todd W. Hernandez, Judge Presiding

**A. Shelby Easterly, III
Denham Springs, Louisiana**

**Counsel for Defendant/Appellant
The Lakes at Bluebonnet, LLC and
Claude M. Penn, Jr.**

**J. E. Cullens, Jr.
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**Counsel for Plaintiff/Appellee
Franklin Realty Group, LLC**

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

THERIOT, J.

This appeal is from a summary judgment enforcing a settlement agreement. We vacate and remand.

FACTS AND PROCEDURAL HISTORY

This suit involves the enforcement of a settlement agreement arising from disputes over a real estate listing agreement. The August 2004 written Listing and Marketing Agreement, which is not contained in the record of this suit, allegedly provided that Franklin Realty Group, L.L.C. would be the exclusive listing agent for all sales of condominium units at The Lakes at Bluebonnet for a five-year term, August 12, 2004 through August 12, 2009. In January of 2008, The Lakes at Bluebonnet, L.L.C. attempted to terminate the written Listing and Marketing Agreement pursuant to a verbal agreement with Ben Franklin, III, member/manager of Franklin Realty Group, L.L.C. Mr. Franklin denied agreeing to terminate the Listing and Marketing Agreement, and a lawsuit was filed for the wrongful termination of the listing agreement.¹

On August 31, 2009, a Settlement and Release Agreement was negotiated and agreed to by Mr. Franklin, Franklin Realty Group, L.L.C., The Lakes at Bluebonnet, L.L.C., and Claude M. Penn, Jr. (manager/member of The Lakes at Bluebonnet, L.L.C.). The Settlement and Release Agreement provides that it is intended to resolve a number of disputes, including: (1) the lawsuit filed by the "Franklin Group" (defined as collectively referring to Mr. Franklin and Franklin Realty Group, L.L.C.) against The Lakes at Bluebonnet, L.L.C., and (2) claims asserted by the

¹ Because the lawsuit filed for wrongful termination of the listing agreement is not contained in the record of the suit to enforce the settlement agreement, it is unclear who the parties to the suit were and what claims were made; however, the Settlement and Release Agreement indicates that Mr. Franklin and Franklin Realty Group, L.L.C. filed suit against The Lakes at Bluebonnet, L.L.C.

“Franklin Group” and the “Bluebonnet Group” (defined as collectively referring to The Lakes at Bluebonnet, L.L.C. and Mr. Penn) related to the Listing and Marketing Agreement, the condominium development, and/or ownership in The Lakes at Bluebonnet, L.L.C.

In the Settlement and Release Agreement, the parties agreed to terminate the Listing and Marketing Agreement, and the Franklin Group agreed to dismiss its lawsuit. In consideration of the termination of the Listing and Marketing Agreement and the dismissal of the lawsuit, the parties agreed that \$23,160.00 being held in escrow would be released to Franklin Realty Group, L.L.C.; The Lakes at Bluebonnet, L.L.C. paid \$13,420.00 to “Franklin Realty Group, LLC and Walters, Papillion, Thomas, Cullens, LLC”; and Franklin Realty Group, L.L.C. was designated as the exclusive agent for the sale of Units 504 and 1606 at The Lakes at Bluebonnet Condominiums for a period of twelve months. The provision regarding the exclusive listing for Units 504 and 1606 expressly states that The Lakes at Bluebonnet, L.L.C. “shall be obligated to pay the Franklin Group the sum of \$15,790.00” for each unit sold.

When payment of the commission for Units 504 and 1606 was not made as provided by the Settlement and Release Agreement, Franklin Realty Group, L.L.C. filed this suit against The Lakes at Bluebonnet, L.L.C. and Mr. Penn for payment of the amounts due under the Settlement and Release Agreement. The Lakes at Bluebonnet, L.L.C. and Mr. Penn filed a peremptory exception raising the objection of non-joinder of a party, and the objections of no cause of action and no right of action as to Mr. Penn. The basis for the objection of non-joinder was that Mr. Franklin was a party needed for a just adjudication under La. C.C.P. art. 641. The court overruled the objection of non-joinder and sustained the objections of no right of

action and no cause of action, ruling that Mr. Franklin and Mr. Penn signed the Settlement and Release Agreement only as representatives of Franklin Realty Group, L.L.C. and The Lakes at Bluebonnet, L.L.C. respectively, and Mr. Franklin and Mr. Penn did not personally obligate themselves for the obligations of the companies in the Settlement Agreement.

The Lakes at Bluebonnet, L.L.C. filed an answer, in which it alleged offset for sums Mr. Franklin owes to The Lakes at Bluebonnet, L.L.C. for condominium dues, late charges, and interest relating to several condominiums Mr. Franklin owns. The dues, late charges, and interest were initially owed to The Lakes at Bluebonnet Condominium Association, Inc. ("Condominium Association"), but the rights to those sums were later assigned to The Lakes at Bluebonnet, L.L.C. by the Condominium Association. The Lakes at Bluebonnet, L.L.C. also reurged its objection of non-joinder of a party, alleging that the obligation under the Settlement and Release Agreement was joint, not solidary, and therefore Mr. Franklin is a necessary party. The reurged objection to the non-joinder was overruled.

Franklin Realty Group, L.L.C. filed a motion for summary judgment seeking to enforce the Settlement and Release Agreement. In support of its motion for summary judgment, Franklin Realty Group, L.L.C. offered the Settlement and Release Agreement and the affidavit of Mr. Franklin. Mr. Franklin's affidavit states that The Lakes at Bluebonnet, L.L.C. has not paid the \$31,580.00 due under the Settlement and Release Agreement to either him or Franklin Realty Group, L.L.C. and that Franklin Realty Group, L.L.C. does not owe the amounts claimed in offset by The Lakes at Bluebonnet, L.L.C. because Franklin Realty Group, L.L.C. has never owned a condominium at The Lakes at Bluebonnet and Franklin Realty Group,

L.L.C. has never obligated itself in any way to the Condominium Association.

The Lakes at Bluebonnet, L.L.C. opposed the motion for summary judgment, arguing that because the Settlement and Release Agreement provided for payment to the "Franklin Group," which was defined in the document as including both Franklin Realty Group, L.L.C. and Mr. Franklin, The Lakes at Bluebonnet, L.L.C. should be allowed to raise the defense of offset arising from Mr. Franklin's obligation. In support of its opposition, The Lakes at Bluebonnet, L.L.C. offered the affidavit of Chris Dumestre, managing agent of the Condominium Association, which stated that Mr. Franklin owed \$31,291.62 to the Condominium Association, and the Condominium Association assigned the rights to this indebtedness to The Lakes at Bluebonnet, L.L.C. The Lakes at Bluebonnet, L.L.C. also offered the affidavit of Mr. Penn, stating that the debt owed by Mr. Franklin to the Condominium Association, totalling \$31,291.62, had been assigned to The Lakes at Bluebonnet, L.L.C. through a series of assignments.

The court granted Franklin Realty Group, L.L.C.'s motion for summary judgment, casting The Lakes at Bluebonnet, L.L.C. in judgment and ordering them to pay Franklin Realty Group, L.L.C. \$31,580.00, plus interest. In ruling, the court found that the Settlement and Release Agreement is clear and unambiguous and the only parties obligated under the Settlement and Release Agreement were Franklin Realty Group, L.L.C. and The Lakes at Bluebonnet, L.L.C. Because the court concluded that the Settlement and Release Agreement was clear that Mr. Franklin was not a party obligated under the agreement, the court held that The Lakes at Bluebonnet, L.L.C. could not claim an offset for obligations owed by Mr. Franklin. The Lakes at Bluebonnet, L.L.C. appealed.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine factual dispute. *Sanders v. Ashland Oil, Inc.*, 96–1751, p. 5 (La.App. 1 Cir. 6/20/97), 696 So.2d 1031, 1034, *writ denied*, 97–1911 (La.10/31/97), 703 So.2d 29. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B) (prior to amendment by 2012 La. Acts No. 257). In determining whether an issue is genuine, a court should not consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. *Fernandez v. Hebert*, 06–1558, p. 8 (La.App. 1 Cir. 5/4/07), 961 So.2d 404, 408, *writ denied*, 07–1123 (La. 9/21/07), 964 So.2d 333. A fact is material if it potentially insures or precludes recovery, affects a litigant’s ultimate success, or determines the outcome of the legal dispute. *Anglin v. Anglin*, 05–1233, p. 5 (La.App. 1 Cir. 6/9/06), 938 So.2d 766, 769. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of trial on the merits. *Fernandez*, 06–1558 at 8, 961 So.2d at 408. Summary judgment is favored and “is designed to secure the just, speedy, and inexpensive determination of every action.” La. C.C.P. art. 966(A)(2).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court’s determination of whether summary judgment is appropriate. *Sanders*, 96–1751 at 7, 696 So.2d at 1035. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable

to this case. *Walker v. Phi Beta Sigma Fraternity (Rho Chapter)*, 96-2345, p. 6 (La.App. 1 Cir. 12/29/97), 706 So.2d 525, 528.

A person shall be joined as a party in an action when either: (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject matter of the action and is so situated that the adjudication of the action in his absence may either: (a) as a practical matter, impair or impede his ability to protect that interest, or (b) leave any of the persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations. La. C.C.P. art. 641.

We do not agree with the trial court that the Settlement and Release Agreement is clear that the only parties obligated were Franklin Realty Group, L.L.C. and The Lakes at Bluebonnet, L.L.C. The Settlement and Release Agreement states that the initial lawsuit was filed by both Franklin Realty Group, L.L.C. and Mr. Franklin, and that this lawsuit would be dismissed as part of the Settlement and Release Agreement. The Settlement and Release Agreement further provides that The Lakes at Bluebonnet, L.L.C. would pay commission on Units 504 and 1606 to Franklin Realty Group, L.L.C. and Mr. Franklin. The Settlement and Release Agreement lists Mr. Franklin as a party, and Mr. Franklin signed the Settlement and Release Agreement in his individual capacity as well as in his capacity as manager of Franklin Realty Group, L.L.C.

When an obligation binds one obligor to more than one obligee, the obligation may be several, joint, or solidary. La. C.C. art. 1786. When one obligor owes just one performance intended for the common benefit of different obligees, neither of whom is entitled to the whole performance, the obligation is joint. La. C.C. art. 1788. An obligation is solidary when it gives each obligee the right to demand the whole performance from the

common obligor. La. C.C. art. 1790. Before a solidary obligee brings an action for performance, the obligor may extinguish the obligation by rendering performance to any of the solidary obligees. La. C.C. art. 1791. A solidary obligation arises from a clear expression of the parties' intent or from the law; it shall not be presumed. La. C.C. art. 1796. One or more solidary obligees may sue to enforce a solidary right, without the necessity of joining all others in the action. La. C.C.P. art. 643.

We find Mr. Franklin is a party needed for a just adjudication under La. C.C.P. art. 641. As such, there remain outstanding issues of material fact insofar as whether The Lakes at Bluebonnet, L.L.C. is entitled to an offset for the debt against Mr. Franklin that it acquired through an assignment from the Condominium Association. Therefore, summary judgment was inappropriate.

CONCLUSION

The summary judgment in favor of Franklin Realty Group, L.L.C. is vacated, and the matter is remanded to the trial court for further proceedings. Costs of this appeal are assessed to Franklin Realty Group, L.L.C.

VACATED AND REMANDED.