

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 1567

SUCCESSION OF MELVIN EDWARD HARPER

VERSUS

DOROTHY FREDERICK-HARPER

Judgment Rendered: **APR 24 2015**

**Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Case No. 2013-0002569**

The Honorable Elizabeth P. Wolfe, Judge Presiding

**Sherman Q. Mack
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Albany, Louisiana**

**Counsel for Defendant/Appellant
Dorothy Frederick-Harper**

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Hammond, Louisiana**

**Counsel for Plaintiff/Appellee
Melanie Leigh Harper Jarreau,
in her capacity as the duly
appointed administratrix of the
Succession of Melvin Edward
Harper and the Succession of
Melvin Edward Harper**

BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

Guidry, P. CONCUR

THERIOT, J.

In this suit arising from a motion for summary judgment, the defendant/appellant, Dorothy Frederick-Harper, appeals the judgment of the 21st Judicial District Court, in which a “warranty deed” transferring immovable property to the defendant was declared an absolute nullity. Plaintiff/Appellee answered the appeal seeking damages and attorney fees for the filing of a frivolous appeal. For the reasons that follow, we affirm the judgment of the district court and deny the request for damages and attorney fees.

FACTS AND PROCEDURAL HISTORY

On August 22, 2013, Melanie Leigh Harper Jarreau, administratrix of the Succession of Melvin Edward Harper, filed a petition to collect succession property against Dorothy Frederick-Harper, the widow of the decedent. The property at issue was the land where the marital home is located, and where Mrs. Harper resides.

In her petition, Mrs. Jarreau, who is the daughter of the decedent but not of Mrs. Harper, claimed that the property was the separate property of her father, since he purchased it prior to his marriage to Mrs. Harper. The petition alleged that on August 26, 2004, Mr. Harper executed an alleged “warranty deed” in which he apparently attempted to convey an ownership interest in the property to Mrs. Harper to make it community property.¹ Mrs. Jarreau claimed in her petition that the warranty deed functions as a donation inter vivos and, as such, was required to be notarized and signed by two witnesses. Mrs. Jarreau further argued that the warranty deed is deficient in form as an authentic act because it does not conform to the requirements

¹ The warranty deed was duly recorded in the public records of Tangipahoa Parish, under COB 996, page 426.

of La. C.C. arts. 1541² and 1833.³ Mrs. Jarreau prayed that the warranty deed be declared an absolute nullity so that the subject property could be returned to the succession as the separate property of Melvin Edward Harper.

Mrs. Jarreau filed a motion for summary judgment on November 5, 2013, arguing that there was no issue of material fact that the warranty deed was not in proper form, and therefore, an absolute nullity. On July 3, 2014, the district court granted summary judgment in favor of Mrs. Jarreau, declaring the warranty deed to be an absolute nullity and the subject property to be the separate property of the decedent. Mrs. Harper moved for a new trial. On July 14, 2014, a hearing was held and the district court rendered judgment denying Mrs. Harper's motion for new trial. The district court signed the judgment denying the motion for new trial on August 8, 2014. Mrs. Harper filed a suspensive appeal of the district court's judgment on August 12, 2014.

ASSIGNMENT OF ERROR

Mrs. Harper claims in her sole assignment of error that the district court erred in granting Mrs. Jarreau's motion for summary judgment as there were existing issues of material fact.

STANDARD OF REVIEW

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues.

Berard v. L-3 Communications Vertex Aerospace, LLC, 2009-1202, (La.

² Louisiana Civil Code article 1541 states: "A donation inter vivos shall be made by authentic act under the penalty of absolute nullity, unless otherwise expressly permitted by law."

³ Louisiana Civil Code article 1833 states, in pertinent part: "An authentic act is a writing executed before a notary public ... in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed."

App. 1 Cir. 2/12/10), 35 So.3d 334, 339-340, writ denied, 2010-0715 (La. 6/4/10), 38 So.3d 302. The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. La. C.C.P. art. 966(A)(2). Its purpose is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. *Hines v. Garrett*, 2004-0806, (La. 6/25/04), 876 So.2d 764, 769 (per curiam). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record 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).

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966(C)(2); *Janney v. Pearce*, 2009-2103, (La. App. 1 Cir. 5/7/10), 40 So.3d 285, 288-289, writ denied, 2010-1356 (La. 9/24/10), 45 So.3d 1078.

In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact.

Hines, 876 So.2d at 765. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. *Willis v. Medders*, 2000-2507, (La. 12/8/00), 775 So.2d 1049, 1050 (per curiam).

DISCUSSION

Warranty Deed

Louisiana Civil Code article 1833 defines an authentic act, as it relates to contracts, as a writing executed before a notary public or other officer in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed. See *Eschete v. Eschete*, 2012-2059 (La. App. 1 Cir. 2/27/14, 142 So.3d 985, 987. Louisiana Civil Code article 1541 requires that donations inter vivos be done by authentic act under the penalty of absolute nullity, unless otherwise expressly permitted by law. *Id.*

The warranty deed relied upon by Mrs. Harper was executed in the state of New York. The warranty deed expressed Mr. Harper's apparent intent to transfer some interest in the property to Mrs. Harper for no price, attaches a property description, and contains signature lines for a notary public, the two parties, and two witnesses. The same signature appears on both the notary public line and one of the witness lines. The second witness line is blank, and Mr. and Mrs. Harper respectively signed as "seller" and "buyer."

Because the warranty deed was executed in the state of New York, we must first determine if the laws of the state of New York or the laws of the state of Louisiana apply. Louisiana Civil Code article 3515 states, in pertinent part:

[A]n issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate ... systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

The property at issue is located in the state of Louisiana, and the parties to the suit reside in the state of Louisiana. The only contact the state of New York has to the instant case is the location where the warranty deed was executed. Using the guidance of La. C.C. art. 3515, we find that the policies of the state of Louisiana would be more seriously impaired if a transfer of immovable property in this state could be effected from another state without adhering to the laws of authenticity of the state of Louisiana. Thus, the warranty deed must pass the requirements of La. C.C. art. 1833, and from a simple viewing of the document, it does not meet the requirements of La. C.C. art. 1833.

Mrs. Harper argues that even if the warranty deed is not in authentic form, it is still an act under private signature and must still be acknowledged under La. C.C. art. 1834.⁴ An act under private signature may be acknowledged by a party to that act by recognizing the signature as his own before a court, or before a notary public, or other person authorized to perform that function, in the presence of two witnesses. *Ritz v. Ritz*, 95-683 (La. App. 5 Cir. 12/13/95), 666 So.2d 1181, 1185, writ denied, 96-0131 (La. 3/8/96) 669 So.2d 395. The record does not contain any such acknowledgement by Mrs. Harper. However, an act under private signature,

⁴ Louisiana Civil Code article 1834 provides: “[A]n act that fails to be authentic because of the lack of competence or capacity of the notary public, or because of a defect of form, may still be valid as an act under private signature.”

even if it has been duly acknowledged, cannot substitute for an authentic act when the law prescribes such an act. *Id.* Thus, as Louisiana law requires that a donation inter vivos be made by authentic act under the penalty of absolute nullity, the district court did not err in granting summary judgment in favor of Mrs. Jarreau and against Mrs. Harper, declaring the warranty deed an absolute nullity since the warranty deed failed to satisfy the requirements of an authentic act. The assignment of error is without merit.

Frivolous Appeal

Mrs. Jarreau answered the appeal and alleges in her brief that Mrs. Harper's appeal has no reasonable basis in fact or in law, and thus, she is entitled to damages for Mrs. Harper's frivolous appeal.⁵

Although a successful appeal is by definition non-frivolous, the converse is not true because appeals are favored. *Bottle Poetry, LLC v. Doyle Restaurant Group Franchise Co., LLC*, 2013-0406 (La. App. 4 Cir. 1/15/14), 133 So.3d 60, 67, writ denied, 2014-0335 (La. 4/11/14), 138 So.3d 606. Under La. C.C.P. art. 2164, this Court may award damages, including attorney fees and appeal costs, for a frivolous appeal. A frivolous appeal is one where there is no serious legal question, when the appeal is taken solely

⁵ Louisiana Code of Civil Procedure article 2133 provides, in pertinent part:

An appellee shall not be obliged to answer the appeal unless he desires to have the judgment modified, revised, or reversed in part or unless he demands damages against the appellant. In such cases, he must file an answer to the appeal, stating the relief demanded, not later than fifteen days after the return day or the lodging of the record whichever is later. The answer filed by the appellee shall be equivalent to an appeal on his part from any portion of the judgment rendered against him in favor of the appellant and of which he complains in his answer.

Rule 2-19 of the Uniform Rules-Courts of Appeal provides that "[t]he court may award damages for frivolous appeal in civil cases as provided by law." Damages for a frivolous appeal are awarded pursuant to La. C.C.P. art. 2164, which states:

The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages for frivolous appeal, and may tax the costs of the lower or appellate court, or any party thereof, against any party to the suit, as in its judgment may be considered equitable."

for the purpose of delay, or when it is evident that the appellant's counsel does not seriously believe in the position he advocates. *Lane Memorial Hosp. v. Gay*, 2003-0701 (La. App. 1 Cir. 2/23/04), 873 So.2d 682, 687. The courts have been very reluctant to grant damages under this article, as it is penal in nature and must be strictly construed. *Id.*

In the instant case, Mrs. Harper appeals a summary judgment declaring the warranty deed an absolute nullity. We agree with the district court, but rather than simply stating that the warranty deed is obviously defective in form, it was necessary for us to address any potential conflict of law with the state of New York and determine whether the warranty deed may have been a valid act under private signature. The issue of an act under private signature was meticulously briefed by Mrs. Harper and was the primary argument in her appeal. Mrs. Harper's position ultimately lost, but it was a losing position that required research and discussion by this Court.

Although we have determined Mrs. Harper's appeal lacks merit, we cannot say with certainty that the appeal was taken solely for the purpose of delay, nor can we say that Mrs. Harper or her attorney did not seriously believe the position they advocated. See *Id.* Mrs. Jarreau's request for damages based on frivolous appeal is denied.

DECREE

The July 3, 2014 judgment of the district court declaring the Harpers' warranty deed an absolute nullity is affirmed. The plaintiff/appellee's request for damages and attorney fees is denied. Costs of this appeal are assessed to the defendant/appellant, Dorothy Frederick-Harper.

JUDGMENT AFFIRMED; ANSWER TO APPEAL DENIED.