

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0081

BYARD "PECK" EDWARDS, JR.

VERSUS

FIRST BANK AND TRUST

DATE OF JUDGMENT: **DEC 23 2015**

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 2010-0004107, DIVISION "B," PARISH OF TANGIPAHOA
STATE OF LOUISIANA

HONORABLE BRUCE C. BENNETT, JUDGE

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First Bank and Trust

BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

Disposition: AFFIRMED.

CHUTZ, J.

Appellant, Byard “Peck” Edwards, appeals the trial court’s grant of summary judgment in favor of appellee, First Bank and Trust (First Bank), for the sum due on a promissory note. We affirm.

On April 28, 2010, appellant executed a promissory note in favor of First Bank in the principal amount of \$25,465.00 at a rate of 9.5% per annum. Edwards failed to make his first two payments, made two untimely payments and then stopped paying. When First Bank sent a formal default letter demanding the entire outstanding balance, Edwards responded by filing this lawsuit on October 15, 2010, averring that First Bank owed him attorney’s fees in the amount of \$5,400.00. First Bank subsequently filed a reconventional demand, seeking enforcement of the terms of the promissory note.

Protracted litigation relative to service issues ensued. See *Edwards v. First Bank and Trust*, 2012-0423 (La. App. 1st Cir. 4/8/13), --- So.3d ---. Before us in this appeal is the propriety of the trial court’s grant of summary judgment in favor of First Bank enforcing the provisions of the promissory note.¹ Edwards maintains the trial court erred because outstanding issues of material fact exist. He initially claims he is entitled to a credit for an attorney’s fee that First Bank allegedly owes him. He also maintains there was no consideration to support the contract, urging

¹ In addition to the nullity action on the issue of proper service of process examined in this court’s earlier opinion, a subsequent rendition of summary judgment in favor of First Bank on its reconventional demand was the subject of another nullity action for improper service. A stay of execution of that judgment was rendered by the trial court. After a rendition of a third summary judgment in favor of First Bank, on Edwards’ motion for new trial, the trial court once again nullified its judgment based on improper service. A special process server was appointed to serve the fourth motion for summary judgment First Bank filed on May 14, 2014. The trial court heard the matter on July 21, 2014, and the summary judgment in favor of First Bank, which is the subject of this appeal, issued on August 22, 2014, for which Edwards’ motion for new trial was denied on September 22, 2014.

that the evidence shows he executed the promissory note merely to assume debts of others and that he personally received none of the proceeds.²

Extinguishment of the obligation in any manner and failure of cause are affirmative defenses that Edwards did not plead. See La. C.C.P. art. 1005.³ As such, the issue of whether these allegations would have been adequate to defend against plaintiff's motion for summary judgment is not properly before us. See *M.G. Mayer Yacht Services, Inc. v. Ryder*, 2003-2225 (La. App. 1st Cir. 10/29/04), 897 So.2d 72, 74-75. This is particularly so with the claim for an attorney's fee, which was dismissed after Edwards failed to amend his petition within 30 days in accordance with the trial court's order when it sustained a dilatory exception raising an objection of vagueness asserted by First Bank.

Even if Edwards were permitted to assert a defense of a failure of cause, the evidence he offered was insufficient to rebut First Bank's showing of entitlement to enforce the promissory note in accordance with its terms. See La. C.C.P. art. 966B. The terms of the promissory note do not reference any other debtor. More importantly, Edwards' intent to assume the debts of others, one of whom was a limited liability company for which he is 100% owner, serves as a sufficient basis

² We find no merit in Edwards' assertion, first raised in his motion for new trial, that a material issue of fact precluding summary judgment exists as to whether the obligation was partially extinguished for a payment for which he was not credited. Edwards attached to his motion a check made out to First Bank in the amount of \$3,900.00. But the check was not identified in an affidavit, did not indicate an account number or purpose for its application, failed to show that it had been negotiated, and was dated June 28, 2009, which was before Edwards executed the promissory note. Thus, the copy of the check was insufficient to create a material issue of fact. Edwards also claimed in the motion for new trial that First Bank incorrectly calculated interest. Although he attached an affidavit of a CPA suggesting error in First Bank's per annum interest calculations, the provisions of the promissory note show that the parties agreed to calculate interest based on a 360-day year. The trial court did not abuse its discretion in denying Edwards' motion on either of these bases. See La. C.C.P. arts. 1971, 1972, & 1973; see also *Guillory v. Lee*, 2009-0075 (La. 6/26/09), 16 So.3d 1104, 1131.

³ Although La. C.C.P. art. 1005 states "failure of consideration" in its express list of the affirmative defenses which may be pled, that terminology was in accordance with the terms of the provisions of the former Civil Code articles addressing "cause." When the Civil Code articles were amended in 1984 to remove the term "consideration" from the explanation of "cause," the legislature failed to likewise amend La. C.C.P. art. 1005. *Mapp Const., LLC v. Southgate Penthouses, LLC*, 2009-0850 (La. App. 1st Cir. 10/23/09), 29 So.3d 548, 565 n.14, writ denied, 2009-2743 (La. 2/26/10), 28 So.3d 275. Accordingly, we refer to the defense as a failure of cause.

by which to bind him. See *Mapp Const., LLC v. Southgate Penthouses, LLC*, 2009-0850 (La. App. 1st Cir. 10/23/09), 29 So.3d 548, 565, writ denied, 2009-2743 (La. 2/26/10), 28 So.3d 275 (the mere will of the parties will bind them so long as the parties have a lawful cause; and the cause need not have any economic value).

DECREE

For these reasons, we find the trial court correctly granted summary judgment in favor of First Bank and Trust in the amount of \$26,028.51 plus interest at the contractual rate, an attorney's fee, and costs. The trial court judgment is affirmed. Appeal costs are assessed against appellant, Byard "Peck" Edwards.

AFFIRMED.