NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0244

LAKE VILLAS NO. II HOMEOWNERS' ASSOCIATION, INC.

VERSUS

ELISE LAMARTINA

Judgment Rendered: DEC 23 2015

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 2008-11342, DIVISION "J"

HONORABLE WILLIAM J. KNIGHT, JUDGE

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Lesli S. Bolner Glen R. Galbraith Hammond, Louisiana	Attorneys for Plaintiff/Appellee Lake Villas No. II Homeowners' Association, Inc.
David J. Messina Fernand Louis Laudumiey, IV New Orleans, Louisiana	Attorneys for Adler David, as Bankruptcy Trustee for the Estate of Donald Grodsky
Keith Couture Madisonville, Louisiana	Attorney for Defendant-in-Rule/Appellant John LaMartina-Howell and Defendant-in Rule Pooter, T., L.L.C.
Elise LaMartina Mandeville, Louisiana	Pro Se
Jane LaMartina Mandeville, Louisiana	Pro Se
Timothy Howell New Orleans, Louisiana	Pro Se
Donald Grodsky Metairie, Louisiana	Pro Se, individually, and as agent for Casa Pita, L.L.C.

BEFORE: McDONALD, McCLENDON, and THERIOT, JJ.

McDONALD, J.

In this appeal, a defendant-in-rule appeals from a judgment decreeing ownership of a promissory note and mortgage, declaring the balance due thereon, and authorizing the plaintiff to seek a writ of fieri facias. For the following reasons, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009, Lake Villas No. II Homeowners' Association, Inc. (Lake Villas) obtained a $37,147.68 judgment against Elise LaMartina, a condominium resident/owner, for past due monthly dues and assessments dating back to 2002, plus attorney fees, costs, and interest. When Lake Villas attempted to collect on the judgment, it discovered the existence of a conventional mortgage on Elise LaMartina's condominium that appeared to be superior to its judgment. The record holder of the mortgage note and mortgage, with a principal balance due of over $81,000, was Jane LaMartina, Elise LaMartina's mother.[1]

In June of 2013, Lake Villas filed a motion seeking: (1) a writ of fieri facias (fifa) ordering the St. Tammany Parish Sheriff to seize and sell Elise LaMartina's condominium to satisfy Lake Villas' 2009 judgment, and (2) an order to Jane LaMartina to show cause why her mortgage should not be canceled, or alternatively, why the trial court should not fix the amount of her mortgage. According to Lake Villas, judicial determination of the existence and amount of any superior mortgage was necessary before the sheriff's sale of Elise LaMartina's condominium could occur.

As the litigation proceeded, several conflicting narratives emerged regarding ownership of the note/mortgage on Elise LaMartina's condominium.

In a February 2013 deposition, Jane LaMartina stated that she was not the true owner of the note/mortgage but rather that, in 2007, such had been assigned to her as a convenience for Donald Grodsky, a family friend who actually paid $66,000, the majority of the money to buy the note/mortgage, but who was out of town on the day the assignment of the note/mortgage occurred. Jane LaMartina also testified that she put up approximately $15,000 of her own money to acquire the note/mortgage.

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[1] In August 1996, Elise LaMartina and her ex-husband, Timothy Howell, as co-makers, executed an $87,200 promissory note and mortgage in favor of payee, Paul Tucker. In August 2007, Mr. Tucker assigned the note/mortgage to Jane LaMartina.

In March 2013, to allegedly reflect that Mr. Grodsky was the true owner, Jane LaMartina assigned the note/mortgage to Casa Pita, LLC, a limited liability company of which Mr. Grodsky was the only member. However, on the same day, Mr. Grodsky signed a sworn document stating that neither he nor Casa Pita, LLC, had any interest in the note/mortgage, and he had acquired such on behalf of Timothy Howell, Elise LaMartina's ex-husband.

At some point during the litigation, Timothy Howell did claim to be the owner of the note/mortgage. He later claimed, though, that the $66,000 used to purchase the note/mortgage in 2007 belonged to John LaMartina-Howell, his and Elise LaMartina's son, who was 12 years old in 2007. Mr. Howell claimed the money was from John's college savings, which Mr. Howell kept in a cardboard box in his bedroom, and he gave the money to Mr. Grodsky in 2007 to buy the note/mortgage and to hold it in his Mr. Grodsky's name until John LaMartina-Howell turned 18 years old.

In late September 2013, David Alder, identifying himself as the trustee of Mr. Grodsky's bankruptcy estate, filed a notice into the record stating that Mr. Grodsky filed for bankruptcy in 2009 and the case had been closed. He further stated that the bankruptcy court had recently ordered that Mr. Grodsky's case be reopened to administer a newly discovered asset, i.e., the mortgage/note at issue here, which Mr. Grodsky now claimed ownership of, but had not listed as an asset in his 2009 bankruptcy proceeding. Mr. Adler contended that the reopened bankruptcy proceeding operated to stay Lake Villas' proceedings in the current suit.

According to Mr. Grodsky, in September 2013, he assigned the note/mortgage to Pooter T, LLC, (Pooter T), a limited liability company of which John LaMartina-Howell was the sole member.

In an effort to respond to the multiple and changing claims of the note/mortgage's ownership, Lake Villas twice amended its motion for a writ of fifa and to fix the amount of the note/mortgage to name Mr. Grodsky; Casa Pita, LLC; Timothy Howell; Elise LaMartina; John LaMartina-Howell; and Pooter T, LLC, as additional defendants-in-rule, and renaming Jane LaMartina, the original defendant-in-rule. Among other filings, Elise LaMartina then filed an exception of improper use of summary proceedings. These matters were heard on January 8, 2014. During the hearing, John

LaMartina-Howell, appearing in proper person, asked the trial court to continue the proceeding until a separate suit he had filed against Mr. Grodsky in another district was "handled."

In a judgment signed on January 27, 2014, the trial court denied John LaMartina-Howell's motion to continue; overruled Elise LaMartina's exception of improper use of summary proceedings; determined that Mr. Grodsky was the sole owner of the note/mortgage since August 13, 2007, subject to whatever effect the bankruptcy laws had on his ownership interest; determined the balance on the note was $114,199.83 as of August 27, 2013; and, ruled that Lake Villas could seek a writ of fifa at any time according to law.

John LaMartina-Howell and Pooter T filed a motion for new trial, which the trial court denied by judgment signed on March 20, 2014. John LaMartina-Howell and Pooter T then moved to appeal suspensively on April 4, 2014. Litigation ensued regarding the details of the appeal, which ultimately resulted in the dismissal of Pooter T's appeal for failure to pay appeal costs and the lodging of John LaMartina-Howell's appeal as devolutive.[2] After his appeal was lodged, this Court issued a show cause order observing that the January 27, 2014 judgment appeared to be a nonappealable ruling. **Lake Villas No. II Homeowners' Ass'n., Inc. v. Elise LaMartina**, 15-0244 (La. App. 1 Cir. 4/28/15) (unpublished). This Court ordered the parties to brief the issue and referred the rule to show cause to this panel for decision. **Lake Villas No. II Homeowners' Ass'n., Inc. v. Elise LaMartina**, 15-0244 (La. App. 1 Cir. 7/13/15) (unpublished). Although John LaMartina-Howell is the only appellant before us, briefs on the rule to show cause and/or on the merits were filed by him, Elise LaMartina, Timothy Howell, and Jane LaMartina, as well as by Lake Villas, as appellee.

SUBJECT MATTER JURISDICTION

Appellate courts have the duty to examine subject matter jurisdiction sua sponte even when the parties do not raise the issue. **Motorola, Inc. v. Associated**

[2] John LaMartina-Howell challenged the trial court ruling converting his appeal to devolutive. This court and the Louisiana Supreme Court denied writs. **Lake Villas No. II Homeowners' Ass'n. v. Elise LaMartina,** 15-1397 (La. App. 1 Cir. 2/23/15) (unpublished), writ denied, 15-0580 (La. 5/22/15), 171 So.3d 250.

Indemnity Corp., 02-0716 (La. App. 1 Cir. 4/30/03), 867 So.2d 715, 717 (en banc). This Court's appellate jurisdiction extends to "final judgments." While a final judgment is appealable, an interlocutory judgment is appealable only when expressly provided by law. LSA-C.C.P. art. 2083. A final judgment is one that determines the merits, in whole or in part, while an interlocutory judgment is one that does not determine the merits. LSA-C.C.P. art. 1841. An incidental judgment rendered by a trial court in execution of a previous final judgment is generally a nonappealable, interlocutory judgment. See **Drew v. His Creditors**, 49. La. Ann. 1641, 1648, 22 So. 956, 959 (La. 1897); **Sonnier v. Sonnier**, 141 La. App. 588, 589, 130 So. 133, 134 (La. App 1 Cir. 1930).

The final judgment in this case was the $37,147.68 money judgment rendered in favor of Lake Villas and against Elise LaMartina in 2009. It is undisputed that Elise LaMartina, the judgment debtor, did not pay the 2009 money judgment. Thus, to execute on the 2009 money judgment, Lake Villas properly sought a writ of fifa under LSA-C.C.P. art. 2291, et seq., directing the seizure and sale of Elise LaMartina's property. Under LSA-C.C.P. art. 2292(A),[3] a seizing creditor, by the mere act of seizure, acquires a privilege on the property seized, which entitles him to a preference over ordinary creditors. Thus, incidental to execution of the writ of fifa, which directs the "seizure and sale" of the judgment debtor's property, the identity and amount owed to other creditors is relevant. LSA-C.C.P. art. 2291.

The instant January 27, 2014 judgment held that Mr. Grodsky is the owner of the note/mortgage as of August 13, 2007; declares that the balance owed as of that date was $114,199.83; and that Lake Villas could proceed with its writ of fifa. The ownership of the note/mortgage and balance due thereon were incidental issues that were determined so that Lake Villas could execute on its 2009 money judgment against Elise LaMartina. Thus, the trial court's January 27, 2014 judgment was an incidental order made in execution of a previous final judgment, and such orders are not appealable. **Drew**, 22 So. at 959; **Sonnier**, 30 So. at 134. Accord **Durward v. Jewett**, 46 La. Ann. 706, 709, 15 So. 292, 293 (La. 1894) (finding no appeal lies from an interlocutory order that carries into effect an original judgment that has become final

[3] The privilege granted to the seizing creditor by LSA-C.C.P. art. 2292 attaches "[t]o the extent not otherwise governed under Chapter 9 of the Louisiana Commercial Laws [LSA-R.S. 10:9-101, et seq.][.]"

or from which no suspensive appeal has been taken); **Murphy v. Murphy**, 45 La. Ann. 1482, 1484, 14 So. 212 (La. 1893) (finding no appeal can be taken from an interlocutory order carrying an original judgment into effect).[4]

All respondents to this Court's show cause order appear to agree that the January 27, 2014 judgment is interlocutory and that this Court's review should be by supervisory writs. Although this Court has discretion to convert an appeal to an application for supervisory writs, we may only do so if the appeal would have been timely had it been filed as a writ application. See URCA Rule 4-3; LSA-C.C.P. art. 1914; **Stelluto v. Stelluto**, 05-0074 (La. 6/29/05), 914 So.2d 34, 39; **Kas Properties, LLC v. Louisiana Bd. of Sup'rs. for LSU**, 14-0566 (La. App. 1 Cir. 4/21/15), 167 So.3d 1007, 1010.

In this case, the trial court signed the judgment at issue on January 27, 2014, and notice of the judgment was sent on February 3, 2014.[5] John LaMartina-Howell filed his motion for appeal on April 4, 2014. Because the appeal was not filed within 30 days of the notice, the motion for appeal cannot be considered a timely filed application for supervisory writs under URCA Rule 4-3. Accordingly, we will not convert John LaMartina-Howell's appeal to an application for supervisory writs.

CONCLUSION

For the foregoing reasons, the appeal is dismissed. Despite his pauper status, costs of the appeal are assessed to John LaMartina-Howell. See LSA-C.C.P. arts. 2164 and 5188.[6]

APPEAL DISMISSED.

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[4] As further support that the January 27, 2014 judgment is not a final judgment, we note that, if and when Elise LaMartina's property is seized, a third person claiming ownership of, or a mortgage or privilege on that property may, under LSA-C.C.P. art. 1092, assert his claim by intervention after the seizure has occurred.

[5] Although John LaMartina-Howell filed a motion for new trial, a motion for new trial is not allowed from an interlocutory ruling, and the filing of such does not extend the delay to seek review by writs. See **Barnett v. Watkins**, 2007 CW 0720 (La. App. 1 Cir. 7/23/07) (unpublished); **Gagneaux v. Palisi**, 2006 CW 1251 (La. App. 1 Cir. 5/15/07) (unpublished); **Bourne v. Bombardier**, 2007 CW 1823 (La. App. 1 Cir. 10/27/06) (unpublished); **Vidrine v. Canal Ins. Co.**, 2004 CW 2008 (La. App. 1 Cir. 12/1/04) (unpublished); and **Falcone v. State Farm Ins. Cos.**, 2004 CW 0324 (La. App. 1 Cir. 11/1/04) (unpublished).

[6] See **also** **State in Interest of EG**, 95-0018 (La. App. 1 Cir. 6/23/95), 657 So.2d 1094, 1098, writ denied, 95-1865 (La. 9/1/95), 658 So.2d 1263.