

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0150

MOUNT ZION BAPTIST ASSOCIATION

VERSUS

MOUNT ZION BAPTIST CHURCH #1 OF REVILLETOWN PARK

DATE OF JUDGMENT: OCT 31 2016

*ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
NUMBER 71975, DIVISION A, PARISH OF IBERVILLE
STATE OF LOUISIANA*

HONORABLE JAMES J. BEST, JUDGE

* * * * *

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LLC

* * * * *

BEFORE: HIGGINBOTHAM, THERIOT AND CHUTZ, JJ.

Disposition: AFFIRMED IN PART; VACATED IN PART.

CHUTZ, J.

Plaintiff-appellant, Mount Zion Baptist Association, Inc. (hereinafter “MZBA Inc.”) appeals a summary judgment dismissing its claims after the trial court held MZBA Inc. did not own certain immovable property at issue and that another party was in possession of the property. For the following reasons, we affirm in part and vacate in part.

PROCEDURAL AND FACTUAL BACKGROUND

MZBA Inc., a non-profit corporation, was incorporated on March 6, 2009, by six incorporators for the purpose of maintaining a historic cemetery located in Iberville Parish, commonly known as Revilletown Cemetery. On October 8, 2012, MZBA Inc. filed a petition for injunctive relief against the alienation, encumbrance, or destruction of any burial plots located in Revilletown Cemetery, which MZBA Inc. alleged it owned pursuant to an 1881 Act of Exchange. The only named defendant was Mount Zion Baptist Church #1 of Revilletown Park (hereinafter “the Church”). MZBA Inc. alleged the cemetery had been operated for over a century “as the final resting place of [the] original inhabitants of Revilletown and their descendants” but that the Church was making unauthorized sales of cemetery burial plots to individuals who were neither residents of Revilletown nor descendants of its original inhabitants.¹

On November 20, 2012, Georgia Gulf Chemicals & Vinyls, LLC (hereinafter “Georgia Gulf”), filed a petition for intervention in which it asserted it owned the Revilletown Cemetery property and sought dismissal of MZBA Inc.’s petition for

¹ MZBA Inc. subsequently filed a supplemental and amending petition adding Janice Dickerson and Vivian Ann Craig Chiphe as additional plaintiffs, both in their individual and representative capacities on behalf of Mount Zion Baptist Association, an unincorporated association that purportedly acquired title to Revilletown Cemetery in 1881. The unincorporated association was also effectively added to the suit as an additional plaintiff. The claims raised by the unincorporated association, Ms. Dickerson, and Ms. Chiphe were later dismissed by the trial court pursuant to a dilatory exception raising the objection of lack of procedural capacity. A review of that dismissal is the subject of a separate appeal taken to this court. *See Mount Zion Baptist Association v. Mount Zion Baptist Church #1 of Revilletown Park*, 16-0151 (La. App. 1st Cir. 10/31/16), ____ So.3d ____.

injunctive relief. Subsequently, on October 3, 2014, Axiall Corporation (hereinafter “Axiall”), as successor to Georgia Gulf, together with the Church, filed a motion for summary judgment seeking dismissal of MZBA Inc.’s claims. On January 22, 2015, the trial court, without holding a hearing, granted the motion for summary judgment. MZBA Inc. filed a motion to suspend that ruling in order to allow the parties an opportunity to argue the motion for summary judgment.

A hearing was held on the motion to suspend on April 1, 2015. At the hearing, the trial court also considered a motion by Axiall to strike numerous exhibits relied on by MZBA Inc. in support of its opposition to the motion for summary judgment.

After hearing arguments, the trial court signed a written judgment, dated April 1, 2015, granting the motion for summary judgment and dismissing the claims of MZBA Inc., with prejudice. The trial court noted this action effectively denied MZBA Inc.’s motion to suspend its earlier ruling. The trial court also granted the motion to strike several of the exhibits attached to MZBA Inc.’s opposition to the motion for summary judgment, including the affidavits of two incorporators of MZBA Inc., Janice Dickerson and Vivian Ann Craig Chiphe. MZBA Inc. filed a motion for new trial, which the trial court denied by a written judgment signed on August 20, 2015. MZBA Inc. has now appealed,² complaining the trial court erred in granting summary judgment dismissing its claims.

DISCUSSION

MZBA Inc. complains the trial court erred in granting summary judgment in favor of Axiall and the Church and dismissing its claims. In reaching its judgment, the trial court held that: (1) Axiall was in possession of the Revilletown Cemetery property; and (2) MZBA Inc. did not own the Revilletown Cemetery property. MZBA Inc. directs no specific arguments to the trial court’s holding that Axiall is in

² The motion for appeal was filed by MZBA Inc. only and, therefore, does not include Ms. Dickerson and Ms. Chiphe as appellants.

possession of the Revilletown Cemetery property but asserts it owns the cemetery pursuant to an 1881 Act of Exchange between Dr. David Reville and Mount Zion Baptist Association, an unincorporated association. In reviewing the trial court's summary judgment, we will examine each of the trial court's holdings separately.

A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, 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)(2).³ On appeal, appellate courts review the granting or denial of a motion for summary judgment *de novo* under the same criteria governing the district court's consideration of whether summary judgment is appropriate. *Schultz v. Guoth*, 10-0343 (La. 1/19/11), 57 So.3d 1002, 1005.

On a motion for summary judgment, the burden of proof is on the mover. La. C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial, the mover's burden does not require that all essential elements of the adverse party's claim 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. 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 as a matter of law. La. C.C.P. art. 966(C)(2); *Schultz*, 57 So.3d at 1006. 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 the case. *Cason v. Saniford*,

³ All references to La. C.C.P. art. 966 are to that article as it existed at the time that Axiall and the Church filed their motion for summary judgment on October 3, 2014.

13-1825 (La. App. 1st Cir. 6/6/14), 148 So.3d 8, 11, writ denied, 14-1431 (La. 10/24/14), 151 So.3d 602.

Possession of Revilletown Cemetery property:

Initially, we note that the issue of whether or not Axiall, which was an intervenor in this matter, was in possession of the Revilletown Cemetery property was not a matter at issue in the principal action between MZBA Inc. and the Church. It is well-settled that an intervenor takes the proceedings as he finds them. *Strain v. Trinchard*, 05-1433 (La. App. 1st Cir. 6/9/06), 938 So.2d 1008, 1013; *Mike M. Marcello, Inc. v. Louisiana Gaming Control Board*, 04-0488 (La. App. 1st Cir. 5/6/05), 903 So.2d 545, 548. The intervenor cannot change the issue between the parties, and can raise no new one. He must take the suit as he finds it without raising any new issues between the plaintiff and the defendant that they have not themselves raised. See La. C.C.P. art. 1094; *Mike M. Marcello, Inc.*, 903 So.2d at 548. The intervenor's rights are confined to joining or resisting either the plaintiff or the defendant, or to opposing both. La. C.C.P. art. 1091; *Mike M. Marcello, Inc.*, 903 So.2d at 548. An intervenor's rights are subject to these limitations because he can always assert his claim in a separate action. *Strain*, 938 So.2d at 1013; *Mike M. Marcello, Inc.*, 903 So.2d at 548.

Moreover, under La. C.C.P. art. 966(A)(1), a plaintiff or defendant in the principal or any incidental action is permitted to move for summary judgment in his favor “**for all or part of the relief for which he has prayed.**” (Emphasis added.) In this case, Axiall moved for summary judgment in its favor finding it was in possession of the Revilletown Cemetery property, and the trial court granted that relief. However, the relief granted was beyond the scope of relief Axiall prayed for in its petition for intervention, wherein it prayed for dismissal of MZBA Inc.'s petition for injunctive relief. Nor was a determination of whether Axiall was in possession of the Revilletown cemetery property required to dispose of the issues

existing between the plaintiff, MZBA Inc., and the defendant, the Church. Therefore, that portion of Axiall's motion for summary judgment requesting a holding that Axiall was in possession of the Revilletown Cemetery property did not place at issue or affect any part of the relief prayed for in this matter by either Axiall, MZBA Inc., or the Church, but merely resolved an extraneous matter not at issue. In this respect, the motion for summary judgment did not comply with the portion of La. C.C.P. art. 966(A)(1) permitting a mover for summary judgment to seek judgment "for all or part of the relief for which he has prayed." Since the portion of the motion for summary judgment seeking judgment on the issue of Axiall's possession of the Revilletown Cemetery property failed to comply with the procedural requirements of a motion for summary judgment, Axiall was not entitled to summary judgment in its favor as a matter of law. See La. C.C.P. art. 966(B)(2). The trial court erred in granting summary judgment holding that Axiall was in possession of the Revilletown Cemetery property, especially since Axiall, as an intervenor, was not entitled to interject new issues into the proceedings.

MZBA Inc.'s Non-ownership of the Revilletown Cemetery property:

MZBA Inc. also challenges the portion of the trial court's summary judgment holding it does not own the Revilletown Cemetery property. MZBA Inc., which was incorporated in 2009, claims ownership of the cemetery by virtue of the 1881 Act of Exchange between Dr. David Reville and Mount Zion Baptist Association, the unincorporated association. Without clearly articulating its legal rationale, MZBA Inc. appears to argue it is entitled to stand in the stead of the unincorporated association, Mount Zion Baptist Association.

In moving for summary judgment, Axiall and the Church pointed out that, even assuming for purposes of argument that Mount Zion Baptist Association, the unincorporated association, acquired ownership of the Revilletown Cemetery property through the 1881 Act of Exchange, MZBA Inc. cannot prove a transfer of

the property from the unincorporated association to it.⁴ MZBA Inc. was required at that point to produce factual evidence sufficient to establish it would be able to satisfy its evidentiary burden of proving a transfer of title at trial. MZBA Inc. has presented no such evidence.

Under La. R.S. 12:504(A), an unincorporated association is a legal entity entitled to acquire, hold, encumber, donate, or otherwise transfer immovable property. The procedure for an unincorporated association to transfer immovable property is delineated in La. R.S. 9:1051(A), as follows:

Unless otherwise provided by its constitution, charter, bylaws, rules, or regulations under which it is organized, governed, and exists, any unincorporated nonprofit association may alienate or encumber title to immovable property to any person. ... **Any such transaction shall be authorized by resolution adopted by a majority of the members of the association who vote on the resolution at a special meeting called and held for that purpose.** The resolution may designate a person or persons to act as agent for the purpose of effectuating the transaction. Notice of the special meeting, including the date, time, and place of the meeting and the substance of the contemplated resolution, shall be published, on two separate days at least fifteen days prior to the date of the meeting, in the official journal of the parish in which a majority of the members reside or, if none, in a newspaper of general circulation in the parish. A copy of the resolution and proof of publication as required herein shall be attached to each act effectuating the transaction. (Emphasis added.)

In this case, there was no evidence indicating Mount Zion Baptist Association, the unincorporated association, ever had a constitution, bylaws, rules or regulations providing for the transfer of its property in any matter other than that provided in La. R.S. 9:1051(A). Moreover, the evidence introduced in support of the motion for summary judgment reflects that there was no compliance with the statutory requirements of La. R.S. 9:1051(A) for the transfer of immovable property by an unincorporated association. Specifically, the record shows that no notice of a special meeting to consider the transfer was ever given to the members of the unincorporated

⁴ For the limited purpose of this appeal, Axiall and the Church assume both the validity and continued existence of Mount Zion Baptist Association, the unincorporated association, and that it owned Revilletown Cemetery.

association, a special meeting was never held to consider this issue, and no resolution to transfer the Revilletown Cemetery property to MZBA Inc. was ever voted upon or adopted by a majority of the members of the unincorporated association

According to Ms. Dickerson, one of the six incorporators of MZBA Inc., no document transferring ownership of the Revilletown Cemetery property from the unincorporated association to MZBA Inc. exists. She testified by deposition that no transfer was necessary because “[t]he two groups are the same, just one incorporated.” The record does not support this assertion.

Ms. Dickerson estimated in her deposition that there were 100-plus members of the unincorporated Mount Zion Baptist Association, which consisted of residents of Revilletown and the descendants of Revilletown residents. Nevertheless, she admitted there were only “possibly” ten people present at the meeting at which the decision to incorporate as MZBA Inc. was made. Further, no written notice was given to the members of the unincorporated association that a meeting to consider the issue of incorporation was to be held.

Under these circumstances, MZBA Inc. has not shown that either its six incorporators or the “possibly” ten persons present at the incorporation meeting constituted a majority of or had any authority to act on behalf of the unincorporated association, Mount Zion Baptist Association, either to form a corporation or to transfer any assets owned by the unincorporated association to MZBA Inc. These individuals did not constitute a majority of the unincorporated association’s members. Therefore, MZBA Inc. did not establish that its incorporators were authorized to act on behalf of the unincorporated association in forming a corporation. *See Washington v. James*, 42,345 (La. App. 2d Cir. 8/15/07), 962 So.2d 1154, 1160-61. MZBA Inc. and Mount Zion Baptist Association, the unincorporated association, are not the same legal entity.

Based on our *de novo* review of the record, we find no genuine issue of material fact exists as to MZBA Inc.'s failure to comply with the statutory requirements of La. R.S. 9:1051(A) for a valid transfer of title from the unincorporated association to MZBA Inc.. Without proving this essential element, MZBA Inc. cannot establish title to the Revilletown Cemetery property based upon the 1881 Act of Exchange, which is the foundation of its claims. Since MZBA Inc. failed to meet its burden of proving an essential element of its claim, there is no genuine issue of material fact, and the mover is entitled to summary judgment as a matter of law. La. C.C.P. art. 966(C)(2); *Schultz*, 57 So.3d at 1006. The trial court did not err in dismissing MZBA Inc.'s claims based on its holding that MZBA Inc. is not the owner of the Revilletown Cemetery property.

CONCLUSION

For the reasons assigned, the portion of the trial court judgment holding that Axiall is in possession of the Revilletown Cemetery property is vacated, and judgment is hereby entered denying that portion of the motion for summary judgment requesting such relief. The judgment of the trial court granting summary judgment in favor of Axiall and the Church and against MZBA Inc. is affirmed in all other respects.⁵ The costs of this appeal are assessed equally to MZBA Inc. and Axiall.

AFFIRMED IN PART; VACATED IN PART.

⁵ MZBA Inc. indicated in brief that it also sought review of the denial of its motion for new trial. However, MZBA Inc. neither assigned error to the trial court's denial of the motion for new trial nor made any specific arguments regarding the trial court's ruling. Accordingly, no issue as to the motion for new trial is properly before us in this appeal. See Uniform Rules, Courts of Appeal, Rule 2-12.4(B)(4).