STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0319

MICHELENA A. ROSE, LINDA ROSE GALLAGHER, MELANIE K. ROSE

VERSUS

TWIN RIVER DEVELOPMENT, LLC, CSRS, INC., HILLTOP LOGGING CORP., MARTY DUE, RICHARD DEMINT, AND CHARLES BROWN

Judgment rendered NOV 01 2017

* * * * * *

Appealed from the
21st Judicial District Court
in and for the Parish of Livingston, Louisiana
Trial Court No. 115789
Honorable Elizabeth P. Wolfe, Judge

* * * * * *

RICHARD T. GALLAGHER, JR.
METAIRIE, LA

ATTORNEY FOR
PLAINTIFFS-APPELLANTS
THE ESTATE OF MICHELENA A. ROSE, LINDA ROSE GALLAGHER AND MELANIE K. ROSE

STEVEN B. LOEB
JACOB E. ROUSSEL
BATON ROUGE, LA

ATTORNEYS FOR
DEFENDANT-APPELLEE
CSRS, INC.

ANTHONY S. MASKA
HAMMOND, LA

ATTORNEY FOR
DEFENDANT-APPELLEE
RICHARD DEMINT

* * * * * *

BEFORE: GUIDRY, PETTIGREW, AND CRAIN, JJ.

PETTIGREW, J.

In the instant case, the trial court heard two motions for summary judgment on September 19, 2016. Following the hearing, both motions were granted by the trial court, each in favor of a different defendant. However, only one judgment was signed on that day. According to plaintiffs, they had no intention of appealing the judgment signed on September 19, 2016, but they did. Although the second judgment, signed on October 6, 2016, was never appealed, it is the only judgment challenged by plaintiffs in the appeal before us now. For the reasons that follow, we dismiss this appeal.

FACTS AND PROCEDURAL HISTORY

The underlying litigation arises from the clear-cutting of a large swath of trees from land ("the Rose property") plaintiffs, the Estate of Michelena A. Rose, Linda Rose Gallagher, and Melanie K. Rose, claim to own.[1] Particularly, the disputed land consists of approximately 6.6 acres along the Tickfaw River in Livingston Parish.

In 2006, Twin Rivers Development, LLC ("Twin Rivers") bought a tract adjoining the Rose property. Marty Due owned Twin Rivers, and Richard Demint was the company's manager. Prior to Twin Rivers' purchase of the adjoining property, Twin Rivers hired CSRS, Inc. and Stephen Estopinal to survey the property.

Also in 2006, Michael Gallagher, Linda's son, hired a surveyor, Larry Lessard, to survey the property lines in connection with possible reclamation of riverfront property that had eroded. Lessard's employees determined that survey stakes had been placed diagonally over the Rose property, incorrectly setting the boundary line between the tracts and diminishing the Rose tract. After checking the public conveyance records, Lessard notified CSRS and its surveyor that they had placed the property line incorrectly over part of the Rose property. However, the allegedly encroaching stakes were never removed.

---

[1] Following the death of Michelena A. Rose in 2010, the Estate of Michelena A. Rose was substituted as party plaintiff for Michelena A. Rose.

Twin Rivers subsequently hired Hilltop Logging Corp. to clear cut trees up to the CSRS survey markers. As a result, Hilltop Logging cut approximately 6.6 acres of old growth riverfront timber from property allegedly belonging to plaintiffs.

In May 2007, plaintiffs filed a petition for damages and trespass. Among the named defendants were Richard Demint and CSRS. In July 2016, Demint and CSRS filed separate motions for summary judgment. Demint alleged that he had no ownership interest in Twin Rivers and that he had no involvement in cutting the trees on the disputed land. CSRS alleged that it should be dismissed from the litigation because there was no evidence that CSRS violated the applicable duty of care for surveyors.

Both motions for summary judgment came on for hearing on September 19, 2016. The hearing transcript shows that plaintiffs did not contest the grant of summary judgment in Demint's favor. A prepared judgment granting the motion for summary judgment, without decretal language, was submitted and signed that date, and was later certified as final under La. Code Civ. P. art. 1915.

CSRS's motion for summary judgment, however, was contested. After hearing argument from the parties, the trial court granted CSRS's motion for summary judgment. In a judgment signed on October 6, 2016, the trial court dismissed plaintiffs' claims against CSRS, with prejudice. On November 29, 2016, plaintiffs filed a motion and order for appeal, as follows:

> **NOW INTO COURT**, through undersigned counsel, come plaintiffs, the Estate of Michelena A. Rose, Linda Rose Gallagher and Melanie K. Rose who moves that this Court grant them a [devolutive] appeal from the final judgment in this case, which was read, rendered and signed on September 19, 2016, and mailed on October 4, 2016.

The record in this appeal was lodged on March 9, 2017. That same day, this court issued a show cause order on the grounds that the September 19, 2016 judgment appeared to lack appropriate decretal language and therefore is not a final, appealable judgment. The order directed the parties to show cause why the appeal should or

should not be dismissed on that basis. It further remanded the matter to the trial court for the limited purposes of curing the defect in the judgment.[2]

DISCUSSION

The judgment signed by the trial court on September 19, 2016, simply states:

> Considering the facts, pleadings and argument of counsel made during the hearing on the *Motion for Summary Judgment* submitted by Richard Demint:
>
> **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the *Motion for Summary Judgment* filed by the defendant, Richard Demint, be and is **GRANTED**.
>
> This Court further finds that there is no just reason for delay, and this is a final judgment pursuant to L.C.C.P. art. 1915.

This judgment does not dismiss plaintiffs' claims against Demint. Appellate courts have the duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue. **Texas Gas Exploration Corp. v. Lafourche Realty Co., Inc.**, 2011-0520, p. 8 (La. App. 1 Cir. 11/9/11), 79 So.3d 1054, 1059, writ denied, 2012-0360 (La. 4/9/12), 85 So.3d 698. This court's appellate jurisdiction extends only to "final judgments." See La. Code Civ. P. art. 2083(A); **Van ex rel. White v. Davis**, 2000-0206,

p. 5 (La. App. 1 Cir. 2/16/01), 808 So.2d 478, 483. A judgment that determines the merits in whole or in part is a final judgment. La. Code Civ. P. art. 1841. A final judgment shall be identified as such by appropriate language. A valid judgment must be "precise, definite, and certain." **Laird v. St. Tammany Parish Safe Harbor**, 2002-0045, p. 3 (La. App. 1 Cir. 12/20/02), 836 So.2d 364, 365. Moreover, a final appealable judgment must contain decretal language, and it must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied. See **Carter v. Williamson Eye Center**, 2001-2016, p. 2 (La. App. 1 Cir. 11/27/02), 837 So.2d 43, 44. These determinations should be evident from the language of a judgment without reference to other documents in

---

[2] We note that although the parties filed briefs in response to our show cause order, to this date there has been no amended judgment filed into the record addressing our concerns about the finality of the September 19, 2016 judgment.

the record. **Laird**, 2002-0045 at 3, 836 So.2d at 366. Thus, a judgment that does not contain decretal language cannot be considered as a final judgment for the purpose of an immediate appeal, and this court lacks jurisdiction to review such a judgment. See **Johnson v. Mount Pilgrim Baptist Church**, 2005-0337, p. 3 (La. App. 1 Cir. 3/24/06), 934 So.2d 66, 67. Because the September 19, 2016 judgment is defective in that it does not contain decretal language, we cannot consider it as a final judgment for the purpose of an immediate appeal. However, because of the unique posture of this case, our discussion does not end here.

In their brief submitted in response to this court's show cause order, plaintiffs allege that although they referenced the September 19, 2016 judgment in their motion and order for appeal, they actually intended to appeal only the judgment rendered in favor of CSRS, *i.e.*, the judgment signed by the trial court on October 6, 2016. In fact, in their appellate brief filed herein, the only error alleged by plaintiffs concerns the granting of summary judgment in favor of CSRS. Citing **Vienne v. Chalona**, 203 La. 450, 14 So.2d 54 (La. 1943), plaintiffs argue that where there are multiple judgments, one motion to appeal is sufficient to perfect the appeal.

Subsequent thereto, CSRS filed a "Motion To Dismiss Appeal, Or Alternatively, Motion For Leave To File Appellee Brief" with this court. CSRS argued that pursuant to La. Code Civ. P. art. 2088 and applicable jurisprudence, there can be no appeal of the judgment rendered in its favor and signed on October 6, 2016, as plaintiffs never filed a motion to appeal said judgment.[3]

It is well settled that appeals are favored in the law and should be maintained unless the grounds urged for dismissal are free from doubt. **Adams v. South Lafourche Levee Dist.**, 2015-0507, p. 11 (La. App. 1 Cir. 6/27/16), 199 So.3d 20, 26, writ granted and cause remanded, 2016-1423 (La. 6/29/17), 222 So.3d 34. However, a party wishing to appeal an adverse judgment must obtain an order of appeal. There can be no appeal absent an order of appeal because the order is jurisdictional; this lack

[3] Based on our holding dismissing the instant appeal, we deny this motion by CSRS as moot.

of jurisdiction can be noticed by the court on its own motion at any time. **Noyel v. City of St. Gabriel**, 2015-1890, p. 5 (La. App. 1 Cir. 9/1/16), 202 So.3d 1139, 1142, writ denied, 2016-1745 (La. 11/29/16), 213 So.3d. 392. See also La. Code Civ. P. art. 2088. The failure of the appellant to obtain an order of appeal forfeits his right to appeal. **Snearl v. Mercer**, 99-1738, p. 7 (La. App. 1 Cir. 2/16/01), 780 So.2d 563, 571, writs denied, 2001-1319, 2001-1320 (La. 6/22/01), 794 So.2d 800, 801.

Here, the motion and order for appeal unambiguously state that plaintiffs are appealing the judgment read, rendered, and signed on September 19, 2016, and mailed on October 4, 2016. Even on careful review of the motion and order for appeal and the latter judgment signed on October 6, 2016 and mailed on October 19, 2016, there appears to be no ambiguity, latent question, or doubt about which judgment is being appealed.

In **Kirsch v. Kirsch**, 2015-0281, pp. 19-20 (La. App. 1 Cir. 7/29/15), 180 So.3d 417, 428, writ denied, 2015-1626 (La. 9/18/15), 178 So.3d 153, this court considered whether it had jurisdiction over all of the issues presented in an appeal where the appellant filed a motion and order for appeal that referenced the first of two judgments but sought review of the "final judgment rendered in this action." The second judgment was not signed until after the order granting the appeal was signed. Based on another first circuit opinion, **Voelkel v. State**, 95-0147, pp. 3-4 (La. App. 1 Cir. 10/6/95), 671 So.2d 478, 479-480, writ denied, 95-2676 (La. 1/12/96), 667 So.2d 523, this court in **Kirsch** concluded: "As the [first] judgment only addressed the award of sole custody ..., the remaining assignments of error do not arise from [that] judgment. Therefore, pursuant to **Voelkel**, this Court lacks jurisdiction over the remaining assignments of error, which are not encompassed within the award of sole custody." **Kirsch**, 95-0147 at 21, 180 So.3d at 429.

In **Voelkel**, the trial court signed a judgment on September 1, 1994, granting the State of Louisiana's motion for summary judgment. A separate judgment was signed on September 30, 1994, dismissing the Washington Parish Police Jury. The appellant moved for an appeal, on September 23, 1994, wherein he stated he was

appealing the judgment "rendered on or about August 30, 1994." The order granting the appeal was signed October 17, 1994. The appellant treated the appeal as if it were an appeal of both judgments. This court dismissed the appeal as to the latter judgment concluding as follows: "We find we have no jurisdiction over the appeal of the September 30 judgment because of the lack of an order of appeal." **Voelkel**, 95-0174 at 3-4, 671 So.2d at 480.

The only apparent distinction between these two cases and the one on appeal here is that here, the order of appeal was signed after both judgments were rendered. Even so, the plain language of the motion and order for appeal here pertains only to the judgment signed September 19, 2016 and mailed October 4, 2016.

In opposing the dismissal of their appeal, plaintiffs argue several points. First, they explain that they did not oppose the summary judgment as to Demint. Rather, they did oppose the summary judgment filed by CSRS. Plaintiffs argue that they demonstrated an intent to appeal this ruling "by requesting reasons for judgment in the oral arguments before the [trial court]." They explain that it was their intent to appeal the judgment in favor of CSRS. As previously noted, plaintiffs cite the Louisiana Supreme Court's holding in **Vienne**, supra, as authority for the proposition that where there are multiple judgments, one motion to appeal is sufficient to perfect the appeal.

The holding in **Vienne**, however, is easily distinguishable. In **Vienne**, the notice of appeal was specifically filed on behalf of two distinct plaintiffs who both received substantially the same, but separate judgments at the same time. The motion for appeal referenced both appellants and both judgments. The order granting the appeal granted a devolutive appeal to both appellants by name. **Vienne**, 14 So.2d at 54-55. In the instant case, nothing in the motion and order for appeal provides a basis for referencing or incorporating the summary judgment in favor of CSRS into plaintiffs' appeal of the first judgment.

The first circuit has at times liberally construed motions for appeal in order to maintain appeals. In **Noyel**, supra, the trial court signed a judgment on June 17, 2015. Following the appellant's motion for devolutive appeal of the June 17, 2015 judgment,

the trial court issued an order of appeal "from the Judgment rendered in the above-captioned matter on April 30, 2015 and signed on May 15, 2016[.]" No such judgment existed however, so on the motion of the appellant, the trial court ultimately rendered an amended order of appeal reflecting the correct dates. Further, based on the apparent defect in the appeal, this court, *ex proprio motu*, issued an interim order on May 20, 2016, remanding the case to the trial court for the limited purpose of issuing an amended order of appeal with the correct dates of the original judgment. The trial court rendered an amended order of appeal. This court then held: "As the amended order of appeal contains the correct dates of the original judgment, the jurisdiction of this court now attaches upon the granting of the amended order of appeal." **Noyel**, 2015-1890 at 5-6, 202 So.3d at 1142.

Similarly, in **Grote v. Federal Insurance Company**, 2016-0474 (La. App. 1 Cir. 12/22/16), 2016 WL 7407385 (unpublished), writ denied, 2017-00153 (La. 3/13/17), 216 So.3d 805, the trial court signed a judgment on September 15, 2015. On motion for appeal, however, the trial court signed an order granting an appeal "of the judgment rendered on 08/17/15." However, there was no judgment rendered on August 17, 2015. Again, based on the apparent defect in the appeal, this court, *ex proprio motu*, issued an interim order remanding the case to the trial court for the limited purpose of issuing an amended order of appeal with the correct dates of the original judgment. The trial court then supplemented the record with an amended order for devolutive appeal. As in **Noyel**, this court observed that "[a]s the amended order of appeal contains the correct dates of the original judgment, the jurisdiction of this court now attaches upon the granting of the amended order of appeal." **Grote**, 2016 WL 7407385, at 4-5.

These cases, however, also appear to be distinguishable from the facts at issue in this appeal. In **Noyel** and in **Grote**, there was only one judgment to be appealed, and this court recognized that the orders of appeal apparently contained clerical errors, which the appellants were allowed to correct. Here, perhaps the reference to the judgment signed September 19, 2016 and mailed October 4, 2016, may be a clerical

error on plaintiffs' part. However, a judgment exists that completely conforms to the judgment referenced in the motion and order for appeal. Even if all the parties know that plaintiffs had no intent to appeal the judgment they appear to have acquiesced in, but rather that they intended to appeal the judgment in favor of CSRS, they have not obtained an order of appeal for that judgment.

DECREE

For the above and foregoing reasons, we dismiss the instant appeal and assess all appeal costs against plaintiffs, the Estate of Michelena A. Rose, Linda Rose Gallagher, and Melanie K. Rose.

APPEAL DISMISSED; MOTION TO DISMISS APPEAL DENIED AS MOOT.