NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0475

FIRST BANK AND TRUST

VERSUS

FITNESS VENTURES, L.L.C., JOSEPH T. SPINOSA,
and CLAYTON A. PETERSON

Judgment rendered DEC 06 2017

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C621013
Honorable Janice Clark, Judge

* * * * * *

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and JOSEPH T. SPINOSA

* * * * * *

BEFORE: GUIDRY, PETTIGREW, AND CRAIN, JJ.

PETTIGREW, J.

In this case, the defendants appeal a judgment in favor of the plaintiff in a suit on a promissory note. We affirm.

FACTS AND PROCEDURAL HISTORY

On April 25, 2013, First Bank and Trust ("FBT") filed suit on a promissory note, commercial guaranty, and for enforcement of a security interest against Fitness Ventures, L.L.C. ("Fitness Ventures"), Joseph T. Spinosa, and Clayton A. Peterson.[1] The promissory note, dated December 21, 2007, was executed in connection with a Business Loan Agreement of that same date whereby Fitness Ventures and Spinosa obtained a loan from FBT for the purpose of opening a Bally Total Fitness™ gym in Perkins Rowe in Baton Rouge. In addition to a money judgment, FBT sought: recognition of its rights over the membership interest in Fitness Ventures under the Business Loan Agreement; judgment requiring Spinosa to turn over all keys, documents, books, records, computer access codes, and other information necessary for FBT to exercise the membership interest; and judgment enjoining Spinosa from interfering with FBT's exercise of the membership interest.[2] In their answer to the petition, Fitness Ventures and Spinosa asserted that FBT had no cause of action to enforce a security interest because the Business Loan Agreement did not grant a security interest in the membership interest of Fitness Ventures.

Thereafter, on October 30, 2013, FBT and Spinosa[3] signed a document entitled "TERM SHEET," which contained the following statements:

> TERM SHEET
> FIRST BANK & TRUST/FITNESS VENTURES
>
> - Spinosa will transfer or cause his affiliates to transfer 100% of his or the affiliates' membership interest in Fitness Ventures, LLC to First Bank or assigns in exchange for a credit on the indebtedness of

[1] Peterson, who guaranteed payment of Fitness Ventures' and Spinosa's indebtedness, entered into a settlement agreement with FBT and was dismissed from the suit with prejudice on September 9, 2014.
[2] Prior to filing suit on the December 21, 2007 note, FBT obtained a charging order in a separate suit, charging Spinosa's membership interest in Fitness Ventures and two other limited liability companies with payment of a judgment in the amount of $4,369,165.25, plus attorney fees and interest.
[3] The document does not specify whether Spinosa is signing on behalf of Fitness Ventures or in his individual capacity, or both.

$136,413.15 (Being the current loan balance of 2,236,413.15 less $2,100,000.00).

- The indebtedness owing to First Bank shall be fixed at $2,100,000 and interest shall cease to accrue on this indebtedness.
- At closing, Spinosa will resign from all positions, including as an officer, director or manager of Fitness Ventures and Fitness Ventures shall appoint as its sole manager a person designated by First Bank[.]
- Spinosa will execute any and all documents necessary to cause Bally's to remit the dues collections to a Fitness Ventures account at First Bank.
- First Bank, or its subsidiary, as a member of Fitness Ventures will attempt to restructure the lease with Key Bank and/or its successors.
- Fitness Ventures will operate as a going concern and attempt to generate a profit, 100% of which shall be distributed to First Bank first for the payment of taxes generated from operations and then for payment on the interest and principal due on the indebtedness owing to First Bank.
- Any amounts received by First Bank shall be applied to the balance due by Fitness Ventures to First Bank with Spinosa receiving dollar-for-dollar credit for such amounts on his guaranty of the this [sic] indebtedness.
- Pending closing, Fitness Ventures will continue to operate as [a] going concern, retaining all management in place.
- Spinosa will assist First Bank at no charge in formulating a strategy for negotiating with Key Bank and/or its successors to restructure the rent due by Fitness Ventures and make all of Fitness Venture's [sic] books, records, employees and potential purchasers available to First Bank.
- In the event that First Bank sells its membership in Fitness Ventures, the proceeds of such sale shall be applied to the balance due by Fitness Ventures to First Bank with Spinosa receiving dollar-for-dollar credit for such amounts on his guaranty of the this [sic] indebtedness.
- First Bank will forbear from further collection efforts on the Fitness Ventures note and Spinosa's guarantee thereof until the membership interests of Fitness Ventures or its assets, or the health club business run by Fitness Ventures is sold or otherwise disposed. After any such disposal of the membership of Fitness Ventures or its assets, Spinosa and all of his affiliates shall be released from all liability under the note and his or any affiliate's guaranty.
- This Term Sheet is subject to written agreements mutually acceptable to the parties and due diligence by First Bank and Spinosa shall cooperate fully with such due diligence. The parties agree to utilize their best efforts to consummate the transactions herein within thirty (30) days.
- All parties agree that it is in the best interest of all parties, the health club and its membership rolls that all aspects of this Term Sheet and any resulting transactions be held in the strictest confidences. Any public relations release(s) shall be with the consent of all parties.

FBT began the due diligence process following the signing of the Term Sheet; however, in April of 2014, Fitness Ventures consented to an eviction from the leased premises, and the business ceased operations. Thereafter, FBT filed a motion for

summary judgment in its suit on the note, which was opposed by Fitness Ventures and Spinosa on the grounds that a genuine issue of material fact existed as to the continued enforceability of the note and the amount, if any, owed, based on the Term Sheet. The trial court denied the motion for summary judgment, and the matter proceeded to trial.

On the first day of the bench trial in this matter, the trial court signed an order granting leave to Fitness Ventures and Spinosa to file a Supplemental Answer raising the affirmative defense of settlement, compromise, or extinguishment based on the Term Sheet, which they allege constituted an enforceable settlement agreement, compromise, or extinguishment of any alleged obligations between the parties. At the conclusion of the trial, the trial court requested the parties submit proposed findings of fact and conclusions of law and proposed judgments. Both parties filed proposed judgments with the trial court as requested, and the trial court inadvertently signed both judgments. On November 2, 2016, the trial court signed a judgment in favor of defendants Fitness Ventures and Spinosa, and notice of judgment was mailed to the parties on November 3, 2016. Also on November 3, 2016, the trial court signed a conflicting judgment in favor of FBT, ordering Fitness Ventures and Spinosa to pay FBT $3,624,791.88, plus additional interest and attorney fees accruing after July 11, 2016. Notice of this judgment was mailed November 4, 2016.

On November 9, 2016, FBT filed a Motion to Clarify Grounds for Rendering Second Judgment or Alternatively, Motion for New Trial for Reargument Only, pointing out that the court had signed two conflicting judgments and asking the court to either clarify that it had granted a new trial ex parte in order to correct its error and vacate the first, erroneously-signed judgment before signing the second judgment, or grant a new trial for reargument only in order to correct its error in signing two conflicting judgments. On November 11, 2016, the trial court signed the order granting the new trial; however, the court noted on the order that counsel should be notified by fax and no hearing date was set.

A Minute Entry dated December 1, 2016, was issued, stating:

> This matter came before the Court on a Motion to Clarify Grounds for Rendering Second Judgment or Alternatively, Motion for a New Trial for Reargument only. The Court has reviewed the record and has determined that it has signed conflicting judgments in error. The Court hereby affirms or reiterates its decision in favor of defendants as outlined in the minute entry. Therefore, the Court will allow Judgment previously submitted by counsel for the petitioner to remain judgment in effect. Judgment to be signed accordingly. Notify counsel.

Thereafter, on January 17, 2017, another Minute Entry was issued, amending the December 1, 2016 Minute Entry:

> Amended Minute Entry from Wednesday, December 1, 2016:
>
> This matter came before the Court on a Motion to Clarify Grounds for Rendering Second Judgment or Alternatively, Motion for a New Trial for Reargument only. The Court has reviewed the record and has determined that it has signed conflicting judgments in error. The Court hereby affirms or reiterates its decision in favor of plaintiffs as outlined in the minute entry. Therefore, the Court will allow Judgment previously submitted by counsel for the petitioner to remain judgment in effect. Judgment to be signed accordingly. Notify counsel.

On January 25, 2017, the trial court signed a Judgment on Motion for New Trial stating that it had signed conflicting judgments in error and that the November 3, 2016 judgment in favor of FBT was the correct judgment. The trial court vacated the November 2, 2016 judgment in favor of defendants and declared it null and void and thereafter affirmed the November 3, 2016 judgment in favor of FBT.

Defendants have appealed, asserting that the trial court erred in: (1) granting the judgment in favor of FBT in spite of a settlement and compromise between the parties and their actions in conformity therewith, and (2) granting judgment on a motion for new trial without complying with the hearing requirements of La. C.C.P. art. 1977.

DISCUSSION

New Trial

This court has held that a timely-granted new trial is an appropriate avenue for a trial court to correct its own error in signing the wrong judgment. **Radcliffe 10, L.L.C. v. Zip Tube Systems of Louisiana**, 09-0417, pp. 9-12 (La. App. 1 Cir. 12/29/09), 30 So.3d 825, 830-832, writ denied, 01-0244 (La. 4/9/10), 31 So.3d 394; **Esplanade, L.L.C. v. KMR Entertainment Co.**, 06-0567, p. 4 (La. App. 1 Cir. 3/30/07), 2007WL949473.

See also **Lousteau v. K-Mart Corp.**, 03-1182, p. 3 (La. App. 5 Cir. 3/30/04), 871 So.2d 618, 620, writ denied, 2004-1027 (La. 6/25/04), 876 So.2d 835 ("The recordation of the trial court that it signed the first judgment in error, within the time frame permitted for granting a new trial, persuades us that the [second] judgment is not invalid as an impermissible amended judgment."). The order granting a new trial in this case was signed November 11, 2016, which was within the delay for granting a new trial.[4]

A motion for new trial does not necessarily require a contradictory hearing. **Bracken v. Payne & Keller Co., Inc.**, 14-0637, p. 6 (La. App. 1 Cir. 8/10/15), 181 So.3d 53, 57, n. 4. Inasmuch as a new trial may be granted by the court on its own motion without a contradictory hearing, the court may in the same manner grant a new trial on the motion of a party, if convinced by the motion that the party is entitled thereto. Constitutional due process does not require a contradictory hearing on a motion for a new trial. Moreover, if the order applied for by the motion is one to which the mover is clearly entitled without supporting proof, the court may grant the motion ex parte. **Borras v. Falgoust**, 285 So.2d 583, 587 (La. App. 4 Cir. 1973), writ denied, 289 So.2d 161 (La. 1974); citing **Sonnier v. Liberty Mutual Ins. Co.**, 258 La. 813, 248 So.2d 299 (1971) and La. C.C.P. art. 963.

Louisiana Code of Civil Procedure article 1977 provides that when a new trial is granted, it shall be assigned for hearing in accordance with the rules and practice of the court. However, the failure of a trial court to hold a hearing following the granting of a motion for new trial is not always reversible error. See **Heritage Worldwide, Inc. v. Jimmy Swaggart Ministries**, 95-0484, pp. 3-4 (La. App. 1 Cir. 11/16/95), 665 So.2d 523, 526 ("[A] separate hearing or 'new trial' is not necessary where the motion for new trial is for reargument only, and reargument of the case by counsel for all parties is heard at the hearing on the motion for a new trial. In that instance, the trial court is only

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[4] Louisiana Code of Civil Procedure article 1974 grants seven days, exclusive of holidays, in which a new trial may be applied for. Where a judge grants a motion for new trial ex proprio motu, the delay for the trial court to grant the new trial begins to run on the day after notice of judgment is mailed to the parties. **H.B. "Buster" Hughes, Inc. v. Bernard**, 306 So.2d 785, 789-90 (1975).

required to reconsider its previous judgment." (Citation omitted.)); **Russell v. McDonald's Corp.**, 576 So.2d 1213, 1216-17 (La. App. 5 Cir. 1991) (While the new trial was not set for a separate hearing after it was granted for reargument only, the appellate court held that the parties, who were allowed to present argument at the hearing on the motion for new trial, were not deprived of any rights nor were they prejudiced by the manner in which the trial court handled the rehearing, and therefore there was no reversible error.).

In this case, after the conclusion of the bench trial, the parties filed post-trial memoranda, proposed findings of fact and law, and proposed judgments with the trial court. After the parties received notice of the signing of the two conflicting judgments, the trial court granted a new trial within the delays for doing so. Thereafter, the court issued a minute entry explaining its error in signing both judgments submitted by the parties and explaining in whose favor she intended to rule, and subsequently signed a judgment on the new trial, vacating the judgment signed in error and affirming the judgment she intended to sign. Although article 1977 provides that once a new trial is granted, it shall be set for hearing, when a new trial is for reargument only, the trial court has the power to define and limit the scope of the new trial and no evidence may be adduced. **Russell**, 576 So.2d at 1217 (1991); La. C.C.P. art. 1978. Thus, although the parties would have been allowed to present arguments at a new trial of this matter if it had been set for hearing in accordance with article 1977, the court would thereafter simply be required to reconsider its previous judgment. **Heritage Worldwide**, 95-0484 at pp. 3-4, 665 So.2d at 526. Considering the sole reason for the new trial in this case was the correction of a ministerial error and not a reconsideration of the merits, we do not believe the defendants were prejudiced in any way by the failure of the trial court to set this matter for hearing to allow reargument. We are mindful that the primary objective of all procedural rules should be to secure to the parties the full measure of their substantive rights. Rules of procedure exist for the sake of substantive law and to implement substantive rights, not as an end in and of itself. **Radcliffe**, 09-0417 at p. 11, 30 So.3d at 831. Based on the unique circumstances of this case, we do not believe that

the parties were deprived of any rights, nor were they prejudiced by the manner in which the trial court handled the motion for new trial, and therefore there was no reversible error. This assignment of error lacks merit.

Compromise

Fitness Ventures and Spinosa also argue on appeal that the trial court erred in finding that the Term Sheet did not constitute a valid compromise.

A compromise is a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship. La. C.C. art. 3071. A compromise settles only those differences that the parties clearly intended to settle, including the necessary consequences of what they express. La. C.C. art. 3076.

A compromise instrument is the law between the parties and must be interpreted according to the intent of the parties to the agreement. The compromise instrument is governed by the same general rules of construction applicable to contracts. **Ortego v. State, Dept. of Transp. and Dev.**, 96-1322, p. 7 (La. 2/25/97), 689 So.2d 1358, 1363. Accordingly, when the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La.C.C. art. 2046. **Smith v. Walker**, 96-2813 (La. App. 1 Cir. 2/20/98), 708 So.2d 797, 802, writ denied, 98-0757 (La. 5/1/98), 718 So.2d 418.

In determining those matters the parties intended to settle, we must consider the contract as a whole and in light of attending events and circumstances. **Ortego**, 96-1322 at p. 7, 689 So.2d at 1363. Thus, the intent which the words of the compromise instrument express in light of the surrounding circumstances at the time of execution of the agreement is controlling. **Brown v. Drillers, Inc.**, 93-1019 at p. 8, 630 So.2d 741, 748. **Smith**, 708 So.2d at 802.

Joseph Canizaro, CEO of FBT, testified at trial that the discussions surrounding the Term Sheet began because FBT wanted to collect its debt from Fitness Ventures and Spinosa and he believed that he could help Spinosa find a purchaser to buy the business for an amount which would allow him to pay off his debt to FBT. Canizaro testified that

FBT agreed with Spinosa that if they could sell the business for $2.1 million, Spinosa would receive a $136,413.15 credit on the indebtedness in exchange for the transfer of all of his interest in the business to FBT or its assigns. Canizaro explained that the potential buyers FBT approached about purchasing the business wanted to see something in writing about the details of the deal, and that was the purpose of the Term Sheet, which he characterized as a "letter of intent." The Term Sheet "was an outline of a deal . . . that Tommy indicated that he would be willing to make subject to our getting, of course, someone to buy the business." Canizaro stated that once a buyer could be found, the Term Sheet would serve as the basis for more detailed agreements, including an agreement with the buyer to purchase the business. He testified that the Term Sheet required Fitness Ventures to continue to operate the business as a going concern, retaining all management in place, in order to generate a profit and to help find a buyer, explaining that employees leaving could hurt the business, making it less desirable to a potential buyer. Canizaro stated that potential buyers eventually lost interest as time passed and Fitness Ventures was evicted from the building and ultimately closed.

James Noel, manager of FBT's Special Assets and Loan Work Out Department, testified that he participated in discussions with Spinosa and Canizaro regarding the Term Sheet. He testified that at the time the Term Sheet was being negotiated, Spinosa was in default on multiple commitments to FBT, and the parties were seeking a "global solution." The Term Sheet was intended to be "an agreement to agree," the purpose of which was to assist Spinosa in getting the debt to FBT paid by finding a third party to purchase and take over the operation of Fitness Ventures. Once the Term Sheet was signed, Noel testified that he began conducting due diligence, which went on for many months because: "I wasn't getting the information that I needed to do due diligence . . . . [I]t took quite a while, and we also had to get -- try to get interests from prospective investors to buy the assets or the ownership interest of Fitness Ventures as part of the due diligence, and that takes quite a bit of time." Because the purpose of the due diligence was to find a buyer to purchase and take over the operation of Fitness Ventures, the due diligence process ended once Fitness Ventures was evicted from its leased

premises in Perkins Rowe and ceased operations in April of 2014. Regarding compliance with the Term Sheet, Noel testified that the membership interests in Fitness Ventures were never transferred to FBT, no closing or further written agreements ever took place, and FBT never appointed its own manager to Fitness Ventures.

Spinosa denied that the Term Sheet was an agreement to agree; rather, he testified that he believed that by signing the Term Sheet, he had entered into a settlement agreement with FBT, and "under the terms and conditions of the Term Sheet, if certain things happened, [he] was released from liability personally." However, despite his assertions that he believed the Term Sheet was the settlement agreement between the parties, Spinosa referred to "the definitive papers which are to be prepared" in an email sent to Canizaro after the Term Sheet was executed. Furthermore, Spinosa acknowledged at trial that he did not take all actions required by the Term Sheet: he did not transfer his membership interest in Fitness Ventures to FBT, he did not resign from any positions at Fitness Ventures, Fitness Ventures did not continue operating as a going concern,[5] and the parties did not enter into any further written agreements as contemplated by the Term Sheet. Spinosa testified that it was his belief that by signing the Term Sheet, his indebtedness was automatically capped at $2.1 million without any further action on his part. He also testified that it was his belief that by selling certain assets (primarily, furniture, fixtures, and equipment) of the company for $50,000.00 upon Fitness Ventures' eviction from the premises and tendering $25,000.00 from that sale to FBT, he complied with his obligations under the Term Sheet, and would be released from all liability under the note without doing anything further.

Since the existence or validity of a compromise depends on a finding of the parties' intent, which is an inherently factual finding, a trial court's interpretation of an alleged compromise agreement is subject to the manifest error/clearly wrong standard of review. **Feingerts v. State Farm Mut. Auto. Ins. Co.**, 12-1598, p. 4 (La. App. 4 Cir. 6/26/13),

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[5] Although Fitness Ventures did initially continue to operate the gym as a going concern after the Term Sheet was signed, Fitness Ventures was evicted from the Perkins Rowe premises pursuant to a consent judgment approximately six months later, and operations ceased.

117 So.3d 1294, 1297, writ denied, 13-2156 (La. 11/22/13), 126 So.3d 489; **Hancock Bank of Louisiana v. Holmes**, 09-1094, p. 6 (La. App. 5 Cir. 5/25/10), 40 So.3d 1131, 1134; **Rosell v. ESCO**, 549 So.2d 840 (La. 1989). In light of the evidence presented on the issue of the parties' intent related to the Term Sheet, we cannot say that the trial court's factual finding that the Term Sheet did not constitute a compromise of the disputes between the parties was manifestly erroneous or clearly wrong. There was sufficient evidence before the trial court upon which it could have concluded that the parties intended the Term Sheet to be simply an agreement to agree, outlining the terms of a proposed agreement or agreements to be entered into after due diligence was completed in the event a purchaser was found for the business. Several of the terms listed in the Term Sheet were not complied with, including Fitness Ventures continuing to operate the business as a going concern, Spinosa transferring all of his membership interests in the company to FBT or its assigns, and Spinosa resigning from all positions held in the company. This assignment of error is also without merit.

CONCLUSION

The trial court judgment signed January 25, 2017, vacating the November 2, 2016 judgment signed in error and affirming the November 3, 2016 judgment in favor of plaintiffs is affirmed. Costs of this appeal are assessed to defendants-appellants, Fitness Ventures, L.L.C. and Joseph T. Spinosa.

AFFIRMED.