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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 1337

IN THE MATTER OF THE SUCCESSION OF DIANA SALLY WEBER

Judgment Rendered: APR 29 2019

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 100664

Honorable Timothy E. Kelley, Judge Presiding

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Jo Carol Herbert

BEFORE: WHIPPLE, C.J., McCLENDON AND HIGGINBOTHAM, JJ.

McClelland, J. Cencer

WHIPPLE, C.J.

In this appeal involving the disbursement of funds that were filed into the registry of the court, the ownership of which is disputed, the executor of the Succession of Diana Sally Weber challenges the trial court's judgment ordering that the funds be distributed pursuant to a judgment of possession rendered in another succession proceeding. For the following reasons, we dismiss the appeal and remand for further proceedings as ordered herein.

FACTS AND PROCEDURAL HISTORY

Diana Sally Weber died on December 17, 2015. Prior to her death, she executed a last will and testament dated October 5, 2015, bequeathing all of her property to Allen Robert Miller. About one month after her death, Miller filed a "Petition for Filing and Execution of Notarial Testament" and was appointed executor of Diana's estate.

Thereafter, Baton Rouge Credit, LLC, filed a "Motion to Deposit Proceeds into the Registry of the Court" (hereinafter referred to as "the Motion to Deposit") in the succession proceedings, seeking to deposit principal sums and interest from two subordinated certificates of indebtedness ("debentures") and to have the court determine ownership of those funds because of conflicting ownership claims to the two debentures by the Succession of Diana Weber and the Succession of Donald Weber.

According to the allegations of the Motion to Deposit, prior to her death, Diana had a debenture in the amount of \$125,000.00 in her name invested at Baton Rouge Credit, and on November 2, 2015, in the month prior to her death, Diana, accompanied by Miller, asked Baton Rouge Credit to change the payee on the debenture to "Diana Weber or Donald Weber." After Diana's death, Baton Rouge Credit issued a new debenture dated December 18, 2015, payable to Diana's brother "Donald Weber," which it alleged was to replace the debenture payable to

“Diana Weber or Donald Weber.” Baton Rouge Credit further averred that on January 1, 2016, it created a new debenture in the amount of \$340.28 in Donald’s name, representing the interest paid on the debenture from the date of Diana’s death until December 31, 2015.

As alleged in the Motion to Deposit and established in the record before us, Donald later died on May 9, 2017, and a First Amended Judgment of Possession dated November 7, 2017, rendered in another division of the Nineteenth Judicial District Court, recognized Carol Jo Herbert as Donald’s testamentary legatee and ordered that she was entitled to be placed into possession of Donald’s property, including the two debentures at issue.

However, because ownership claims were being made by both the Succession of Diana Weber and the Succession of Donald Weber, and because Baton Rouge Credit was unable to determine what rights these parties have to the funds invested in the debentures, it moved to be allowed to deposit the remaining disputed proceeds into the registry of the court “for a determination of ownership.” Baton Rouge Credit prayed that the disputed funds submitted to the registry of the court be recognized as consisting of the following amounts: as to the \$125,000.00 debenture, \$126,020.84 (representing \$125,000.00, plus \$1,020.84 in interest), together with \$17,500.08 in interest for 2016 and 2017 already paid to the Estate of Diana Sally Weber at the direction of Weber’s attorney; and as to the \$340.28 debenture, \$343.05 (representing \$340.28, plus \$2.77 in interest), together with \$47.52 in interest for 2016 and 2017 already paid to the Estate of Diana Sally Weber at the direction of Weber’s attorney. It further prayed that after due notice to the Estate of Diana Sally Weber; Miller, as executor and universal legatee of Diana; and Carol Jo Herbert, as universal legatee of Donald, and a hearing thereon, “the court determines ownership of the disputed funds deposited into the Estate”; that it be awarded reimbursement of costs incurred in this dispute, including

attorney's fees; and that it be released "from any further obligation to the Estate of Diana Sally Weber, Allen Miller, and Carol Jo Herbert."¹

By order dated February 15, 2018, the court ordered the funds be deposited into the registry of the court for the benefit of the Succession of Diana Sally Weber, Miller, and Herbert and that "in due course the Court determines [sic] the ownership of the disputed funds." In the February 15, 2018 order, the court further released Baton Rouge Credit "from any further obligation with regard to the disputed funds" and ordered that the owner of the funds "reimburse Baton Rouge Credit ... for its expenditures, including attorney's fees."²

Miller then filed an "Answer to Baton Rouge Credit, L.L.C. Concurus," claiming that the Estate of Diana Sally Weber owned the disputed funds and contending that any purported transfer by Diana to Donald was a nullity due to vices of form or an error or mistake. Miller further reconvened against Herbert, individually and as executrix of Donald's estate for income and/or lost profits attributed to the loss of the debentures.

Herbert, in her capacity as executrix of the Succession of Donald Weber, also filed an Answer to Baton Rouge Credit's Motion to Deposit, contending that the claims of Miller and/or the Estate of Diana Sally Weber were barred because ownership of the funds had been previously determined in favor of Herbert in a court of competent jurisdiction and Herbert possessed a valid executory judgment establishing her right to possess the funds. In her answer, Hebert also averred, as an affirmative defense, that Baton Rouge Credit employed the wrong procedural mechanism to invoke a concursus and purported to reserve "all rights to file dilatory and declinatory exceptions in connection therewith" if the Motion to Deposit were to be treated as a petition.

¹Baton Rouge Credit certified that service of the motion was made on Miller and Herbert through their respective counsel by U.S. mail.

Herbert, in her individual capacity and as executrix of Donald's estate, also filed a "Petition in Intervention and Application for Distribution of Funds Held in Registry of the Court" (hereinafter referred to as "Petition in Intervention"). In the Petition in Intervention, Herbert averred that while Baton Rouge Credit and the "other alleged beneficiary of the funds" considered the Motion to Deposit to have invoked a concursus proceeding, a petition is the proper mechanism to initiate a concursus proceeding and that she had not been personally served. Nonetheless, out of an abundance of caution, she sought to intervene to ensure that she had "become a party to the instant litigation," averred that she was entitled to **possess** the debentures by virtue of the First Amended and Restated Judgment of Possession rendered in Donald's succession, and applied for disbursement of the funds to her pursuant to that First Amended and Restated Judgment of Possession.

Herbert also answered Miller's reconventional demand, denying liability and again asserting that ownership of the disputed funds had previously been determined in a court of competent jurisdiction and that she possessed a valid executory judgment establishing her right to possess the funds.

The trial court granted Herbert's request to intervene and conducted a hearing on her application for disbursement of the disputed funds on July 16, 2018. At the hearing, the trial court ruled in open court in favor of Herbert, stating that its "judgment today is to disburse the funds according to the judgment of possession that was signed by Judge Clark in November of 2017." The court reasoned that it had to honor the First Amended and Restated Judgment of Possession, but specifically stated that "this is no statement as to who owns the funds." The court further stated that costs were assessed "against the opponent."

²Personal service of the trial court's order was requested on counsel for the Succession of Donald Weber and the Succession of Diana Weber.

Miller filed a writ application with this court, challenging the trial court's ruling. However, by order dated July 20, 2018, this court denied the writ application, reasoning that "[t]he district court's judgment on ... Herbert's Petition for Intervention and Disbursement of Funds, once signed, constitutes a final, appealable judgment." In the Matter of the Succession of Diana Sally Weber, 2018 CW 0985 (La. App. 1st Cir. 7/20/18) (unpublished writ action).

Thereafter, on August 1, 2018, the trial court signed an "Order," ordering that "the funds held in the registry of the court be distributed pursuant to the First Amended and Restated Judgment of Possession signed by Judge Janice Clark on November 7, 2017." The Order further assessed costs against Baton Rouge Credit. From this Order, Miller appeals, contending that the trial court erred in: (1) relying on the November 7, 2017 First Amended and Restated Judgment of Possession rendered in the Succession of Donald R. Weber; (2) assessing costs against Baton Rouge Credit; and (3) requiring an appeal security in the amount of \$125,000.00.

Herbert also filed a Motion to Dismiss Appeal in this court, contending that the matter before the trial court was not a concursus proceeding and that the trial court's ruling on her application for registry funds is an interlocutory ruling not subject to appeal. Thus, we will first address whether this court has jurisdiction to consider this appeal.

MOTION TO DISMISS APPEAL

In support of her motion to dismiss the appeal, Herbert asserts that Miller has mischaracterized Baton Rouge Credit's "Motion to Deposit Proceeds into the Registry of the Court" as a concursus proceeding, and that the formalities for a concursus proceeding were not met. Specifically, Herbert cites LSA-C.C.P. art. 4654, which provides:

The petition in a concursus proceeding shall comply with Article 891, shall allege the nature of the competing or conflicting claims, and shall include a prayer that all of the persons having such claims be

required to assert their respective claims contradictorily against all other parties to the proceeding.

Herbert avers that this matter could not be considered a concursus given the following deficiencies: (1) The “Motion to Deposit” pleading is not a petition or reconventional demand, the accepted vehicles for instituting a concursus, and does not set forth the parties’ domicile as required by LSA-C.C.P. art. 891; (2) service of the initial pleading was made on counsel for Herbert, rather than through personal service as required by LSA-C.C.P. art. 4655; (3) because the pleading was filed in Diana’s succession proceeding, it was not randomly allotted to a division of the district court; (4) no one was impleaded as required in a concursus proceeding, with Herbert instead intervening in Diana’s succession proceeding to assert her claims; and (5) because Herbert’s claim to the funds has been prosecuted to judgment in the November 7, 2017 Amended and Restated Judgment of Possession, LSA-C.C.P. art. 4652 prohibits impleading her in a concursus proceeding.

Thus, she contends that the Order at issue, granting her Application for Registry Funds, was not a final judgment in a concursus proceeding. Herbert asserts that instead, the Order, which only recognized her uncontested right to possess the funds and which did not determine ownership, was an interlocutory ruling not subject to immediate appeal.

At the outset, we note that the judgment before us was rendered following a hearing on Herbert’s intervention, through which she asserted that she was entitled to **possess** the funds deposited into the registry of the court by Baton Rouge Credit and, thus, sought to have those funds disbursed to her. Moreover, the Order attempts to fully resolve all claims raised in Herbert’s intervention. Herbert’s intervention is an incidental action, LSA-C.C.P. art. 1031(B), and a judgment on either the principal or incidental action, when the two have been tried separately,

constitutes a final judgment that is immediately appealable.³ LSA-C.C.P. arts. 1038 & 1915(A)(4); Mortgage Electronic Registration Systems, Inc. v. Bynum, 2003-1671 (La. App. 1st Cir. 5/14/04), 879 So. 2d 807, 810 n.1, writ denied, 2004-1926 (La. 11/15/04), 887 So. 2d 479; see also Kadair v. Hampton, 2013-1171 (La. App. 1st Cir. 7/10/14), 146 So. 3d 694, 700 n.8, writ denied, 2014-1709 (La. 11/7/14), 152 So. 3d 177.

Thus, ordinarily we would conclude that, regardless of whether Baton Rouge Credit properly invoked a concursus proceeding, the trial court's August 1, 2018 Order on Herbert's intervention was an appealable partial judgment for which no designation of finality was required. However, the August 1, 2018 Order, which would otherwise be an appealable judgment of the court, is nonetheless fatally defective for lack of proper decretal language.

An appellate court cannot determine the merits of an appeal unless appellate jurisdiction is properly invoked by a valid final judgment. Texas Gas Exploration Corporation v. Lafourche Realty Company, Inc., 2011-0520 (La. App. 1st Cir. 11/9/11), 79 So. 3d 1054, 1061, writ denied, 2012-0360 (La. 4/9/12), 85 So. 3d 698. For a judgment to be a final judgment, it must contain appropriate decretal language. See Carter v. Williamson Eye Center, 2001-2016 (La. App. 1st Cir. 11/27/02), 837 So. 2d 43, 44. For the language to be considered decretal, 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 Jenkins v. Recovery Technology Investors, 2002-1788 (La. App. 1st Cir. 6/27/03), 858 So. 2d 598, 600; Laird v. St. Tammany Parish Safe Harbor, 2002-0045 (La. App. 1st Cir. 12/20/02), 836 So. 2d 364, 366. These determinations should be evident from the language of a judgment without reference to other documents in the record. Laird, 836 So. 2d

³While Herbert's intervention was tried by summary proceeding, Miller did not object on these procedural grounds below.

at 366. The absence of the necessary decretal language results in a judgment that is not final and appealable.

The August 1, 2018 Order on appeal fails to identify the identity of the party or parties to whom the disputed funds held in the registry of the court are to be disbursed. That information is only determinable by referring to the First Amended and Restated Judgment of Possession rendered in Donald's succession, which is referenced in the trial court's August 1, 2018 Order only as "the First Amended and Restated Judgment of Possession signed by Judge Janice Clark on November 7, 2017" and which is not attached to nor made a part of the trial court's August 1, 2018 Order before us. Thus, it is impossible to determine, without resort to extrinsic evidence, the party or parties to whom the funds are to be distributed or the amount of the funds to be so distributed. Accordingly, as written, the August 1, 2018 Order lacks the required decretal language and is not a final appealable judgment.

This court has discretion to convert an appeal of a non-appealable judgment to an application for supervisory writs. See *Stelluto v. Stelluto*, 2005-0074 (La. 6/29/05), 914 So. 2d 34, 39. However, appellate courts generally have exercised that discretion when the motion for appeal was filed within the thirty-day time period allowed for the filing of an application for supervisory writs of review under Rule 4-3 of the Uniform Rules, Courts of Appeal, and where reversal of the trial court's decision would terminate the litigation, or where clear error in the trial court's judgment, if not corrected, will create a grave injustice. See *Mapp Construction, LLC v. Amerisure Mutual Insurance Company*, 2013-1074 (La. App. 1st Cir. 3/24/14), 143 So. 3d 520, 528; *Reed v. Finklestein*, 2001-1015 (La. App. 4th Cir. 1/16/02), 807 So. 2d 1032, 1033-1034, writ denied, 2002-0550 (La. 4/26/02), 814 So. 2d 560.

However, when the jurisdictional defect lies in the non-finality of a judgment for its lack of the requisite decretal language or specificity (as opposed to an appeal from an interlocutory judgment), an appellate court will generally refrain from the exercise of its supervisory jurisdiction when an adequate remedy exists by appeal, particularly when an adequate remedy by appeal will exist upon the entry of a judgment containing the requisite precise, definite, and certain decretal language necessary for appellate review. In the absence of precise, definite and certain decretal language, the judgment is defective, and this court lacks jurisdiction to review the merits, even if we were to convert the matter to an application for supervisory writs. See Boyd Louisiana Racing, Inc. v. Bridges, 2015-0393 (La. App. 1st Cir. 12/23/15), 2015 WL 9435285, *4 (unpublished).

Because the August 1, 2018 Order is defective in that it lacks proper decretal language (and requires reference to extrinsic evidence), we decline to convert this appeal of a judgment that is not final for lack of precise language to an application for supervisory writs of review. Instead, upon the trial court's entry of a proper final judgment, Miller will have the right to appeal.⁴

CONCLUSION

For the foregoing reasons, we dismiss the appeal and remand to the district court for expeditious entry of a judgment with proper decretal language. Costs of this appeal are assessed equally against Jo Carol Herbert and the Succession of Diana Sally Weber.

APPEAL DISMISSED; REMANDED.

⁴We again note, as we did in our prior action on Miller's writ application in 2018 CW 0985, that pursuant to LSA-C.C.P. art. 2252, a judgment creditor may proceed with execution of a judgment only after the delay for a suspensive appeal therefrom has elapsed. In the Matter of the Succession of Diana Sally Weber, 2018 CW 0985 (La. App. 1st Cir. 7/20/18) (unpublished writ action).