

DCDB MANAGEMENT, L.L.C. * NO. 2005-CA-1084
VERSUS * COURT OF APPEAL
DORIAN M. BENNETT, ET AL. * FOURTH CIRCUIT
* STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2004-2545, DIVISION "B-15"
Honorable Rosemary Ledet, Judge

Judge Max N. Tobias, Jr.

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray,
Judge James F. McKay III, Judge Terri F. Love, Judge Max N. Tobias Jr.)

(ON APPLICATION FOR REHEARING)

MURRAY, J., CONCURS AND ASSIGNS REASONS
LOVE, J., CONCURS WITH REASONS
JONES, J., DISSENTS FOR REASONS ASSIGNED BY JUDGE
MCKAY
MCKAY, J., DISSENTS WITH REASONS

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**REHEARING GRANTED; PRIOR JUDGMENT VACATED;
JUDGMENT REVERSED; REMANDED.**

MAY 23, 2007

We grant the application for rehearing of the defendant/appellant, Pamela A. Fortner, to consider whether we erred in affirming the trial court's judgment sustaining the motion for summary judgment of the plaintiff/appellee, DCDB Management, L.L.C. ("DCDB"). Our standard for review, as we pointed out in our original opinion, is *de novo* review.

In her application for rehearing, to which DCDB filed a response, Ms. Fortner asserts that this court erred in concluding that the principal cause of the contract (the Agreement to Purchase or Sell) between DCDB and Ms. Fortner was DCDB's ability to convert the Royal Street property to five or six condominium units for sale as such. A further review of the record on appeal, however, discloses that whereas a principal cause, and possibly *the* principal cause, for DCDB's acquiring the subject property was for a condominium conversion to five or six units, Ms. Fortner had no other purpose to sell the subject property other than to get out of ownership of the

property. Once her nephew, who had formerly occupied the premises and managed them as a bed and breakfast, moved, leaving the premises to her management, Ms. Fortner no longer desired to own the premises. Ms. Fortner persuasively argues in her application for rehearing that the conversion of the property to a multi-unit dwelling was not the principal cause for her sale of the subject property and whether DCDB's desire to so convert the premises creates a genuine issue of material fact.

Moreover, the Agreement to Purchase or Sell ("the Agreement") executed by the parties contains language that the purchaser, DCDB, accepted the property "subject to ... zoning restrictions ... and laws and ordinances." The parties attached as an addendum to the Agreement a property disclosure statement. In pertinent part in the addendum, the question is asked: "10. Does the property and its current usage conflict with current zoning, title, building and safety restriction or ordinances?" Ms. Fortner answered the question "No." She signed the addendum attesting that the answer given was "TRUE AND CORRECT TO THE BEST OF MY/OUR KNOWLEDGE." (Emphasis in original.) The purchaser signed the

addendum making it a part of the Agreement. The purchaser's signing of the Agreement did not relieve it of the obligation to reasonably investigate the zoning restrictions on the property in spite of the representations in Rita M. Cables' flyer about the premises and the representations of Ms. Fortner in the addendum. Although error may have existed (La. C.C. arts. 1948, 1949, and 1950) as to principal cause, the issue of "principal cause" requires a more complicated, detailed factual analysis than the documentation submitted both for and against the motion for summary judgment before us establishes. We find sufficient conflict in the documentation that creates a genuine issue of material fact that precludes the granting of a summary judgment for the present.

Ms. Fortner's agent represented and thus clearly implied through a flyer that the subject property was a five-plex and possibly implying that it was being so operated in accordance with zoning ordinances. Ms. Fortner represented that the property to the best of her knowledge complied with all zoning ordinance.

Summary judgments are now favored in our law. La. C.C.P. art. 966A (2). We note that the motion summary judgment of DCDB sought relief in

two respects: first, it sought recession of the sale; second it sought a return of the purchase price (i.e., \$450,000.00). The trial court granted DCDB the relief it requested: recession of the sale and refund of the full purchase price plus judicial interest. The trial court further declared the judgment final, appealable, and without justifiable reason for delay of the appeal pursuant to La. C.C.P. art. 1915. In oral argument, DCDB's and Ms.

Fortner's attorneys alluded to the judgment having been amended on motion for new trial to delete that portion of the judgment ordering that Ms. Fortner refund the purchase price plus judicial interest. Neither the purported motion nor the purported amended/ new judgment forms part of the record on appeal. Moreover, the record reflects that a motion for suspensive appeal from that original judgment was filed on 11 May 2005, nine days after the judgment was rendered on 2 May 2005, and five days after notice of judgment was issued on 6 May 2005. The order granting the suspensive appeal was signed on 11 May 2005 and a suspensive appeal bond filed. The trial court was divested of jurisdiction of all matters addressed in the judgment when the order of appeal was granted. La. C.C.P. art 2088.

Although DCDB's executive officer's (David J. Erath) documentation submitted in support of the motion established that DCDB wanted the premises for a condominium conversion, Ms. Fortner's documentation established that she did not personally represent to the plaintiff anything regarding the zoning or what the premises could be used for or as. This may be inaccurate in view of the addendum to the Agreement. Nevertheless and in addition, she may also be bound by the representations of her mandatary (real estate agent).

Under the facts of this case and the physical record on appeal that is filed in this court and by which we are bound, we find that the judgment granting the motion for summary judgment, ordering Ms. Fortner to return the purchase price paid by DCDB plus judicial interest, must be vacated. DCDB's petition as amended seeks additional damages from Ms. Fortner in the form of "all expenses occasioned to [it] by the purchase...." We find that vacating the trial court's judgment in its entirety and remanding for a resolution of all issues serves the purposes of justice. La. C.C.P. art. 2164. Resolution of all issues should await a trial on the merits, or, if appropriate, by further documentation submitted on future motions for summary

judgment. To proceed by other than vacating the trial court's 2 May 2005 judgment and remanding will result in piecemeal adjudications of the various issues in this case.

Therefore, we vacate our former judgment affirming the trial court's judgment granting the plaintiff's motion for summary judgment. We reverse the trial court's judgment sustaining DCDB's motion for summary judgment and remand the matter for further proceedings.

**REHEARING GRANTED; PRIOR JUDGMENT VACATED;
JUDGMENT REVERSED; REMANDED.**