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
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge James F. McKay III, Judge Terri F. Love, Judge Max N. Tobias, Jr.)

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AFFIRMED

The appellant, Dorian M. Bennett, appeals the trial court's judgment granting summary judgment on behalf of the appellee, DCDB Management, L.L.C., ("DCDB"). For the reasons set forth below we affirm.

FACTS AND PROCEDURAL HISTORY

This matter comes before this Court pursuant to a suit for rescission of the sale of an immovable property designated as 2446/2248 Royal Street. The trial court granted the appellee's motion for summary judgment and ordered the seller to return the purchase price of $450,000.00 plus legal interest.

On July 31, 2003, David J. Erath submitted a written signed offer to purchase the property "subject to title and zoning restrictions, servitudes of record, and laws or ordinances" to the seller, Pamela A. Fortner. Pursuant to this offer and acceptance Ms. Fortner subsequently executed, as seller, an act of cash sale of the property to DCDB, which was substituted for David J. Erath as the purchaser. The appellant listed the property as "six units of

record, currently used as a 5-plex." It was further advertised that the "[u]nits will be able to produce strong rental revenue with some interior redecoration work." Based upon the representations of the seller, the appellee purchased the Royal Street property for the sum of four hundred fifty thousand dollars ($450,000) on August 27, 2003. After the purchase of the property, the appellee obtained the necessary permits from the City of New Orleans and began to renovate the property. Soon thereafter, neighbors filed objections with the Department of Safety and Permits ("DPS") on the basis that the six-condominium project was a nonconforming use of the property not permitted at that location. On November 5, 2003, DPS advised the appellee that, as of November 4, 2003, the building permits for the Royal Street property were rescinded, having been issued in error, and that the property had lost its nonconforming use status. Consequently, the Royal Street property could only be used as a single or double family dwelling. In reaction, the appellee filed this suit moving the court to rescind the August 27, 2003 sale.

The appellee urged the trial court to grant a summary judgment in the matter on the grounds that error concerning the cause of the obligation

vitiated appellee's consent, contending that it would not have purchased the property had it known it could not be sold for multiple units.

The trial court in its reasons for judgment held the following:

> Thus, the Court concludes that the principal cause of the contract between plaintiff, DCDB, as buyer, and defendant, Pamela Fortner, as seller of the Royal Street property was the sale of the condominium units. La. C.C. art. 1949. La. C.C. art. 1950 provides that error may concern cause when it bears on a substantial quality of a thing that is the contractual object. Pursuant to La. C.C. art 1949 error vitiates consent when it concerns a cause, without which the obligation would not have incurred and which was known or should have been known to the other party. Thus, plaintiff's Motion for Summary Judgment is granted.

In granting the summary judgment the trial court ordered that the sale of the immovable property on Royal Street be rescinded and ordered the seller to return the purchase price to the purchaser, plus legal interest from the date of judicial demand until paid. The trial court also ordered that each party bear its own cost. We agree with the judgment of the trial court.

ASSIGNMENT OF ERROR

The appellant raises one assignment of error, arguing that the trial court erred in granting the motion for summary judgment asserting that there are genuine issues of material fact in dispute and

that DCDB is not entitled to judgment as a matter of law.

STANDARD OF REVIEW

Appellate courts review summary judgments de novo under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. Reynolds v. Select Properties, Ltd., 93-1480 (La.4/11/94), 634 So.2d 1180, 1183. "Favored in Louisiana, the summary judgment procedure 'is designed to secure the just, speedy, and inexpensive determination of every action' and shall be construed to accomplish these ends." King v. Parish National Bank, 2004-0337, p.7 (La.10/19/04), 885 So.2d 540, 545 (quoting La. C.C.P. art. 966(A)(2)).

A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966. If the court finds that a genuine issue of material fact exists, summary judgment must be rejected. Alexis v. Southwood Ltd. Partnership, 2000-1124, p.3 (La.App. 4 Cir. 7/18/01), 792 So.2d 100, 102. The burden does not shift to the party opposing the summary judgment until the moving party

first presents a prima facie case that no genuine issues of material fact exist. Id. At that point, the party opposing the motion must "make a showing sufficient to establish existence of proof of an element essential to his claim, action, or defense and on which he will bear the burden of proof at trial." La. C.C.P. art. 966(C).

DISCUSSION

We begin our analysis of the applicable Louisiana law with the basic propositions set forth in La. C.C. art.1983: "Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith." The requisite consent for an enforceable contract may be vitiated by error on the part of one or both parties to the contract, La. C.C.art 1948; La. C.C. art. 1948 specifically states that contractual consent may be vitiated "by error, fraud, or duress." Error sufficient to vitiate consent is described by La. C.C. art. 1949 and 1950 as follows:

> Art. 1949. Error vitiates consent
>
> Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.
>
> Art. 1950. Error that concerns cause

> Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation.

In the instant matter the error concerns a cause without which the appellee would not have purchased the Royal Street property: that is the ability of the property to be renovated and potentially sold as a multi-family dwelling. The buyer erroneously believed that the property could be used as a multi-family property. The buyer contends that he would not have purchased the property had it been known that multi-family dwelling designation was inaccurate, in fact false.

The record before us indicates that all parties involved believed that the property was in conformity with zoning regulations and could be converted and used for the purpose of a six-unit multi-family dwelling.

On August 27, 2003, the seller's agent was Rita M. Cabes; the buyer's agent was Dorian M. Bennett, both worked at Dorian M. Bennett, Inc., ("agency"). The agency listed the Royal Street property as "six units of record, currently used as a 5-plex." The advertisement further states that the "[u]nits will be able to produce a strong rental revenue with some interior redecoration work." Dorian M. Bennett represented to the buyer that the

Royal Street property's conversion to condominium units had already begun and considerable progress had been made. It was upon these assertions that David J. Erath agreed to purchase the property. In the portion of the June 7, 2004 deposition of Dorian M. Bennett, which is in the record before us, Ms. Bennett testified that:

> **Question**. Isn't it true at some point during negotiations for the sale of the Royal Street Property that Mr. Erath informed you that he was interested in buying the Royal Street Property only if it could be converted to six condominium units?
> **Answer**. Yes.
> **Question**. And isn't it true that you told him that it could, in fact, be converted into six units or that it was six units?
> **Answer.** Yes, to my belief, yes.
> **Question**. And you told him this before the sale, correct?
> **Answer**. Yes.
> **Question**. And on what basis did you make that representation?
> **Answer**. Based upon what I knew of that property.
> **Question** And that was?
> **Answer**. That there were six meters on the property, six bathrooms, six kitchens. It is a 6-plex as long as I have known the property.

Clearly, Ms. Bennett knew that the appellee did not want to purchase the property unless the property could be converted into multiple condominiums for resale.

In the portion of the September 9, 2004 deposition of Ms. Cabes, which is in the record before us, Ms. Cabes similarly testified as to the belief in the multi-unit purpose of the Royal Street property.

The seller, Ms. Fortner, as referenced in the portions of the deposition in the record before us, testified in her September 27, 2004 deposition that she was of the same belief that the property could have been used for five units.

As noted above, after the purchase of the property the appellee obtained the necessary permits from the DPS for the City of New Orleans and began renovating the Royal Street property. Neighbors contending that the construction was nonconforming with the zoning for the area filed objections to the renovations with the DPS. As a consequence of this complaint, the DPS rescinded the permit on November 4, 2003, stating that the permit had been issued in error. As such, the property could only be used for a single or a double family dwelling potentially causing significant financial loss to the appellee.

The appellant asserts that the original cash sale was made "without all legal warranties except as to title" and with no warranty or representation as to any zoning classification or permitted uses of the property. She also asserts neither the appellee nor David J. Erath nor any one else at any time prior to the sale of the property communicate to Ms. Fortner that any particular zoning classification or permitted use of the property was a necessary condition of the sale or a principal cause for the purchase of the

property. Therefore, the appellant argues that she was not placed on notice to investigate and determine such legal conditions and was not afforded the opportunity to decline David Erath's offer to purchase and/or the sale of the property to DCDB if those legal conditions were not present.

The appellant also agues that the zoning issue is not a defect or vice to successfully forward a redhibition claim. For authority the appellant sites Louviere v. Meteye, 260 So.2d 377 (La. App. 4 Cir. 1972). The Louviere case is in certain aspects very similar to the instant matter except for a very important issue. In Louviere, the purchaser purchased the property for a commercial purpose, only to discover that the land in question was zoned for residential. The trial court rescinded the sale because at the time of the purchase the purchaser believed the property to be zoned commercially. The defendant in Louviere believed that the articles on redhibition, La. C.C. art. 2520 et seq., governed the action, which was specifically pled. The appellate court in Louviere held that this matter did not lie in redhibition.

> Defendant contends that this action is governed by the articles of the Louisiana Civil Code which concern redhibition, LSA-C.C., Articles 2520 et seq., and that the prescriptive period of one year must apply and plaintiff's suit be dismissed. We do not agree. In order for redhibition to apply there must be a vice or defect in the thing sold which renders it useless, or so inconvenient and imperfect that it is presumed that the buyer would not have purchased it if the vice or defect was known, (LSA-C.C. Article 2520), the essential element being a vice or defect in the object sold. The fact that the property was not zoned as the buyer wanted is not a defect or vice within the

> meaning intended by the articles of redhibition. The parties to the present suit were laboring under a mistake or error that more properly gives rise to rescission under LSA-C.C., Articles 1821, et seq.
>
> For an error to invalidate a contract it must be interrelated to the principal cause for making the contract. LSA-C.C. Article 1823. The principal cause for making this contract for the sale of land was the desire to use it for commercial purposes. Plaintiff's sole reason for purchasing this land was for the development of a commercial enterprise. Clearly indicative of this is the condition written in the agreement to sell that the property be zoned 'C--2 Commercial'.
>
> Where the vendee labors under an error fact as to the mistaken belief of a property's zoning restriction and that such belief being a principal cause of the sale is justifiable in relation to the circumstances surrounding the case, then rescission of the contract may be obtained. C. H. Boehmer Sales Agency v. Russo, 99 So.2d 475 (La.App., Orleans, 1958); Carpenter v. Skinner, 224 La. 848, 71 So.2d 133 (1954).

The basis for the affirmation of the trial court judgment rescinding the sale in Louviere, was not that there was a vice or defect but a clear error concerning the zoning of the property. This Court was cognizant of that evaluation and affirmed the trial court. Herein lie the similarities to the instant matter. The trial court in its reasons for judgment indicated that the sale was rescinded because of error. This error invalidates the contract as in Louviere.

We draw the same conclusion as did the trial court. There were none of the requisite elements to support the validity of the contract. Error vitiated the consent of the parties. There is no need to examine

any redhibition claims nor is it necessary to explore any issues concerning any alleged waivers of warranty because error vitiated consent thereby invalidating the contract.

Although, the appellant argues that there are genuine issues of material fact in question, there is no dispute in the determinative factor, that the buyer would not have purchased the property if it could not have been used as a multi-family dwelling. Ms. Bennett, Ms. Cabes and the seller, Ms. Fortner, all testified that they believed that the property could have been used as a multi-family dwelling. Even the DSP believed the property could have been used as a multi-family dwelling and it issued permits for the renovation work. Furthermore, the property had six bedrooms, six bathrooms, six kitchens and six electric meters. The appellant also advertised that the property could be used as five or six units.

Finally, the appellant failed to offer any evidence to overcome the summary judgment pertaining to the cause of the obligation. The purpose was to purchase a property that could be used as a multi-family dwelling. This was clearly not a unilateral error but at the very least a bilateral error sufficient to vitiate consent

Conversely, the appellee has met its burden of proof that all of

the parties involved were under the same erroneous belief that the property could be used a multi-family dwelling. It was this error that concerns the cause of the obligation resulting is lack of valid consent as a matter of law rendering the contract null and void. Therefore, the entire sale is void as are any of the provisions in the sale documents related to the waiver of warranty or zoning.

Accordingly, for the above and foregoing reasons we affirm the judgment of the trial court granting the motion for summary judgment and affirm its judgment rescinding the sale. All costs of appeal are taxed equally to the parties.

AFFIRMED