ROSETTA IRONS, RICKEY NYE, WILLIAM WATTS,	*	**NO. 2007-CA-0570**
SYLVIA VAN BUREN, ROSE THOMAS & SHANNON	*	**COURT OF APPEAL**
THOMAS, LYNELL CLARK AND BRUNO & BRUNO, LLP	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

VERSUS

*** * * * * * ***

US BANK, INC.

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-6105, DIVISION "L-6"
Honorable Kern A. Reese, Judge
* * * * * *

Judge Patricia Rivet Murray
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Michael E. Kirby, Judge Max N. Tobias, Jr., Judge David S. Gorbaty)

TOBIAS, J., CONCURS AND ASSIGNS REASONS

Max Nathan, Jr.
SESSIONS, FISHMAN & NATHAN, L.L.P.
201 St. Charles Avenue – Suie 3500
New Orleans, LA 70170-3500
- AND -
David S. Scalia
Stephen P. Bruno
BRUNO & BRUNO
855 Baronne Street
New Orleans, LA 70113
COUNSEL FOR PLAINTIFF/APPELLEE

Michael H. Rubin
Juston M. O'Brien
Jamie D. Seymour
MCGLINCHEY STAFFORD, PLLC
14th Floor, One American Place
Baton Rouge, LA 70825
- AND -
Stephen W. Rider
Lisa D. Munyon
McGLINCHEY STAFFORD, PLLC
P.O. Box 60643
New Orleans, LA 70160
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

This is a concursus proceeding. This proceeding was commenced by seven homeowners and their attorney, the law firm of Bruno & Bruno, L.L.P., Inc. (the "Bruno Firm"), against US Bank, Inc., which is the holder of the mortgage on each of the homeowners' residences and an additional loss payee on each of their insurance policies.[1] The narrow legal issue presented in this proceeding is whether the Bruno Firm's privilege and interest for its attorney's fees in the insurance settlement funds it obtained on the homeowners' behalf is superior to US Bank's interest as mortgagee-loss payee in such funds. Answering that question in the affirmative, the trial court found the plaintiffs were entitled to summary judgment as a matter of law. For the reasons that follow, we affirm.[2]

FACTUAL AND PROCEDURAL BACKGROUND

In August 2005, the homeowners suffered damages to their residences as a result of Hurricane Katrina. Dissatisfied with the amount of the initial settlement their insurance companies paid to them and to US Bank as an additional loss

[1] There are six homeowners named as plaintiffs in the petition. A seventh homeowner was added to the suit by an intervention.

[2] As directed by Louisiana Supreme Court, this court has implemented procedures for handling Hurricane Katrina and Hurricane Rita related civil cases in an expedited manner. Pursuant to those procedures, this case was docketed before a five-judge panel and decided in an expedited manner.

payee, the homeowners retained the Bruno Firm to pursue their claims for increased insurance settlement amounts. In so doing, the homeowners entered into a contingency fee contract with the Bruno Firm whereby the firm would receive 25% of any recovery by the homeowners from their insurers above the initial settlement amounts.

The Bruno Firm successfully obtained increased recoveries from the respective insurers on behalf of each of the homeowners. The insurance companies made the settlement checks payable to the homeowner, US Bank, and the Bruno Firm. Given the ethical mandate that an attorney deposit settlement checks into its escrow account before dispersing the funds, the Bruno Firm requested that US Bank endorse the checks. US Bank refused to do so.

In July 2006, the Bruno Firm and the homeowners commenced the instant concursus proceeding pursuant to La. C.C.P. art. 4651.[3] In this proceeding, the plaintiffs sought a determination of the Bruno Firm's right to withdraw 25% of the amount deposited for each of the plaintiff-homeowners as its attorney's fee. As noted, the plaintiffs filed a motion for summary judgment. Following a hearing, the trial court granted the plaintiffs' motion for summary judgment. US Bank then filed a motion for new trial, which was denied. This appeal followed.

DISCUSSION

On appeal, U.S. Bank asserts that the trial court erred in granting summary judgment both procedurally and substantively. Procedurally, it contends that the trial court was mandated to grant its request for a continuance for two reasons:

[3] Although US Bank removed this case to federal court, it was remanded to state court. US Bank then filed exceptions of no cause of action and improper use of summary proceedings. The exception of improper use of summary proceedings was based on the plaintiffs' initial setting of the matter as a rule to show cause. US Bank also filed a motion to compel the plaintiffs to respond to various discovery requests.

(i) the motion for summary judgment was untimely and improperly noticed, and (ii) there was a pending motion to compel discovery that the trial court had not ruled upon. Substantively, it contends that summary judgment was improper because its rights as a mortgagee-loss payee are superior to the Bruno Firm's privilege for its attorney's fees.

The timing of the notice of a motion for summary judgment is provided for in La. C.C.P. art. 966(B), which requires that "[t]he motion for summary judgment and supporting affidavits shall be served at least fifteen days before the time specified for the hearing." La. C.C.P. art. 966(B). Although the plaintiffs do not dispute that the timing requirement was not met, they contend that US Bank waived this requirement by appearing in court on the appointed day and arguing the merits of the motion. In support, they cite *Strickland v. Board of Sup'rs of Louisiana State University and Agr. and Mechanical College*, 432 So.2d 964 (La. App. 4th Cir. 1983), and *Johnson v. Canale*, 00-89 (La. App. 5 Cir. 10/18/00), 769 So.2d 833. They cite these cases for the proposition that the mandatory timing requirement of Article 966(A) can be waived when the circumstances indicate that the opponent acquiesced in the violation of the timing requirement, and the opponent is not prejudiced by that violation. *Johnson*, 00-89 at p. 7, 769 So.2d at 836 (citing *Strickland*, *supra*). We find no error in the trial court's implicit finding that US Bank was not prejudiced.

US Bank also argues that it was premature to grant summary judgment given its outstanding motion to compel discovery. We disagree. The issue presented by the motion for summary judgment, as the plaintiffs point out, was the purely legal one of whether its attorney's fee privilege ranks first ahead of US Bank's interest.

The summary judgment procedure is favored in this state and is designed to allow for the just, speedy, and inexpensive resolution of every case. *King v. Parish National Bank*, 2004-0337, p. 7 (La. 10/19/04), 885 So. 2d 540, 545; La. C.C.P. art. 966(A)(2). Appellate courts review grants of summary judgment *de novo* using the same standard applied by the trial court in deciding the motion for summary judgment. *Schmidt v. Chevez*, 2000-2456, p.4 (La. App. 4 Cir.1/10/01), 778 So. 2d 668, 670. Under that standard, a summary judgment shall be granted 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 material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); *Schmidt*, 2000-2456 at p.3, 778 So. 2d at 670. A fact is "material" if its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery. *Schmidt*, 2000-2456 at p.3, 778 So.2d at 670 (citing *Moyles v. Cruz*, 96-0307 (La. App. 4 Cir. 10/16/96), 682 So.2d 326).

As the trial court noted in its reasons for judgment, the pertinent undisputed facts on which the summary judgment motion was based are as follows:

- The homeowners have contingency fee contracts with the Bruno Firm for that firm to seek increased insurance proceeds for their Katrina related property damages.

- The Bruno Firm has succeeded in obtaining increased insurance proceeds from the homeowners' insurance companies.

- The insurance companies have made the settlement checks payable to the homeowner, US Bank, and the Bruno Firm.

- The Bruno Firm has requested authorization from US Bank to deposit the insurance settlement checks into its escrow account.

- US Bank did not participate in connection with the recovery of the funds at issue.

The legal issue on which the trial court granted summary judgment is whether the Bruno Firm's privilege for its contingency fee in the settlement funds it obtained for the homeowners is superior to US Bank's interest. The applicable statutory provision that applies to this dispute is La. R.S. 37:218(A), which provides:

> By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution, or defense of which he is employed, whether the claim or suit be for money or for property. Such interest shall be a special privilege to take rank as a first privilege thereon, superior to all other privileges and security interests under Chapter 9 of the Louisiana Commercial laws.

La. R.S. 37:218(A). The legislative history of this provision was discussed in detail in *Calk v. Highland Constr. & Mfg*, 376 So. 2d 495, 499 (La. 1979).

In *Calk, supra*, the Louisiana Supreme Court addressed a dispute between a personal injury plaintiff, the plaintiff's attorney, and the plaintiff's judgment creditor over the proceeds of the plaintiff's tort settlement. In finding the attorney's lien under La. R.S. 37:218 outranked the judgment creditor's claim under R.S. 13:3864, the Supreme Court reasoned that the legislative intent behind La. R.S. 37:218 was "to assist the attorney in collecting his fee when he settles a case in the same way he is assisted by R.S. 9:5001, when he brings the suit to judgment." *Calk*, 376 So.2d at 499. The Court stated that the statute gives the attorney "a privilege to the extent of his earned fee on any recovery obtained by settlement." *Id.* The Court further stated that the attorney's contract need not be recorded for the attorney's fees claim to succeed; "however, for the attorney to

succeed he must assert his claim by intervention or other legal proceedings prior to disbursement of the proceeds to a third party." *Id.*

In this case, the plaintiffs contend that the language of La. R.S. 37:218 and the holding in *Calk* support their position that the Bruno Firm is entitled to a first ranked privilege for its attorney's fees on the insurance proceeds it obtained on behalf of the homeowners. They contend that US Bank as mortgagee-loss payee is not the owner of the insurance proceeds. *See* La. C.C. art. 477(A)(defining ownership as "the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.") US Bank is required to hold the insurance proceeds as security to ensure the homeowner-mortgagors make the necessary repairs to their property. It follows, they contend, that US Bank's status as mortgagee-loss payee does not trump the Bruno Firm's first ranked privilege in the insurance proceeds for its attorney's fee.

US Bank counters that when an insurance policy contains a loss payee clause, the mortgagee is contractually entitled to all of the insurance proceeds before the mortgagor-owner or those claiming through the owner are entitled to recover any amount. US Bank, as it did in the trial court, cites *Hussain v. Boston Old Colony Ins. Co.*, 311 F.3d 623 (5th Cir. 2002), for the proposition that its contractual claim as a loss payee is superior to that of the Bruno Firm's privilege for its attorney's fees.

In *Hussain*, the plaintiff, Javaid Hussain, d/b/a Sheik's Oriental Rugs, was insured by Boston Old Colony ("BOC"); and his mortgagee, Hibernia Bank, was named as a loss payee. After the mortgaged property was destroyed by a fire, Mr. Hussain defaulted on his loan, and Hibernia obtained a state court judgment recognizing its continued security interest in the property. Hibernia also filed a separate state court suit in its capacity as loss payee against both Mr. Hussain and BOC to recover a portion of the policy proceeds. Mr. Hussain also filed suit in state court against BOC. A final judgment was entered in state court holding BOC liable to both Mr. Hussain and Hibernia for the policy limits "as their interests appear in the Policy." The suit subsequently was removed to federal court. In the federal court, one of the issues presented was whether the claim of Hibernia, as mortgagee-loss payee, outranked the privileged claim of Mr. Hussain's attorney, Mr. Rando, in the distribution of insurance proceeds.[4] Rejecting the argument that Mr. Rando's attorney's fee should be calculated on the gross amount of the settlement, the federal court held that Hibernia, as mortgagee-loss payee, was a superior creditor to Mr. Rando.

In this case, the trial court in its reasons for judgment factually distinguished the *Hussain* case from this one, stating: "[d]riving the Fifth Circuit's opinion was the fact that the mortgagee was the first to pursue the claim, and that the mortgagee was active in protecting its interest." The trial court stressed that the federal court

[4] We note, as did the trial court, that the statutory privilege provision at issue in *Hussain* was La. R.S. 9:5001, not La. R.S. 37:218.

mentioned this fact multiple times throughout the opinion. The trial court thus concluded:

> Applying the result in *Hussain* to these facts would be patently unfair. Here, the mortgagee has done nothing to protect its interest, yet expects to reap the benefits of the insured homeowner's and the insured homeowner's attorney's work and expense. Bruno was the first—and only—attorney to expend resources and effort to obtain a bigger recovery on behalf of the homeowner, and consequently, the mortgagee. Bruno alone interrupted prescription. Bruno alone commenced the accrual of judicial interest. Not allowing Bruno & Bruno to recover its fees in untenable result.

We agree. We thus find no error in the trial court's holding that the Bruno Firm's privilege in the settlement proceeds is superior to that of US Bank.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED