

NOT DESIGNATED FOR PUBLICATION

GEORGETTE KHALIL, ALFY KHALIL	*	NO. 2008-CA-0838
	*	
VERSUS	*	COURT OF APPEAL
	*	
AZMY EBRAHIM, CONCORD ENGINEERING, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-12171, DIVISION "K-5"
Honorable Herbert Cade, Judge

Judge David S. Gorbaty

(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)

ARMSTRONG, C.J., CONCURS.

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AFFIRMED

In this appeal, plaintiffs aver that the trial court erred in granting Concord Engineering's Motion for Summary Judgment and sustaining the Exception of No Cause of Action. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, Dr. Alfy Khalil and Georgette Khalil, owned four properties in New Orleans that were damaged by Hurricane Katrina. Dr. Khalil entered into an oral contract with his friend Azmy Ebrahim and his company Concord Engineering, Inc. (collectively "Concord") to assist him with repairing his home and apartments. When Dr. Khalil and Mr. Ebrahim had a dispute over the repairs and payments to Mr. Ebrahim, they sought the advice of a friend and mediator, Adly Ghobrial, to settle their dispute. The settlement was negotiated over 48 hours and eventually was memorialized in a written settlement agreement ("Closing Statement") signed by Dr. Khalil, Mr. Ebrahim, and Mr. Ghobrial.

During the 48-hour settlement negotiation, Mrs. Khalil twice told her husband not to settle with Mr. Ebrahim because she thought Mr. Ebrahim had

defrauded them. Dr. Khalil disagreed with his wife and settled the dispute. All of the parties to the Closing Statement testified in depositions that they understood a term of the Closing Statement was that Dr. Khalil had to release any and all claims that he had against Concord.

Plaintiffs filed suit, asserting numerous vices of consent and nullities to attempt to rescind or invalidate the Closing Statement. On March 11, 2008, the trial court granted defendants' motion for summary judgment and exception of no cause of action, dismissing the case in its entirety. Plaintiffs subsequently filed this appeal.

DISCUSSION

Plaintiffs urge that the trial court erred in granting the motion for summary judgment because there are disputed issues of fact concerning the scope and validity of the Closing Statement. Plaintiffs also allege there are disputed facts as to the "extent of Concord's fraudulent conduct" "at the time the Closing Statement was signed." Appellants urge other errors of law, namely that Mrs. Khalil's concurrence in the Closing Statement was required, and that the contract was adhesionary.

Appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, 99-2257 (La.2/29/00), 755 So.2d 226. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this. The procedure is

avored and shall be construed to accomplish these ends. 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, scrutinized equally, 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).

The burden of proof remains with the mover. *Board of Assessors of the City of New Orleans v. City of New Orleans*, 2002-0691, p. 8 (La.App. 4 Cir. 9/25/02), 829 So.2d 501, 506, writ denied 2002-2633 (La.1/10/03), 834 So.2d 439. However, if the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2).

A fact is *material* if it is essential to a plaintiff's cause of action under the applicable theory of recovery and if, without the establishment of the fact by a preponderance of the evidence, plaintiff could not prevail. Generally, material facts are those that potentially insure or preclude recovery, affect the litigant's ultimate success, or determine the outcome of a legal dispute. *Prado v. Sloman Neptun Schiffahrts, A.G.*, 611 So.2d 691, 699 (La.App. 4th Cir.1992), writ not considered

613 So.2d 986 (La.1993).

The Closing Statement contained the following pertinent provisions:

- The Client agrees that all work on this project by Concord Engineering was done to his satisfaction, including the quality and quantity of such work.
- The Client agrees that no more work or payments of any kinds are due to him by Concord Engineering.
- The Client agrees that by stopping Concord Engineering's involvement in this project before the previously agreed upon completion point, the Client takes full responsibility and liability for this project, and hereby releases Concord Engineering from such responsibility and liability.

The Khalils had previously submitted \$595,650.00 of insurance proceeds to Concord Engineering in order to repair their properties. The Closing Statement provided that Concord would pay \$41,475.40 to the Khalils in exchange for Dr. Khalil's acceptance of the work and release of Concord. Concord also discounted its agreed upon hourly rate and gave up its claim for \$32,000.00 in outstanding fees. Dr. Khalil testified that he was not suffering from any health issues during this time; that he read the Closing Statement; and that he understood that he was releasing any legal claims he would have against Concord and Mr. Ebrahim. Mr. Ghobrial testified that Dr. Khalil read the Closing Statement "very carefully" before signing it. Dr. Khalil signed the Closing Statement and took the check for \$41,475.40, which had a notation in the memo "Final-Closing Statement," and left. Mr. Ghobrial described the meeting as "very peaceful."

At the hearing, Dr. Khalil could not answer the simple question of how defendants had defrauded him. He referred those questions to his wife, and even admitted that he did not file the lawsuit, stating: "Georgette filed" it. Dr. Khalil

admitted in his depositions that he was not threatened, and that he understood that the Closing Statement contained a release of any claims he had against defendants.

In light of these facts, we conclude that the trial court's judgment was correct and supported by the law and evidence. No genuine issues of material fact exist regarding the allegations of error, duress, and fraud.

Plaintiffs also assert that the trial court erred in finding that there existed no cause of action to rescind the Closing Statement on the grounds that concurrence was not required to alienate rights relating to community immovables. Plaintiffs aver that the Closing Statement's object related to immovable community property, and that the Closing Statement is an incorporeal immovable. Thus, under La. C.C. art. 2347, both Dr. and Mrs. Khalil should have executed the Closing Statement because it constituted an alienation, encumbrance, or lease of a community immovable, according to plaintiffs. We disagree.

Money and a claim to recover money are movables. *See*, A.N. Yiannopoulos, 2 La. Civ. L. Treatise Property Section 148 (4th ed.), citing La. C.C. art. 471: ("Money is a corporeal movable."). "[A]ll actions for the recovery of movable property, whether personal or real, are incorporeal movables." A.N. Yiannopoulos 2 La. Civ. L. Treatise, Property Section 146 (4th ed.).

The object of the Closing Statement and the lawsuit is money. Money is a movable under Louisiana law. Louisiana law, specifically La. C.C. art. 2346, further provides that Dr. Khalil can manage, control, and dispose of community movables: "Each spouse acting alone may manage, control, or dispose of community property, unless otherwise provided by law." The law does not afford the Khalils a remedy to rescind the Closing Statement simply by alleging that its object relates to immovable property. Pursuant to community property laws, Dr.

Khalil could manage the assets of the community, including executing the Closing Statement, without his wife's signature. The trial court did not err in finding there was no cause of action to rescind the Closing Statement on community property grounds.

Plaintiffs further argue that the trial court erred in refusing to supplement the record with DVD excerpts of Dr. Khalil's deposition.

The trial court is given great discretion in deciding whether to receive or refuse evidence. *Coignet v. Deubert*, 413 So.2d 253 (La. App. 4 Cir. 1982). A trial court's decision regarding exclusion of evidence may only be reversed if it constituted an abuse of discretion. *Id.*

The trial court reviewed Dr. Khalil's deposition testimony by reading the transcripts. The trial court evidently concluded that the transcripts of the testimony were sufficient, and that further viewing of a video recording of the testimony was unnecessary. We cannot say that this constitutes an abuse of discretion. This assignment of error has no merit.

CONCLUSION

Accordingly, for the foregoing reasons, the judgment of the trial court granting the Motion for Summary Judgment and sustaining the Exception of No Cause of Action is affirmed.

AFFIRMED