

NOT DESIGNATED FOR PUBLICATION

**LAMAR FORTUNA, SR. AND
COLETTE J. FORTUNA**

*

NO. 2018-CA-0156

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VERSUS

COURT OF APPEAL

*

**MCNAIR PROPERTIES, LLC
AND DONALD HUDSON**

FOURTH CIRCUIT

*

STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2017-02722, DIVISION "A"
HONORABLE HENRY P JULIEN, AD HOC

Judge Paula A. Brown

(Court composed of Chief Judge James F. McKay, III, Judge Terri F. Love, Judge Paula A. Brown)

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**APPEAL DISMISSED WITHOUT PREJUDICE; REMANDED
JULY 25, 2018**

This breach of contract action arises out of a purchase agreement between the Appellants/Plaintiffs, Lamar Fortuna, Sr., and Colette J. Fortuna (“Plaintiffs”), and Appellees/Defendants, McNair Properties, LLC, and Donald Hudson (“Defendants”). When the purchase agreement was not realized, Plaintiffs filed a Petition for Specific Performance. The Defendants filed a motion for summary judgment which was granted by the district court. The judgment was rendered on November 6, 2017.

Following, on December 5, 2017, Plaintiffs filed a motion for new trial. The district court signed the order on December 6, 2017, setting the motion for hearing for February 9, 2018. On December 7, 2017, before the hearing was held on the motion for new trial, Plaintiffs filed a motion for appeal. The district court granted the appeal in part, on December 13, 2017, writing: “Denied as to the Motion for New Trial. Motion set for February 9, 2018. Granted as to Motion for Summary Judgment only.” The appellate record was lodged in this Court on February 27, 2018.

The appellate record reflects a motion for new trial is pending in the district court. On July 3, 2018, this Court ordered Plaintiffs to show cause why the pending appeal should not be dismissed for lack of jurisdiction, citing *Merritt v.*

Dixon, 97-0781 (La. App. 4 Cir. 5/28/97), 695 So.2d 1095.¹ In the response to this Court’s order, the Plaintiffs allege that a hearing on the motion for new trial was held at which Plaintiffs’ counsel moved to dismiss the motion for new trial as moot because the motion for appeal had been granted. In support, Plaintiffs attached an unsigned copy of the judgment dismissing the motion for new trial as moot to their response. Plaintiffs state they have not received a copy of the signed judgment.

The Defendants filed an opposition to Plaintiffs’ memorandum in response to the rule to show cause. The Defendants contend the district court signed the judgment dismissing the motion for new trial on February 28, 2018, and attached, as an exhibit to the Defendants’ Appellee brief, a signed copy of the judgment.

For the reasons that follow, we dismiss the appeal without prejudice for lack of jurisdiction and remand this matter for further proceedings consistent with this opinion.

DISCUSSION

Louisiana Code Civil Procedure Article 2164 provides in part, that “the appellate court shall render any judgment which is just, legal, and proper upon the record on appeal.” *In re Succession of Jones*, 14-0642, p. 12 (La. App. 4 Cir. 11/12/14), 154 So.3d 624, 630, this Court explained, citing La. C.C.P. art. 2164, that an appellate court is a court of record and review is restricted to the record before the appellate court. The *Jones* court opined that “attachments to briefs are not a part of the record on appeal and cannot be considered in resolving issues on

¹ Louisiana Code Civil Procedure Article 2132 provides in pertinent part:

A record on appeal which is incorrect or contains misstatements, irregularities or informalities, or which omits a material part of the trial record, may be corrected even after the record is transmitted to the appellate court, by the parties by stipulation, by the trial court or by the order of the appellate court.

appeal.” *Id.* (citing *Miller v. Crescent City Health Care Ctr.*, 08-1347, p. 8 (La. App. 4 Cir. 5/28/09), 24 So.3d 891, 898-99 (Tobias, J., concurring) (collecting cases)).

In the case *sub judice*, the appellate record reflects a pending motion for new trial. Despite the parties’ assertions that the district court dismissed the motion for new trial as moot, the appellate record is devoid of the transcript of the hearing on the motion for new trial and the signed judgment. As stated *supra*, Plaintiffs express they did not receive a copy of the signed judgment dismissing the motion for new trial. In *Merritt*, this Court held that “[a]n appeal taken while a timely motion for a new trial is pending is premature and subject to dismissal because the motion suspends the operation of the final judgment being appealed.” *Id.*, 97-0781, p. 2 (La. App. 4 Cir. 5/28/97), 695 So.2d 1095, 1096 (citation omitted).² Where there is no ruling on the motion for new trial, the trial court is never divested of original jurisdiction, and the appellate court lacks jurisdiction to hear the appeal. *Id.* (citing *Bowers v. Viator*, 597 So.2d 1250 (La. App. 3 Cir. 1992)). The appellate court can dismiss an appeal at any time for lack of jurisdiction. *Id.* (citing *Thomas v. Department of Corrections*, 430 So.2d 1153 (La. App. 1 Cir. 1983)). Accordingly, the instant appeal is hereby dismissed without prejudice for lack of jurisdiction, and the case is remanded to the district court for further proceedings consistent with this opinion.

APPEAL DISMISSED WITHOUT PREJUDICE; REMANDED

² La. C.C.P. art. 1974 provides: “The delay for applying for a new trial shall be seven days, exclusive of legal holidays. The delay for applying for a new trial commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by Article 1913.” Lack of proper notice of the summary judgment is one for the grounds for the new trial alleged by Plaintiffs.