"Notarial Liability"

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§ 199. Duty to file, register, or record notarial instruments

LA R.S. 35:199 | West's Louisiana Statutes Annotated | Louisiana Revised Statutes | Effective: January 1, 2011

Search Details

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West's Louisiana Statutes Annotated
Louisiana Revised Statutes
Title 35. Notaries Public and Commissioners (Refs & Annos)
Chapter 4. Appointment, Qualifications, and Bonds of Notaries (Refs & Annos)

LSA-R.S. 35:199

§ 199. Duty to file, register, or record notarial instruments

Effective: January 1, 2011
Currentness

A. Notaries public shall record all acts of sale, exchange, donation, and mortgage of immovable property passed before them, together with all resolutions, powers of attorney, and other documents annexed to or made part of the acts, in their proper order, and after first making a careful record of the acts in record books to be kept for that purpose as follows:

(1) If the immovable is located in this state outside of the parish of Orleans, the notary shall record the instrument within fifteen days after they are passed, with the appropriate recorder of the parish or parishes in which the immovable property is situated.

(2)(a) If the immovable is situated within the parish of Orleans, the notary shall file the instrument in the office of the custodian of notarial records for the parish of Orleans and record the instrument with the register of conveyances or recorder of mortgages or both.

(b) If the instrument is an act of sale or any other act evidencing a transfer of immovable property situated in the parish of Orleans, it shall be the duty of the notary to cause the act to be registered with the office of the clerk as the recorder for the parish of Orleans, within forty-eight hours after the passage of the act.

(c) The original of every authentic act, except chattel mortgages and acts relating to immovable property outside of Orleans Parish, passed before a notary public in Orleans Parish, and also every act, contract, and instrument except money judgments and chattel mortgages filed for record in the offices of either the recorder of mortgages or the registrar of conveyances for the parish of Orleans, shall, as a condition precedent to such filing in the office of the recorder of mortgages or the register of conveyances for the parish of Orleans, be first filed in the notarial archives of the parish of Orleans.

B. The provisions of Subsection A of this Section shall not be applicable to instruments affecting cemetery plots and shall not be so construed as embracing inventories or partitions or any other act required by law to be performed by notaries or parish recorders under any order of court, but the original of all such acts, without being recorded, shall be returned to the court from which the order is issued.

C. All notaries who contravene the provisions of this Section shall be subject to a fine of two hundred dollars for each infraction of the same, to be recovered before any court of competent jurisdiction, one-half for the benefit of the informer, as well as all such damages as the parties may suffer thereby.

D. A notary public shall be relieved of his obligations under Paragraph (A)(1) and Subparagraph (A)(2)(a) of this Section when he has been expressly directed in writing by all parties to the instrument to defer or refrain from such recordation or to deliver the instruments to one of the parties or to another person.

Credits

Amended by Acts 2006, No. 730, § 1; Acts 2008, No. 677, § 1, eff. July 1, 2008; Acts 2008, No. 856, § 1, eff. Aug. 15, 2008; Acts 2010, No. 537, § 2, eff. Jan. 1, 2011.

LSA-R.S. 35:199, LA R.S. 35:199

The Revised Statutes and the Codes are current through the 2020 First Extraordinary Session.

End of Document

Harz v. Gowland

Supreme Court of Louisiana. | June 6, 1910 | 126 La. 674 | 52 So. 986

Document Details

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126 La. 674
Supreme Court of Louisiana.

HARZ
v.
GOWLAND et al.

No. 18,086.
|
June 6, 1910.
|
Rehearing Denied June 28, 1910.

Synopsis
Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by Joseph Harz against Joseph Q. Gowland and another, in which the United States Safety Deposit & Savings Bank intervened. Judgment for plaintiff and intervener, and defendants appeal. Affirmed.

See, also, 52 South. 988.

Syllabus by the Court

The 'paraph' of a notary is his official signature, and where he paraphs a forged note he acts as a notary, and not as an individual, and one deceived by this paraph has a cause of action against the surety on his bond. Rochereau v. Jones, 29 La. Ann. 82; Nolan v. Labatut, 117 La. 431, 41 South. 713.

While the paraph of a notary does not guarantee either the value of the property or the rank of the mortgage, it does guarantee the genuineness of the note and of the mortgage with which it is identified, and where a notary fraudulently issues a note, the fraud gives rise to an action against him and his surety regardless of an absence of value, or of an act of mortgage.

Where a notary issues a mortgage note duly paraphed the fact that the purchaser had confidence in him personally does not have the effect of defeating the purchaser's right to recover on the notary's bond for wrongs and losses caused by the acts of the notary.

The rate of interest allowed on the money lost by the plaintiff will be 5 per cent., as there is no written evidence to show that the defendants are bound for more, and this interest will run from the day on which the notary committed the act by which plaintiff suffered loss.

Attorneys and Law Firms

***675** ****986** P. M. Milner, for appellants.

Denegre & Blair and Henry H. Chaffe, for appellee United States Safety Deposit & Savings Bank.

Edgar M. Cahn and E. M. Robbert, for appellee Harz.

Opinion

BREAUX, C. J.

Alleging that J. Q. Gowland, notary public, forged 10 notes of which plaintiff is the holder, plaintiff brought this suit thereon against Gowland and his surety, the Fidelity & Deposit Company of Maryland, in solido, to recover the sum of $14,400, with 8 per cent. interest.

He paid full value for the notes to Gowland.

He alleged that he accepted them, paid for them, on the faith of the paraph of the notary; that he believed they were secured by mortgage and vendor's privilege.

That there was no mortgage or vendor's privilege, although the notary said to plaintiff that they were secured by mortgage and privilege.

That the mortgage notes which are described in the petition were not of record in the recorder's office, nor was there anything of record showing their verity.

For a number of years plaintiff had been dealing with the notary. From time to time the notary would call upon him with a note of $1,000 and ask him if he desired to invest.

The plaintiff took up different notes at different times, until they aggregated in his ***676** hands the sum claimed by him as due by the notary and the surety on his bond.

The complaint is that the notary was unfaithful to his trust, and thereby broke the condition of his bond, and rendered his surety liable.

The United States Safety Deposit & Savings Bank intervened in the suit, alleging that on January 12, 1909, through its cashier, it loaned to the Columbia Realty Company the sum of $2,500 on the latter's promissory note, drawn to the maker's own order, and by him indorsed in blank, bearing 7 per cent. interest from date, secured by mortgage granted by the Columbia Realty Company in favor of Miltenberger, cashier, by act before the same notary, on property described in its petition of intervention.

This note of $500 was covered by subsequent note and mortgage, and was in consequence returned to Gowland, notary, as satisfied.

The mortgage for $500 was not recorded at all by the notary, and as to the second mortgage although it contains the declaration as follows:
'By reference to the mortgage certificate hereto annexed it will be seen that said property is free from all incumbrances, except the assumption by the mortgagor herein of a mortgage granted by William Gowland to Wm. L. Miltenberger, as per act before the undersigned notary,' January 21, 1909.

This mortgage was not the first in rank; it was only the third in rank. No certificate of mortgage was ever produced by the notary and attached to the act.

We are informed that the officer of the bank before named read the act, and then it was read by the notary, in which it was stated that the mortgage was first in rank.

That it was signed by the mortgagor and mortgagee.

That some time thereafter it became known that instead of a first mortgage it was a third mortgage.

***677** The property was of less value than the first two mortgages. ****987**

Intervener at this point invokes article 3364 of the Civil Code, which provides:
'Every notary who shall pass an act of sale, mortgage, or donation of an immovable, shall be bound to obtain from the office of mortgages of the place where the immovable is situated, a certificate declaring the privileges or mortgages which may be inscribed on the object of the contract, and to mention them in his act, under penalty of damages toward the party who may suffer by his neglect in this respect.'

And the notary must see that 'taxes for three years past have been paid.'

The defendant joined issue with plaintiff, admitted that it was surety on the bond, but denied that plaintiff employed the notary to make the investment (that the employment was per parol); averred that he trusted the notary personally, and not as an officer; that plaintiff was influenced by consideration of friendship for and confidence in Gowland, and not by the fact that he was a notary; that plaintiff was negligent; that he should have examined the record, which would have disclosed to him the forgery charged; that the note was not such a deception and snare as plaintiff charges.

It avers that there are other claims upon the bond largely in excess of the amount claimed by plaintiff, and that if judgment is rendered for plaintiff the amount collected should be restricted to his pro rata, and respondent's right to force a concurso reserved.

Returning to plaintiff, Harz, he (made defendant in intervention) filed an exception to the petition of intervention because of want of jurisdiction, want of interest, and no cause of action.

Taking up defendant's plea to the intervention, it denied all of intervener's allegations, and reiterated that the claim of Harz exceeds the sum of $10,000; that the maximum liability on the bond is that sum; and that, if any judgment is rendered, the judgment ***678** should be decreed payable pro rata out of the amount just stated.

The notary sued made no answer. There was as to him confirmation of the judgment by default.

On the merits there was judgment in favor of plaintiff against defendant, also in favor of intervener 'amount of the bond due, to be prorated between plaintiff and intervener.'

The notes, beyond question, including the paraph, were forged. They had no other effect save that which the notary sought to give to it by his forgery.

The question arises whether his surety is liable on its bond.

We are of opinion that it is. He, the notary, was acting in his official capacity, and in that capacity called upon the plaintiff

and informed him, substantially, of the notes, and of their validity, stated where the property mortgaged was situated.

As relates to the paraph ne varietur, there was nothing done or said to place the investor upon inquiry.

The paraph is the official signature, and evidence of the reality and genuineness of the note on which it is written.

The officer is commissioned as a notary to pass acts of mortgage and of sale. Part of the duty consists in adding the words required in paraphing a note and his signature. He answers for its genuineness. His paraph is generally received in evidence in courts of justice. It is taken as true. The notary who offers this signature to an investor violates the duties devolving upon a notary if he thus forges the note and affixes his paraph in order to better enable him to deceive and induce the one to whom he proposes to take it up.

These notes were made payable to bearer.

The act of paraphing the forged note was an offense committed as notary.

The paraph is an act, one which he is authorized ***679** to perform as notary, and not personally.

In the Rochereau Case, 29 La. Ann. 82, the syllabus clearly announces the principle of the decision.
'The sureties on the official bond of a notary public are liable for any loss or damage caused by his affixing his notarial paraph to any mortgage note which he knew to be forged.'

In the body of the decision the court says:
'The forgery is not that of the individual, but of the notary.'

It must be borne in mind that in this decision the question rested on the fact that the paraph was a deception and a fraud, because the notary knew that the purported identification was no identification because of the fraud.

The same in substance is the case before us for decision.

The paraph is official. It identifies the note. Succession of Johnson, 3 Rob. 218.

The legal paraph is evidence of identity with a genuine act.

Every notary shall 'attest each of the notes' by putting his name on them and date of the act. Article 3384.

Each of the notes in question is paraphed ne varietur for identification, the usual paraph in such cases.

In another decision the court emphasized the rule laid down substantially in preceding cases:
'The surety's liability will arise if he does not perform and discharge the duties imposed upon him by law.' Schmidt v. Drouet, 42 La. Ann. 1068, 8 South. 396, 21, Am. St. Rep. 408.

In a recent case the court was still more emphatic and direct upon the subject.

Paraphing the note is a notarial function, for the nondischarge or improper discharge of which the notary and his surety may be held liable to any one who may be thereby ***680** injured. Nolan v. Labatut, 117 La. 431, 41 South. 713.

The next proposition of the defendant is that, even if the notes had been genuine, ****988** plaintiff ought not to recover because there was no property in existence and the notary was insolvent.

True, the paraph of the notary does not guarantee either the value of the property nor the rank of the mortgage.

It, beyond question, ought to guarantee the genuineness of the note and of the mortgage with which it is identified.

While it guarantees neither of these important considerations —i. e., value of the property or rank of the mortgage—if a forgery is resorted to in order to transfer the note, the notary and his surety are liable.

There is a personal liability on the note, and a guaranty that the notary will not resort to dishonest methods in discharging the duties of his office.

The fraud committed gives rise to liability, and not the partial or entire want of value, or the absence of all act of mortgage.

The plaintiff attached a responsibility to the office of notary which it does not have. That after years of confidence he had become overconfident in the integrity of the notary, and trusted him personally, and not as notary, to assist him in making his investment, is the next ground, in substance, urged by learned counsel.

Under the laws he was warranted in giving weight to the acts of the notary, and the fact that he had confidence in him personally does not have the effect of defeating the right to recover on the bond.

There is no complete similarity between the case of one of the forged notes and the other nine, also forged. The facts and circumstances are not the same, for at the time that the last-mentioned notes were handed to him he immediately handed his check for ***681** each as they were received from the notary.

As to the other, the one note, he trusted the officer to an extent that gives it the appearance of a personal transaction between man and man.

Plaintiff left the $1,000 negotiable check for this note with the officer; the latter assuring him that he ought to be trusted, as he is liable on his bond for any failure to account for the amount.

For these reasons, the judgment will remain unchanged in this respect.

Now as to the amount of interest, the next question at issue.

Plaintiff asked for interest at the rate of 8 per cent. from the date of failure of payment.

Defendant's contention is that, if any amount at all be due, it bears interest at the rate of 5 per cent. from judicial demand.

The interest at 8 per cent. is due only when the promise to pay is evidenced by writing.

Plaintiff has no written evidence.

It follows that the amount due is 5 per cent.

As to date, it should be from the time that defendant committed the act charged. From that date he became actively indebted for amount and interest.

We will not dwell upon the intervener's cause.

The notary became indebted for the amount as made evident by the statement of facts, and by our view, and by our opinion above.

Here, again, he failed to perform the duty incumbent upon him as notary. He must suffer the consequences. The demand of intervener as heretofore granted is sustained, and the judgment as to it is maintained.

For reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from is affirmed.

All Citations

126 La. 674, 52 So. 986

Collins v. Collins

Court of Appeal of Louisiana, Fifth Circuit. | December 15, 1993 | 629 So.2d 1274 | 1993 WL 536093

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629 So.2d 1274
Court of Appeal of Louisiana,
Fifth Circuit.

Harvey J. COLLINS

v.

Juanita Eskew COLLINS, Leonard J. Cline, John Doe and XYZ Insurance Company

No. 93–CA–518.
|
Dec. 15, 1993.
|
Rehearing Denied Jan. 18, 1994.

Synopsis

Former husband brought action against former wife and notary arising from wife's allegedly fraudulent sale of property co-owned by wife and husband, without husband's consent. The Twenty-Fourth Judicial District Court, Parish of Jefferson, Ronald P. Loumiet, J., granted defendants' exception of no right or cause of action. On appeal, the Court of Appeal, Kliebert, C.J., held that: (1) husband stated cause of action against wife for fraudulent sale of community property without his concurrence; (2) husband stated cause of action against notary by alleging that notary violated his notarial obligations by notarizing act of sale while notary knew or should have known that person signing as husband was not husband, and/or that notary should have requested identification from whomever signed as husband; and (3) fact that husband entered into quitclaim deed with purchaser of property after wife's sale of property did not preclude husband from bringing action against wife and notary.

Reversed and remanded.

Attorneys and Law Firms

***1275** Richard A. Tonry, Michael C. Ginart, Jr., The Law Offices of Tonry & Ginart, Chalmette, for plaintiff-appellant Harvey J. Collins.

Harry R. Cabral, Cabral & Cabral, Metairie, for defendants-appellees Juanita Eskew Collins and Leonard J. Cline.

Before KLIEBERT and DUFRESNE, JJ., and THOMAS F. DALEY, J. Pro Tem.

Opinion

KLIEBERT, Chief Judge.

Harvey J. Collins, plaintiff, originally filed suit in the Twenty-fourth Judicial District Court on March 29, 1990 to recover damages, attorney's fees, costs, and punitive damages for the allegedly fraudulent sale of immovable property in Florida in which he owned a one-half interest. Made defendants were Juanita Eskew Collins, plaintiff's ex-wife; Mr. Leonard J. Cline, the notary before whom the sale was passed; a John Doe; and XYZ Insurance Company, alleged to have issued a liability policy to the defendant notary.

Although the apparent intention of the plaintiff was to appeal the judgment of September 3, 1992, which granted defendants' exceptions, in his notice of appeal he used the date of the Denial of Motion for New Trial. Since counsel for defendants addresses the merits of the appeal, therefore, in the interests of justice, we will do the same.

The original suit was dismissed on July 3, 1991, for plaintiff's failure to attend a deposition. The trial court's dismissal was affirmed by this Court on February 18, 1992. (91–CA–849, Grisbaum, writer, not designated for publication).

***1276** On February 20, 1992 Mr. Collins filed the suit which is the subject of the instant appeal, containing substantially identical allegations against the same parties. Defendants filed an Exception of No Cause and No Right of Action, which was granted by the trial court on September 3, 1992, with no written reasons. Plaintiff filed a Motion for New Trial on September 18, 1992, which was heard on February 10, 1993. The motion was denied on March 17, 1993. Plaintiff was granted this suspensive appeal on April 7, 1993.

Plaintiff's petition alleges that in 1988, he and defendant Juanita Eskew Collins purchased two lots of ground in Lee County, Florida, each receiving a one-half interest therein. The petition is unclear whether plaintiff and defendant Collins were married at the time of the purchase, although it is apparent that the parties were divorced when suit was filed. Mr. Collins further alleges that on or about March 29, 1989, defendant Collins appeared in the office of the defendant notary Mr. Cline, accompanied by someone purporting to be plaintiff, who forged his signature to an Act of Sale conveying the two Florida lots to purchaser, Mr. Robert McMichael. (Mr. McMichael is not a party to these proceedings.) Mr. Collins

claims he first learned of the fraudulent sale sometime in July 1989.

On Appeal, plaintiff argues that the trial court erred in granting defendants' Exception of No Right or Cause of Action.

Initially, we note that Louisiana does not have an Exception of "No Right or Cause of Action." They are separate and distinct exceptions. Each serves a particular purpose and each follows particular procedural rules. LSA–C.C.P. art. 927(4), (5); *Smith v. Cole,* 541 So.2d 307 (5th Cir.1989); affirmed 553 So.2d 847 (La.1989). For the purposes of this opinion, we will consider the exception as two distinct matters.

The purpose of an exception of no cause of action is to determine whether the law affords any remedy to the plaintiff under the particular allegations of the petition. No evidence may be introduced and all well-pleaded facts are accepted as true. *Walker Resources, Inc. v. Jif's Petroleum Services, Inc.,* 550 So.2d 958 (5th Cir.1989). The exception may be sustained only when it is clearly shown that the law affords no remedy to anyone for the particular grievance alleged. *Smith v. Cole,* supra, at 309.

In paragraph IX of the petition, plaintiff alleges that Mrs. Collins deliberately sold property belonging to the community of acquets and gains existing between herself and petitioner, and caused the forgery of the petitioner's name to be executed on the Act of Sale. In the same paragraph of the petition, petitioner alleges that the notary violated his notarial obligations by notarizing the Act of Sale, while he knew or should have known that the person signing as Harvey Collins was not in fact Harvey Collins, and/or the notary should have requested identification from whomever signed as Harvey Collins.

The concurrence of both spouses is required for the alienation, encumbrance, or lease of community property, and the unauthorized sale of community property is a relative nullity. LSA–C.C. arts. 2347 and 2353.

In *Webb v. Pioneer Bank & Trust Co.,* 530 So.2d 115 (2nd Cir.1988), the court held that a wife was entitled to damages against her husband who had caused her signature to be forged on a mortgage affecting community property. Clearly, in the instant case, plaintiff Collins' petition stated a cause of action against his ex-wife for the sale of community property without his concurrence. Furthermore, this result is not changed by the fraudulent sale allegedly having occurred after the parties' divorce. After the community regime is terminated by a judgment of divorce, the provisions governing co-ownership apply unless there is a contrary provision of law or juridical act. LSA–C.C. arts. 2356, 2369.1. According to LSA–C.C. art. 805, the consent of all co-owners is required for the alienation of the entire thing held in indivision.

As to stating a cause of action against the notary, the law is clear that a notary is liable both for deliberate misfeasance in the course of his official duties, and for negligence in performing those duties.

***1277** In *Summers Brothers, Inc. v. Brewer,* 420 So.2d 197 (1st Cir.1982) the court upheld a judgment against a notary who notarized a document containing forged signatures. The court said at page 204:

> "Even if Mills did not know that the signatures on the contract were forgeries, he knew that by authenticating the document, as notary, he was telling the world that the parties had appeared before him and affixed their signatures in his presence. Thus, he committed fraud in that he purposely let third parties rely on a document purporting to be genuine but actually without validity as an authentic act. The 'proof' of validity he supplied was misleading to all who relied on the contract."

The court also recognized that a notary was liable for deliberate misfeasance occurring during the course of his official notarial duties.

In *Webb,* supra, the court found that the notary who notarized the note in the mortgage but could not recall whether the wife's signature was affixed in his presence was negligent for failing to exercise ordinary care in ascertaining the genuineness of the signature allegedly fixed in his presence, citing LSA–R.S. 35:2 and R.S. 35:198.

The court in *Levy v. Western Casualty & Surety Co.,* 43 So.2d 291 (2nd Cir.1949) recognized that under certain circumstances, a notary could be negligent for failing to get proof of identification from a person signing a document in his presence.

Considering the above jurisprudence, we find it clear that plaintiff's petition stated a cause of action against both defendants Juanita Eskew Collins and notary Leonard J. Cline. Therefore, the exception of no cause of action must be overruled.

The peremptory exception of no right of action raises the question of whether this plaintiff has a legal interest in the subject matter of the litigation. LSA–C.C.P. art. 927(5); *Walker Resources, Inc.,* supra.

Evidence may be introduced at the trial of the exception of no right of action where the grounds thereof do not appear from the petition. LSA–C.C.P. art. 931.

The exception of no right of action is not available to argue a defense to the effect that the plaintiff is without interest simply because the defendants have a defense to the plaintiff's actions. *Smith v. Cole,* supra.

At the hearing on the exceptions, defendants introduced a quitclaim deed entered into between Mr. Collins and the purchaser, Mr. McMichael. They assert that this quitclaim deed serves to divest plaintiff of his legal right to pursue defendants. However, defendants are not correct.

Plaintiff's suit prays for damages in connection with the allegedly fraudulent sale of the land. He does not sue to rescind the sale or in any way seek to nullify it. He does not seek the land back itself. A quitclaim deed transfers the grantor's interest in the property, whatever the extent of that interest, to the grantee. *Sabine Prod. Co. v. Guaranty Bank & Trust,* 432 So.2d 1047 (1st Cir.1983). The quitclaim deed *may* provide defendants with a defense to the plaintiff's suit, but it does not serve to change the plaintiff's legal status.

In a suit against co-owner(s) for their alleged violations of the duties of co-ownership, the only rightful and proper plaintiff is the other aggrieved co-owner(s). Therefore, it is clear that the trial court erred when it granted defendants' exception of no right of action.

Accordingly, the trial court's judgment granting defendants' exception of no cause and no right of action is hereby reversed, and the matter is remanded to the trial court for trial on the merits. Costs of the appeal are to be borne by defendants-appellees.

REVERSED AND REMANDED.

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End of Document

Howcott v. Talen

Supreme Court of Louisiana. | October 20, 1913 | 133 La. 845 | 63 So. 376

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133 La. 845
Supreme Court of Louisiana.

HOWCOTT
v.
TALEN et al.

No. 19,538.
|
Oct. 20, 1913.
|
Rehearing Denied Nov. 17, 1913.

Synopsis
Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by William H. Howcott against C. G. W. Talen and others. From judgment for plaintiff, certain defendants appeal. Reversed.

Syllabus by the Court

The fact that, pursuant to a fraudulent conspiracy, titles to real estate are manufactured and inscribed in the conveyance office does not furnish a cause of action, in damages, against the conspirators, to a person not the owner of property affected by their acts.

If a notary public or other person knowingly co-operates in the manufacture and inscription in the conveyance office of fictitious and fraudulent titles to real estate, without the knowledge or consent of the owner, such notary or other person may no doubt be held liable in damages to such owner; but where a person appearing before a notary is identified by another person, known to the notary, and whom he has no reason to suspect of wrongdoing, the fact that the notary in good faith receives the acknowledgment of the person so appearing to an act of conveyance or other instrument does not subject him to liability for damages, though such person be not the person whom he was represented and believed to be.

Where a person, through gross negligence or indifference to the consequences, permits himself to be inveigled into participating in the manufacture and inscription of acts purporting to dispose of real estate belonging to other people, he may be held liable for the resulting damages, even though he may be a victim, rather than a confederate, of the originator of the scheme.

Attorneys and Law Firms

***845** Gustave Lemle, W. Catesby Jones, and A. A. Moreno, all of New Orleans, for appellant ***846** McGowan.

S. F. Gautier, of New Orleans, for appellant Dearing.

Wm. Winans Wall, of New Orleans, for appellee.

Statement of the Case.

Opinion

MONROE, J.

Plaintiff brings this suit against 11 named defendants, alleging that they, and others to him unknown, entered into a fraudulent conspiracy to incumber and to possess themselves of certain property belonging to him and to other persons, and, in furtherance of that purpose, caused proceedings to be taken purporting to open the succession of Edmund Josephson Moore and wife and to put their son and heir, Edmund Moore, in possession of such property, and caused to be executed and inscribed in the conveyance office pretended acts of sale thereof, by fictitious vendors, all of which is set out at length. He alleges that he has been damaged to the extent of $5,000 and prays for judgment awarding him that amount and ordering the cancellation of said fraudulent inscriptions. There was judgment in the district court condemning eight of the defendants, as prayed, and rejecting plaintiff's demands as to three defendants. Two of the parties condemned (George W. Dearing, Jr., and James McGowan) have appealed. Plaintiff has not appealed nor asked for any amendment of the judgment. The allegations of the petition descriptive of the property to which plaintiff claims title, of the title thus set up, and of the operations of the defendants, in so far as they are said to have been connected therewith, are as follows:
'That petitioner is the sole owner and, as such, has had possession, since February 4, 1904, of the following described property, to wit: A certain tract of land, situated in the Third district of New Orleans, La., in sections 19 and 30 of township 12 S. of range 12 E., designated as lot No. 3, on a plan by B. Buisson, surveyor, dated May 6, 1839, No. 63 of the Book of Plans of Theodore Guyol and Felix Grima, notaries public. Said tract contains 19.30 acres.'

***847** It is then alleged that plaintiff acquired the property so described from Mrs. Marietta Soulé Denis, Mrs. Theresa Soulé Salgado, and Mrs. Angele Soulé Delcroix, who acquired it, by inheritance, from Pierre Soulé, who acquired it by virtue of a partition between John Slidell and others (including himself), who acquired it from Wm. C. Mylne, who acquired it from the government of the United States. It is further alleged:

'That if the existing streets of the city of New Orleans, in the vicinity of petitioner's said property, were prolonged, said property would comprise part of square 1605, bounded by Clouet, Montegut, and Industry streets and Florida walk; part of square 1696, bounded by Clouet, Montegut, Industry, and Agriculture streets; and part of square 1813, bounded by Clouet, Montegut, Abundance, and Agriculture streets.'

It is then alleged that, in furtherance of their conspiracy, defendants caused a petition to be presented to the court, alleging that Edmund Josephson Moore and his wife, Rosina Moran, had departed this life, leaving one son and heir, Edmund Moore, and leaving an estate consisting of certain squares of ground in the Third district, including square No. 1605 bounded by Clouet, Montegut, and Industry streets and Florida walk; that a judgment was obtained purporting to send said Edmund Moore into possession of said property; that acts were then acknowledged and authenticated before the appellant Dearing, as notary, and witnessed by two of the defendants, who have not appealed, whereby Edmund Moore apparently conveys said property to another of the defendants, who executed an act purporting to convey it to the appellant McGowan, who executed an act purporting to convey it, with other squares, to another of the defendants. And it is then alleged that no such persons as Edmund Josephson Moore or his wife or son have ever existed, and that defendants knew it, etc. It is further alleged that an act was acknowledged before the appellant ***848** Dearing, in the presence of the other defendants, whereby Edward J. Whindan apparently ****378** sold to the appellant McGowan the square No. 1813 (together with other squares), and that McGowan executed an act purporting to convey said square (with others) to another defendant. As to the square 1696, we find nothing further in the petition than the allegation that plaintiff acquired it, as stated, and now owns it.

Opinion.

On the trial of the case, plaintiff offered in evidence the plan No. 63, referred to in the petition, which purports to have been the basis of a partition, made on June 4, 1839, between John Slidell, Pierre Soulé and others, and to show township 12 S. in range 12 E., with certain subdivisions, among which is one designated as 'sections Nos. 19 and 30,' containing nine lots, numbered from 1 to 9, inclusive. The act of partition was also offered and shows that Pierre Soulé acquired the lot 3, and an act of deposit by plaintiff, of date March 31, 1904, recites that by an act under private signature, duly acknowledged, of date February 19, 1904, Mesdames Marietta Soulé Denis, Angele Soulé Delcroix, and Theresa Soulé Saldago sold that lot to him. We, however, find nothing in the record which connects the title thus dealt with with that of Pierre Soulé. Moreover, plaintiff offered in evidence two blueprints, purporting to represent a part or parts of the property represented on plan No. 63 as though it were divided into squares, whereas, according to the evidence, it has never been actually so divided. Upon one of the blueprints, the only numbers that we find are 1 to 9, inclusive, indicating apparently the lots bearing those numbers according to plan 63. The other blueprint purports to give the numbers of the squares but not the numbers of the lots. Identifying the squares by the streets bounding them, and taking the ***849** two blueprints together, we fail to find that either of the squares claimed by plaintiff is within the boundaries of the lot 63, which appears to cut through squares 1606, bounded by Clouet, Feliciana, and Industry streets and Florida walk, 1695, bounded by Clouet, Feliciana, Industry, and Agriculture streets, 1814, bounded by Clouet, Feliciana, Agriculture, and Abundance streets, and other squares, but does not touch squares 1605, 1696, or 1813, or either of them. And the impression thus created that those squares are not within the limits of lot 63 is strengthened by the oral testimony. Thus Mr. Bres, an expert, whom plaintiff employed and called as a witness, testified that all the maps that he had ever seen were a 'little mixed' on the question of the boundaries f square 1605, and that he did not know whether it was bounded by Clouet, Montegut, and Industry streets and Florida walk, as alleged in the petition herein filed, or by Florida walk, Montegut, Feliciana, and Industry streets, as alleged in a petition filed by the Leader Realty Company against some of these same defendants; the fact being that, according to the blueprints to which we have referred, square 1605 is bounded by Florida walk, Montegut, Feliciana, and Industry streets. Plaintiff's own counsel, being on the stand, gave the following testimony on the cross-examination, to wit:

'Q. Well, Mr. Wall, in the judgment which was rendered in the Leader Realty Company Case, I see that the same number of

squares have been recovered by the Leader Realty Company that you claim in this suit; now, who is the owner of those properties, Mr. Howcott or the Leader Realty Company? A. I don't know; I think it is a question for the court to resolve, in considering the case, and for that reason I am forced to object to answering you. Q. But, Mr. Wall, you appeared as attorney in the Leader Case? A. Why, certainly. Q. You answered it in that case? A. But I don't undertake to decide this case.'

We are therefore of opinion that plaintiff fails to disclose any such interest in the property which was affected by the operations ***850** of the defendants as to entitle him to recover in this suit. But, even if he had shown title to the squares claimed by him, we do not think that the judgment against the defendants who have appealed could be affirmed. The evidence shows that beyond doubt there was a fraudulent conspiracy, in furtherance of which the parties thereto caused proceedings to be instituted, purporting to open the successions of persons who never existed and resulting in the obtention of judgments, purporting to put the fictitious heirs of such fictitious persons in possession of quite a good many pieces of real estate, and that real persons, representing such fictitious heirs, then executed acts purporting to sell the property, and that in other instances, without the opening of any successions, persons were introduced to prospective buyers and to notaries as the owners of certain real estate, to which they had no pretense of title, and acts of sale signed by them, and sometimes witnessed by other of the conspirators, were authenticated by the notaries; but the evidence fails to satisfy us that the appellant Dearing, who was one of the notaries referred to, or the appellant McGowan, who was one of the buyers, were parties to the conspiracy. The inventor apparently and main actor in the whole business was Felix H. Boulmay, who necessarily required the co-operation of a number of persons, but such co-operation, though guilty in some instances, was innocent in others. A number of witnesses testified that they had known Boulmay for many years, and there was no attempt to show that he was disreputable or for any reason a person with whom ordinary business might not be transacted in the ordinary way. When, therefore, he professed to have discovered the heir to land lying out in what until recently has been a swamp and assessed to 'unknown owners,' and himself, with a milkman, known to the attorney and notary to whom ****379** ***851** he presented himself, made the necessary affidavits, it is not altogether surprising that the attorney and notary should have taken the steps required to put the supposed heir in possession of his supposed estate; and the fact that, in the course of his operations, Boulmay employed a half dozen notaries or more, and that none of them appear to have received more than the ordinary fees, indicates that, though in some instances not as prudent as they might have been, they were the victims, rather than the confederates, of their client. The charges against Dearing are: That he received an acknowledgment purporting to be that of Edmund Moore, the fictitious heir, and of Leo. J. Sapera, a son-in-law of Boulmay, to an act of sale, under private signature, whereby the supposed Moore sold to Sapera several squares, including square 1605; that he received an acknowledgment purporting to be that of Edward J. Whindan, a fictitious person, and of the appellant McGowan, to an act of sale, under private signature; that he received an affidavit, purporting to be that of the pretended Edmund Moore, and the acknowledgment of two real persons to an act of sale, under private signature, affecting property to which neither of them had any title. The evidence is entirely uncontradicted to the effect that Boulmay had once been a notary public and that Dearing had known him for 20 years; that he brought to Dearing's office two men whom he introduced, the one as Moore and the other as Sapera, his son-in-law (which he was); that Dearing received their acknowledgments to an instrument which, having previously been prepared, was signed by the parties and by Boulmay and Dearing's son as witnesses; that on another occasion Boulmay brought a man, whom he introduced as Whindan, with an instrument, already prepared, purporting to be an act of sale from Whindan to McGowan, informing Dearing that McGowan, ***852** whom Dearing knew, would come in later, which he did, and that Dearing received the acknowledgments of their signatures, witnessed by Boulmay and a man named Perrett, whom Dearing knew; that the affidavit of the pretended Edmund Moore, to which Dearing affixed the jurat, is appended to a supplemental petition, signed by a reputable attorney and notary, purporting to correct an error in the proceedings which he had been deceived into instituting in the pseudo succession of Edmund Josephson Moore and wife; that some one personating Edmund Moore had signed the affidavit; and that he received the acknowledgments of the signatures to the other instrument by the persons who put them there and who testified in the case—in all of which we find nothing unusual or which reflects upon the good faith of Dearing. If a notary public knowingly participates in the confection and the inscription in the conveyance or mortgage office of an instrument incumbering the title to real estate, without the knowledge or consent of the owner, he is no doubt liable to the owner in damages for the consequences of his fault; but it can hardly be expected that he will ordinarily require more than the reasonable identification of persons who come before him merely to acknowledge their signatures to instruments of

any kind. He most assuredly is not obliged to examine the titles of the property which the instruments purport to affect or to verify the truth of the affidavits which the parties propose to sign. In fact, so long as he exercises the precaution of an ordinarily prudent business man in certifying to the identity of the persons who appear before him, it may be doubted whether he has any othet function to discharge; and we are of opinion that such precaution was exercised by Dearing in the matters here complained of.

McGowan's case is not so clear, since he ***853** was guilty of gross negligence in accepting, conveying, and placing on record titles to property which belonged to others, merely upon the faith of Boulmay's representations. Precisely what those representations were the record does not show, but we infer that McGowan was told that Boulmay had found a number of outlying squares of ground that were assessed to ‘unknown owners' (which was a fact); that he had discovered the owners; and that the property might be bought at a low price; but that it would require some money, possibly, to pay back taxes and clear up the titles, etc.; and McGowan appears to have furnished the money and to have accepted Boulmay's assurances as to his disposition of it and as to the character of the titles that he was to acquire. His credulity is shown to have cost him something like $5,000, and his negligence would perhaps cost him something more, if the plaintiff in this case had shown that his property was affected by McGowan's operations, even though we do not find that the evidence adduced convicts McGowan of fraud. He was rather the victim, as we take it, of Boulmay than his confederate; and, so far as we can see, he inflicted no injury on the plaintiff, whose misapprehension in regard to his own titles was a matter for which McGowan was not responsible.

There is some suggestion, in the brief of McGowan's counsel, to the effect that the judgment appealed from is erroneous in ordering the cancellation of the inscriptions of titles to property in which the plaintiff has no interest, and that may be true; but McGowan has no more interest in the property than has the plaintiff, and we see no reason why the judgment, though erroneous, should be disturbed on that account, at his instance. In so far, then, as the judgment appealed from condemns the defendants George W. Dearing, Jr., and James McGowan to pay plaintiff the sum of $5,000, with ***854** interest and costs, it is ordered, adjudged, ****380** and decreed that the same be annulled and set aside. It is further decreed that plaintiff's demand therefor be rejected at his cost in both courts.

All Citations

133 La. 845, 63 So. 376, 49 L.R.A.N.S. 45

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Quealy v. Paine, Webber, Jackson & Curtis, Inc.

Supreme Court of Louisiana. | September 10, 1985 | 475 So.2d 756

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Outline

475 So.2d 756
Supreme Court of Louisiana.

William L. QUEALY
v.
PAINE, WEBBER, JACKSON & CURTIS, INC., Donald S. Castrone, New England Gas and Electric Association and Vance, Sanders Investors Fund, Inc.

No. 85–C–0495.
|
Sept. 10, 1985.
|
Rehearing Denied Oct. 10, 1985.

Synopsis

Registered owner of 1,500 shares of common stock brought action against broker and issuer seeking to recover damages for unauthorized sale of his stock. Broker filed third-party action against notary public who prepared and notarized bill of sale which purportedly transferred stock. Issuer filed third-party action against broker claiming indemnification for any amount in which it might be cast on main demand. The Civil District Court, Parish of Orleans, Richard J. Ganucheau, J., rendered judgment in favor of the owner, upheld claim of issuer against broker, and dismissed all claims against notary public. Broker and issuer appealed. The Court of Appeal, 464 So.2d 930, Lobrano, J., amended in part, reversed and remanded in part, and affirmed in part. On application for writ of certiorari, the Supreme Court, Marcus, J., held that: (1) stockbroker was liable for conversion; (2) notary was not liable to stockbroker on its third-party demand for notarizing the signature of an imposter; and (3) trial judge properly awarded registered owner amount commensurate with value of 1,500 shares of type of stock converted as of day before trial.

Affirmed in part; reversed in part.

Lemmon, J., concurred in part and dissented in part.

Attorneys and Law Firms

***758** Phillip Wittmann, Douglas Dodd, Jo Strickler, Stone, Pigman, Walther, Wittmann & Hutchinson, New Orleans, for defendant-applicant.

John Baus, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, Perry Staub, Monroe & Lemann, Matthew Greenbaum, New Orleans for respondents.

Opinion

MARCUS, Justice.

This action was filed by William L. Quealy against Paine, Webber, Jackson & Curtis, Inc. (Paine Webber) and New England Gas and Electric Association (NEGEA) for the unauthorized sale of 1,500 shares of NEGEA stock owned by Quealy. Also named defendant was Donald S. Castrone, who bought the shares from an imposter and presented them for re-sale to Paine Webber.[1] Paine Webber filed a third-party demand against William F. Ryan, a notary who prepared and notarized a bill of sale which purportedly transferred ownership of the shares from the imposter to Castrone. NEGEA filed a third-party demand against Paine Webber seeking indemnification for any damages for which it might be cast.

The trial judge rendered judgment in favor of Quealy and against Paine Webber and NEGEA, *in solido,* in the amount of $32,437.50 for the loss of the shares based on their value on the day before trial,[2] together with $15,840 for lost dividends, and $15,000 in general damages, or a total of $63,227.50. The judge further awarded legal interest from the date of judicial demand until paid on the award for the lost shares and general damages and from the date due on the award for lost dividends. Judgment was further rendered in favor of NEGEA on its third-party demand against Paine Webber in an amount equal to that rendered in favor of Quealy. Paine Webber's third-party demand against Ryan was dismissed.

***759** The court of appeal, finding that Paine Webber and NEGEA were guilty of conversion, affirmed the judgment of the trial court in all respects except to exclude interest on the value of the lost stock and to award attorney fees and court costs to NEGEA on its third-party demand against Paine Webber. It further remanded the case to the trial court to fix the amount of attorney fees and costs.[3] On Paine Webber's

application, we granted certiorari to determine the correctness of that decision.[4]

Quealy inherited 1,500 shares of NEGEA common stock from his mother, as well as a small amount of shares in three other corporations. He kept the stock certificates in an unlocked leather suitcase in the room he lived in at a French Quarter hotel. Besides the dividends he received from those securities, his only income was a small Army disability pension. In 1977, a fire at the hotel forced him to move to another nearby hotel. He assumed the stock certificates remained in the suitcase after he moved. In February of 1978, Quealy noticed that he had not received his quarterly dividend and immediately contacted NEGEA. He was informed that the shares had been surrendered. Apparently, the NEGEA stock certificate had been stolen from Quealy's suitcase.[5]

Donald Castrone, sales manager of a West Bank new car dealership, testified that in December of 1977 a man claiming to be William Quealy came to the dealership and spoke to him about purchasing a car. (Several months later, Castrone was introduced to the plaintiff and stated that he was not the same man who came to the dealership). During their negotiations, the imposter stated that he wanted to buy the car with cash and offered to sell Castrone various stocks, including 1,500 shares of NEGEA, at a price below market value. The imposter claimed that he did not want to sell the stock through a broker because he wanted to avoid the usual delays in receiving cash for the stock. Castrone contacted his friend and attorney, William Ryan, and requested advice on the purchase of the stock.

Ryan called Morris Cali, a broker at Paine Webber's New Orleans office, to determine what steps were necessary for Castrone to purchase the stock by private sale and then to sell it for cash without waiting the usual period. Charles Bailey, operations manager of the office, checked with NEGEA and determined that the stock had not been reported as lost, stolen or missing. Cali then advised Ryan that in order to transfer the stock, Paine Webber would require a notarized bill of sale.

Castrone and the imposter arrived at Ryan's home (located in uptown New Orleans) the following evening after Castrone closed the car dealership. Castrone testified that he had gone to Ryan's home on several previous occasions, both for social purposes and to conduct legal business. At Ryan's inquiry, the imposter stated that he had obtained the stock through an inheritance. Ryan asked the imposter for identification, but at trial in December of 1983 (some six years later) could not recall what type of identification was produced. He testified that he did not personally know the man who represented himself as William Quealy. The imposter signed the back of the stock certificate, and he and Castrone signed the bill of sale which Ryan then notarized. Witnesses who subsequently signed the bill of sale did not actually see Castrone and the imposter sign the document. Castrone paid the imposter in cash, outside of Ryan's presence.

The following day (December 9, 1977), Ryan accompanied Castrone to the Paine Webber office with the stock certificate and notarized bill of sale. In order to accomplish the sale and transfer of the NEGEA stock, Castrone opened an account for the first time with Paine Webber. Bailey and John P. Godchaux, manager of the ***760** office, each reviewed the documents and satisfied themselves that the bill of sale was properly notarized and that the signature on the back of the certificate matched the seller's signature on the bill of sale. Godchaux approved the sale, and Bailey placed on the certificate a guarantee that the signature was that of the person whose name appeared on the face of the certificate (William L. Quealy). Godchaux and Bailey both testified that Paine Webber guaranteed the seller's signature in reliance on the notarized bill of sale. Godchaux indicated that NEGEA would not have accepted the shares without the signature guarantee. Castrone then sold the stock for cash and received payment. Paine Webber earned a $390 commission on the transaction. Castrone bought the stock from the imposter for $24,000 and sold it for $24,885, making a profit of $885.

Quealy testified that the signatures on the stock certificate and bill of sale were not his, and that he never sold the NEGEA stock nor received any money from its sale. Since he ceased to receive dividends in 1977, practically all of Quealy's income has been derived from his disability pension which is insufficient to meet his expenses. At the time of trial, Quealy was living in a rooming house in New Orleans. He had great difficulty walking and had twice been confined to a wheelchair. He was unable to travel to the courthouse to testify. Quealy was physically unable to work and testified that his living conditions had seriously deteriorated since the loss of the NEGEA dividends.

The issues presented for our determination are:

(1) Whether Paine Webber was guilty of converting Quealy's stock.

(2) Whether the notary was liable to Paine Webber on its third-party demand for notarizing a forged signature.

(3) Whether the trial judge properly awarded the value of the lost stock as of the day before trial rather than the date of conversion.

(4) Whether the trial judge erred in awarding general damages for mental anguish and inconvenience suffered by Quealy for the loss of use of the stock.

(5) Whether Paine Webber was liable to NEGEA on its third-party demand for attorney fees and court costs.

LIABILITY OF PAINE WEBBER

A conversion consists of an act in derogation of the plaintiff's possessory rights, and any wrongful exercise or assumption of authority over another's goods, depriving him of the possession, permanently or for an indefinite time, is a conversion. It is of no importance what subsequent application was made of the converted property, or that defendant derived no benefit from his act. *Importsales, Inc. v. Lindeman,* 231 La. 663, 92 So.2d 574 (1957).

Without Paine Webber's signature guarantee, NEGEA would not have accepted the stock and Quealy would have remained the record owner. Paine Webber's signature guarantee was therefore a necessary step in the transfer of ownership and was a contributing cause of Quealy's loss. Internal regulations (Internal Control Memo # 50) circulated to Paine Webber employees required that signature guarantees be made only where the employee either knows the individual or takes steps to verify his identity, such as by making a comparison of the signature to a signature card or other similar records. As a member of the New York Stock Exchange, Paine Webber was bound by that association's Rule 405 (also known as the "Know Your Customer" rule) which obliged the brokerage firm to use due diligence in knowing with whom it does business. Godchaux and Bailey testified, however, that they merely relied on the notarized bill of sale as proof that the signature of Quealy was genuine. Bailey guaranteed that the signature was that of the person named on the face of the certificate, although Paine Webber personnel did not know Quealy nor have a record of his signature and the certificate was not signed in their presence. Moreover, although ***761** Ryan knew Morris Cali and had an account with Paine Webber, none of the personnel had previously known Castrone.

Under these circumstances, it was not reasonable for Paine Webber to rely on the notarized bill of sale and take no further steps to verify the authenticity of Quealy's signature. In guaranteeing the signature of a person they did not know, who did not sign in their presence, and whose signature they did not compare to other existing records, Paine Webber employees acted in a manner inconsistent with Quealy's property rights. Paine Webber wrongfully assumed control over Quealy's stock and contributed to depriving him of its possession and was liable for conversion. La.Civ.Code art. 2315.

LIABILITY OF NOTARY

In *Howcott v. Talen,* 133 La. 845, 63 So. 376 (1913), in enunciating the standard of care for a notary who acknowledges a signature, we stated:

> [S]o long as he exercises the precaution of an ordinarily prudent businessman in certifying to the identity of the persons who appear before him, it may be doubted whether he has any other function to discharge.... [I]t can hardly be expected that he will ordinarily require more than the reasonable identification of persons who come before him merely to acknowledge their signatures to instruments of any kind.

In *Howcott,* a notary (Dearing) was approached by Boulmay, a man he had known several years. Boulmay introduced Dearing to an individual who claimed to be heir to a succession. (In fact, the succession never existed and the heir was an imposter scheming to sell property he did not actually own). Boulmay requested that Dearing notarize an act of sale which purported to transfer ownership of property from the imposter to another. Dearing notarized the instrument, and the scheme was later uncovered. This court found that Dearing, as notary, had exercised the care of an ordinarily prudent businessman and was not liable for notarizing the imposter's signature.

In the instant case, Ryan took further precautionary steps than did the notary in *Howcott.* Like Dearing, Ryan was well-acquainted with the individual (Castrone) who introduced him to the imposter. When Castrone contacted him about the proposed private sale of stock, Ryan called Paine Webber

to ascertain the requirements of such a transaction. Bailey testified at trial that a private sale of stock was not unusual. The fact that Ryan notarized the bill of sale in his home at night does not suggest any impropriety, as he had previously done legal work for Castrone in his home after Castrone (who lived in Slidell) finished work. Ryan asked the imposter how he had obtained the stock and requested identification. While Ryan could not recall at trial exactly what type of identification the imposter produced, it should be noted that the trial took place six years after the bill of sale was notarized. Under the circumstances, we are unable to say that the trial judge was clearly wrong in finding that Ryan did not act unreasonably in this transaction. *Arceneaux v. Domingue,* 365 So.2d 1330 (La.1978). Clearly, Ryan met the standard of care for a notary as set forth in *Howcott.* Therefore, the court of appeal did not err in affirming the finding of the trial judge that Ryan was not liable to Paine Webber on its third-party demand for notarizing the signature of an imposter.

MEASURE OF DAMAGES FOR LOST STOCK

The traditional damages for conversion consist of the return of the property itself, or if the property cannot be returned, the value of the property at the time of the conversion. *Boisdore v. International City Bank & Trust Co.,* 361 So.2d 925 (La.App.4th Cir.), *writ denied,* 363 So.2d 1384 (La.1978). There are some transactions in stocks in which to hold a defendant liable only for the value of the stocks at the date of their actual conversion would afford a very inadequate remedy; ***762** as, for instance, where one buys stocks with the intention of holding them for a rise in the market and the broker sells them without authority so that the principal loses the opportunity of availing himself of the rise. *Leurey v. Bank of Baton Rouge,* 131 La. 30, 58 So. 1022 (1912). Where a commodity which fluctuates in value is converted, its owners should be given the benefit of better prices that prevailed within a few months afterwards. *Succession of Gragard,* 106 La. 298, 30 So. 885 (1901). Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. La.Civ.Code art. 2315. Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived. La.Civ.Code art. 1995.

The value of Quealy's NEGEA shares on the date they were wrongfully transferred by Paine Webber to NEGEA (December 9, 1977) was $24,885. Rather than following the general rule in conversion cases and measuring the shares' value as of the date of conversion, the trial judge awarded Quealy $32,437 for the lost stock, which represented its market value on the day before trial (December 13, 1983). The general rule accomplishes the goal of fully compensating the conversion victim in cases where the converted property depreciates over time. In such instances, the victim is made whole by returning to him exactly what was lost. In the case of stock, which fluctuates in value, applying the general rule of damages will not always accomplish the goal of making the victim whole. Such is the case here. In order for Paine Webber to fully repair the damage caused, it must reimburse Quealy in an amount sufficient to enable him to repurchase exactly what was lost: 1,500 shares of NEGEA stock. La.Civ.Code arts. 2315 and 1995. The trial judge thus properly awarded Quealy an amount commensurate with the value of 1,500 shares of NEGEA stock as of the day before trial.[6]

GENERAL DAMAGES

Damages for mental anguish and inconvenience arising from the loss of use of property have been allowed in tortious conversion cases. *Alexander v. Qwik Change Car Center, Inc.,* 352 So.2d 188 (La.1977). Similarly, where property has been wrongfully seized through judicial process, damages for mental anguish and inconvenience due to the loss of use of the property are recoverable. *Nassau Realty Co., Inc. v. Brown,* 332 So.2d 206 (La.1976); *Hernandez v. Harson,* 237 La. 389, 111 So.2d 320 (1958). In *Hernandez,* we stated:

> Plaintiff is entitled to recover for humiliation, mortification and mental anxiety, and for physical discomfort and inconvenience as a result of the deprivation of use and enjoyment of his car.... Such an item is not confined to proof of actual pecuniary loss. It is true that there is no proof of malice nor was the seizure characterized by harshness and total disregard to the interests of plaintiff. Yet it was illegally and wrongfully executed, coupled with the continued deprivation of its use for an extended period of time, sufficient to have caused mortification, annoyance and physical discomfort.

The award of general damages in a conversion case, if proven, is clearly supported by the jurisprudence. Quealy testified that except for a small disability pension, the dividends from the converted stock constituted his main source of income and his living conditions were drastically impaired by the loss of those dividends.[7] ***763** He was physically unable to work, and on December 14, 1983 (date of trial), he had been without the dividend income for six

years. There was ample evidence in the record to support a finding that Quealy suffered mental anguish, humiliation and inconvenience from the loss of use of his property. Therefore, the trial judge did not err in awarding general damages.

LIABILITY OF PAINE WEBBER TO NEGEA FOR ATTORNEY FEES AND COURT COSTS

Attorney fees are not allowed in Louisiana except where authorized by statute or contract. *Hernandez v. Harson, supra* (on rehearing). Unless the judgment provides otherwise, costs shall be paid by the party cast. La.Code Civ.P.art. 1920.

The trial judge granted NEGEA's third-party demand for indemnification based on Paine Webber's signature guarantee of an imposter. He found that Paine Webber was liable for all costs of the proceedings. The court of appeal stated that Paine Webber was liable to NEGEA for any loss that resulted from the signature guarantee and included within Paine Webber's liability an award of attorney fees and court costs. The court of appeal relied on La.R.S. 10:8–312.[8]

Paine Webber guaranteed the imposter's signature on December 9, 1977. Quealy's suit was filed December 6, 1978. La.R.S. 10:8–312 was enacted by Acts 1978, No. 165, § 1 with an effective date of January 1, 1979. It was not in effect at the time the signature was guaranteed nor when suit was filed. Being substantive in nature, the statute should not be retroactively applied. Therefore, it does not govern this case.[9]

The statutory provisions which applied when Paine Webber guaranteed the imposter's signature are contained in the Uniform Stock Transfer Act. La.R.S. 12:621, *et seq.* (repealed by Acts 1978, No. 165, § 6, eff. Jan. 1, 1979). Our review of these statutes yields no provision whereby a signature guarantor assumes the defense of the issuer when a claim is made against the latter for wrongful transfer, nor do we find any statutory authority for an award of attorney fees against a signature guarantor in such a case. Furthermore, there was no contractual agreement between Paine Webber and NEGEA that could provide for attorney fees. Thus, the court of appeal erred in finding Paine Webber liable for attorney fees on NEGEA's third-party demand.

Paine Webber was found liable for indemnification on NEGEA's third-party demand and, as the party cast, it was obliged to pay court costs. La.Code Civ.P. art. 1920.

In sum, we find that the court of appeal erred in awarding NEGEA attorney fees on its third-party demand against Paine Webber, and we reverse that portion of the judgment. In all other respects, the judgment of the court of appeal is affirmed.

***764** DECREE

The judgment of the court of appeal is affirmed in all respects except it is reversed insofar as it grants attorney fees to New England Gas and Electric Association on its third-party demand against Paine, Webber, Jackson & Curtis, Inc.

LEMMON, J., dissents from the award of general damages, the measure of damages, and the liability of Paine Webber to plaintiff, but concurs as to Paine Webber's liability on NEGEA's third party demand.

All Citations

475 So.2d 756

Footnotes

1 Castrone filed for relief under Chapter 7 of the Bankruptcy Code (11 U.S.C. Sec. 701, et seq.) prior to trial and did not take part in these proceedings. Also named defendant was Vance, Sanders Investors Fund, Inc. who settled with Quealy before trial.

2 To prove the current market value of the stock, Quealy introduced in evidence the NYSE-Composite Transactions of December 13, 1983 appearing in *The Wall Street Journal* the next day (December 14, 1983) which was the date of trial. Therefore, the value of the stock fixed by the trial judge was based on the closing price for December 13, 1983.

3 464 So.2d 930 (La.App. 4th Cir.1985).

4 467 So.2d 528 (La.1985).

5 Three other stock certificates were also stolen from Quealy. The record is unclear as to the disposition of these three certificates; in any event, they are not the subject of this litigation.

6 The question of what value should be awarded for stock which has declined in value since its conversion is not before us. We note, however, that in such a case, the general rule which measures damages as of the date of conversion would make the owner whole by replacing exactly what he lost. *See Atkins v. Garrett,* 270 F. 939 (5th Cir.1921).

7 Due to physical infirmities, Quealy did not testify at trial. His testimony was introduced through a videotaped deposition. Paine Webber objected on relevancy grounds to questions regarding Quealy's living conditions since the conversion, and the trial judge sustained the objections. The trial judge erred in his rulings as this evidence was relevant to the proof of general damages which are recoverable in conversion cases. Moreover, the trial judge awarded general damages based on the record which contained the evidence that he had previously ruled inadmissible.

8 La.R.S. 10:8–312 provides:

(1) Any person guaranteeing a signature of an indorser of a security warrants that at the time of signing

(a) The signature was genuine; and

(b) The signer was an appropriate person to indorse; and

(c) The signer had legal capacity to sign.

(2) Any person may guarantee an indorsement of a security and by so doing warrants not only the signature (Subsection 1) but also the rightfulness of the particular transfer in all respects. But no issuer may require a guarantee of indorsement as a condition to registration of transfer.

(3) The foregoing warranties are made to any person taking or dealing with the security in reliance on the guarantee and the guarantor is liable to such person for any loss resulting from breach of the warranties.

9 Because La.R.S. 10:8–312 was not in effect when Paine Webber guaranteed the signature, we do not reach the question of whether the term “any loss” includes attorney fees.

Webb v. Pioneer Bank & Trust Co.

Court of Appeal of Louisiana, Second Circuit. | August 17, 1988 | 530 So.2d 115 | 1988 WL 85632

Document Details

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530 So.2d 115
Court of Appeal of Louisiana,
Second Circuit.

Artie M. WEBB, Appellant,
v.
PIONEER BANK & TRUST COMPANY, et al., Appellees.

No. 19844–CA.
|
Aug. 17, 1988.
|
Rehearing Denied Sept. 15, 1988.

Synopsis

Wife sued to annul note and cancel mortgage and for damages from former husband, notary, and creditor bank. The District Court, First Judicial District, Parish of Caddo, James E. Clark, J., ordered mortgage canceled but rejected demand for damages, and wife appealed. The Court of Appeal, Fred W. Jones, Jr., J., held that: (1) loan incurred for common interests of spouses which benefited community was properly characterized as community obligation, but (2) wife whose name was forged to note and mortgage was entitled to damages.

Affirmed in part; reversed in part.

Attorneys and Law Firms

***116** Nelson, Hammons & Johnson by Walter D. White, Shreveport, for appellant.

Bodenheimer, Jones, Klotz & Simmons by Gary S. Brown, Shreveport, for appellees.

Before JASPER E. JONES, FRED W. JONES, Jr. and NORRIS, JJ.

FRED W. JONES, Jr., Judge.

Alleging that her signature on a note and mortgage had been forged by her husband, plaintiff sued to annul the note, cancel the mortgage, and for damages from the former husband, the bank employee who notarized the mortgage, and the creditor bank. From a judgment ordering cancellation of the mortgage but rejecting the demand for damages, plaintiff appealed.

James Webb and Artie Webb were married in 1941 and in the ensuing years had four children. Mrs. Webb left the management of family finances to her husband, turning her paycheck over to him even after she became the sole wage earner in 1981. Webb did most of the writing of checks and Mrs. Webb never reviewed bank statements. The family banking was done at Pioneer Bank and Trust Company in Shreveport, from which Webb secured several loans over the years.

The Webbs were judicially separated in 1985 and subsequently divorced. Following the separation Mrs. Webb discovered a past due loan notice from Pioneer Bank. Upon inquiry, she was informed that the bank held a note and mortgage, purportedly signed by Mrs. Webb along with her husband on January 28, 1981, for some $40,000. Mrs. Webb informed the bank official that the signatures were not hers, ***117** but made the $225.50 monthly payments for several months before filing this suit in August 1985.

At the trial the 61 year old plaintiff testified that she had been the primary financial support of the family for some years prior to the separation and was making $5.17 per hour. Webb, who had a drinking problem, was not employed when the loan in question was made. Mrs. Webb admitted signing the credit application for the loan, but stated that she did not realize its import at the time. Before this loan her house payments were $78 per month. This loan increased those payments to $310 per month. Plaintiff denied signing the note and mortgage in question. There was testimony that, since learning of the forged signature on the instruments, plaintiff had been extremely upset, frequently wept, and suffered physical difficulties.

Robert Foley, an expert in the examination of Forensic Documents, stated he had compared plaintiff's acknowledged signature on cancelled checks and her purported signature on the note and mortgage. It was his opinion that the person who signed the checks was not the same person as the one who signed the note and mortgage.

Gary Parker, who notarized the mortgage, testified that he was formerly employed by Pioneer Bank as a Vice–President and loan officer. He said that Webb was a regular bank customer to whom several loans had been made. In 1979 a $7500 mortgage loan was made to Webb for home improvements, with a portion of the proceeds used to repay a prior loan.

Parker knew that Webb was married but never met Mrs. Webb.

When Webb approached Parker for another loan in 1981, Parker provided him with a loan application for the couple to sign and informed Webb that his wife would have to sign the note and mortgage. At the time, the bank's policy was not to lend more than $2,000 without collateral and without the spouse's signature. Parker could not recall whether Mrs. Webb's signature to the note and mortgage was affixed in his presence, although he was the notary.

The note and the mortgage were for $40,600.30, but Webb only received $15,000. Of this, $7448 was used to pay off the prior loan and interest payments (included in the note and mortgage) amounting to $24,475.80. Later, $3,000 was used to buy a bank money order for one of the Webb daughters.

Webb did not testify.

In a written opinion, the trial judge found that plaintiff had proved her signature on the note and mortgage was forged and ordered cancellation of the mortgage as null and void. On the other hand, he concluded that the loaned proceeds of $15,000 had benefited the community. Therefore, the note was deemed a community obligation which was not voided by plaintiff's forged signature. Further, plaintiff's claim for damages was rejected because the trial judge found no evidence the existence of the mortgage caused her any more harm or mental anguish than the knowledge of the existing community obligation alone.

Plaintiff argued, on appeal, that the trial judge erred in finding the forged note created a community obligation because loan proceeds obtained fraudulently by one spouse cannot benefit the community. She also contended that Parker clearly violated the duties imposed upon notaries by La.R.S. 35:1–17 and is liable, as well as his bank employer, for damages.

1) Did the promissory note, containing plaintiff's forged signature, represent a community obligation?

La.C.C. Article 2346 establishes the principle of equal management of community property. It provides that "each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." Consequently, the consent or concurrence of both spouses is required only in those instances specified by law. See comment (a) to the article.

La.C.C. Article 2347 mandates the concurrence of both spouses for the alienation, encumbrance or lease of community property. An unauthorized encumbrance of community ***118** property is a relative nullity. La.C.C. Article 2353. Also see *Coburn v. Commercial National Bank,* 453 So.2d 597 (La.App.2d Cir.1984), writ denied, 457 So.2d 681 (La.1984). Here, the trial judge correctly found the mortgage to be null. The question is whether the underlying obligation secured by the mortgage, represented by the promissory note in favor of Pioneer Bank, is a community obligation or is an obligation of Webb's separate estate.

A community obligation is defined as one "... incurred by a spouse during the existence of a community property regime for the common interest of the spouses or for the interest of the other spouse." La.C.C. Article 2360. Plaintiff argues that this loan was the result of an "intentional wrong not perpetrated for the benefit of the community" (La.C.C. Article 2363) and was thus a separate obligation of Webb.

In order to determine whether this money benefited the community, or was used for the "common interest of the spouses", it is necessary to examine the uses to which it was put. Bank records received in evidence revealed that about half of the proceeds was used to repay a community obligation. An officer of the bank testified that, according to its records, Webb also used a substantial amount to purchase a money order for one of the children of the marriage.

The fact that this loan was obtained without plaintiff's knowledge or consent does not affect its validity as a community obligation, since plaintiff's consent was not required by the law. La.C.C. Article 2346. Evidence in the record supports the finding of the trial judge that the loan was incurred for the common interest of the spouses and benefited the community. Therefore, the loan obtained and the promissory note executed by plaintiff's former husband, even if fraudulently, was properly characterized as a community obligation. See *Ledet v. Ledet,* 496 So.2d 381 (La.App. 4th Cir.1986); *First Security Bank & Trust Co. v. Dooley,* 480 So.2d 842 (La.App.2d Cir.1985).

2) Although the note represented a community obligation, was plaintiff entitled to damages because of the forgery of her name to the note and the mortgage?

As pointed out, Article 2347 requires the signature of both spouses for the encumbrance of community property. Further,

Pioneer Bank would not have made this loan without Mrs. Webb's signature on the note and the mortgage. In the *Coburn* case, *supra,* we held that a bank was at fault for not releasing a mortgage when the bank had actual or constructive knowledge that the plaintiff wife, who had not signed the mortgage, was sole owner of the premises affected by the mortgage.

Here, since the loan would not have been made without a note and mortgage signed by plaintiff, she would have had a decisive voice in determining whether a note for some $40,000 should be signed to liquidate a community obligation of about $7500. Of course, as the primary wage earner of the family who would be burdened with payment of the obligation over a period of many years, plaintiff had a direct interest in the transaction. She was not consulted. Her signature was forged to critical instruments, and she was obviously damaged.

There is no question concerning the fault of Webb, who forged the plaintiff's signature on the note and the mortgage. As the notary, Parker was negligent in failing to exercise ordinary care in ascertaining the genuineness of the signature allegedly affixed in his presence. See La.R.S. 35:2, 35:198; *Levy v. Western Casualty & Surety Co.,* 43 So.2d 291 (La.App.2d Cir.1949). As the employer of Parker, the bank is liable to plaintiff for his negligent action.

In calculating damages, we again note that $15,000 received for execution of the $40,000 plus note and mortgage was used for the benefit of the community. Plaintiff would have expected to pay interest on this. Consequently, consistent with the reasoning in the *Coburn* case, we find that plaintiff was damaged in the amount of $20,000 by the forgery of Webb and the ***119** negligence of Parker, for which the bank was liable. In addition, plaintiff is entitled to the sum of $2500 for her mental anguish and distress.

For these reasons, insofar as it rejects plaintiff's demand for damages, the judgment of the trial court is REVERSED and there is judgment in favor of plaintiff, Mrs. Artie Webb, and against the defendants, James Webb, Gary Parker and Pioneer Bank & Trust Company, *in solido,* for the sum of $22,500, with legal interest from date of judgment until paid.

All court costs, both in the trial court and on appeal, are assessed to defendants-appellees.

ON APPLICATION FOR REHEARING

Before JASPER E. JONES, FRED W. JONES, Jr., NORRIS, MARVIN and SEXTON, JJ.

Opinion

Rehearing denied.

All Citations

530 So.2d 115

End of Document

Levy v. Western Cas. & Sur. Co.

Court of Appeal of Louisiana, Second Circuit. | October 28, 1949 | 43 So.2d 291

Document Details

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43 So.2d 291
Court of Appeal of Louisiana, Second Circuit.

LEVY et al.
v.
WESTERN CASUALTY
SURETY CO./ ET AL.

No. 7397.
|
Oct. 28, 1949.

Synopsis

Lee Harris Levy and others, as heirs and legal representatives of Jake G. Levy, deceased, sued Helen R. Lee, a notary public, and the Western Casualty & Surety Company, the surety on her official bond to recover for damages sustained by the deceased because of the alleged negligence of the notary public in signing and executing in her official capacity an act of mortgage, and in paraphing a forged note.

Judgment was rendered for defendants by the First Judicial District Court of the Parish of Caddo, James U. Galloway, J., and the plaintiffs appealed.

The Court of Appeal, Kennon, J., affirmed the judgment, holding that the deceased and his attorney were contributorily negligent, precluding any recovery for damages because of the alleged negligence of the notary public.

Attorneys and Law Firms

***291** Jacques L. Wiener, Shreveport, for appellants.

Dimick & Hamilton, Shreveport, Morgan, Baker & Skeels, Shreveport, for appellees.

Opinion

KENNON, Judge.

Plaintiffs as heirs and legal representatives of Jake G. Levy, deceased, filed this suit against Miss Helen R. Lee, a notary public, for $1,962.50, being the damage allegedly suffered by Mr. Levy as a result of the negligence of this notary in signing and executing in her official capacity an act of mortgage, and paraphing the accompanying note, as the act of one Mrs. Genie Culpepper, when in fact same was executed by another person and constituted a forgery.

The Western Casualty and Surety Company, surety on her official bond, was named defendant for the amount of its bond.

Exceptions of no cause of action filed by both defendants were overruled. The issues raised by these exceptions have been settled by the filing of a supplementary and amended petition and the stipulation of facts contained in the record.

The answer of the notary constituted a general denial of plaintiffs' original and supplemental petitions, except to admit that she acted as notary public in the passing of the mortgage and the paraphing of the ***292** note. Her answer asserted that she exercised due care and diligence in the performance of her duties as notary; that one of the parties who signed the note, one H. H. Seymour, was duly identified and known to her; that he was accompanied by his wife who was also properly identified and that he then identified a second lady accompanying him as a Mrs. Genie Culpepper (the record shows that the property described in the forged mortgage was owned by Mrs. Genie Culpepper), and that the said Seymour had previously obtained the confidence of Jake G. Levy, of the realtor employed by Mr. Levy, and of the lawyer who represented Mr. Levy in his negotiations with H. H. Seymour, who promised to deliver a mortgage on the property of his grandmother, Mrs. Genie Culpepper, to secure a proposed loan from Levy to Seymour. The answer further set forth that the mortgage and other papers were prepared by Mr. Levy's lawyer; that same did not show that Genie Culpepper was Seymour's grandmother and that defendant required of Seymour ‘such identification as would reasonably be required by an ordinarily prudent business person, and was not negligent in any respect; and if said Seymour perpetrated a fraud, then defendant was merely another victim of his fraud.’

In the alternative, she pleaded that should her conduct be held negligent in any respect, Jake G. Levy was guilty of contributory negligence, as set forth in paragraph 32 of the answer quoted below, which barred recovery by his heirs: ‘That since the execution of the aforesaid paper defendant has been informed, and believes, and therefore avers that the aforesaid H. H. Seymour conceived and contrived a fraudulent scheme to raise money on a mortgage on the property of his grandmother, Mrs. Genie Culpepper, without her knowledge or consent; that in furtherance of said scheme he contacted one Levin, a realtor, to obtain a loan on said property; that said Levin contacted Jake G. Levy, and the

three of them inspected the property at times at which Seymour contrived to have his grandmother away from the premises; that Seymour was then referred to a lawyer who examined the title and drew the proposed mortgage papers on behalf of said Levy, but intrusted them to said Seymour for execution; that although it was represented by Seymour to all of said persons that he was obtaining a loan on his grandmother's property, none of them exercised the natural precautions or simple measure of contacting or interviewing the owner of said property; that Jake G. Levy and all of said persons representing him imposed their confidence in said H. H. Seymour, trusted him, and acted on his representations; that had any of them contacted the owner of the property, the fraudulent scheme of said Seymour would have been detected and no one could or would have been imposed upon, or injured; that if defendant should be held to have been negligent in any way, then Jake G. Levy was negligent in his dealings with Seymour, and in imposing trust and confidence in him, as above set forth, and that said negligence contributed to the alleged injury complained of by plaintiffs.'

The answer of the Western Casualty and Surety Company presented similar defenses, and called the notary in warranty, under the terms of the bond. After her exception of no cause or right of action to the call in warranty was overruled, the notary filed an answer to same.

The District Court gave judgment rejecting plaintiffs' demands against all defendants and the case is before us on appeal from that judgment.

From the evidence and stipulation of counsel in the record, we make the following finding of fact. Mrs. Genie Culpepper is the owner of Lot 1544 of the Cedar Grove Addition to the City of Shreveport, Louisiana. She is the grandmother of one H. H. Seymour, who conceived the scheme of borrowing $2,100 through the forging of his grandmother's name on a note secured by mortgage on this lot in Cedar Grove. Through the placing of a business opportunity advertisement, he contacted Woodrow Levin, a licensed realtor. Levin contacted Mr. Jake G. Levy. Messrs. Seymour, Levin and Levy went together to examine the property on which was built Mrs. Culpepper's home. Mrs. Culpepper was not present. After examining the ***293** property, Mr. Levy agreed to make the loan provided title was good and the note was secured by a valid mortgage on the property. Mr. Seymour suggested the employment of an attorney whom he had met while participating in bowling matches in the City of Shreveport. Mr. Levy agreed to employ this attorney to examine the title, and prepare the necessary act of mortgage and accompanying note.

When the title was found valid in Mrs. Culpepper, Seymour informed the attorney that his grandmother was infirm; that some members of the family were using their influence against her mortgaging the property, and asked that he be permitted to carry the papers out to her in order that he might complete the papers whenever Mrs. Culpepper would be so inclined, using a neighborhood notary. Seymour, who had never contacted his grandmother with reference to the loan, arraged for one Mrs. McKeon to pose as Mrs. Culpepper and in furtherance of this scheme, Seymour, his wife and Mrs. McKeon went to the office of the defendant notary before 9:00 a. m. and presented the note and mortgage forms prepared by the attorney representing Mr. Levy. Seymour introduced himself to the notary and produced cards from his billfold showing his height, weight, color of eyes and signature. He then introduced one of the ladies who accompanied him as his wife (she was in fact his wife) and the other as 'Mrs. Genie Culpepper, his sister,' who desired to mortgage her property and execute the note whth him.

When the notary asked why the parties had not gone to the office of the lawyer who prepared the papers, her suspicions were allayed by the statement that Mrs. Culpepper desired to go on to work and the lawyer had not yet come down to his office. Since it was before 9:00 a. m., the notary accepted this plausible explanation, executed the mortgage and paraphed the note with Mrs. McKeon forging the name of Mrs. Genie Culpepper to both instruments.

Mr. Seymour carried the executed papers to Mr. Levy's attorney who, in good faith, accepted the papers at face value and rendered a written opinion to Mr. Levy that the note was secured by a valid first mortgage on the property of Mrs. Culpepper. This attorney who had met Mr. and Mrs. Seymour on several occasions at the Shreveport Bowling Alley, went with Seymour and identified him at the bank. Mrs. Culpepper's name did not appear on the check as payee and the bank delivered the money to Seymour.

When the first payment became due, Mr. Levy could not locate Mr. Seymour. When he wrote a letter to Mrs. Culpepper demanding payment, the whole scheme was exposed. Seymour and his accomplices when arrested and prosecuted, pleaded guilty. Mrs. Culpepper filed suit and obtained judgment declaring the note and mortgage a forgery insofar as her signature was concerned. Mr. Levy obtained judgment against Seymour for the amount due under the note, but, as was expected, the Sheriff's return on the writ was 'Nulla Bona.' Seymour and his accomplice, under suspended

sentences for forgery, had made, at the time of the trial, fourteen monthly payments of $27.50 each on the forged note.

In the case of Howcott v. Talen, et al., 133 La. 845, 63 So. 376, 379, 49 L.R.A., N.S., 45, the Supreme Court of Louisiana summed up the responsibility of a notary with regard to identification of persons appearing before him in the following language: 'In fact, so long as he (the notary) exercises the precaution of an ordinarily prudent business man in certifying to the identity of the persons who appear before him, it may be doubted whether he has any other function to discharge; and we are of opinion that such precaution was exercised by Dearing in the matters here complained of.'

In that case, one Boulmay concocted and confected a fraudulent scheme which included the opening of the succession of persons who never existed and in the obtaining of judgments purporting to put the fictitious heirs of such fictitious persons in possession of certain pieces of real estate and the preparing of deeds in which the fictitious ***294** heirs purported to convey the property described in the fictitious judgments. Felix H. Boulmay was the main actor in the whole matter. The notary apparently accepted the identification of this Felix H. Boulmay. The Supreme Court noted that a number of witnesses testified that they had known Boulmay for many years and there was no evidence to show that he was disreputable (prior to this transaction, of course), or a person with whom ordinary business might not be transacted in the ordinary way. The Court reversed a judgment against one Dearing, a notary, and did not consider him responsible legally for receiving forged acknowledgments to instruments from two men whom he accepted as being 'Moore' and 'Sapers' and passing their acknowledgments as Moore and Sapers when the only knowledge which he possessed of their identity was the introduction of Boulmay, whom the notary had known for twenty years.

The notary in this case required of Seymour the identification ordinarily used. Her testimony that she required identification is corroborated by a disinterested witness, Mr. Roland W. McKneely, who saw Seymour produce his billfold and display cards to the notary and heard Seymour introduce his wife and 'sister.' Seymour himself called as a witness admitted his part in the entire transaction (to which he had already pleaded guilty in criminal court) and testified that he identified himself to the notary as she had testified. In fact, her identification of Seymour himself was complete and acceptable and the question for us to determine is whether her action in accepting his introduction of Mrs. McKeon as Mrs. Genie Culpepper constituted negligence sufficient to make her and her bondsman liable for the damage resulting in the forgery of Mrs. Culpepper's name to the mortgage and note.

The papers nowhere showed that Mrs. Culpepper was a grandmother of Seymour, or of any one else, and the action of the notary, after exercising due care in the identification of Seymour, in accepting his introduction of his wife and 'sister' was not unusual and was the exercise of the care and diligence that reasonably prudent business people exercise under like circumstances.

The record shows that the notary acted in complete good faith and acted in the belief that the entire transaction was regular and authentic. The realtor and the attorney were likewise free of any knowledge that Seymour was planning on carrying out a scheme to defraud Mr. Levy. Of course Mr. Levy had not the slightest suspicion of Seymour, otherwise he would have refrained from completing the loan. All three of these persons had more opportunity of observing Seymour than did Miss Lee, the notary. The failure of Mr. Levy, the realtor and the attorney assisting him to contact Mrs. Culpepper and verify her connection with the loan and the failure to place her name on the check as payee and thus insure that she could exercise whatever control she desired over the proceeds, was, to say the least, as serious a deviation from safe business practices as was the acceptance by the notary of Seymour's introduction of his 'sister' as 'Mis. Genie Culpepper.' It would have been only common prudence to make a co-payee of Mrs. Culpepper, who was a co-maker of the note and the only maker putting up security.

Granting that the notary was negligent, it follows that the plea of contributory negligence is good. She was, as the Supreme Court stated in the Howcott case, supra, a 'victim, rather than a confederate,' and if she were negligent in accepting Seymour's introduction of his 'sister' after his valid and convincing identification of himself, Mr. Levy, his attorney and his realtor were equally, if not more, negligent in having accepted Seymour's statements that his grandmother was willing to mortgage her property; in permitting him to take the papers out for her signature and in at no time making contact with her and last, but not least, in failing to place her name as payee on the check, which Mr. Levy's attorney delivered to Seymour in exchange for the forged note. Plaintiffs as heirs are chargeable with the acts of Mr. Levy and those representing him in the transaction.

The judgment appealed from is affirmed, with costs.

All Citations

43 So.2d 291

End of Document

REMOTE ONLINE NOTARIZATION

2020 La. Sess. Law Serv. Act 254 (H.B. 274) (WEST)

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LOUISIANA 2020 SESSION LAW SERVICE

2020 Regular Session

Additions are indicated by **Text**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

ACT NO. 254
H.B. No. 274
REMOTE ONLINE NOTARIZATION

BY REPRESENTATIVE GAROFALO
(On Recommendation of the Louisiana State Law Institute)

AN ACT to amend and reenact Civil Code Article 3344(A)(introductory paragraph) and R.S. 35:6 and to enact R.S. 9:2760 and Chapter 10 of Title 35 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 35:621 through 630, relative to remote online notarization; to provide for recordation of tangible copies of electronic acts; to provide for performance of remote online notarization; to provide for limitations relative to remote online notarization; to provide for definitions; to provide for rulemaking; to provide for duties of notaries public; to provide for recordkeeping; to provide for an effective date; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Civil Code Article 3344(A)(introductory paragraph) is hereby amended and reenacted to read as follows:

<< LA C.C. Art. 3344 >>

Art. 3344. Refusal for failure of original signature or proper certification; effect of recordation; necessity of proof of signature recordation of a duplicate

A. ~~The~~ **Except as otherwise provided by law, the** recorder shall refuse to record:

* * *

Section 2. R.S. 9:2760 is hereby enacted to read as follows:

<< LA R.S. 9:2760 >>

§ 2760. Recordation of electronic record in tangible form

The recorder shall not refuse to record a tangible copy of an electronic record on the ground that it does not bear the original signature of a party if a notary public or other officer before whom it was executed certifies that the tangible copy is an accurate copy of the electronic record.

Section 3. R.S. 35:6 is hereby amended and reenacted to read as follows:

<< LA R.S. 35:6 >>

§ 6. Foreign notaries; acts and other instruments, effect

All acts passed before any notary public and two witnesses in the District of Columbia, or any state of the United States other than Louisiana**, except those performed by remote online notarization,** shall be authentic acts and shall have the same force and effect as if passed before a notary public in Louisiana.

Section 4. Chapter 10 of Title 35 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 35:621 through 624 and 626 through 630, is hereby enacted to read as follows:

T. 35 Ch. 10 pr. § 35:621

CHAPTER 10. REMOTE ONLINE NOTARIZATION

<< LA R.S. 35:621 >>

§ 621. Short title

This Chapter may be cited as the "Remote Online Notarization Act".

<< LA R.S. 35:622 >>

§ 622. Definitions

A. In this Chapter:

(1) "Communication technology" means an electronic device or process that allows substantially simultaneous communication by sight and sound.

(2) "Credential analysis" means a process through which the authenticity of an individual's government-issued identification credential is evaluated by another person through review of public and proprietary data sources.

(3) "Identity proofing" means a process through which the identity of an individual is affirmed by another person by either of the following means:

(a) Dynamic knowledge-based authentication, such as a review of personal information from public or proprietary data sources.

(b) Analysis of biometric data, such as facial recognition, voiceprint analysis, or fingerprint analysis.

(4) "Remote online notarial act" means an instrument executed before a notary public by means of communication technology that meets the standards adopted under this Chapter.

(5) "Remote online notarization" means the process through which an instrument is executed before a notary public by means of communication technology that meets the standards adopted under this Chapter.

B. The definitions of "electronic", "electronic record", "electronic signature", and "record" as provided by the Louisiana Uniform Electronic Transactions Act, R.S. 9:2601 et seq., apply in this Chapter.

<< LA R.S. 35:623 >>

§ 623. Legal recognition of remote online notarial acts

A. Except as otherwise provided in Subsections B and C of this Section, a remote online notarial act that meets the requirements of R.S. 35:625 through 627 satisfies any requirement that a party appear before a notary public at the time of the execution of the instrument. In all other respects, a remote online notarial act shall comply with other applicable laws governing the manner of the execution of that act.

B. The following instruments shall not be executed by remote online notarization:

(1) Testaments or codicils thereto.

(2) Trust instruments or acknowledgments thereof.

(3) Donations inter vivos.

(4) Matrimonial agreements or acknowledgments thereof.

(5) Acts modifying, waiving, or extinguishing an obligation of final spousal support or acknowledgments thereof.

C. Remote online notarization may not be used to execute an authentic act as defined in Civil Code Article 1833. Except as otherwise provided in Subsection B of this Section, an act that fails to be authentic as a result of being executed by remote online notarization may still be valid as an act under private signature or an acknowledged act.

D. This Chapter supplements and does not repeal, supersede, or limit the provisions of the Louisiana Uniform Electronic Transactions Act, R.S. 9:2601 et seq.

<< LA R.S. 35:624 >>

§ 624. Standards for remote online notarization

A. The secretary of state shall, by rule adopted in accordance with the Administrative Procedure Act, develop and maintain standards for the implementation of this Chapter.

B. In developing standards for remote online notarization, the secretary of state shall form a stakeholder committee that shall include but need not be limited to representatives of the Louisiana Land Title Association, the Louisiana Association of Independent Land Title Agents, the Louisiana Notary Association, the Louisiana Bankers Association, the Louisiana Clerks of Court Association, the Louisiana State Bar Association, the Louisiana Public Tag Association, and the Louisiana State Law Institute.

C. The rules shall be adopted prior to February 1, 2022, and may thereafter be modified, amended, or supplemented with or without the input of the stakeholder committee.

*** * ***

<< LA R.S. 35:626 >>

§ 626. Location of notary, parties, and witnesses; location of remote online notarial act

A. A notary public physically located in any parish of this state in which the notary has the power to exercise the function of a notary public may perform a remote online notarization for a party who is not in the physical presence of the notary and who may be located in or outside this state. A witness to a remote online notarial act shall be in the physical presence of the party.

B. A remote online notarial act is deemed to be executed in any parish of this state where any party is physically located at the time of the remote online notarization. If no party was physically located in this state at the time of the remote online notarization, the remote online notarial act is deemed to be executed in the parish where the notary public is physically located at the time of the remote online notarization.

<< LA R.S. 35:627 >>

§ 627. Procedure for performing remote online notarization

A. At the time of a remote online notarization, the notary public shall verify the identity of any party or witness appearing remotely, both through use of communication technology and by one of the following means:

(1) The notary public's personal knowledge of the individual.

(2) A process that includes all of the following:

(a) Remote presentation by the individual of a government-issued identification credential, such as a passport or driver's license, that contains the signature and a photograph of the individual.

(b) Credential analysis.

(c) Identity proofing.

B. The notary public shall do all of the following:

(1) Include in the remote online notarial act a statement that it is a remote online notarial act.

(2) Attach to or cause to be logically associated with the remote online notarial act the notary public's electronic signature, together with all other information required to be included in the act by other applicable law.

(3) Digitally sign the remote online notarial act in a manner that renders any subsequent change or modification of the remote online notarial act to be evident.

<< LA R.S. 35:628 >>

§ 628. Duties of the notary

The notary public shall take reasonable steps to ensure both of the following:

(1) The communication technology used in the performance of a remote online notarization is secure from unauthorized interception.

(2) The electronic record before the notary public is the same electronic record in which the party made a statement or on which the party executed or adopted an electronic signature.

<< LA R.S. 35:629 >>

§ 629. Records of remote online notarizations

A. The notary public shall do all of the following:

(1) Maintain electronic copies capable of being printed in a tangible medium of all remote online notarial acts for at least ten years after the date of the remote online notarization.

(2) Maintain an audio and video recording of each remote online notarization for at least ten years after the date of the remote online notarization.

(3) Take reasonable steps to secure the records required to be maintained by this Section from corruption, loss, destruction, and unauthorized interception or alteration.

B. The notary public may designate a custodian to maintain the electronic records required by Subsection A of this Section, provided that the notary public has unrestricted access to the electronic records and the custodian meets any standards established by the secretary of state for the maintenance of electronic records.

<< LA R.S. 35:630 >>

§ 630. No variation by agreement

The provisions of this Chapter may not be varied by agreement.

Section 5. R.S. 35:625 is hereby enacted to read as follows:

<< LA R.S. 35:625 >>

§ 625. Notaries authorized to perform remote online notarization

A. Any regularly commissioned notary public who holds a valid notarial commission in the state of Louisiana is hereby authorized to perform remote online notarizations.

B. The provisions of this Section shall cease to be effective on February 1, 2022.

Section 6. R.S. 35:625.1 is hereby enacted to read as follows:

<< LA R.S. 35:625.1 >>

§ 625.1. Notaries authorized to perform remote online notarization

A. Only a regularly commissioned notary public who holds a valid notarial commission in the state of Louisiana may be authorized by the secretary of state to perform remote online notarization.

B. In order to obtain authorization to perform remote online notarization, a notary public shall submit an application to the secretary of state in a format prescribed by the secretary of state, complete any course of instruction required by the secretary of state, and satisfy any other requirements imposed by rules adopted by the secretary of state.

C. The authority to perform remote online notarization shall continue as long as the notary public is validly commissioned and the secretary of state has not revoked the notary public's authority to perform remote online notarization.

Section 7. This Section and Sections 1, 2, 3, 8, 9, and 10 of this Act shall become effective on August 1, 2020.

Section 8. (A) Section 4 of this Act shall become effective upon the later of enactment of the SECURE Notarization Act (H.R. 6364 or S. 3533 of the 116th Congress) or August 1, 2020.
(B) If the SECURE Notarization Act is not enacted prior to February 1, 2022, Section 4 of the Act shall become effective on February 1, 2022.

Section 9. (A) Section 5 of this Act is contingent upon the enactment of the SECURE Notarization Act (H.R. 6364 or S. 3533 of the 116th Congress).
(B) If the SECURE Notarization Act (H.R. 6364 or S. 3533 of the 116th Congress) is enacted, Section 5 of this Act shall become effective upon the later of the enactment of the H.R. 6364 or S. 3533 of the 116th Congress or August 1, 2020.

Section 10. Section 6 of this Act shall become effective on February 1, 2022.

Approved June 11, 2020.

End of Document

Summers Bros., Inc. v. Brewer

Court of Appeal of Louisiana, First Circuit. | April 13, 1982 | 420 So.2d 197

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Outline

420 So.2d 197
Court of Appeal of Louisiana,
First Circuit.

SUMMERS BROTHERS, INC., et al.

v.

Douglas W. BREWER, et al.

No. 14679.
|
April 13, 1982.
|
On Rehearing May 25, 1982.

Synopsis

Corporation, its president and its secretary-treasurer sued another corporation and others for fraud. The Nineteenth Judicial District Court, Parish of East Baton Rouge, Steve A. Alford, Jr., J., entered judgment in favor of plaintiffs and defendants appealed. The Court of Appeal, Covington, J., held that: (1) if notary public did not know that signatures on contract were forgeries, since he knew that, by authenticating documents as notary, he was telling the world that parties had appeared before him and affixed their signatures in his presence, he committed fraud when he purposely let third parties rely on document purporting to be genuine but actually without validity as an authentic act; (2) plaintiffs were not entitled to have judgment against all defendants, in solido; and (3) trial judge's refusal to allow plaintiffs' alleged expert witnesses to testify was not error.

Affirmed.

Attorneys and Law Firms

***197** W. Leonard Werner, Baton Rouge, for plaintiffs-appellants, Summers Bros., Inc., Leo G. Summers, and Leo M. Summers.

James Earrier, Robert W. Williams, III, Baton Rouge, for defendant-appellant, A. J. Paul Fredrickson.

A. J. Paul Fredrickson, Baton Rouge, pro se.

Daniel J. Dziuba, Baton Rouge, for defendant-appellee, Aetna Life and Cas. Co.

Douglas W. Brewer, Baton Rouge, pro se.

Doris Gates Rankin, Baton Rouge, for defendant-appellant, Donald J. Mills.

***198** Donald J. Mills, Baton Rouge, pro se.

LeRoy A. Hartley, Marvin Duke, New Orleans, for defendant-appellee, Richard Collier.

Before COVINGTON, COLE and WATKINS, JJ.

Opinion

COVINGTON, Judge.

This action commenced as a petition for damages brought by Summers Brothers, Inc., Leo G. Summers and Leo M. Summers against Douglas W. Brewer, Donald J. Mills, A. J. Paul Fredrickson, II, Richard Collier, Gulf Coast Construction and Maintenance, Inc., and Aetna Casualty and Surety Company.

Plaintiff, Summers Brothers, Inc., is a Louisiana corporation domiciled in East Baton Rouge Parish, Louisiana, engaged in the business of leasing construction equipment. Leo G. Summers and Leo M. Summers are father and son and are the President and Secretary-Treasurer, respectively, of Summers Brothers, Inc.

Defendant, Douglas W. Brewer, prior to the matters giving rise to this lawsuit, was an acquaintance of plaintiffs. Brewer contacted plaintiffs and advised them Quinco Construction Company had a maintenance contract with Triad Chemical Company that it, Quinco, was about to lose. He told the plaintiffs he thought he could secure the maintenance contract with Triad, which contract would require the use of construction equipment. Brewer advised the plaintiffs that if he could secure the maintenance contract, it would be through a corporation which he would form and plaintiffs could lease equipment to the corporation and purchase stock in it. Brewer informed them that $1,250.00 would be needed to accomplish the foregoing. These funds were to be used to offset certain expenses, such as travel, but were to be primarily used for legal expenses in securing the contract and forming the corporation. He advised plaintiffs that if he were unsuccessful in securing the maintenance contract, the $1,250.00 would be returned to them.

Thereupon, on August 5, 1976, Summers Brothers, Inc. advanced the requested sum of money to Brewer. A few days later, Brewer advised plaintiffs that he had been successful in securing the contract with Triad. He presented to them a written maintenance contract, dated August 9, 1976, between Gulf Coast Construction and Maintenance, Inc. and Triad Chemical Company. This contract, in authentic form, purportedly had been executed by Triad Chemical Company through Lee Dowdy, its general manager, and by Gulf Coast through Brewer, its president, in the presence of two witnesses and defendant, Donald J. Mills, an attorney practicing law in Baton Rouge, in his capacity as a Notary Public. Plaintiffs accepted the contract as genuine because of its apparent authenticity.

Discussions then followed concerning plaintiffs purchasing stock in Gulf Coast. Leo G. Summers and Leo M. Summers delivered to Brewer $3,000.00 for the purchase of stock in this corporation. On the following day, Brewer returned with two stock certificates (75 shares of stock to each Summers) of Gulf Coast Construction Maintenance, Inc., one registered in the name of Leo G. Summers, and one in the name of Leo M. Summers. The certificates were signed by Douglas W. Brewer as president of Gulf Coast and by defendant, Mr. A. J. Paul Fredrickson, II, as its secretary-treasurer. Plaintiffs believed the stock certificates were genuine because of their apparent validity.

Discussions regarding the leasing of equipment by Summers Brothers to Gulf Coast for use by the latter in the performance of its contract with Triad then took place between Brewer and the Summerses. These discussions culminated in a written contract between Summers Brothers and Gulf Coast at a rental rate of $17,330.40 per month.

Summers Brothers owned some of the equipment called for by this lease, but not all. To fulfill its obligations under the contract, Summers Brothers leased equipment from Head and Engquist Equipment, Inc. ***199** for a term of one year. To further fulfill its obligations on the lease contract, Summers Brothers purchased eight welding machines. Brewer advised plaintiff that a friend of his, defendant, Richard Collier, owned welding equipment which was for sale. Several phone calls transpired between plaintiffs and Collier. An agreement was reached whereby Summers Brothers would purchase three of the welding machines for $3,600.00 and five of the machines, which were not in as good a condition as the first three, for $3,000.00.

Summers Brothers delivered a check to Brewer dated September 15, 1976, in the sum of $1,800.00 payable to the order of Richard Collier as a down payment on the three welding machines. Subsequently, Summers Brothers delivered to Brewer $4,800.00, $1,800.00 in a check dated September 21, 1976, for the balance of the price on the first three machines and $3,000.00 in a check dated October 1, 1976, for the price of the remaining five machines, for payment to Collier.

While the foregoing was in progress, Brewer requested plaintiffs to loan him various funds. Believing him to be a business associate who had successfully secured a maintenance contract with Triad for Gulf Coast, who had assisted them in purchasing stock in Gulf Coast, and who had on behalf of Gulf Coast contracted with the Summers Brothers for the lease of equipment, and who was assisting in the purchase of welding equipment from Collier, Summers Brothers, on August 24, 1976, loaned to Brewer $580.00, and on September 28, 1976, loaned him an additional $500.00. On October 1, 1976, Brewer delivered to Summers Brothers a check for $1,080.00 in repayment of these loans.

On October 4, 1976, plaintiffs contacted the law office of Fredrickson, seeking verification of the serial numbers of the welding equipment. Fredrickson verified the numbers as correct.

Shortly thereafter the check for $1,080.00, issued by Brewer in payment of the loans made to him, was returned because of insufficient funds. Plaintiffs then discovered the contract between Triad and Gulf Coast was a forgery; and that the stock certificates of Gulf Coast which they had purchased were invalid because Fredrickson was not an officer of Gulf Coast despite his signature thereon as its secretary-treasurer. The welding equipment purchased from Collier was non-existent. Head and Engquist Equipment, Inc. sued the plaintiffs for the equipment leased to Summers Brothers, making it necessary for the plaintiffs to pay Head and Engquist $3,500.00. Because of the lease contract it had with Gulf Coast, Summers Brothers' equipment was tied up for approximately one month, causing them to lose a month's equipment rental.

Subsequently, the plaintiffs brought suit against the defendants as set out above. Judgment was rendered in favor of plaintiffs, as follows:

> "IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein:

"1. In favor of Summers Brothers, Inc. and against Douglas W. Brewer in the sum of Twenty-six Thousand Two Hundred Sixty and 40/100 ($26,260.40) Dollars, together with legal interest thereon at the rate of seven (7%) per cent per annum from August 8, 1977, until paid;

"2. In favor of Summers Brothers, Inc. and against Douglas W. Brewer in the additional sum of Two Thousand Five Hundred and No/100 ($2,500.00) Dollars, together with legal interest thereon at the rate of seven (7%) per cent per annum from March 1, 1979, until paid;

"3. In favor of Leo G. Summers and against Douglas W. Brewer in the sum of One Thousand Five Hundred and No/100 ($1,500.00) Dollars, together with legal interest thereon at the rate of seven (7%) per cent per annum from August 8, 1977, until paid;

"4. In favor of Leo M. Summers and against Douglas W. Brewer in the sum of One Thousand Five Hundred and No/100 ($1,500.00) Dollars, together ***200** with legal interest thereon at the rate of seven (7%) per cent per annum from August 8, 1977, until paid;

"5. In favor of Summers Brothers, Inc., Leo G. Summers, and Leo M. Summers and against Douglas W. Brewer in the additional sum of Four Thousand and No/100 ($4,000.00) Dollars for application on their attorney fees in this matter, together with legal interest thereon at the rate of seven (7%) per cent per annum from February 5, 1981, until paid;

"6. In favor of Summers Brothers, Inc., Leo G. Summers and Leo M. Summers and against Douglas W. Brewer, A. J. Paul Fredrickson, II, Donald J. Mills, and the latter's surety company, the Aetna Casualty & Surety Company of Hartford, Connecticut, in solido, in the sum of Eleven Thousand Eight Hundred and No/100 ($11,800.00) Dollars, with the liability of the Aetna Casualty & Surety Company of Hartford, Connecticut limited to the principal sum of One Thousand and No/100 ($1,000.00) Dollars, which is the amount of its surety bond with Donald J. Mills, together with legal interest thereon on the aforesaid sum of Eleven Thousand Eight Hundred and No/100 ($11,800.00) Dollars at the rate of seven (7%) per cent per annum from August 8, 1977 until paid;

"7. In favor of Summers Brothers, Inc., Leo G. Summers and Leo M. Summers and against Richard Collier in the sum of Three Hundred and No/100 ($300.00) Dollars, together with legal interest thereon at the rate of seven (7%) per cent per annum from August 8, 1977 until paid;

"8. Fixing the amount of the expert witness fee of Robert G. Foley in the sum of One Hundred Fifty and No/100 ($150.00) Dollars and assessing the same as court costs;

"9. In favor of Summers Brothers, Inc., Leo G. Summers and Leo M. Summers and against the defendants, Douglas W. Brewer, A. J. Paul Fredrickson, II, Donald J. Mills, and Richard Collier for all costs of court as follows:

A. Douglas W. Brewer, 72% of court costs

B. Douglas W. Brewer, A. J. Paul Fredrickson, II, and Donald J. Mills, in solido, 27% of court costs

C. Richard Collier, 1% of court costs."

The lower court also dismissed the reconventional demand by Fredrickson.

In reaching its decision, the trial court assigned oral reasons for judgment, as follows:

"BY THE COURT:

"This is suit number 204,486, on the docket of the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, case styled Summers Brothers, Incorporated, et al versus Douglas M. [W.] Brewer, et al.

"The Court would like to say at the outset that it has been called upon to render decisions in numerous cases in its time on this bench. Some of the decisions that it has had to make have been rather distasteful. This one today falls in the category of distasteful to this Court because it involves two members of the bar of East Baton Rouge Parish and the State of Louisiana, one of which has been practicing law since 1968 and the other since 1972. Those gentlemen to whom I refer are therefore not novices in the practice of law.

"This matter involves the negotiations with the Summers Brothers, Incorporated and/or Mr. Leo G. and Mr. Leo M. Summers, a father and son who are President and one of the principal stockholders in Summers Brothers, Incorporated, in their dealings with a[n] admitted felon, Douglas W. Brewer, who is at the present time serving time for a felony theft arising out of this exact matter that is the subject of this litigation. And Mr. Brewer, on the witness stand, by his own

admission, has been one of the best 'con men in the business', with which this court completely agrees.

"Sometime in the middle part of 1976 Brewer concocted a scheme whereby he intended ***201** to rig a purported contract between Triad Chemical Company and Gulf Coast Construction & Maintenance, Inc., a corporation that he intended to form for the purpose of perpetrating a fraud on any or anybody that was available for perpetration of such a fraud and he chose as his selected target Summers Brothers, Incorporated to carry out his scheme.

"A contract between Triad and Gulf Coast, prior to the time of this negotiation with the—about the contract, a corporation was started up by Mr. Paul Fredrickson, attorney at law, —A. J. Paul Fredrickson, II, prepared the incorporation papers. Brewer then drew up a contract between Triad Chemical Company and Gulf Coast, Brewer's Construction & Maintenance Corporation just formed recently, on this contract, forged the signatures of Mr. Lee Dowty as a representative of Triad. Mr. Dowty's signature having been forged by his own admission, by Douglas Brewer, as well as one of the witnesses, Mr. William J. Braud, who was another employee of Triad Chemical Company, and presented to Mr. Donald J. Mills, a Notary Public of East Baton Rouge Parish, so that the same might be notarized. The only actual signatures as far as this court can determine that were on that document were that of Terry Nelson, a part-time secretary in the office of Mr. Fredrickson, who had on occasion accommodated Mr. Mills by acting as a witness on documents. According to her testimony she only remained in the office for approximately one week—Douglas Brewer and Donald J. Mills.

"According to the testimony of Mr. Robert G. Foley, a handwriting expert, there's no question that the name of Lee Dowty, the last name of which incidentally was misspelled, was a forgery. This was admitted by Brewer. It was also his testimony that in his opinion, the signature of Mr. Braud, one of the witnesses to the document, was also a forgery. There's no question in the court's mind that the signature of Donald J. Mills, who acted as Notary on this document, is genuine. There is also no question in the court's mind that Mr. Mills affixed his signature and his notary seal after all the signatures had been affixed thereto and this is not in accordance with the law and the jurisprudence of this state.

"There is a third named—a fourth named defendant, if you're counting Brewer who's already stipulated his liability here, and that is Mr. Richard Collier. Something that Mr. Collier's got going for him that cannot be said of the other two defendants is that at the time of his involvement in this matter he was not a lawyer, he was not a business man, but was a student residing in the same complex with Mr. Douglas Brewer. He, nevertheless, is involved in it.

"There were some stock certificates issued from the corporation to the two Summers' [sic], Mr. Leo G. and Mr. Leo M., for seventy-five (75) shares of stock to each. And to his credit, in his testimony, Mr. Fredrickson said, 'I don't know why I let him do it, but I did sign as Secretary-Treasurer of that corporation,' knowing that he was not Secretary of that corporation, and the Court will not hear the argument that he could have gotten up a resolution to the effect that he was made Secretary-Treasurer. As a matter of fact, he was not made Secretary-Treasurer, and when Mr. Brewer presented the stock certificates to him he signed with full knowledge that he was dealing with a known felon. Where he got the stock certificates, Brewer himself said he got them out of the drawer of Mr. Fredrickson's law office. For whatever purposes, Mr. Fredrickson made his office space and that of Mr. Mills available to a known felon for whatever activities he chose to engage in, use in that bases and operation—that base of operation.

"Relying on the documents notarized by Mr. Mills, the stock certificates issued by Mr. Brewer who filled them out himself, signed his name as President of the corporation and had Mr. Fredrickson join him as the Secretary-Treasurer of the corporation, presented them to the Summers' [sic], collected money for the stock certificates—talking about Brewer, not Fredrickson.

"Now, as far as the business of the—there was some testimony to the effect that ***202** some Twelve Hundred and Fifty Dollars ($1250.00) was advanced by Summers to Brewer prior to the time that they became aware of the fact that there was a notarized contract or bogus—those stock certificates that had been issued, well that's Twelve Hundred and Fifty Dollars ($1250.00) the Summers [sic] threw away, because they didn't have any business giving him any start-up money to go down there and tell those people what he was doing and allegedly to tell them what—that—for travel expenses and under the table business. So you can forget that Twelve Hundred and Fifty Dollars ($1250.00).

"But when they started to rely on those documents that had been executed by or in the presence of these other defendants,

the Court takes a different approach to that. Now, there's been a good deal said about whether or not there was actual fraud involved in this matter as far as Mr. Fredrickson and Mr. Mills were concerned. The Court will say, categorically at the outset, that it does not believe that Paul Fredrickson and Donald Mills engaged in active fraud or a scheme designed to deprive Summers Brothers of their money. The Court does, however, feel that there is an area that it chooses to call 'gray', into which they did become involved to an extent that relying on the documents that were either signed by them or in some other way to which they attached their signatures and upon which the Summers Brothers relied on the dealings with a known felon, Douglas W. Brewer, then they did get involved in this matter.

"Now, the Reconventional Demand filed on behalf of Mr. Paul Fredrickson has been dismissed as far as this lawsuit is concerned. So this Court is not called upon—is not concerning itself with any action he might have as far as fraud is concerned. The Court is relying on the belief that on the pleadings filed herein, that as far as their involvement to the extent that the Summers Brothers were deprived of cash money out-of-pocket, on reliance on these documents, that we're talking about here this morning, that they very well might be involved as far as constructive fraud is concerned.

"As the Court has said, Brewer has individually entered into a Stipulation of liability—where is that Stipulation? That's Fredrickson-1. And that Stipulation entered in—by—in—entered into the record as Fredrickson Number-1, which is a copy of that Stipulation, the Court will now read that Stipulation and make it the judgment of this Court.

" 'It is hereby stipulated and agreed by and between Summers Brothers, Incorporated, Leo G. Summers and Leo M. Summers, Plaintiffs in the above numbered and entitled cause, and Douglas W. Brewer, one of the Defendants in the above numbered and entitled cause, as follows:

" 'That there be judgment herein in favor of Summers Brothers, Incorporated and against Douglas Brewer in the sum of Twenty-Six Thousand, Two Hundred Sixty Dollars and Forty Cents ($26,260.40), together with legal interest thereon at the rate of seven percent (7%) per annum from August 8th, 1977, until paid.

" '2. That there be judgment herein in favor of Summers Brothers, Incorporated and against Douglas W. Brewer in the additional sum of Two Thousand, Five Hundred Dollars ($2,500.00), which is the amount Summers Brothers, Incorporated paid to Head & [sic] Engquist, Incorporated, together with the legal interest thereon at the rate of seven percent (7%) per annum from March 1st, 1979, until paid.

" '3. That there be judgment herein in favor of Leo G. Summers and against Douglas W. Brewer in the sum of One Thousand, Five Hundred Dollars ($1,500.00), together with legal interest thereon at the rate of seven percent (7%) per annum from August 8th, 1977, until paid.

" 'That there be judgment herein in favor of Leo M. Summers and against Douglas W. Brewer in the sum of One Thousand, Five Hundred Dollars ($1,500.00), together with legal interest thereon at the rate of seven percent (7%) per annum from August 8th, 1977, until paid.

***203** " '5. That there be judgment herein in favor of Summers Brothers, Incorporated, Leo G. Summers and Leo M. Summers and against Douglas W. Brewer in the sum of Four Thousand Dollars ($4,000.00) for application of their attorney fees in this matter, together with legal interests thereon at the rate of seven percent (7%) per annum from date of judgment for said sum until paid.

" '6. That there be judgment herein in favor of Summers Brothers, Incorporated, Leo G. Summers and Leo M. Summers and against Douglas W. Brewer for all costs of these proceedings. That Summers Brothers, Incorporated, Leo G. Summers and Leo M. Summers, preserve all of their rights, claims and causes of actions against the other defendants in this law suit.

" 'That a judgment in accordance with this stipulation and agreement may be rendered and signed by the Court upon presentation of this stipulation to the Court without prior notice to any of the parties hereto, the parties hereto expressly waiving their presence, the hearing of this matter, and the rendention [sic] and signing of this judgment.'

"It is therefore the judgment of this Court that that Stipulation entered into by and between these parties and signed on the respective date shown on the Stipulation included herein is made the judgment of this Court to the extent that Douglas W. Brewer, defendant, is involved.

"According to the Court's calculations, according to the Stipulation, Mr. Brewer's involv[e]ment is for the total sum of Thirty-One Thousand, Seven Hundred Dollars ($31,700.00).

"It comes now to the involvement of Brewer, Fredrickson, and Mills, in solido, with regards to the activities that involve Mr. Fredrickson and Mr. Mills. According to the Court's calculations, the involvement of those two men in the securing by Brewer of money out of the pockets of the Summers Brothers, Incorporated and/or Leo G. and Leo M. Summers, is to the extent of Eleven Thousand, Eight Hundred Dollars ($11,800.00), which is broken down as follows: Three Thousand Dollars ($3,000.00) for the stock which is shown at P–6; a payment of Fifteen Hundred Dollars ($1500.00) for welding equipment shown at P–9. And at this point is where Mr. Collier comes into the picture because the check was actually issued for Eighteen Hundred Dollars ($1800.00), Three Hundred Dollars ($300.00) of which went to Richard Collier, the other Fifteen Hundred Dollars ($1500.00) to Mr. Brewer. P–10 shows the payment of Eighteen Hundred Dollars ($1800.00) for welding equipment, and a final check in the amount of Three Thousand Dollars ($3,000.00) shown at P–11, the final payment on that welding equipment. An additional sum of Twenty-five Hundred Dollars ($2500.00) based on a negotiated deal with Head & [sic] Engquist Equipment Company which resulted in a law suit against Summers Brothers, Incorporated and/or Leo M. or Leo G. Summers in the amount of Twenty-five Hundred Dollars ($2500.00), making a total of Eleven Thousand, Eight Hundred Dollars ($11,800.00).

"For the amount of Eleven Thousand, Eight Hundred Dollars ($11,800.00) there will be judgment herein in favor of the plaintiffs and against defendants, Brewer, Fredrickson and Mills, in solido, for that amount.

"It is the further—to be the judgment of this Court that there be judgment herein, in solido, between Donald J. Mills and his surety company, the Aetna Casualty & Surety Company of Hartford, Connecticut, in the amount of One Thousand Dollars ($1,000.00), being the amount of his surety bond as shown in the exhibits filed in this suit.

"The court costs, including the expert witness fee of Robert G. Foley in the amount of A Hundred and Fifty Dollars ($150.00), is to be borne by the defendants in the percentages set out as follows: Douglas M. Brewer—Douglas W. Brewer, individually, seventy-two (72%) percent; Brewer, Fredrickson and Mills, in solido, twenty-seven (27%) percent; —...

"—Collier, individually, one (1%) percent. All judgments rendered by this Court this ***204** date are to bear judicial interest from date of judicial demand, August 8, 1977.

"Now, with respect to Mr. Collier, individually, there will be judgment herein in favor of plaintiffs and against Richard Collier in the amount of Three Hundred Dollars ($300.00). That amount to bear judicial interest from date of judicial demand, August 8, 1977, until paid and his pro rata share of the costs as pointed out previously."

We have carefully reviewed the record, and find that the evidence amply supports the findings of the trial court. See *Arceneaux v. Domingue,* 365 So.2d 1330 (La.1978).

We find no merit in the contentions of Donald J. Mills that his acts as notary public were not a proximate cause of the plaintiffs' financial losses as set out above, or that he was not guilty of "constructive fraud", as suggested by the trial court.

Mills and Fredrickson have taken an appeal from the judgment of the District Court. Plaintiffs, Summers Brothers, Inc., Leo G. Summers, and Leo M. Summers, have answered these appeals, and have also taken an appeal from the judgment. Douglas W. Brewer, Richard Collier, and Aetna Casualty and Surety Company have neither appealed nor answered the appeal. We affirm.

It is settled that deliberate misfeasance of a notary public occurring during the course of his official notarial duties will subject the notary to liability for all damages sustained by the aggrieved party which are proximately caused by the misfeasance. See Annot., Liability of Notary Public or his Bond for Wilful or Deliberate Misconduct in Performance of Duties, 44 A.L.R.3d 1243. A notary is responsible to all persons who have been defrauded of their money as a consequence of their reliance upon the genuineness of any document executed by the notary public while in the performance of his official duties. See *Lacour v. National Surety Co. of New York,* 147 La. 586, 85 So. 600 (1920); *Harz v. Gowland,* 126 La. 674, 52 So. 986 (1910); *Rochereau v. Jones,* 29 La.Ann. 82 (1877).

In *Rochereau, supra,* the decision rested on the fact that the notary's paraph of promissory notes was a deception and fraud, because the notary knew that the purported identification of the notes with a mortgage was a fraud. The same in substance is the present case, as far as Mills is concerned. Even if Mills did not know that the signatures on

the contract were forgeries, he knew that by authenticating the document, as notary, he was telling the world that the parties had appeared before him and affixed their signatures in his presence. Thus, he committed fraud in that he purposely let third parties rely on a document purporting to be genuine but actually without validity as an authentic act. The "proof" of validity he supplied was misleading to all who relied on the contract.

The plaintiffs on appeal argue that the judgment should have been in favor of the plaintiffs against all defendants, in solido, instead of just certain defendants, or the defendants severally, and that costs should also have been against all defendants, in solido. We disagree.

In order for solidary liability to exist, Brewer and each of the other defendants (Mills and Fredrickson) would have to be considered joint tortfeasors or joint wrongdoers under LSA–C.C. art. 2324. We find, as did the trial court, that this codal article has no application to the instant case. The various acts of which the defendants are accused were independent acts, with the fraudulent scheme of Brewer already set in motion before Mills and Fredrickson participated in the fraud. Furthermore, some of the damages caused to plaintiffs by Mills and Fredrickson were not the natural and foreseeable consequences of the earlier fraudulent acts of Brewer, but were rather the result of particular wrongdoing or fault on the part of Mills, as notary, or Fredrickson, as one pretending to be an officer of the corporation. See *Weber v. McMillan,* 285 So.2d 349 (La.App. 4 Cir. 1973), writs denied, 288 So.2d 357, 358 (La.1974).

***205** As to the plaintiffs' complaint against the taxing of costs, LSA–C.C.P. art. 1920 authorizes the trial court to "render judgment for costs, or any part thereof, against any party, as it may consider equitable." We find no error in the trial court's assessment of costs. *Metalock Corporation v. Metal-Locking of Louisiana, Inc.,* 260 So.2d 814 (La.App. 4 Cir. 1972), writs denied, 262 La. 189, 262 So.2d 788 (La.1972).

The plaintiffs' assignment of error pertaining to the trial judge's refusal to allow the plaintiffs to produce expert witnesses on the question of the reasonableness of the equipment rental rates is without merit. There was evidence in the record adequate for the trial court to properly consider this element of damages in his award. There was no reason for expert testimony on this item of damages. Moreover, the witnesses which plaintiffs sought to call on the trial as "expert witnesses" were listed on the pre-trial order as "fact witnesses." Calling a fact witness on the trial as an "expert witness" is not in compliance with the pre-trial order. If error were committed, it was harmless, and had no effect on the trial court's judgment.

Accordingly, for the assigned reasons, we affirm the judgment appealed at the costs of appellants, Donald J. Mills and A. J. Paul Fredrickson, II.

AFFIRMED.

ON REHEARING

PER CURIAM.

In our original decision, we affirmed the judgment of the trial court, which had the effect of fixing the interest allowed to petitioners at the rate of seven per cent per annum from August 8, 1977, the date of judicial demand, until paid. Our attention has been directed to LSA–C.C. art. 2924, as amended by Act 574 of 1981, in the application for rehearing on behalf of Summers Brothers, Inc., Leo G. Summers, and Leo M. Summers, and we have granted this application, on briefs previously filed, solely to consider the question of interest.

In view of LSA-C.C. art. 2924, as amended, we correct our judgment to amend the judgment of the trial court in the following respects:

The interest shall be seven per cent (7%) per annum from August 8, 1977, the date of judicial demand, until September 12, 1980; ten per cent (10%) per annum from September 12, 1980 until September 11, 1981; and twelve per cent (12%) per annum from September 11, 1981 until paid.

We deny the application for rehearing on the other questions presented therein, and affirm the judgment of the trial court in all other respects, at the costs of appellants, Donald J. Mills and A. J. Paul Fredrickson, II.

AMENDED AND, AS AMENDED, AFFIRMED.

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McGuire v. Kelly

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOT DESIGNATED FOR PUBLICATION

Court of Appeal of Louisiana,
First Circuit.

Thomas L. McGUIRE, III
and E. Douglas Henriksen
v.
John J. KELLY.

No. 2010 CA 0562.
|
Jan. 30, 2012.

On Appeal from the Nineteenth Judicial District Court, Number 548,103, Sec. 26, Parish of East Baton Rouge, State of Louisiana, Honorable Kay Bates, Judge.

Attorneys and Law Firms

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Charlotte C. Meade, William E. Wright, Jr., New Orleans, Louisiana, for Defendant–Appellee, Continental Casualty Company.

Before CARTER, C.J., KUHN, McDONALD, McCLENDON, and HIGGINBOTHAM, JJ.

Opinion

KUHN, J.

***1** In this appeal, we address a judgment of the trial court dismissing the claims of the plaintiffs, Thomas L. McGuire, MI ("McGuire") and E. Douglas Henriksen ("Henriksen"), with prejudice at their cost, and also dismissing the claims of the plaintiff-in-reconvention, John J. Kelly ("Kelly"), with prejudice at his cost. We reverse in part and affirm in part.

FACTUAL AND PROCEDURAL HISTORY

This litigation involves a bay front home and property located in a gated subdivision in Santa Rosa Beach near Destin, Florida. The property was purchased by McGuire, Henriksen and Kelly (collectively known as "the parties") in May 2004 for the approximate price of $1,238,000.00. At the time of the purchase, the property was appraised for $2,500,000.00. The parties purchased the property as an investment, and based on their belief that the property would increase in value, they decided to maintain ownership for one year before selling the property for a profit. Contributions to the down payment of $142,000.00 were made by the parties in the following amounts and proportions: Kelly ($84,916.00; 50%), McGuire ($42,458.00; 25%), and Henriksen ($42,458.00; 25%). The parties obtained secured loans of $968,000.00 and $100,000.00 from two different lenders, resulting in first and second mortgages and a debt of approximately $1 million on the property.[1]

On May 23, 2006, Kelly contacted an attorney, David Voss ("Voss"), and asked him to notarize a quitclaim deed transferring the plaintiffs' ownership to Kelly. Voss met Kelly at a local restaurant and bar. Out of the presence of Voss, Kelly forged the plaintiffs' names on the document and presented it to Voss, who notarized the deed without actually seeing McGuire and Henriksen sign.[2] The next day, based on the representation in the notarized quitclaim deed that he was the sole owner of the property, Kelly received a loan for $1,680,000.00 from Countrywide Home Mortgage Loans, Inc. ("Countrywide"), which was secured by a mortgage on the property. The loan funds were used to pay off the first and second mortgages, to pay the refinancing closing costs, and to pay Kelly a "cash out" sum of approximately $362,000.00. The quitclaim deed and the mortgage documents were recorded in the Florida county public records where the property is located.

A few months later, after conducting a check of the public records in Walton County, Florida, plaintiffs McGuire and Henriksen learned of the forged quitclaim deed that purportedly transferred their ownership interest in the property to Kelly. They also learned that the property

was encumbered by a new mortgage for $1,680,000.00, approximately $400,000.00 more than the previous mortgage. The plaintiffs filed suit against Kelly, Voss, Continental Casualty Company ("Continental," Voss' liability insurer), Countrywide Home Loans, Inc., ("Countrywide," the mortgagee and lender), and Executive Title of Emerald Coast ("Emerald Coast," the mortgage broker), alleging damages were due as a result of fraudulent activities, conversion of their property, and negligence by Kelly and Voss. Plaintiffs also alleged Kelly's actions violated La. R.S. 51:1401, *et seq.,* the Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA).[3]

***2** Several motions for partial summary judgment were filed by the plaintiffs and defendants, seeking rulings as to several issues in the suit. The trial court ruled on these motions and made several findings, including that: (1) the plaintiffs' signatures on the quitclaim deed were forgeries; (2) Voss breached his duties as a notary public by notarizing the deed without seeing the plaintiffs sign the document; (3) Voss' actions did not constitute fraud; (4) Voss was only liable for his allocable share of fault as to any damages sustained; (5) the plaintiffs may not maintain an action for damages based upon conversion; (6) the "fraud exclusion" in Continental's policy did not exclude coverage; (7) Kelly's reconventional demand for damages based on defamation was denied; and (8) the trial court did not have the authority to adjudicate ownership interests in the Florida property and declare that plaintiffs each currently owned a 22.5% share of the property.[4]

The matter was tried by the trial court in July 2009, and after receiving post-trial briefs, the court issued written reasons for judgment. On November 9, 2009, the court signed a written judgment in accordance with the written reasons, dismissing the claims of plaintiffs against all defendants, with prejudice, at plaintiffs' cost, and dismissing Kelly's reconventional demand, with prejudice at his cost.[5]

Plaintiffs appealed and several defendants answered the appeal. Additionally, Voss filed his own appeal. Plaintiffs allege several assignments of error, including three assignments that challenge the trial court's conclusions that plaintiffs failed to prove fraud or "constructive fraud" and damages, that Voss was not solidarity liable with Kelly, and that the reasonable measure of damages was not the value of the property at the time of Kelly's and Voss' tortious actions. Kelly also appealed the portion of the judgment denying his reconventional demand for reimbursement for monies he spent related to the property and denying his claim that all court costs should have been assessed against the plaintiffs.

TRIAL COURT'S REASONS FOR JUDGMENT

The trial court's written reasons noted that the facts are largely undisputed, that Kelly admitted forging the signatures of the plaintiffs on the quitclaim deed that "purported to transfer the plaintiffs' ownership interest in the property to John Kelly alone" and that Voss admitted notarizing the deed without witnessing the signatures or verifying the identities of the alleged signers, McGuire and Henriksen. The trial court further found that the day after the deed was notarized, Kelly presented it to Countrywide as proof of his full ownership of the property and, based on that deed, obtained a loan from Countrywide that added an additional $412,000.00 in mortgage indebtedness on the property.

The trial court denied the plaintiffs' claims based on fraud. In doing so, the trial court specifically stated that "[f]raud must be established by proof stronger than mere preponderance of the evidence." Regarding Kelly's actions, the trial court reasoned that Kelly and Voss' actions were improper and that although Kelly's forgery on the quitclaim deed was "certainly untruthful, there is no evidence that he did it to obtain any unjust advantage or to inconvenience his partners." Instead, the trial court concluded that the evidence showed "Mr. Kelly intended to help the plaintiffs by refinancing the property in his own name, however misguided or officious those efforts may seem today." Despite finding that Voss' conduct allowed Kelly to refinance the property, the court concluded that Voss did not commit "an intentional act of fraud." Moreover, the court found that Voss' failure to follow proper notary procedures did not "create [a] basis for recovery absent some proof of actual damages." The court further rejected the plaintiffs' claims for recovery under LUTPA, for conversion of immovable property under Florida or Louisiana law, and under the theory that the forged quitclaim deed was a forced sale of plaintiffs' property.

***3** Based on the finding that a recorded, forged deed is a nullity and cannot actually transfer ownership and that plaintiffs had not instituted legal proceedings in Florida to declare the deed null or to correct the public record, the court concluded the plaintiffs had not shown "any ascertainable damage" and had no basis for recovery in Louisiana. The court noted the plaintiffs had not suffered any discernible monetary loss, had not suffered any mental distress, and "were

never denied use or enjoyment of the property." Instead, the court concluded that although the actions of Kelly and Voss were clearly wrong, the plaintiffs had benefited because at the time of the trial, the property's market value had decreased to about $886,000.00 and the plaintiffs were not obligated to pay the $1,680,000.00 loan and mortgage obtained by Kelly on the property. The court acknowledged that the validity of Countrywide's mortgage was a matter for the Florida courts, but reasoned that "[i]f it were proven that [the plaintiffs] could not set aside the fraudulent mortgage, then I would find that they would be entitled to receive the return of their down payments."

STANDARD OF REVIEW

It is well settled that an appellate court cannot set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. In order to reverse a trier-of-fact's determination of fact, an appellate court must review the record in its entirety, conclude that a reasonable factual basis does not exist for the finding, and further determine that the record establishes that the trier-of-fact is clearly wrong or manifestly erroneous. *Hulsey v. Sears, Roebuck & Co.,* 96–2704 (La.App. 1st Cir.12/29/97), 705 So.2d 1173, 1176–77. If there is no reasonable factual basis in the record for the trier-of-fact's finding, no additional inquiry is necessary to conclude there was manifest error. *Smegal v. Gettys,* 10–0648 (La.App. 1st Cir.10/29/10), 48 So.3d 431, 435. If the trial court's findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse those findings even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. *Boyd v. Boyd,* 10–1369 (La.App. 1st Cir.2/11/11), 57 So.3d 1169, 1174.

When findings are based on determinations regarding the credibility of witnesses, the manifest error/clearly wrong standard demands great deference to the trier-of-fact's findings. However, an appellate court may find manifest error or clear wrongness in a finding purportedly based upon a credibility determination where documents or objective evidence so contradict the witness' story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable trier-of-fact would not credit the witness' story. *Hulsey,* 705 So.2d at 1177.

With regard to questions of law, appellate review is simply a review of whether the trial court was legally correct or legally incorrect. On legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and render judgment on the record. A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. When such a prejudicial error of law skews the trial court's finding as to issues of material fact, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts *de novo.* If only one of the factual findings is tainted by the application of incorrect principles of law that are prejudicial, the appellate court's *de novo* review is limited to the finding so affected. *Boyd,* 57 So.3d at 1174.

***4** In this case, the trial court committed legal error when it concluded fraud must be established by proof stronger than a mere preponderance of the evidence, the wrong standard of proof.[6] The proper standard of proving fraud is by a preponderance of the evidence and fraud may be established by circumstantial evidence. *See* La. C.C. art.1957; *ODECO Oil & Gas Company v. Nunez,* 532 So.2d 453, 457 n. 3 (La.App. 1st Cir.1988), *writ denied,* 535 So.2d 745 (La.1989). Herein, the application of the erroneous legal standard for fraud was prejudicial and skewed the trial court's numerous findings as to issues of essential material fact, including credibility, intent, and the existence of damages. Thus, we will conduct a *de novo* review of the record before us to determine the correctness of the judgment as to the numerous rulings by the trial court.

LIABILITY OF KELLY AND VOSS

Under La. C.C. art. 2315, a person may recover damages for injuries caused by a wrongful act of another. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. La. C.C. art. 2315(A). *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm & Restatement (Second) of Torts.[7]

Liability may be the result of different theories of tort, including intentional wrongs and negligence. One type of intentional tort is based on fraudulent acts. Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction. *See*

La. C.C. art.1953. Fraud cannot be predicated on mistake or negligence, no matter how gross. Fraudulent intent, which constitutes the intent to deceive, is a necessary element of fraud. *Whitehead v. American Coachworks, Inc.,* 02–0027 (La.App. 1st Cir.12/20/02), 837 So.2d 678, 682. Circumstantial evidence, including highly suspicious facts and circumstances surrounding a transaction, may be considered in determining whether fraud has been committed. *Terrebonne Concrete, LLC v. CEC Enterprises, LLC,* 11–0072 (La.App. 1st Cir.8/17/11), —— So.3d ——, *writ denied,* 11–2021 (La.11/18/11), —— So.3d ——; *Sun Drilling Products Corporation v. Rayborn,* 00–1884 (La.App. 4th Cir.10/3/01), 798 So.2d 1141, 1153, *writ denied,* 01–2939 (La.1/25/02), 807 So.2d 840; *Williamson v. Haynes Best Western of Alexandria,* 95–1725 (La.App. 4th Cir.1/29/97), 688 So.2d 1201, 1239, *writ denied,* 97–1145 (La.6/20/97), 695 So.2d 1355.

In *Brumfield v. Brumfield,* 477 So.2d 1161 (La.App. 1st Cir.), *writ denied,* 479 So.2d 922 (La.1985), the wife sued her husband, an attorney, to have their marriage contract declared null and void on the basis of fraud and improper form. The jury rendered judgment in favor of the wife, and the husband appealed on several grounds, including that the jury's finding of fraud was contrary to the law and evidence. This Court concluded the jury's evaluations of credibility were reasonable, that there was sufficient evidence to conclusively prove fraud, and affirmed the jury's verdict. In *Brumfield,* this Court stated:

> ***5** A charge of fraud is most serious and grave.... Although Article 1847[8] is found in that portion of the Civil Code dealing with nullity of contracts resulting from defects of consent, including error, it is clear that to constitute fraud the error must be caused by fraudulent misrepresentation. *Buston v. McKendrick,* 64 So.2d 844, 223 La. 62 (La.1953); *Broussard v. Fidelity Standard Life Insurance Co.,* 146 So.2d 292 (La.App. 3d Cir.1962).

Brumfield, 477 So.2d at 1167–68 (footnote added).

When discussing the necessary proof for fraud in the *Brumfield* case, this Court reasoned as follows:

> [The] tapestry of deception, assuming again that it can be believed, proves fraud beyond any doubt and beyond the requirements of law. All doubts are removed and all legal standards of proof are met when a party asserts the triumph of his own duplicity. The question before us, then, is not only a matter of law and evidence, but of believability.
>
> By its very nature, fraud has as many different styles and disguises as those who engage in it. Some kinds of fraud are more easily proved than others. In the case of commercial or industrial fraud, for instance, a team of auditors can often go in and examine books, records and inventories, and in a few hours produce tangible proof of deception. It is much different in the case of intimate fraud between lovers. Usually no one is present except the two parties, and records are quite often not kept. Yet there is no doctrine that intimate fraud cannot be successfully proved.

Brumfield, 477 So.2d at 1168.

In the instant case, the trial court concluded Kelly's forgery did not constitute fraud because there was no evidence of Kelly's intent to gain an unjust advantage or cause an inconvenience. Instead, the court found that Kelly intended to help the plaintiffs by refinancing the property in his name. Kelly maintains that his sole intent in the forgery and refinancing was to help the plaintiffs by removing them from the property's mortgage obligation and to continue their relationship. However, Kelly's own testimony reveals he secretly planned for months to become the property's sole record owner and to accomplish his desire to refinance the property. A few months before forging the quitclaim deed, Kelly asked the plaintiffs to agree to refinance the property, but they resisted his suggestion. Nevertheless, Kelly ignored their decision and secretly began a series of actions regarding the property. On March 18, 2006, over two months before Kelly forged plaintiffs' signatures on the quitclaim deed; he represented himself as the property's sole owner and applied for a loan to refinance the property with a Florida mortgage broker. At the time of that application, Kelly signed a disclosure notice stating the property was his secondary residence and was not investment property. However, Kelly and the parties consistently testified that the property had been purchased as an investment. In fact, at the time of Kelly's loan application, the property was listed with a real estate agent.

***6** Other evidence reveals Kelly had a self-serving motive that was unrelated to any desire to help the plaintiffs. Kelly admitted that he was the majority owner in many business entities, that he had different bank accounts for these businesses, and that he moved money among these accounts. Kelly further admitted that at the May 2006 refinancing, he received a "cash out" sum of about $362,000.00, after payment of costs, that he had used this money as he "saw fit" for his own personal and business needs, and that "most of [the cash sum] was re-distributed back to the original accounts at some point in time."

The record further shows that during his 2008 pretrial deposition, Kelly was asked about all lawsuits against him or his businesses; he stated he had won every lawsuit. When questioned at trial, Kelly admitted he forgot to mention a Texas lawsuit against one of his businesses, Maverick Real Estate Investments ("Maverick"). At a trial in April 2006, a jury verdict was rendered against Kelly and Maverick in the amount of $249,000.00, plus interest, and $22,000.00 in attorney fees. Kelly acknowledged that, in order to avoid having a judgment formally entered against him, he personally and on behalf of Maverick, executed a promissory note on May 1, 2006 to pay the plaintiff a sum of $299,666.97. Kelly denied that this lawsuit and potential judgment was related to his desire to refinance the property, but again stated he had deposited the "cash out" sum in his different bank accounts and that he "used it for whatever purposes [he] thought were appropriate."

Kelly's testimony about the various bank accounts, his deposit of the "cash out" sum, and the bank account used to pay off the promissory note is confusing. A bank statement from one of the Maverick accounts indicates a check was written for the exact amount of the promissory note and cleared that account in July 2006.[9] At first, Kelly denied that this check was used to pay off the promissory note, but when questioned by the trial court, Kelly admitted he must have transferred money into the Maverick account to pay the promissory note. Although Kelly testified he did not know where he obtained that money, he admitted monies were "coming in and out all the time" and that he was the only person who controlled the checkbook. Even though Kelly would not admit that the "cash out" sum from the refinancing was used to pay the promissory note, his testimony, the documentary evidence, and the dates of certain pertinent events reasonably support a finding that this sum was used for payment of that debt.

In conjunction with the refinancing, new loan, and mortgage, Kelly executed many documents. Kelly denied preparing, signing or instructing anyone else to prepare and sign his name to some of the loan documents introduced at trial. Nevertheless, Kelly testified that the content of the majority of these documents was accurate; he hypothesized that because loan guidelines needed to be met, the mortgage broker obtained the appropriate information from him, prepared the documents or letters, and signed Kelly's name to the documents.

***7** Two of the documents purportedly signed by Kelly were written in May 2006, shortly before the loan closing. One letter was in response to a request for information regarding the property's listing for sale. The letter explained that Kelly had initially listed the bay front home for sale when he planned to use another property as his Florida residence, but when that other property was leased, Kelly took the bay front home and property off the market. The statements in this letter conflict with the testimony of Bobbie Fenn, a Florida real estate agent, who said the property was listed for sale during this entire time period.

The second letter was an explanation about the obvious conflict between the public record, indicating the property's ownership by Kelly and the plaintiffs, and Kelly's assertion in his loan application that he was the sole owner. The letter stated, "[T]his is property that I own with 2 other people and I am refinancing this property in order to have this property in my name only. After this transaction, T will be the only person on the title." Although the letter stated it was written in response to the question of why Kelly was requesting a "cash out" refinance of the property, it failed to contain an explanation.

To support his claim of a benevolent intent and desire to help the plaintiffs, Kelly asserted that after the first year of ownership, he offered to pay the plaintiffs' portion of the mortgage and expense payments. Kelly testified that when the property was first purchased, the plaintiffs made it clear to him that they could not continue to make payments on the property for a long period of time. Kelly testified McGuire said he could only pay the mortgage note and expenses for about a year. Kelly claimed that after this first year, he paid McGuire's portion of the mortgage note for several months and that McGuire was upset because the amount of the debt obligation on the property prohibited him from obtaining a loan to build a home in Baton Rouge. Kelly also testified that Henriksen struggled to make his portion of the payments. Kelly did acknowledge that as a co-owner he had legal remedies, such as partition of the property, if he did not agree with the co-owners and wanted sole ownership of the property. *See* Fla. Stat. § 64.011, *et seq.*

The plaintiffs' testimony reflected a different version of their financial ability to pay the property's mortgage and expenses. According to McGuire, each of the men contributed equally during the first year to a bank account used to pay the property's expenses. The first refinancing of the second mortgage with a "cash out" sum to pay expenses was solely

Kelly's idea. McGuire denied that he had trouble contributing his portion of the mortgage payment, that he complained about the financial burden, or that he asked Kelly to make his payments. In fact, after the first refinancing, McGuire continued to contribute his portion of expenses and handled the payment of the property's utility bills from a designated checking account, despite Kelly's agreement to take on that duty.

***8** Henriksen corroborated McGuire's testimony and testified that both he and McGuire made their contributions to the property expenses and mortgage payments. He denied telling Kelly that he was struggling to make the payments. He also noted that the first refinancing of the second mortgage with a "cash out" sum to pay the mortgage note was a result of Kelly's suggestion. Henriksen denied that Kelly had informed plaintiffs in 2006 that this "cash out" amount was almost depleted and that they would need to begin contributing money for the mortgage payments and property maintenance. In addition, Henriksen denied receiving voicemail messages from Kelly stating he was planning on refinancing the property in his own name and that he needed the plaintiffs' signatures on a quitclaim deed to do so.

Both McGuire and Henriksen testified about meetings with Kelly in 2006 before and after the forgery. McGuire recalled only one meeting in early 2006 at Champs Restaurant to discuss renovations to the property. McGuire denied any discussions at those meetings about his inability to contribute to the monthly mortgage payments.

Henriksen recalled more than one meeting, but denied that either he or McGuire indicated their inability to contribute their portion of the payments due on the property. At another meeting at Champs Restaurant that occurred sometime between June and August of 2006, McGuire told Kelly about a potential purchaser for the property, but Kelly rejected the verbal offer of approximately two million dollars as being too low. However, a few weeks later Kelly indicated he was interested in the offer, but he insisted the sale must be closed within thirty days and before Kelly's attorney. McGuire responded that the potential purchaser was no longer interested in the property. Henriksen also testified that during this last meeting, he and McGuire became suspicious when Kelly produced a handwritten paper that reflected the property's mortgage indebtedness was $1,680,000.00. When the plaintiffs questioned this figure, Kelly scratched out the amount and put away the sheet. Subsequently, Henriksen researched the Florida country public records and discovered the forged deed, the new mortgage, and the increased indebtedness on the property.

The trial testimony further revealed that during the first year of ownership, Kelly suggested to the plaintiffs that they execute a buy/sell agreement that would require each of the owners to first offer their share to the other owners before seeking an outside buyer. The proposed agreement also provided that the selling owner would receive triple the amount of money he contributed to the down payment, regardless of the value of or the equity in the property at the time of the sale. Kelly testified that he requested the plaintiffs sign this buy/sell agreement at least ten times and, despite his continued requests, the plaintiffs refused. Kelly was perplexed as to why the plaintiffs would not enter into the agreement and stated the only reason for their refusal when the market was doing well was "pure greed."

***9** Although Kelly testified that this buy/sell agreement would have benefited all the parties, the evidence indicates Kelly believed he was the only owner who was in a financial position to buy out the plaintiffs. If Kelly had purchased the ownership interest of one or both plaintiffs, he would have acquired over 60% ownership in the property and based on the operating agreement, he would have been able to control many decisions, including whether to mortgage the property. In addition, if Kelly purchased the plaintiffs' share and sold the property (before the market value decreased), his profit would have been considerably greater than if a sale was made with the co-owners.

Kelly admitted forging the plaintiffs' signatures on the quitclaim deed and deceiving Voss by telling him the plaintiffs had signed the deed. Kelly knew he would not have been able to close the refinancing deal the next day and receive the "cash out" sum of about $400,000.00 without being recognized as the sole owner of the property. The executed and notarized quitclaim deed transferring the plaintiffs' ownership interest to him was required for Kelly to accomplish his plan. The parties disputed the issue of whether Kelly attempted to inform them of the refinancing, but Kelly admitted he did not make any attempt to tell the plaintiffs until a few days before the loan closing. The plaintiffs were neither informed of, nor sent documents about, the loan and mortgage revealing that Kelly had refinanced the property solely in his name. Kelly's secrecy and his actions are circumstantial evidence of his intent to gain an unjust advantage for himself and to cause the plaintiffs to lose their rights as owners.

After conducting a *de novo* review of the evidence, including Kelly's own testimony, and applying the correct burden of proof, we conclude there is sufficient evidence to conclude Kelly committed fraud and misrepresented the truth to plaintiffs, the notary, the mortgage broker, and the mortgagee. The record reveals many facts that indicate a tapestry of deception by Kelly and show that his fraudulent acts began before and continued after his forgery of the plaintiffs' signatures on the quitclaim deed.

An obvious and reasonable conclusion from the evidence is that Kelly's deception was intended to obtain an unjust advantage for himself: to act as the property's sole owner without regard to the plaintiffs' ownership rights. When Kelly made himself the sole public record owner of the property, he obtained an unjust advantage with respect to the property vis-á-vis third parties. At the same time, Kelly intended for plaintiffs to lose their status and rights as co-owners of the property on the public record.[10]

The trial court further concluded that plaintiffs had no basis for recovery under either LUTPA or under theories of conversion and forced sale. We agree that the plaintiffs failed to present sufficient evidence to prove these claims.

Plaintiffs also allege Voss is liable for actions on the basis of fraud and/or negligence. The trial court concluded Voss' conduct was inappropriate, clearly wrong, outrageous, and enabled the refinancing of the property without the plaintiffs' consent, but he did not commit an intentional act of fraud.

***10** Florida law, like Louisiana law, provides that a document conveying, transferring or mortgaging real property, or of any interest therein, shall not be effectual against creditors or subsequent purchasers unless the document is recorded. *See* Fla. Stat. § 695.01(1). *See also* La. C.C. arts. 1839, 2021, 2035 & 3338. No document conveying title or interest in real property shall be recorded by a clerk of court unless it contains certain items, including the signature and name of the notary public or other officer authorized to take acknowledgments. *See* Fla. Stat. § 695.26(1)(d). A notary public outside the State of Florida may legalize or authenticate the document. *See* Fla. Stat. § 695.03(2). *See also* La. R.S. 35:2(A)(2) & La. C.C. art. 1833.

The purpose of authentic act requirements is to insure the validity of a signature on a document and that the person whose name appears thereon is the person who actually signed the document; the notary and witnesses attest to seeing the party sign the document. *Zamjahn v. Zamjahn,* 02–871 (La.App. 5th Cir.1/28/03), 839 So.2d 309, 315, *writ denied,* 03–0574 (La.4/25/03), 842 So.2d 410.

In the case of *Howcott v. Talen,* 133 La. 845, 63 So. 376 (La.1913) the Supreme Court of Louisiana summarized the responsibility of a notary with regard to identification of persons appearing before him in the following language:

> In fact, so long as he [(the notary)] exercises the precaution of an ordinarily prudent business man in certifying to the identity of the persons who appear before him, it may be doubted whether he has any othet [sic] function to discharge ...

Howcott, 133 La. at 852, 63 So. at 379.

A notary is liable both for deliberate misfeasance in the course of his official duties and for negligence in performing those duties. *Collins v. Collins,* 629 So.2d 1274, 1276 (La.App. 5th Cir.1993), *writ denied,* 94–0422 (La.4/4/94), 635 So.2d 1110. In *Collins,* the ex-husband filed suit in Louisiana against his ex-wife and a notary public for the fraudulent sale of immovable property in Florida. The suit alleged the ex-wife went to the notary's office with a man purporting to be her ex-husband and that man forged the ex-husband's name to an act of sale conveying the property to a purchaser. Plaintiff further alleged that the notary violated his notarial obligations by notarizing the act of sale when he knew or should have known that the person signing was not in fact the plaintiff, and/or the notary should have requested identification from that person signing as the ex-husband. The trial court granted the defendants' exceptions of "no right or cause of action." Plaintiff appealed and the Fifth Circuit concluded that a notary is liable both for deliberate misfeasance in the course of his official duties and for negligence in performing those duties. *Collins,* 629 So.2d at 1276.[11]

In addition to the holding in *Collins,* notaries have been found liable to persons who have been defrauded of their money as a consequence of their reliance upon the genuineness of any document executed by a notary public. *See Summers Brothers, Inc. v. Brewer,* 420 So.2d 197, 204 (La.App. 1st Cir.1982). Other courts have held that a notary's misrepresentation, silence, inaction or suppression of the truth, including that the notarized documents were forged, constitutes fraud.[12] *See Lacour v. National Surety Co. of New York,* 147 La. 586, 592, 85 So. 600, 602 (La.1920); *Rochereau v. Jones,* 29 La. Ann. 82 (1877).

***11** In *Summers Brothers,* the plaintiffs sued several defendants, including a notary, for fraud related to a contract for the leasing of equipment. One of the defendants, Brewer, was an acquaintance of the plaintiffs and approached them about a business opportunity. Brewer purportedly negotiated a contract for plaintiffs with a non-existent company. Based on this contract, the plaintiffs incurred expenses for the purchase and leasing of equipment. Brewer also sold plaintiffs stock in the sham company, and they paid him for expenses and the stock. The plaintiffs accepted the contract as genuine and authentic because it was notarized. When the plaintiffs discovered the contract was a forgery, they sued Brewer and others, including the notary. In rendering judgment in plaintiffs' favor, the trial court concluded that some of the signatures on the contract were forgeries and that the notary public had not followed the law by notarizing the contract after the parties to the contract had signed. *Summers Brothers,* 420 So.2d at 201.

The notary and other defendants appealed the trial court's judgment regarding their liability, the award of damages, and the finding that they were liable *in so lido.* In addressing the issue of the notary's liability, this Court relied on the Supreme Court's opinion in *Rouchereau,* which concluded that the notary's paraph of promissory notes was a deception and fraud, because the notary knew that the purported identification of the notes with a mortgage was a fraud. In *Summers Brothers,* this Court concluded the notary's actions were the "same in substance" as in *Rouchereau.* This Court stated:

> Even if [the notary] did not know that the signatures on the contract were forgeries, he knew that by authenticating the document, as notary, he was telling the world that the parties had appeared before him and affixed their signatures in his presence. Thus, he committed fraud in that he purposely let third parties rely on a document purporting to be genuine but actually without validity as an authentic act. The "proof" of validity he supplied was misleading to all who relied on the contract.

Summers Brothers, 420 So.2d at 204.

In affirming the trial court's judgment in favor of the Summers brothers, this Court also concluded that a review of the evidence amply supported the trial court's findings and rejected the notary's contention that his notarial acts were not a proximate cause of the plaintiffs' financial losses or that he was not guilty of "constructive fraud," as suggested by the trial court. *Summers Brothers,* 420 So.2d at 204.

In the instant case, the quitclaim deed form, which was sent to Kelly from the mortgage broker, required signatures of the parties and two witnesses and a signed acknowledgment by a notary public. Voss, a notary, signed the acknowledgment clause, indicating that the plaintiffs personally appeared before him and acknowledged their signatures on the quitclaim deed. That clause states:

> ***12** The foregoing instrument was acknowledged before me this 24th day of May, 2006 by John J. Kelly and Thomas L. McGuire, III, and Eric D. Henrikson who are personally known to me or have produced a driver's license as identification.

Regardless of whether Voss was aware of Kelly's scheme and his forgery of the plaintiffs' signatures, Voss knew that his acknowledgment was false. During the trial, Voss admitted that he did not actually see plaintiffs sign the deed. Furthermore, Voss knew that the plaintiffs did not appear before him and acknowledge their signatures on the deed, nor did he require that they do so. Thus, by executing the acknowledgement clause, Voss intentionally misrepresented the circumstances surrounding the quitclaim deed. Fraud can result from a party's misrepresentations, silence, or inaction. See La. C.C. art.1953. Although Voss testified that he never meant to deceive the plaintiffs, he admitted that Kelly told him a notarized deed was required in order for Kelly to become the property's sole owner and accomplish the refinancing. With this knowledge, Voss acted in concert with Kelly to complete the acknowledgement clause in the deed that both men knew to be false. By executing the quitclaim deed and signing the acknowledgment clause, Voss' actions were a deliberate misrepresentation and violated his duties as a notary public in the course of his official notarial duties. Based on our review of the evidence and the jurisprudence, we conclude Voss is liable because his intentional misrepresentations and failure to require plaintiffs to acknowledge the quitclaim deed in his presence caused harm to the plaintiffs.

SOLIDARY LIABILITY

Louisiana Civil Code article 2324 provides, in pertinent part, that:

> A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.

> B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

In 1996, Article 2324 was revised to provide that joint tortfeasors are no longer liable *in solido* and are liable only for the proportion of fault allocated to them. However, solidary liability exists between intentional or willful joint tortfeasors. See *Touchard v. Williams,* 617 So.2d 885, 891 (La.1993), *superseded on other grounds by statute.* Under Article 2334(A), evidence of a conspiracy can be actual knowledge of both parties or overt actions with another, or can be inferred from the knowledge of the alleged co-conspirator of the impropriety of the actions taken by the other co-conspirator. *Boudreaux v. Jeff,* 03–1932 (La.App. 1st Cir.9/17/04), 884 So.2d 665, 672; *Stephens v. Bail Enforcement of Louisiana,* 96–0809 (La.App. 1st Cir.2/14/97), 690 So.2d 124, 131, *writ denied,* 97–0585 (La.4/18/97), 692 So.2d 454.

***13** Because the trial court concluded the plaintiffs had not proved damages, it made no ruling as to whether the defendants were solidarity or jointly liable. Plaintiffs argue that under *Summers Brothers,* the notary's "constructive fraud" was "purposeful" or "willful," and, thus, Kelly and Voss are liable *in solido.* They further argue that, despite the language of Article 2324, an actual conspiracy is not required because as intentional tortfeasors, Kelly and Voss are liable *in solido.*

Kelly responds that the issue of solidary liability is irrelevant because plaintiffs foiled to prove any damages. Kelly further argues he is not liable *in solido* with Voss under Article 2324(A), because the plaintiffs' claims are based on negligence. Voss argues he is not a willful tortfeasor within the meaning of Article 2324(A) and that absent proof of a conspiracy with Kelly, he is not liable *in solido.*

We note that *Summers Brothers* rejected the plaintiffs' claim that the notary was liable *in solido* with the originator of the fraud under Article 2324. In *Summers Brothers,* 420 So.2d at 204, this Court found, as did the trial court, that Article 2324 had no application to the case because the defendants' acts were independent from the fraudulent scheme that was already set in motion before the notary participated in the fraud. Furthermore, the opinion concluded that some of the damages caused to plaintiffs by the notary were the result of his particular wrongdoing and fault and were not the natural and foreseeable consequences of the original schemer's earlier fraudulent acts. Based on these reasons, this Court concluded all the defendants in that case were not liable *in solido.*

The case before us is distinguishable and presents different facts from those in *Summers Brothers* relating to the issue of solidary liability. Here, the plaintiffs were harmed by the combined acts of both Kelly and Voss. The plaintiffs' loss of rights of ownership, as reflected by the Florida county public records, and the refinancing by Kelly resulted from the concerted, intentional and illegal actions and discussions between Kelly and Voss to complete the false acknowledgement in the quitclaim deed that enabled Kelly to refinance the property. The forgeries without Voss and Kelly's actions in bringing about the illegal notarization would not have been sufficient to cause harm to the plaintiffs.[13] Kelly requested that Voss execute an acknowledgement clause that they both knew to be false. Nevertheless, Voss complied with Kelly's request to notarize the acknowledgement clause. The fact that Kelly and Voss each acted with full knowledge of the impropriety of executing the false acknowledgement is evidence of conspiracy as required by Article 2324(A). Thus, Kelly and Voss are liable *in solido* for the harm caused by their combined actions.

LIABILITY OF CONTINENTAL

Continental, Voss' professional liability insurer, filed an answer to the appeal in which it argues that the trial court's findings, conclusions, and dismissal of all the claims asserted by the plaintiffs were correct and urges this Court to affirm the trial court's judgment. Continental adopts the legal arguments in Voss' brief, but presents additional argument in the event this Court reverses the trial court's judgment and finds that Voss committed fraud and the plaintiffs are entitled to damages based on mental anguish. Continental argues that although the professional liability policy issued to Voss provides coverage for his notarial duties and acts, the policy provisions exclude coverage based on fraud and for mental anguish damages. Moreover, they argue that such damages are not recoverable in a legal malpractice suit because the

foreseeable result of the negligent actions only extends to an economic loss.

***14** Continental's policy includes a provision excluding coverage for "any claim based on or arising out of any dishonest, fraudulent, criminal or malicious act or omission by an Insured...." The clear language of this provision excludes coverage for acts that are dishonest. Voss' actions were a deliberate misrepresentation, and thus, were dishonest. Accordingly, we conclude that Continental's policy does not provide coverage to and indemnify Voss for damages awarded against him in this proceeding.

KELLY'S RECONVENTIONAL DEMAND AND CLAIM FOR COSTS

Kelly contends that the trial court erred in denying his reconventional demand against the plaintiffs for reimbursement of payments he made related to the property. Kelly argues that because the plaintiffs still own the property, they owe him for payment of their portion of the current mortgage on the property and for other expenses. Moreover, he claims that the plaintiffs were unjustly enriched by his payoff of their obligation under the prior indebtedness and first and second mortgages at the time he refinanced the property in his name, regardless of how he obtained the money to pay off that obligation.

The plaintiffs filed suit seeking recovery for the damages caused by Kelly and Voss' actions, which slandered their title to the property and effectively resulted in an unlawful taking of their property. Kelly's claim for reimbursement assumes the plaintiffs remain owners of the property, which is an issue that must be addressed by the Florida courts. Therefore, Kelly's reconventional demand for reimbursement is denied.

Kelly also argues that the trial court erred in failing to award him court costs because he was the "prevailing party." In light of our finding that Kelly is liable, we find this argument lacks merit.

ALLOCATION OF FAULT

Louisiana Civil Code article 2323(A) provides that in "any action for damages ... the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined...." Subsection (B) provides that the allocation of fault "shall apply to any claim for recovery of damages ... asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability."

Because we have concluded that the combined actions of both Kelly and Voss caused harm to the plaintiffs, we find that Kelly and Voss are each equally and totally at fault.

CONTRIBUTION

Voss filed a cross-claim against Kelly seeking indemnification and contribution in the event that he was found to be liable and damages were awarded against him. The trial court did not rule on this cross-claim, apparently because of its finding that there were no damages. Pursuant to La. C.C. arts. 1804 and 1805, Kelly and Voss, as solidary obligors, are each liable for their own "virile portion," the fault allocated to each solidary obligor. Voss is not entitled to contribution from Kelly, if and when that claim arises, because Voss is wholly at fault.

DAMAGES

***15** Plaintiffs argue that they are entitled to damages based on the value of the property as of May 24, 2006. Plaintiffs note that as a result of the refinancing by Kelly, the property now bears an additional encumbrance and indebtedness in the amount of $412,000.00. Although plaintiffs admitted that the decline in real estate values resulted in a mortgage greater than the property's value at the time of trial, they argue that on the date of refinancing, the equity in the property was, at a minimum, $1,332,000.00 (based on Countrywide's appraisal of $2,600,000.00 minus the mortgage of $1,268,000.00) and that their combined interest in the equity was, at a minimum, $666,000.00 (50% of $1,332,000.00). Plaintiffs further claim additional damages based on their inconvenience, loss of use and enjoyment of the property, and their emotional distress in the amount of $75,000.00 each.

Kelly contends that plaintiffs have not proven any damages with reasonable certainty, that normal inconveniences or frustration are not compensable, and that to recover for the intentional infliction of emotional distress, the plaintiffs must prove his conduct was outrageous. At trial, the defendants argued that the plaintiffs had not suffered any damages because the forged quitclaim deed was a nullity and did not actually transfer the plaintiffs' ownership. Moreover, they

contend that the plaintiffs actually benefited from Kelly's actions that resulted in a payoff of the loan and mortgages that plaintiffs were obligated to pay.

The trial court agreed that the forged quitclaim deed was a nullity and, because it did not actually divest plaintiffs of their ownership interest in the property, they did not suffer "any ascertainable damage." The court asserted that "the only damages" plaintiffs could claim were related to the inconvenience of correcting the Florida county public record, but because plaintiffs had not filed any such legal proceeding, they were not entitled to damages. Had they proved the fraudulent mortgage could not be set aside, the trial court indicated the plaintiffs would have been entitled to the return of their down payments. Moreover, the trial court found plaintiffs did not suffer any mental distress, because they were not denied the use or enjoyment of their property by Kelly. Rather, the plaintiffs voluntarily refused to use the property, and their refusal, even if "understandable on a purely emotional level," was not compensable as mental anguish.

The defendants' arguments and the trial court's reasoning defy the reality of the situation. As noted earlier, the issues of nullity of the quitclaim deed and ownership of the property must be decided in a Florida court. The trial court's reasoning that the plaintiffs had to attempt to restore their rights to the property in Florida in order for damages to be assessed in this suit, essentially means that plaintiffs had the obligation to repair their harm, which was caused by Kelly and Voss. Further, we are aware of Kelly's testimony that he was willing to cooperate in restoring plaintiffs to their prior position. However, it was impossible to do so, because the recordation of the quitclaim deed and the mortgage in the Florida county public records created an equitable lien in favor of the new mortgage holder, Countrywide. See *Tribeca Lending Corporation v. Real Estate Depot, Inc.,* 42 So.3d 258, 262–64 (Fla.App. 4th DCA 2010). Thus, if there was any potential for plaintiffs to mitigate their damages, that possibility was destroyed by the creation of the equitable lien.

***16** The term "damages" refers to pecuniary compensation, recompense, or satisfaction for an injury sustained. The most common type of damages in the delictual context is compensatory damages. *Wainwright v. Fontenot,* 00–0492 (La.10/17/00), 774 So.2d 70, 74. Generally, compensatory damages are awarded on the basis of the loss suffered and are designed to replace the loss caused by the wrong or injury. Stated another way, the purpose of a compensatory damage award is to restore the injured party, as closely as possible, to the position he would have been in had the accident or incident never occurred. *Sharp v. Daigre,* 545 So.2d 1063, 1064 (La.App. 1st Cir.1989), *affirmed,* 555 So.2d 1361 (La.1990); *Great American Surplus Lines Insurance Co. v. Bass,* 486 So.2d 789, 793 (La.App. 1st Cir.), *writ denied,* 489 So.2d 245 (La.1986).

Compensatory damages are further divided into the broad categories of special damages and general damages. Special damages are those that either must be specially pled or have a ready market value, *i.e.,* the amount of the damages supposedly can be determined with relative certainty, including medical expenses and lost wages. On the other hand, general damages are those that may not be measured with any degree of pecuniary exactitude, are inherently speculative in nature, and cannot be fixed with mathematical certainty. *See McGee v. AC and S, Inc.,* 05–1036 (La.7/10/06), 933 So.2d 770, 774. The term "general damages" includes those for mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle which cannot be measured definitively in terms of money. *In re Medical Review Panel on Behalf of Laurent,* 94–1661 (La.App. 1st Cir.6/23/95), 657 So.2d 713, 722.

There is no mechanical rule for determining general damages; rather, facts and circumstances of each case control. *Stockstill v. C.F. Industries, Inc.,* 94–2072 (La.App. 1st Cir.12/15/95), 665 So.2d 802, 817, *writ denied,* 96–0149 (La.3/15/96), 669 So.2d 428. Generally, in the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the trier-of-fact. *See* La. C.C. art. 2324.1. Non-pecuniary damages for fraudulent acts can include recovery for mental anguish, aggravation, and inconvenience that the wrongful actions caused. *See Meador v. Toyota of Jefferson, Inc.,* 332 So.2d 433, 438 (La.1976). *See also In re Rushing,* 424 B.R. 747, 753–54 (Bankr.M .D.La.2010)

The actions of Kelly and Voss have or will cause the plaintiffs loss of their time, money, and wages to seek legal representation and to file any legal proceedings in Louisiana and/or Florida. In order for plaintiffs to pursue their remedies in Florida, they would have expenses, including the costs of communicating with Florida legal counsel, possibly hiring experts, traveling to and staying in Florida, and lost wages. Nevertheless, these particular damages are special and must be determined with relative certainty. Since plaintiffs have not presented any evidence as to the specific amount of

these damages, any award of these special damages would be speculative on our part. Moreover, we decline to award the amount of special monetary damages sought by plaintiffs based on the loss of their share of the property. To do so would require this Court to decide the issue of ownership, an issue over which we lack jurisdiction.

***17** This case presents a situation where the damage sustained by plaintiffs is not physical and is hard to quantify. Their damages result from the harm caused to their rights as property owners and their relationship to the property. 73 Corpus Juris Secundum, Property § 44 (2011) provides:

> Ownership of property comprises numerous different attributes, including dominion, control, right, interest, and title. The chief incidents of the ownership of property are the right to its possession, the right to its use, and the right to its enjoyment. Some courts say the chief incidents of ownership of property are the rights of use and enjoyment, and of disposition. It has also been said that the three primary indicia of ownership of personal property are title, possession, and control, which includes the right to sell, dispose of, or transfer. The primary incidents of ownership have been expressed elsewhere as including the right to possession, use, and enjoyment of the property, the right to change or improve the property, and the right to alienate the property at will. [Footnotes omitted.]

Subject to limitations and qualifications, ownership also gives a property owner the right to the natural, proper, and profitable use of the land, the right to income or profits accruing from the property, the right to invite other persons to use the property, or, conversely, to exclude them from doing so, the right to change or improve the property, and the right to sell the property.

Plaintiffs admitted they knew there was a risk that the value of the investment property would decrease. That event, however, is not the source of the plaintiffs' damage. Instead, their harm was a result of the loss of or impingement on their rights as real property owners (actual and/or on the public record.) The combined actions of Kelly and Voss changed the plaintiffs' relationship to the property; they no longer had full rights of ownership, including the right to enjoy, use, profit, and change the property.

Awards of general damages for mental anguish and inconvenience arising from the loss of use of property have been allowed in cases based on the claim of tortious conversion of property. *See Alexander v. Qwik Change Car Center, Inc.,* 352 So.2d 188, 190 (La.1977). The Supreme Court has also concluded that where property has been wrongfully seized through judicial process, damages for mental anguish and inconvenience due to the loss of use of the property are recoverable. *See Nassau Realty Co., Inc. v. Brown,* 332 So.2d 206, 211 (La.1976); *Hernandez v. Harson,* 237 La. 389, 401, 111 So.2d 320, 324 (1958). In *Hernandez,* the Supreme Court stated:

> Plaintiff is entitled to recover for humiliation, mortification and mental anxiety, and for physical discomfort and inconvenience as a result of the deprivation of use and enjoyment of his car.... Such an item is not confined to proof of actual pecuniary loss. It is true that there is no proof of malice nor was the seizure characterized by harshness and total disregard to the interests of plaintiff. Yet it was illegally and wrongfully executed, coupled with the continued deprivation of its use for an extended period of time, sufficient to have caused mortification, annoyance and physical discomfort.

***18** *Hernandez,* 237 La. at 401–02, 111 So.2d at 324.

Herein, the testimony indicates that plaintiffs felt cheated and betrayed, and were unable to use and enjoy the property. They did not voluntarily choose to give up their right to use or enjoy the property; rather, their rights were damaged by the actions of Kelly and Voss. Based on our review of the evidence in the record, we find plaintiffs suffered interference and impingement on their rights as owners of real property, inconvenience, and mental anguish caused by the tortious acts of Kelly and Voss. Accordingly, Thomas L. McGuire, III, and E. Douglas Henriksen are each entitled to an award of $150,000.00 for general damages.

CONCLUSION

For the reasons set forth in this opinion, that portion of the trial court judgment dismissing the plaintiffs' claim for damages against defendants, John J. Kelly and David C. Voss, is reversed and vacated. We hereby render judgment in favor of the plaintiffs, Thomas L. McGuire, III, and E. Douglas Henriksen, and against defendants, John J. Kelly and David C. Voss, *in solido,* for general damages in the sum of $150,000.00 to each plaintiff, together with legal interest thereon as provided by law, and for all costs. In all other respects, the judgment of the trial court is affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND RENDERED.

McDONALD, J. dissents and will assign reasons.

McCLENDON, J. dissents, in part, and assigns reasons.

McCLENDON, J., agrees in part and dissents in part.

***18** I agree with the majority that there is sufficient evidence to conclude that Kelly committed fraud by forging his partners' signatures thereby obtaining an unjust advantage. However, I must respectfully disagree with the majority's finding that the actions of Voss, the notary, amounted to fraud. Although there is no question as to the fault of Voss or that his negligence as a notary public is actionable, I cannot find that Voss, who failed to exercise the required care in performing his duties as a notary, committed the intentional act of fraud.

Louisiana Civil Code article 1953 provides:

> Fraud is a misrepresentation or a suppression of the truth made **with** the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction. (Emphasis added.)

I find the majority's application of fraud in this case to be too far reaching. As the majority correctly notes, fraud requires the intent to deceive. However, fraud cannot be predicated on mistake or negligence, no matter how gross. Fraudulent intent, which constitutes the intent to deceive, is a necessary element of fraud. *Whitehead v. American Coachworks, Inc.,* 02–0027, p. 6 (La.App. 1 Cir. 12/20/02), 837 So.2d 678, 682.

Voss testified that he believed that the plaintiffs were at J. Alexander's Restaurant when the quit claim deed was executed. He stated that when he entered the restaurant, Kelly was talking to a large group of men who were at the end of the bar. Voss stated that he thought that plaintiffs were in the group, but that it was "kind of embarrassing" because he had previously met the plaintiffs, but did not recognize them. When Kelly showed him the unsigned document, Voss looked at it and, thinking that plaintiffs were present, stated, "Let's get it signed." Voss said he started watching a basketball game on television, and Kelly went back to the group with the document. When the document came back to Voss, the signatures were affixed to it. At this point, Voss notarized the document. Voss testified that although he did not witness the signatures, he assumed, knowing Kelly and trusting him, that the plaintiffs were there at the bar and had signed the deed. On that basis, he notarized the document.

***19** In finding the notary committed fraud, the majority relies on the cases of *Lacour v. National Surety Co. of New York,* 147 La. 586, 85 So. 600 (La.1920) and *Rochereau v. Jones,* 29 La.Ann. 82 (La .1877). However, these cases are distinguishable from the present case as they involved situations where either the notary knew of or participated in the forgery. The majority fails to make said distinction. Further, the appellate court in *Collins v. Collins,* 629 So.2d 1274, 1276 (La.App. 5 Cir.1993), *writ denied,* 94–0422 (La.4/4/94), 635 So.2d 110, also cited by the majority, merely held that a notary may be liable both for deliberate misfeasance in the course of his official duties and for negligence in performing those duties. The court in that case reversed the granting of the defendants' exceptions of no cause of action and no right of action finding that the plaintiff had stated a cause of action against the notary by alleging that the notary violated his notarial obligation by notarizing an act of sale while he knew or should have known that the person signing was not who they purported to be and/or by failing to request identification. *Collins,* 629 So.2d at 1277.

More troublesome is this Court's decision in *Summers Brothers, Inc. v. Brewer,* 420 So.2d 197, 204 (La.App. 1 Cir.1982). *Summers* relied upon decisions involving active fraud by the notary, including *Lacour* and *Rochereau,* to reach the conclusion that the notary committed fraud when he authenticated a document after it was signed, despite the fact that the notary was unaware that the signatures were forgeries. I find the holding in *Summers* to be misguided. Unlike the present matter, the cases relied on by the *Summers* court all presented situations where the notary was part of the deception and fraud. The *Summers* court blurred the line between negligent and fraudulent actions, and the majority in this matter continues to do so. Here, while Voss admittedly notarized a document that he knew was not actually signed in his presence, without exercising the ordinary care required of a notary, he did not deliberately notarize a document that he knew to be forged. Therefore, I find that Voss's actions amounted to actionable negligence as opposed to fraud.

Additionally, I disagree with the majority's conclusion that Voss is liable in solido with Kelly. Civil Code Article 2324 provides, in pertinent part:

> A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.

> B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarity liable with any other person for damages attributable to the fault of such other person....

Article 2324A requires a meeting of the minds or collusion between the parties for the purpose of committing wrongdoing. *Boudreaux v.. Jeff,* 03–1932, p. 11 (La.App. 1 Cir. 9/17/04), 884 So.2d 665, 672. Clearly, Voss's actions although negligent and a breach of his duties as a notary were not a part of a conspiracy with Kelly, nor was there collusion between Kelly and Voss for the purpose of authenticating a forged document. There is simply no evidence that Voss and Kelly were working together or acting as co-conspirators. In fact, Voss was also deceived by Kelly and led to believe that all the parties had signed the document in question. The majority attempts to cloak Voss with co-conspirator status, but there is no evidence in the record that suggests Voss had knowledge of Kelly's scheme. The majority's *but for* analysis is insufficient to establish in solido liability. Accordingly, I would find Voss liable for 30% of the damages as a joint tortfeasor.[1]

***20** With regard to the plaintiffs' duty to mitigate their damages, the law requires a person injured by the wrongful act of another to mitigate his damages; it also requires him to resort to legal action in order to mitigate those damages. *Weber v. McMillan,* 285 So.2d 349, 352 (La.App.1974); *Gray v. State, Department of Highways,* 250 La. 1045, 202 So.2d 24 (1967); *Humphreys v. Bennett Oil Corp.,* 195 La. 531, 197 So. 222 (1940). The record does not reflect any action on the part of the plaintiffs to have the property restored in their names, despite Kelly's admission that the signatures were forged and his offers to fully cooperate in recognizing the plaintiffs' interest in the property. Further, the plaintiffs failed to hire legal counsel to attempt to correct the defect in the title or to have the fraudulent act annulled. Had the plaintiffs taken action to restore their title to the property, their damages would have been lessened.

Lastly, I would have awarded specific damages and disagree with the majority's conclusion that no specific damages could be quantified.[2] Clearly, specific damages could be calculated by beginning with the total loan amount acquired by Kelly with the forged documents and subtracting the first and second mortgage payoffs, as well as property taxes, insurance premiums and note payments made by Kelly on the property at issue, from the date of the refinancing to the date of trial. This figure is reflective of the unjust advantage that Kelly gained by forging the signatures of his partners. Further, regarding general damages, given that the plaintiffs made no effort whatsoever to mitigate their damages, I would have awarded only $15,000 each to McGuire and Henriksen over and above the specific damage award.

Considering the above, I respectfully agree in part and dissent in part.

All Citations

Not Reported in So.3d, 2012 WL 602366, 2010-0562 (La.App. 1 Cir. 1/30/12)

Footnotes

1 Just prior to the purchase, the parties signed an amended operating agreement with Sandestin Investments, L.L.C. (a company originally formed by Kelly), which provided that the parties “shall participate in, and be allocated, profits, losses and distributions of the Company in the following percentages” of interest: Kelly—55%, Henriksen and McGuire—22.50% each. The agreement also provided that Kelly was the managing member, who had certain powers, including authority to disburse funds and pay debts and that the parties each had a vote equal to their percentage interest. However, the agreement specifically provided that any action to sell, mortgage, or encumber immovable property required an affirmative vote of 60% interest or, in other words, an affirmative vote by Kelly and at least one of the other owners, McGuire or Henriksen. Shortly after the purchase, the parties executed a quitclaim deed transferring the property to Sandestin Investments, L .L.C. In June 2005, the parties had neither listed the property with a realtor nor sold the property and ownership was transferred from Sandestin Investments, L.L.C, back to the individual parties by execution of a warranty deed. The parties then refinanced the second mortgage and obtained a loan for $300,000.00, which was used to pay off the original second mortgage, pay closing costs, and pay the parties a “cash out” sum of approximately $188,000.00. During the next year, the cash sum was used to pay for monthly mortgage payments on the property, for property maintenance, for renovations of the home's interior, and for the purchase of a party barge. This refinancing increased the

indebtedness on the property to approximately $1,268,000.00. Sometime in late 2005 or early 2006, the property was listed for sale with a real estate agent for the price of $2,600,000.00.

2 The quitclaim deed was actually dated May 24, 2006, the next day.

3 The plaintiffs initially filed suit against Kelly in October 2006, seeking a temporary restraining order (TRO) and preliminary injunction to enjoin Kelly or anyone acting on his behalf, from selling, transferring, exchanging, encumbering, or otherwise alienating the property. A TRO was immediately issued and later, based on a joint motion with Kelly, a preliminary injunction was issued prohibiting Kelly from selling, transferring, encumbering, and alienating the property without the express written consent of McGuire and Henriksen until further orders of the court. Thereafter, the plaintiffs filed two amended petitions seeking damages based on several legal theories. Plaintiffs also added the other defendants. Plaintiffs alleged their signatures on the quitclaim deed were forgeries, that Emerald Coast was liable for failing to verify the signatures on the deed, that Voss' actions constituted fraud and negligence, that Continental was liable as Voss' professional liability insurer, and that Countrywide was a necessary party. Plaintiffs alleged their damages resulted from the loss of proceeds from the potential sale of the property, an additional encumbrance on the property, expenses and costs incurred to obtain relief, payment of debts associated with a property for which they are not title owners, and mental and emotional distress. Kelly filed an answer, denying the allegations and asserting that his actions were taken under his authority as managing partner, had benefitted the plaintiffs, and did not result in damages. Kelly further asserted that if any damages or injury had occurred, any recovery should be reduced based on the plaintiffs' contributory negligence or fault. Kelly also filed a reconventional demand, alleging plaintiffs' public accusation of fraud and other illegal conduct constituted defamation per se, that plaintiffs' threats to take criminal or disciplinary action against himself and Voss unless monetary payment was made constituted extortion, and that he was entitled to a judgment awarding compensation and reimbursement of expenses paid by him. Voss filed an answer and cross-claim in which he denied plaintiffs' claims and, alternatively, pleaded that if he was found liable, he should be reimbursed and receive contribution from Kelly. Continental filed an answer, alleging that its policy excluded damages as a result of Voss' fraudulent, dishonest, and malicious acts. Countrywide denied all the allegations and asserted that, based on the location of the property, all rights and obligations under the mortgage must be determined in a Florida judicial proceeding.

4 The trial court's rulings granted in part and denied in part plaintiffs' motion for summary judgment as to different issues and denied the motions for summary judgment filed by Kelly and Voss. The plaintiffs sought supervisory writs as to that portion of the ruling denying their motion. This Court denied the writ application and declined to exercise its supervisory jurisdiction. *See McGuire v. Kelly,* 08–1681 (La.App. 1st Cir.4/28/09) (unpublished.)

5 We are aware that judgments are appealed and not the reasons for judgment. However, herein the signed judgment specifically referenced the trial court's written reasons and those reasons clearly indicate the court's factual and legal findings.

6 Prior to January 1, 1985, the jurisprudence held that fraud had to be proven by clear and convincing or strong and clear evidence. *See Marcello v. Bussiere,* 284 So.2d 892, 894 (La.1973); *Hoover v. Mid–South Exploration Company, Inc.,* 479 So.2d 551, 555 (La.App. 1st Cir.1985). By Act 331 of 1984, effective January 1, 1985, La. C.C. art.1957 was enacted and changed the standard of proof for fraud to a preponderance of the evidence. According to Article 1957, Comment (b), the article does not allow the prior interpretation.

7 Although the Restatement is not binding on Louisiana courts, the restrictions and guidelines established therein for policy reasons do provide guidance to our courts in the adjudication of these claims. *See Nicholas v. Allstate Insurance Company,* 99–2522 (La.8/31/00), 765 So.2d 1017, 1021 n. 4. In the Restatement of Torts, the word “tortious” is used to denote the fact that conduct whether of act or omission is of such a character as to subject the actor to liability under the principles of the law of torts. The word “tortious” is appropriate to describe not only an act which is intended to cause an invasion of an interest legally protected against intentional invasion or conduct that is negligent as creating an unreasonable risk of invasion of such an interest, but also conduct that is carried on at the risk that the actor shall be subject to liability for harm caused thereby, although no such harm is intended and the harm cannot be prevented by any precautions or care that it is practicable to require. *See* Restatement (Second) of Torts § 6, Comment (a).

8 The definition of fraud is now in La. C.C. art.1953.

9 A copy of the actual check apparently could not be located or was not disclosed by Kelly during discovery.

10 Unlike the trial court, we do not address the issues of whether the forged quitclaim deed and mortgage are nullities under Florida law and whether they legally transferred the plaintiffs' ownership in the property. We agree with Countrywide that the issues of the legal effect of the quitclaim deed and the validity of the mortgage are controlled by Florida law and only Florida courts have jurisdiction over those issues.

11 Moreover, for a plaintiff to recover for a negligent misrepresentation there must be a legal duty on the part of the defendant to supply correct information, a breach of that duty, and damage to the plaintiff caused by the breach. *Fechtner v. Bice,* 06–2077 (La.App. 1st Cir.6/8/07), 964 So.2d 1055, 1058, *writ denied,* 07–1287 (La.9/21/07), 964 So.2d 345; *Osborne v. Ladner,* 96–0863 (La.App. 1st Cir.2/14/97), 691 So.2d 1245, 1257. *See also Webb v. Pioneer Bank & Trust Company,* 530 So.2d 115, 118–19 (La.App.2d Cir.1988)

12 We acknowledge that La. C.C. art.1953 requires that a fraudulent misrepresentation or a suppression of the truth be made with the intent either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Moreover, the fraud cannot be predicated on mistake or negligence, no matter how gross, and the fraudulent intent that constitutes the intent to deceive is a necessary element of fraud. *See Whitehead v. American Coachworks, Inc.,* 02–0027 (La.App. 1st Cir.12/20/02), 837 So.2d 678, 682. Although Article 1953 was enacted by Acts 1984, No. 331 § 1, effective January 1, 1985, the revision comment (a) notes that Article 1953 did not change the law and restated the definition of fraud contained in former La. C.C. art. 1847, enacted in 1870. Thus, the same definition of fraud existed at the time these cases were decided.

13 In his pretrial deposition testimony, Scott Zimov, Countrywide's corporate representative, staled that Kelly's loan for $1,680,000.00 would not have been approved without the notary's signature or seal on the quitclaim deed.

1 Because I do not find that Voss is solidarily liable with Kelly, I also disagree with the majority's discussion regarding contribution.

2 To the extent the majority finds that attorney fees are too speculative, I agree.

135 So.3d 596
Supreme Court of Louisiana.

In re Mack Arthur HOLLIS.

No. 2013–B–2568.
|
March 14, 2014.

Synopsis
Background: Office of Disciplinary Counsel filed amended formal charges against attorney, alleging neglect of a client matter resulting in prescription of clients' personal injury claim, and misconduct with respect to an affidavit, including backdating it and notarizing it outside the presence of the affiant. The hearing committee recommended a suspension of one year and one day, and the disciplinary board further recommended restitution to clients in the amount of $7,000, which was the estimated value of the prescribed claim. Attorney sought to file a late objection, which was rejected.

Holdings: The Supreme Court held that:

[1] attorney violated various Rules of Professional Conduct, and

[2] attorney's misconduct warranted suspension from the practice of law for one year and one day and restitution in the amount of $7,000.

So ordered.

West Headnotes (6)

[1] **Attorneys and Legal Services** Scope, Standard, and Extent of Review

Supreme Court acts as trier of fact in bar disciplinary matters and conducts an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence.

[2] **Attorneys and Legal Services** Power and discretion to determine sanction
Attorneys and Legal Services Particular Subjects of Review
Attorneys and Legal Services Evidence, verdict, and findings

While Supreme Court is not bound in any way by the findings and recommendations of the hearing committee and disciplinary board in a bar disciplinary proceeding, it applies the manifest error standard to the committee's factual findings.

[3] **Attorneys and Legal Services** Diligence and promptness
Attorneys and Legal Services Signatures and notarization

Attorney violated various Rules of Professional Conduct in connection with his representation of clients in a personal injury matter; attorney neglected the matter, causing the personal injury claim to prescribe, attorney backdated one client's in forma pauperis affidavit, and attorney notarized the affidavit outside the presence of the client and despite not being a duly-commissioned notary. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 1.1, 1.3, 3.3, 8.4, LSA–R.S. foll. 37:222.

[4] **Attorneys and Legal Services** Definite Suspension

Attorney's misconduct in neglecting clients' legal matter such that their personal injury claim prescribed, backdating one client's in forma pauperis affidavit, and notarizing the affidavit outside client's presence and despite not being a

duly-commissioned notary, warranted suspension from the practice of law for one year and one day and restitution in the amount of $7,000; attorney acted negligently, knowingly, and intentionally, attorney violated duties owed to clients, the public, the legal system, and the legal profession, causing actual and potential harm, and attorney expressed no remorse and did not appear to recognize the wrongful nature of his conduct. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 1.1, 1.3, 3.3, 8.4, LSA–R.S. foll. 37:222.

[5] **Attorneys and Legal Services** Purpose of proceedings in general

Attorney disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct.

[6] **Attorneys and Legal Services** Factors Considered

The discipline to be imposed in an attorney disciplinary proceeding depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances.

***597** ATTORNEY DISCIPLINARY PROCEEDINGS

PER CURIAM.

****1** This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Mack Arthur Hollis, an attorney licensed to practice law in Louisiana.

UNDERLYING FACTS AND PROCEDURAL HISTORY

The ODC initially filed formal charges against respondent on May 21, 2010, which charges addressed only the alleged misconduct set forth in Count I below. Respondent answered the charges, and the matter proceeded to a formal hearing on the merits conducted by the hearing committee on October 6, 2010. During the hearing, respondent admitted to engaging in conduct related to the misconduct in Count I that might constitute additional attorney misconduct. Nevertheless, the ODC did not amend the formal charges at that time.

Upon consideration of the charged misconduct only, the hearing committee and the disciplinary board both recommended that respondent be suspended from the practice of law for six months, fully deferred, subject to two years of supervised probation with conditions. Respondent objected to the board's recommendation, and the matter was set on this court's docket for oral argument.

***598** Following oral argument and upon further review of the record, we deferred consideration of the charged misconduct pending the ODC's investigation of the additional conduct to which respondent testified during the October 6, 2010 formal ****2** hearing. Accordingly, we remanded the matter to the ODC for additional investigation and the institution of amended formal charges. *In re: Hollis*, 11–1337 (La.12/14/11), 76 So.3d 415.

The ODC amended the formal charges on February 16, 2012. Thus, the instant matter addresses the alleged misconduct subject of the initial formal charges (Count I) and the additional alleged misconduct discovered during the initial formal hearing (Count II).

Count I

In the summer of 2004, Ameshila Alfred, her mother, and her stepfather hired respondent to represent them in a personal injury matter stemming from a June 7, 2004 automobile accident. Respondent received the related accident report in October 2004. He encountered some difficulties in obtaining an *in forma pauperis* affidavit (hereinafter referred to as a "pauper affidavit") from his clients. However, he ultimately received Ms. Alfred's pauper affidavit and purportedly notarized same on February 10, 2005.

Respondent filed a petition for damages on behalf of his clients on May 3, 2006, nearly two years after the June 7, 2004 accident. The defendants filed an exception of prescription, and the trial court signed a judgment dismissing the lawsuit on November 27, 2006. Respondent subsequently informed his clients that the dismissal of their lawsuit was based upon his failure to timely file the petition.

Count II

As stated above, on October 6, 2010, the hearing committee conducted a formal hearing to address the alleged misconduct in Count I. During the hearing, respondent testified about Ms. Alfred's pauper affidavit. Specifically, respondent admitted that he notarized the affidavit in August or September 2005 (after the ****3** prescription date) and not on February 10, 2005 as indicated on the affidavit. In his testimony, he claimed that he "didn't want to put a prescribed date on there." Respondent further testified that he notarized the affidavit outside of the presence of the affiant. Furthermore, he acknowledged that he is not, in fact, registered as a notary public in the State of Louisiana.

DISCIPLINARY PROCEEDINGS

As stated above, the ODC filed amended formal charges against respondent on February 16, 2012. The amended charges alleged that respondent violated the following provisions of the Rules of Professional Conduct: Rules 1.1 (failure to provide competent representation to a client), 1.3 (failure to act with reasonable diligence and promptness in representing a client), 3.3 (candor toward the tribunal), and 8.4.[1]

Respondent answered the amended formal charges, essentially denying any misconduct. Accordingly, the matter proceeded to a formal hearing on the merits.

Hearing Committee Report

After considering the evidence and testimony presented at the hearing, the hearing committee made the following factual findings:

***599** In his testimony, respondent acknowledged his representation of Ms. Alfred and her mother and stepfather in connection with injuries they sustained in an automobile accident on June 7, 2004. This fact is further evidenced by respondent's August 23, 2004 letter to the defendant, which he attached to his initial reply to the disciplinary complaint. Between October 2004, when respondent initially communicated with the defendant insurer, and August or ****4** September 2005, which was after the one-year anniversary of the automobile accident, respondent took no significant steps to advance the claim or preserve his clients' legal interests. Additionally, respondent filed the petition for damages on behalf of his clients on May 3, 2006, nearly two years after the accident date. His clients' lawsuit was ultimately dismissed as prescribed. Respondent attempted to excuse his untimely filing of the lawsuit by explaining that he had relied on a piece of proposed legislation that was never enacted. However, he admitted that he never inquired further about the legislation.

Although Ms. Alfred's pauper affidavit is dated February 10, 2005, respondent testified that he actually notarized it in August or September 2005. Respondent backdated the affidavit so it would not appear to have been notarized outside of the applicable prescriptive period. Additionally, respondent notarized the affidavit despite not being a registered notary, and did so outside the presence of the affiant. He indicated that he notarized the affidavit when he was not a notary because he relied on a judge's statement to him that all Louisiana attorneys are notaries. He misunderstood and believed that, as an attorney, he did not need to register as a notary. However, he also admitted that he did not inquire further about his need to register as a notary, which the committee determined was more than mere negligence. The committee also determined that respondent acted intentionally and

dishonestly in backdating the affidavit to help his argument that the claim was not prescribed and in notarizing the affidavit outside of the presence of the affiant.

Based on these facts, the committee determined that respondent violated the Rules of Professional Conduct as alleged in the amended formal charges. The committee further determined that respondent negligently violated a duty owed to his clients, causing them actual harm. Additionally, the committee concluded that respondent intentionally violated duties owed to the public and the legal system ****5** when he notarized Ms. Alfred's pauper affidavit, which caused actual harm to the integrity of notarial acts. After considering the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined that the baseline sanction is suspension.

In aggravation, the committee recognized respondent's refusal to acknowledge the wrongful nature of his conduct. In mitigation, the committee recognized the absence of a prior disciplinary record.

After further considering this court's prior jurisprudence addressing similar misconduct, the committee recommended that respondent be suspended from the practice of law for one year and one day, followed by a period of probation with conditions.[2]

***600** Neither respondent nor the ODC filed an objection to the hearing committee's report and recommendation. However, in his pre-argument brief to the disciplinary board, respondent indicated that he disagreed with all of the allegations in the committee's report and indicated that he was offended at the committee's "unsavory characterizations" of his actions and the performance of his legal work.

Disciplinary Board Recommendation

After review, the disciplinary board determined that the hearing committee's factual findings are supported by the record and are not manifestly erroneous. The board further determined that the committee correctly applied the facts to the Rules of Professional Conduct to conclude respondent violated the rules as alleged in the amended formal charges.

****6** Based on these findings, the board concluded that respondent violated duties owed to his clients, the public, the legal system, and the legal profession. His conduct was mostly negligent but, at times, was knowing and intentional. He caused significant actual injury to his clients in that they were barred from pursuing their personal injury claim. Furthermore, the potential for even greater harm exists as a result of respondent's notarial misconduct should the documents he improperly notarized be rendered void. After considering the ABA's *Standards for Imposing Lawyer Sanctions*, the board determined that the baseline sanction is suspension. The board agreed with the aggravating and mitigating factors found by the committee.

After further considering this court's prior jurisprudence addressing similar misconduct, the board recommended that respondent be suspended from the practice of law for one year and one day. The board also recommended that respondent make restitution to his clients in the amount of $7,000, the estimated value of their claim had it not prescribed.

Neither respondent nor the ODC filed a timely objection in this court to the disciplinary board's recommendation. However, after the expiration of the time for filing objections under Supreme Court Rule XIX, § 11(G)(1), respondent sought to file a "late" objection. On January 10, 2014, we issued an order rejecting respondent's objection as untimely and, therefore, procedurally improper but permitting the filing of briefs, without oral argument. Respondent and the ODC both filed briefs in response to the court's order.

DISCUSSION

[1] [2] Bar disciplinary matters fall within the original jurisdiction of this court. La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has ****7** been proven by clear and convincing evidence. *In re: Banks*, 09–1212 (La.10/2/09), 18 So.3d 57. While we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board, we have held the manifest error standard is applicable to the committee's factual findings. *See In re: Caulfield*, 96–1401 (La.11/25/96), 683 So.2d 714; *In re: Pardue*, 93–2865 (La.3/11/94), 633 So.2d 150.

[3] In this matter, respondent neglected his clients' legal matter, causing their personal injury claim to prescribe. Additionally, he backdated Ms. Alfred's pauper affidavit

and improperly notarized the affidavit by (1) notarizing same outside of the presence of the affiant and (2) notarizing same when he was not a duly-commissioned notary. Based on these facts, respondent has violated the Rules of Professional Conduct as alleged in the amended formal charges.

***601** [4] [5] [6] Having found evidence of professional misconduct, we now turn to a determination of the appropriate sanction for respondent's actions. In determining a sanction, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis,* 513 So.2d 1173 (La.1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington,* 459 So.2d 520 (La.1984).

We agree with the disciplinary board that respondent acted negligently, knowingly, and intentionally. He violated duties owed to his clients, the public, the legal system, and the legal profession, causing actual and potential harm. The baseline sanction for this type of misconduct is suspension. The record supports the aggravating and mitigating factors found by the hearing committee and the board.

****8** Turning to the issue of an appropriate sanction, we find guidance from the case of *In re: Porter*, 05–1736 (La.3/10/06), 930 So.2d 875. In *Porter*, the attorney neglected a legal matter, failed to communicate with a client, and notarized an affidavit containing a forged signature. Noting the attorney's remorse for his misconduct, we suspended him from the practice of law for one year. In the instant matter, respondent has engaged in similar misconduct. However, respondent has expressed no remorse and does not appear to recognize the wrongful nature of his conduct. Under these circumstances, we find respondent should be required to prove he has met the reinstatement criteria set forth in Supreme Court Rule XIX, § 24(E), before being allowed to return to the practice of law following his period of suspension.

Accordingly, we will adopt the board's recommendation and suspend respondent from the practice of law for one year and one day. We will further order respondent to make restitution to his clients in the amount of $7,000.

DECREE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record and the briefs filed by the parties, it is ordered that Mack Arthur Hollis, Louisiana Bar Roll number 27240, be and he hereby is suspended from the practice of law for one year and one day. It is further ordered that respondent shall make restitution to his clients in the amount of $7,000. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

All Citations

135 So.3d 596, 2013-2568 (La. 3/14/14)

Footnotes

1 Although the ODC does not reference any subsections of Rule 8.4, the language in the formal charges appears to indicate the ODC alleged that respondent specifically violated Rules 8.4(c) (engaging in conduct involving dishonest, fraud, deceit, or misrepresentation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice).

2 We have typically declined to impose probationary periods or conditions in cases in which the sanction will require application for and reinstatement to the practice of law. *See In re: Welcome,* 02–2662 (La.1/24/03), 840 So.2d 519 (imposing an eighteen-month suspension from the practice of law, but declining to impose a two-year period of supervised probation with conditions because "such issues, along with any other relevant factors, may be addressed if and when respondent applies for reinstatement").

2013-2568 (La. 3/14/14)

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934 So.2d 694
Supreme Court of Louisiana.

In re Mitchell Reid LANDRY.

No. 2005–B–1871.
|
July 6, 2006.

Synopsis
Background: Office of Disciplinary Counsel initiated attorney disciplinary proceedings.

Holdings: The Supreme Court held that:

[1] attorney violated rules of professional conduct by notarizing and causing to be filed into a succession proceeding two affidavits that he knew or should have known contained false information, and

[2] six-month suspension, with all but 30 days deferred, was appropriate sanction.

Suspension ordered.

Traylor, J., dissented and would impose greater discipline.

West Headnotes (7)

[1] **Attorneys and Legal Services** Evidence, verdict, and findings

In attorney disciplinary matters, Supreme Court acts as trier of fact and conducts an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence.

[2] **Attorneys and Legal Services** Evidence, verdict, and findings
Attorneys and Legal Services Disposition and punishment; sanctions

On review of attorney disciplinary proceedings, Supreme Court is not bound in any way by the findings and recommendations of the hearing committee and disciplinary board.

[3] **Attorneys and Legal Services** Signatures and notarization

Attorney, who notarized and caused to be filed into a succession proceeding two affidavits that he knew or should have known contained false information, violated rules of professional conduct prohibiting an attorney from knowingly making a false statement of fact or law to a tribunal, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and engaging in conduct prejudicial to the administration of justice. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 3.3(a)(1), 8.4(c, d), LSA–R.S. foll. 37:222.

1 Cases that cite this headnote

[4] **Attorneys and Legal Services** Mitigating factors
Attorneys and Legal Services Definite Suspension
Attorneys and Legal Services Conditional Disposition

Six-month suspension, with all but 30 days deferred, was appropriate sanction for attorney's misconduct in notarizing and causing to be filed into a succession proceeding two affidavits that he knew or should have known contained false information; in mitigation, attorney did not file affidavits with any improper motive, and attorney had no prior disciplinary record, a cooperative attitude toward disciplinary proceedings, inexperience in the practice of law,

good character, and remorse. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 3.3(a)(1), 8.4(c, d), LSA–R.S. foll. 37:222.

1 Cases that cite this headnote

[5] **Attorneys and Legal Services** Purpose of proceedings in general

Attorney disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct.

[6] **Attorneys and Legal Services** Factors Considered

Discipline to be imposed for attorney misconduct depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances.

[7] **Attorneys and Legal Services** Presumptive, baseline, or preliminary potential sanction

Baseline sanction for attorney's misconduct, in notarizing and causing to be filed into a succession proceeding two affidavits that he knew or should have known contained false information, was a suspension from the practice of law. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 3.3(a)(1), 8.4(c, d), LSA–R.S. foll. 37:222.

2 Cases that cite this headnote

Attorneys and Law Firms

***695** Charles B. Plattsmier, Baton Rouge, Eric K. Barefield, Metairie, for Applicant.

Stanley, Flanagan & Reuter, Richard Stanley, Vicki A. Elmer, New Orleans; Mitchell Reid Landry, Mandeville, for Respondent.

****1** ATTORNEY DISCIPLINARY PROCEEDINGS

PER CURIAM.

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Mitchell Reid Landry, an attorney licensed to practice law in Louisiana.

UNDERLYING FACTS

The underlying facts are largely undisputed. Respondent was admitted to the Louisiana bar in April 1996. In March 1997, respondent accepted a position as a title attorney with Authentic Title, Ltd.

In July 1997, respondent acted as the closing attorney for a transaction involving Walter Wallendorf ("Walter"), who wished to refinance his home. Because Walter's wife, Patsy Wallendorf ("Patsy"), had died several months earlier, respondent determined that it was necessary to open a succession to complete the refinancing. Walter informed respondent that he and Patsy had no children and no property other than the home and its furnishings. Walter also told respondent that "there was no will" when Patsy died. When respondent asked Walter for the names of witnesses who could verify these facts, Walter informed respondent that he and Patsy had not socialized much and that he could not think of any witnesses who could provide the information.

****2** Thereafter, respondent prepared an affidavit of death and heirship based solely on the information provided by Walter. The affidavit stated that Patsy died intestate.

Walter signed the affidavit and respondent ***696** notarized it. A second affidavit was executed by Kelly Jones and Heather St. Amant, two notarial secretaries employed by Authentic Title, repeating the information contained in Walter's affidavit. These secretaries swore in the affidavit that they were "well acquainted" with Patsy and knew that she had died intestate. Respondent reviewed the Jones/St. Amant affidavit and notarized it. The affidavits were included with a petition for possession signed by respondent and filed in the matter entitled *Succession of Patsy Ruth Wallendorf*, No. 513–162 on the docket of the 24th Judicial District Court for the Parish of Jefferson. In August 1997, the court rendered a judgment of possession in favor of Walter.

Approximately one year later, respondent learned that Patsy had in fact died testate. In 1994, Patsy had executed a will leaving all of her assets, including the Wallendorf home, to Michael Bradford Walker and Jennifer Brooke Walker ("Michael and Jennifer"), the children of Shirley Walker ("Shirley"). Walter apparently believed that his wife had rescinded that will shortly before her death in 1997, leaving her without a will. Subsequently, Shirley retained counsel and brought an action to annul the 1997 judgment of possession. Walter represented himself in the litigation. At the conclusion of the proceeding, the court set aside the earlier judgment of possession in Walter's favor and appointed Shirley as the testamentary executrix of Patsy's succession.

In July 2000, Michael and Jennifer filed a civil suit against respondent and others. During the course of the litigation, Heather St. Amant testified that neither she nor Ms. Jones knew Patsy at the time they executed the affidavit attesting that they were "well acquainted" with Patsy and knew she had died intestate. Ms. St. ****3** Amant testified that she signed the affidavit, even though she did not know Patsy, because she was told to do so. In October 2001, Michael and Jennifer settled their suit for $70,000, which sum was paid by Authentic Title.

DISCIPLINARY PROCEEDINGS

Following its investigation of a complaint filed by Shirley, the ODC filed one count of formal charges against respondent, alleging that his conduct violated Rules 3.3(a)(1) (knowingly making a false statement of fact or law to a tribunal), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

Respondent answered the formal charges, admitting most of the factual allegations and admitting that he violated the cited Rules of Professional Conduct "by virtue of his submission of affidavits in which the affiants declared personal knowledge of facts that they did not know, although in good faith believed to be true."[1]

***697** This matter then proceeded to a formal hearing on the merits, at which respondent and Shirley Walker testified. In addition, respondent offered testimony, ****4** both in person and by letter and affidavit, attesting to his good character and reputation.

Hearing Committee Recommendation

After considering this matter, the hearing committee made factual findings as follows:

Respondent relied upon Walter's representations that he and Patsy had no children and had no property other than their residence and its furnishings and contents. Respondent also relied upon Walter's representations that Patsy did not execute a will and died intestate. When respondent questioned Walter regarding witnesses who could verify these facts, Walter advised respondent that he could not think of anyone who could execute the appropriate affidavits of death and heirship. Assuming Walter's representations were accurate, respondent prepared an affidavit of death and heirship for Walter's signature. Respondent or another employee of Authentic Title prepared a second affidavit wherein employees of Authentic Title alleged to have personal knowledge of the facts that Walter represented to respondent. Respondent notarized the second affidavit even though he knew or should have known the employees did not have the requisite personal knowledge to execute the affidavit. When Patsy's succession was filed with the court, Walter was recognized as the sole heir and placed in possession of all of the property in the succession. Some two years later, Shirley brought an action to annul the judgment of possession in favor of Walter. Shirley represented to the court that Patsy had died testate and Shirley's children were the proper heirs to the succession. An ancillary litigation was filed seeking recovery against respondent and others for the errors outlined above. That litigation was settled in October 2001, giving the injured parties $70,000 in settlement of their claim.

****5** Based on these factual findings and respondent's stipulations in his answer, the committee determined that respondent violated the Rules of Professional Conduct as alleged in the formal charges. The committee found mitigating factors to be present, namely "the relative inexperience of the respondent, the respondent's reliance upon the statements of his client, and the lack of any motive to do harm to any party." The committee determined that instead of taking the time to investigate Walter's statements, respondent gave into pressure to expedite the refinancing process. The committee further determined that in doing so, respondent made an error which was not motivated by financial gain and was probably made because respondent believed he was expediting a matter that was both truthful and accurate. Respondent's error caused financial loss, which has been resolved by the courts.

The committee was impressed by the character witness and character affidavits submitted by respondent for consideration. The committee also felt that respondent's error was "one that all people in all professions are confronted with at the beginning of their careers."

Under these circumstances, the committee recommended that respondent be publicly reprimanded. The ODC filed an objection to the hearing committee's recommendation.

Ruling of the Disciplinary Board

After review, the disciplinary board determined that the hearing committee's factual findings were not manifestly erroneous. Furthermore, the board determined ***698** the committee properly found that respondent had violated the Rules of Professional Conduct as alleged in the formal charges.

The board found that respondent's conduct was negligent as to the 8.4(c) and (d) violations; however, his violation of Rule 3.3(a)(1) was knowing. It determined ****6** his conduct caused harm to both Shirley's children and Walter, because Shirley's children were required to file a lawsuit to have the appropriate will recognized by the court, and Walter was forced to defend himself in the proceeding. It concluded the lawsuit might have been avoided had respondent investigated Patsy's succession issues. Nevertheless, it recognized Shirley's children received $70,000 in settlement of their malpractice claim against respondent and others.

The board determined that the baseline sanction in this matter is a public reprimand. It found no aggravating factors present. In mitigation, it noted the following: absence of a dishonest or selfish motive, timely good faith effort to make restitution or to rectify the consequences of the misconduct, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, inexperience in the practice of law (admitted 1996), character or reputation, and remorse.

Finding that the case law supports a public reprimand for the misconduct at issue, the board ordered that respondent be publicly reprimanded.[2] It further ordered that he be assessed with all costs and expenses of these proceedings.

Three members of the disciplinary board dissented on the issue of an appropriate sanction. Relying on *In re: Wahlder,* 98–2742 (La.1/15/99), 728 So.2d 837, the dissenting board members would recommend that respondent be suspended from the practice of law for six months, with all but thirty days deferred.[3]

****7** The ODC sought review of the disciplinary board's ruling in this court. We ordered the parties to submit briefs addressing the issue of whether the record supports the board's report. After reviewing the briefs filed by both parties, we docketed the matter for oral argument.

DISCUSSION

[1] [2] Bar disciplinary matters come within the original jurisdiction of this court. La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing ***699** evidence. *In re: Quaid,* 94–1316 (La.11/30/94), 646 So.2d 343; *Louisiana State Bar Ass'n v. Boutall,* 597 So.2d 444 (La.1992). While we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board, we have held the manifest error standard is applicable to the committee's factual findings. *See In re: Caulfield,* 96–1401 (La.11/25/96), 683 So.2d 714; *In re: Pardue,* 93–2865 (La.3/11/94), 633 So.2d 150.

[3] Based on the stipulations by respondent and other evidence in the record, we find respondent notarized and caused to be filed into a succession proceeding two affidavits that he knew or should have known contained

false information. As respondent has admitted, there is clear and convincing evidence which establishes that he has violated Rules 3.3(a)(1), 8.4(c), and 8.4(d) of the Rules of Professional Conduct.

[4] [5] [6] ****8** Having found evidence of professional misconduct, we now turn to a determination of the appropriate sanction for respondent's actions. In considering that issue, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis,* 513 So.2d 1173 (La.1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington,* 459 So.2d 520 (La.1984).

With regard to the affidavit of death and heirship executed by Walter, stating that Patsy died without leaving a will, we find respondent's conduct was largely negligent. Although respondent probably should have undertaken a more detailed investigation to confirm the correctness of Walter's statement that Patsy died intestate, there was nothing in the statement to indicate it was false on its face.

[7] The same cannot be said of the affidavit executed by respondent's office staff. It is undisputed that respondent knew his notarial secretaries were not "well acquainted" with Patsy, and that they had no personal knowledge of whether she died intestate. The only logical conclusion which can be drawn from respondent's actions is that he knowingly and intentionally filed this false affidavit into the court records. Respondent's actions caused actual harm to Walter and Shirley's children. In addition, respondent's actions caused harm to the court system, which must be able to rely on the truthfulness of representations made by counsel. The baseline sanction for respondent's misconduct is a suspension from the practice of law. *See In re: Wahlder,* 98–2742 (La.1/15/99), 728 So.2d 837.

In mitigation, we accept the hearing committee's finding that respondent did not file this affidavit with any improper motive. As the committee observed, ****9** respondent sincerely believed that Walter's representation that his wife died intestate was truthful and accurate, and his actions were undertaken with the intent of expediting the refinancing of Walter's home. We also recognize the absence of a prior disciplinary record, respondent's full and free disclosure to the disciplinary board and cooperative attitude toward the proceedings, inexperience in the practice of law at the time of the offense, good character and reputation, and remorse. We are unable to discern any aggravating factors from the record.

Considering all the circumstances, we find the appropriate sanction in this case is a six-month suspension from the practice ***700** of law. In light of the substantial mitigating factors present, and the absence of any aggravating factors, we will defer all but thirty days of the suspension, subject to the condition that any misconduct during a six-month period may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate.

DECREE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, briefs, and oral argument, it is ordered that Mitchell Reid Landry, Louisiana Bar Roll number 24147, be suspended from the practice of law for a period of six months. It is further ordered that all but thirty days of the suspension shall be deferred and respondent shall be placed on unsupervised probation for six months, subject to the condition that any misconduct during this period may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

TRAYLOR, Justice, dissents and would impose greater discipline.

All Citations

934 So.2d 694, 2005-1871 (La. 7/6/06)

Footnotes

1 More specifically, respondent provided the following admissions:

> (a) With respect to Rule 3.3(a), while [respondent] knew that his secretarial employees were not personally acquainted with the deceased or Mr. Wallendorf, he did not know nor did he believe that the underlying facts contained in the affidavits were false; rather, he believed the underlying facts to be true based upon Mr. Wallendorf's representations;
>
> (b) With respect to Rule 8.4(c) and (d), [respondent] further responds that he did not intentionally engage in any conduct involving misrepresentation to the court on the substantive facts placed before the court in connection with this succession proceeding, but does acknowledge that those aspects of the affidavit stating that the affiants were personally acquainted with the decedent were not accurate.

2 The board cited *In re: Hartley,* 03–2828 (La.4/2/04), 869 So.2d 799 (this court dismissed formal charges filed against an attorney who instructed a fellow attorney to notarize a power of attorney that incorrectly stated the affiant and a witness executed the document in the presence of the notary); *In re: Guillory,* 01–DB–047 (Board Op. 11/19/02) (the board publicly reprimanded an attorney who notarized an act of exchange involving real property after some of the owners did not sign the document in his presence); and *In re: Deshotel,* 97–DB–063 (Board Op. 4/8/99) (the board publicly reprimanded an attorney who prepared and backdated a marriage contract to a date prior to the signatories' marriage even though he knew that a post-nuptial execution of a marriage contract without court authority was null).

3 In *Wahlder,* the attorney permitted his client to sign his wife's name to settlement documents, then witnessed the wife's signature as if she had appeared before the lawyer. The attorney also knowingly attempted to prevent the client's wife and the court from discovering his actions by refusing to produce the documents when requested. Nonetheless, considering the significant mitigating factors present, including a lack of a dishonest or selfish motive and respondent's timely good faith efforts to rectify the consequences of the misconduct, the court imposed a fully deferred six-month suspension with probation.

End of Document

930 So.2d 875
Supreme Court of Louisiana.

In re Joel G. PORTER.

No. 2005–B–1736.
|
March 10, 2006.
|
Rehearing Denied June 23, 2006.

Synopsis

Background: In an attorney disciplinary proceeding, the hearing committee recommended suspension for one year and one day, as to one count, and public reprimand, as to second count, and the Disciplinary Board recommended 18-month suspension. Attorney objected to Board's recommendation.

[Holding:] The Supreme Court held that one-year suspension was appropriate disciplinary sanction for attorney's conduct in abandoning his clients without notice and falsely notarizing a signature on an affidavit attached to the petition in a defamation action.

Attorney suspended.

West Headnotes (8)

[1] **Attorneys and Legal Services**Communications, representations, and disclosures

Attorney's failure to notify clients that, after he and his co-counsel severed their professional and office-sharing arrangement, attorney would no longer be representing clients in their civil action against cemetery owner, violated professional conduct rule regarding communication with clients. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rule 1.4, LSA-R.S. foll. 37:222.

[2] **Attorneys and Legal Services**Signatures and notarization

Attorney's conduct in notarizing husband's signature, on behalf of wife, on affidavit of husband and wife attached to their petition in a defamation action, violated professional conduct rules regarding candor to tribunal and knowingly making false statement of material fact or law to third person, and rules prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation and conduct prejudicial to administration of justice. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 3.3(a), 4.1(a), 8.4(c, d), LSA-R.S. foll. 37:222.

[3] **Attorneys and Legal Services**Court of last resort; Supreme Court

Bar disciplinary matters come within the original jurisdiction of the Supreme Court. LSA-Const. Art. 5, § 5(B).

[4] **Attorneys and Legal Services**Evidence, verdict, and findings

In attorney disciplinary proceedings, the Supreme Court acts as trier of fact and conducts an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence.

[5] **Attorneys and Legal Services**Evidence, verdict, and findings

While the Supreme Court is not bound in any way by the findings and recommendations of the hearing committee and disciplinary board in an attorney disciplinary proceeding, the manifest error standard is applicable to the hearing committee's factual findings.

[6] **Attorneys and Legal Services** Nature and purpose

In determining an attorney disciplinary sanction, the Supreme Court is mindful that attorney disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct.

1 Cases that cite this headnote

[7] **Attorneys and Legal Services** Factors Considered

The attorney discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved, considered in light of any aggravating and mitigating circumstances.

1 Cases that cite this headnote

[8] **Attorneys and Legal Services** Definite Suspension

One-year suspension was appropriate disciplinary sanction for attorney's conduct in abandoning his clients without notice and falsely notarizing a signature on an affidavit attached to the petition in a defamation action. State Bar Articles of Incorporation, Art. 16, Rules of Prof.Conduct, Rules 1.3, 1.4, 3.3(a), 4.1(a), 8.4(c, d), LSA-R.S. foll. 37:222.

2 Cases that cite this headnote

Attorneys and Law Firms

***876** Charles B. Plattsmier, Baton Rouge, Shana Marice Broussard, for applicant.

Clary & Overton, James R. Clary, Jr., Baton Rouge, Thomas Law Firm, Richard S. Thomas, Joel G. Porter, for respondent.

****1** ATTORNEY DISCIPLINARY PROCEEDINGS

PER CURIAM.

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Joel G. Porter, an attorney licensed to practice law in Louisiana.

UNDERLYING FACTS

Count I—The Winnfield Cemetery Matter

In February 1994, Mamie Burden Williams and five others retained respondent to represent them in a suit against the Winnfield Funeral Home Cemetery ("Winnfield").[1] Respondent agreed to pursue the matter on a contingent fee basis plus an additional charge of $250 per person for costs, which the parties paid.

In April 1994, respondent filed a lawsuit against Winnfield and its insurer on behalf of his six clients. In June 1995, respondent amended the petition to add twenty additional plaintiffs. Thereafter, respondent had no further

contact with his clients.

In March 1996, Christopher Whittington, an attorney with whom respondent shared an office in Baton Rouge, enrolled as co-counsel in the Winnfield case. At the same time, Mr. Whittington filed a motion for preliminary default, which was granted on March 20, 1996. Sometime thereafter, respondent and Mr. Whittington severed ****2** their professional relationship and respondent opened a law office at the Weller Avenue Baptist Church in Baton Rouge, where he was a minister. In June 1998, Mr. Whittington filed a motion to withdraw as co-counsel, which was granted.

In October 1998, attorney David Lefeve filed an answer to the plaintiffs' petition on behalf of the defendants. In February 1999, Mr. Lefeve sent a discovery request to the plaintiffs via certified mail addressed to respondent's post office box, which was properly delivered. Respondent did not produce the requested information. Mr. Lefeve then filed a motion to compel, but respondent did not appear at the hearing on the motion in October 1999. In November 1999, the trial court ordered respondent to respond to the discovery request. Respondent did not comply with the order. As such, in February 2000, Mr. Lefeve filed a motion to dismiss. Respondent did not appear at the hearing on the motion to dismiss, and a judgment dismissing the plaintiffs' case without prejudice was rendered in March 2000.

In October 2000, Ms. Williams learned of the dismissal of the suit and filed a complaint against respondent with the ODC.

Count II—The West Matter

In February 1997, respondent filed a defamation suit against Yolanda Hill on ***877** behalf of his clients, Charles and Patricia West. An affidavit was attached to the petition, purportedly signed in respondent's presence by Mr. and Mrs. West, attesting that the factual allegations contained in the petition were true. The affidavit was notarized by respondent. However, Mrs. West did not sign the verification in respondent's presence. Instead, respondent witnessed Mr. West sign the verification with his wife's signature. The improperly notarized verification was filed into the court record and served upon the defendant, Ms. Hill, who subsequently filed a complaint against respondent with the ODC.

****3 DISCIPLINARY PROCEEDINGS**

The ODC filed two counts of formal charges alleging that respondent's conduct violated the following Rules of Professional Conduct: Rules 1.3 (failure to act with reasonable diligence and promptness in representing a client), 1.4 (failure to communicate with a client), 3.3(a) (candor toward the tribunal), 4.1(a) (knowingly making a false statement of material fact or law to a third person), 8.4(a) (violation of the Rules of Professional Conduct), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice).

Respondent answered the formal charges, denying any misconduct on his part. In Count I, respondent contended that the motion to compel was improperly served because the service address was that of the church where he was a minister. He denied ever receiving this service. Respondent also asserted that he had no notice of Mr. Whittington's motion to withdraw, which did not include a certificate of service. Furthermore, Mr. Whittington had possession of the file because he would not allow respondent to take the file when respondent vacated Mr. Whittington's office in 1996. Respondent asserted that he attempted to contact Mr. Whittington regarding the case but was unsuccessful. As an affirmative defense, respondent claimed he reasonably relied upon Mr. Whittington to handle the case.

As to Count II, respondent admitted the notarial act was improper; however, he claimed the verification was not "legally material" to the suit and contained no material facts. Respondent also pointed out that Mr. West signed his wife's signature with her permission. Respondent nevertheless acknowledged the profession could be harmed by such a practice and asserted that same would not occur in the future.

****4** *Hearing Committee Recommendation*

This matter proceeded to a formal hearing on the merits, at which respondent and others testified. Following the hearing, the hearing committee determined that respondent's testimony in regard to Count I was not credible. Specifically, the committee stated,

"[r]espondent's testimony that he left everything in the hands of Mr. Whittington even after he removed himself from Mr. Whittington's office building does not ring true." Based on its evaluation of the testimony and documentary evidence, the committee made the following findings of fact regarding Count I:

1. In February 1994, Ms. Williams, Lionel Courtney, and others retained respondent to represent them in a civil suit for damages against Winnfield Funeral Home regarding the displacement of headstones on family burial sites.

2. Respondent agreed to represent them, and each person was instructed to bring a retainer of $250 to cover the costs, for a total of $1,350. Mr. Courtney paid $1,000 of this amount for himself and for others.

3. On April 23, 1994, respondent filed a petition for damages on behalf of the plaintiffs, and on June 5, 1995, he filed an ***878** amending petition adding an additional twenty plaintiffs to the suit.

4. On March 15, 1996, attorney Christopher Whittington filed a motion to enroll as co-counsel.

5. On June 8, 1998, Christopher Whittington filed a motion to withdraw and did, in fact, withdraw from the case.

6. During this time, respondent did not communicate with the plaintiffs, did not provide them with a copy of their legal pleadings, and did not actively pursue their case in any way.

7. On October 29, 1998, David Lefeve answered on behalf of the defendant.

****5** 8. On January 15, 1999, Mr. Lefeve attempted to correspond with respondent at Mr. Whittington's law office in Baton Rouge, which letter was returned.

9. On February 17, 1999, interrogatories were forwarded to respondent by certified mail at his new law office at the Weller Avenue Baptist Church, which was received by respondent on February 26, 1999. Respondent failed to respond to the requests for information.

10. On March 25, 1999 and April 20, 1999, Mr. Lefeve wrote to respondent at the Weller Avenue Baptist Church address (both the post office box and the street address). Respondent still refused to respond to any inquiries from the defendant's attorney.

11. On June 14, 1999, a motion to compel was filed and mailed to respondent at the street address of the Weller Avenue Baptist Church.

12. Respondent failed to attend the hearing scheduled for October 25, 1999.

13. On November 4, 1999, the court ordered respondent to respond to the discovery requests, but respondent refused.

14. The plaintiffs' suit was eventually dismissed on March 20, 2000.

Based on these factual findings, the committee determined that respondent failed to keep his clients advised of the status of their case and completely neglected their case, resulting in the loss of the retainer as well as the dismissal of the case. After respondent left Mr. Whittington's office, he received several legal documents, letters, and phone calls at his new law office, which he basically ignored. He failed to notify his clients of his new address or that he was no longer in association with Mr. Whittington. Respondent completely abandoned his clients, which ultimately led to the dismissal of their case.

Relying on this court's prior jurisprudence and the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined that the baseline sanction for ****6** the misconduct in Count I is suspension. The committee found the following aggravating factors: a pattern of misconduct, refusal to acknowledge the wrongful nature of the conduct, vulnerability of the victims, substantial experience in the practice of law (admitted 1992), and indifference to making restitution. In mitigation, the committee found the absence of a prior disciplinary record and remorse.

For his misconduct in Count I, the committee recommended that respondent be suspended from the practice of law for one year and one day. The committee also recommended that respondent be required to make restitution to his clients.[2]

The committee made the following findings of fact as to Count II:

1. On February 28, 1997, respondent filed a defamation suit on behalf of Charles ***879** and Patricia West in Baton Rouge City Court.

2. Attached to the petition was a verification of petition purported to have been signed by Patricia West in respondent's presence and notarized by him.

3. Patricia West did not appear before respondent on the date the verification was signed. Instead, respondent allowed Mrs. West's husband, Charles West, to sign the verification.

4. Respondent knew the verification was improper at the time it was signed.

5. Mr. West had Mrs. West's permission to sign the verification on her behalf.

The committee determined the baseline sanction for the misconduct in Count II is a reprimand. Accordingly, the committee recommended that respondent be publicly reprimanded for his misconduct in Count II.

Both respondent and the ODC filed objections to the hearing committee's recommendation.

****7** *Disciplinary Board Recommendation*

After review, the disciplinary board found that the hearing committee's findings of fact are generally supported by the record and are not manifestly erroneous. In particular, the board determined there is ample evidence in the record to show that respondent received several letters and motions at the Weller Avenue Baptist Church address, though some of the correspondence is not in the record. The board was uncertain how the committee calculated the total retainer amount of $1,350, although the committee correctly found that each of the six original clients in Count I were instructed to pay a retainer of $250 and that Mr. Courtney paid $1,000 for himself and others. In all other respects, the board found support in the record for the committee's factual findings and adopted same.

[1] [2] The board found that respondent violated Rules 1.3 and 1.4 of the Rules of Professional Conduct in regard to Count I. As to Count II, the board found that respondent violated Rules 3.3(a), 4.1(a), 8.4(a), 8.4(c), and 8.4(d).

In violating the above Rules of Professional Conduct, the board determined that respondent violated duties owed to his clients, the public, and the legal system. He acted knowingly, causing harm to his clients in Count I and to the "public record" and the profession in Count II.

In Count I, the board found that respondent did nothing after filing the petition and amended petition. He did not provide his clients with information or copies of any pleadings. He did not take action even after receiving pleadings and letters from defense counsel. Furthermore, although he claimed Mr. Whittington was handling the matter, respondent failed to file a motion to withdraw and did not notify his clients that he would no longer be representing them. He tried to blame Mr. Whittington by suggesting he did not receive notice of Mr. Whittington's withdrawal; however, respondent "seems oblivious to the fact that he abandoned his clients ****8** without any notice to them whatsoever." He failed to follow the rules regarding notification designed to protect his clients and upon which they were entitled to rely. Finally, respondent argued that his clients were not harmed because their suit was dismissed without prejudice. However, respondent was first retained in 1994. To date, his clients have no information regarding the status of their case, and it remains unresolved.

In Count II, the board found that respondent admitted he notarized the verification. However, he argued that the verification was immaterial. Nonetheless, the lack of candor in his actions caused harm.

***880** The board determined the baseline sanction for respondent's misconduct is suspension under the ABA's *Standards for Imposing Lawyer Sanctions.* The board adopted the aggravating and mitigating factors found by the committee and added the aggravating factor of multiple offenses.

Considering these findings and this court's prior jurisprudence, the board recommended that respondent be suspended from the practice of law for eighteen months. The board also recommended that respondent be assessed with all costs and expenses of these proceedings.

Respondent filed an objection to the disciplinary board's recommendation. Accordingly, the case was docketed for oral argument pursuant to Supreme Court Rule XIX, § 11(G)(1)(b).

DISCUSSION

[3] [4] [5] Bar disciplinary matters come within the original jurisdiction of this court. La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence. ****9** *In re: Quaid,* 94–1316 (La.11/30/94), 646 So.2d 343; *Louisiana State Bar Ass'n*

v. Boutall, 597 So.2d 444 (La.1992). While we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board, we have held the manifest error standard is applicable to the committee's factual findings. *See In re: Caulfield,* 96–1401 (La.11/25/96), 683 So.2d 714; *In re: Pardue,* 93–2865 (La.3/11/94), 633 So.2d 150.

The record reveals that in Count I, respondent neglected his clients' legal matter and failed to communicate with them. He moved out of Mr. Whittington's office and relocated to a church, where he maintained a small law practice but primarily considered himself a minister. Nevertheless, respondent did not properly withdraw from the Winnfield cemetery case or take steps to notify his clients that he would no longer be handling their legal matter. In Count II, respondent admitted that he improperly notarized a pleading that he later filed into the court record.

[6] [7] Having found evidence of professional misconduct, we now turn to a determination of the appropriate sanction for respondent's actions. In determining a sanction, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis,* 513 So.2d 1173 (La.1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington,* 459 So.2d 520 (La.1984).

[8] In acting as he did, respondent violated the Rules of Professional Conduct as alleged in the formal charges. He violated duties owed to his clients, the legal system, and the profession. He acted knowingly, causing actual harm to his clients and potential harm to the legal system. The baseline sanction is a period of suspension.

**10 The aggravating factors present are multiple offenses and vulnerability of the victims. In mitigation, we recognize that respondent has no prior disciplinary record and was relatively inexperienced in the practice of law at the time of the misconduct at issue here. He has also expressed remorse for his conduct and has pledged to avoid similar problems in the future.

Under these circumstances, we conclude the appropriate sanction for respondent's misconduct is a one-year suspension from the practice of law.

***881 DECREE**

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, briefs, and oral argument, it is ordered that Joel Gerard Porter, Louisiana Bar Roll number 21825, be suspended from the practice of law for one year. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

All Citations

930 So.2d 875, 2005-1736 (La. 3/10/06)

Footnotes

1 Ms. Williams and the other plaintiffs claimed that Winnfield removed all the headstones in the cemetery to perform work on the land to correct drainage problems. When the cemetery replaced the headstones following the work, it put them back on the wrong graves.

2 Following the issuance of the hearing committee's report, respondent paid $1,350 in restitution to the plaintiffs in the Winnfield cemetery matter.

2005-1736 (La. 3/10/06)

Think Before You Sign:

Notarial Liability in Louisiana

By Ryan K. French

Bar associations and practitioners do a fine job of warning new lawyers about the consequences of practicing law — the stressful tediousness of billable hours, the increased likelihood of substance abuse and the ethical pitfalls, among other things. What new lawyers are left woefully unprepared for, however, is their newfound power to notarize. Not only is this notarial authority a source of significant responsibility, but, to the surprise of many lawyers, it is also a source of significant liability.

Attorney-Notary Authority

Louisiana attorneys are not automatically licensed as Louisiana notaries. But an attorney's bar admission *does* automatically exempt him or her from the notary public examination, the only substantive hurdle to a notarial commission.[1] Armed with a Louisiana bar admission, the only other things an attorney needs to do to become a licensed notary is to complete an "Application to Qualify," submit two oaths, submit a "Certificate of Good Standing" and pay $35 to the Louisiana Secretary of State's office.[2] Ironically, though excused from taking the formal notarial exam, an attorney-notary's statewide commission is far more expansive than the parish-based commission held by traditional notaries.[3]

As word of the attorney's notarial authority then spreads, friends and acquaintances — and sometimes people who are neither — suddenly begin to show themselves, papers in hand. Vehicle title certificates, professional certification applications and acts of donation appear from nowhere and in extraordinary numbers. If the attorney is feeling particularly loyal to a friend, he might even find himself sitting outside of a Bob Seger concert in another city, waiting for a certain concert patron to exit and execute a notarial act of correction.[4]

With respect to all of an attorney's professional and extracurricular notarial activities, he or she remains bound to "perform all the duties incumbent upon [him or her] as Notary Public."[5] Perhaps the most obvious notarial duty is the obligation to properly administer oaths and certify sworn statements.[6] A lesser known duty is the obligation to record any notarized act of sale, exchange, donation or mortgage of immovable property in the relevant parish records within 15 days unless excused in writing.[7] It is also notaries to whom the law exclusively entrusts the authority to pass an authentic act,[8] validate a donation[9] or substantiate certain wills.[10] In each of these contexts, the presence of a notary is meant "to ensure the validity of a signature on a document and that the person whose name appears thereon is the person who actually signed the document."[11]

Despite this most basic function of the notary public, notarization is often perceived to be a separate, stand-alone formality that can be satisfied at any time. Before or after obtaining all of the relevant signatures, a well-intentioned party will often present a document to an attorney for "independent notarization." While in the words of one court, "[s]uch a procedure would defeat the entire purpose of the [notarization] requirement,"[12] attorneys are often pressured to simply endorse the already-signed document for everyone's convenience. In the vast majority of cases, the signatures are ultimately authentic, no one is inconvenienced, and the attorney becomes a little more convinced of the meaninglessness of notarial acts. Every once in a while, however, something different happens.

Notary Liability in Louisiana

Though it imposes various registration, bonding and other requirements, the Louisiana notary statute does not itself create a general cause of action against notaries public.[13] It, nonetheless, presupposes that a notary is liable "for the failure to perform his duties" by specifying that bonding does not affect a notary's liability for such failures.[14] Elsewhere, the notary statute provides prescriptive and peremptive periods for any action for damages "occasioned by [a] notary public in the exercise of the functions of a notary public."[15]

Filling the void left by the notarial statute, the Louisiana Supreme Court has articulated a "standard of care for a notary:"

> [S]o long as [a notary] exercises the precaution of an ordinarily prudent business man in certifying to the identity of the persons who appear before him, it may be doubted whether he has any other function to discharge.[16]

In light of the existence of a distinct legal standard and the pervasiveness of notarial acts, there are surprisingly few published judicial decisions considering the liability of a notary. What makes the absence of case law even more surprising is the willingness of courts, when given the chance, to hold notaries liable for failing to perform their duties. Generally speaking, these notarial negligence cases fall into two categories — (1) "imposter cases," in which a signatory is present, although the signatory is not who he claims to be; and (2) "absent-signor cases," in which the signatory is not physically present when the document is notarized.

Imposter Cases: Negligence Liability

With respect to notarial liability in an imposter case, the Louisiana 5th Circuit's decision in *Collins v. Collins*[17] is illustrative. In *Collins*, the plaintiff alleged that his ex-wife had appeared at the notary's office with a man purporting to be the plaintiff; that the notary failed to confirm his identity; that the man forged the plaintiff's name on an act of sale; and that the plaintiff thereby lost property in which he had an interest.[18] Construing the "prudent notary" standard, the *Collins* court first explained, "[A] notary is liable both for deliberate misfeasance in the course of his official duties and for negligence in performing those duties."[19] Under this standard, the court then held a notary could certainly be liable for failing to confirm the identity of a signatory.[20]

In contrast to *Collins*, there are two decisions (*Howcott* and *Quealy*)[21] declining to hold a notary liable for notarizing a false signature. Like *Collins*, both of those decisions involved an "imposter"

who physically appeared before the notary.[22] In both of these decisions, however, the imposter was introduced and vouched for by someone with whom the relevant notary had a significant pre-existing relationship.[23] Where a notary is less familiar with someone, though, the notary's reliance upon an introduction has been found to be a "serious deviation from safe business practices" and, therefore, negligent.[24]

Another noteworthy decision is the Louisiana 2nd Circuit's opinion in *Webb v. Pioneer Bank & Trust Co*.[25] Indeed, the *Webb* court considered the liability of a notary in the circumstances arguably most likely to face a busy attorney — while a notarized signature was later shown to be forged, the notary simply could not remember the specific facts surrounding the transaction.[26] The notary's inability to offer an explanation (some five years after the transaction) was fatal; faced with only a forged signature, the court had to presume that the notary was negligent in certifying its authenticity.[27]

Absent-Signor Cases: Fraud Liability

While it is one thing to fail to verify the identity of a signor that is physically present, it is an entirely different thing to notarize the signature of someone who was never seen. This distinction, it turns out, is the difference between a finding of negligence and a finding of fraud.

Squarely before the Louisiana 1st Circuit in *Summers Bros., Inc. v. Brewer* (1982) was an attorney's "independent notarization," or the certification of a signature that was not physically witnessed by the attorney-notary.[28] The notarized, forged document then served as the basis for various commitments of money and equipment, ultimately costing the aggrieved party more than $10,000.[29] Emphasizing the deception inherent in the notarization of an absent party's signature, the court stated:

> Even if [the attorney-notary] did not know that the signatures on the contract were forgeries, he knew that by authenticating the document, as notary, he was telling the world that the parties had appeared before him and affixed their signatures in his presence. Thus, he committed fraud in that he purposely let third parties rely on a document purporting to be genuine but actually without validity as an authentic act. The "proof" of validity he supplied was misleading to all who relied on the contract.[30]

The 1st Circuit reaffirmed this reasoning in *McGuire v. Kelly*, which also concerned an attorney's notarization of an absent party's signature.[31] Like the *Summers* court before it, the *McGuire* court determined that to notarize an absent party's signature is tantamount to falsely representing that a party personally appeared, presented identification and inscribed a signature.[32] In other words, the *McGuire* court explained, such a notarization is the definition of *fraud*:

> Regardless of whether [the attorney-notary] was aware of Kelly's scheme and his forgery of the plaintiffs' signatures, [the attorney-notary] knew that his acknowledgment was false . . . . Furthermore, [the attorney-notary] knew that the plaintiffs did not appear before him and acknowledge their signatures on the deed, nor did he require that they do so . . . . [By] signing the acknowledgment clause, [the attorney-notary]'s actions were a deliberate misrepresentation.[33]

Put another way, an attorney who notarizes a signature he or she did not witness commits fraud, *even if the signature is authentic*.

Consequences of Notarial Malfeasance

The consequences of notarizing an illegitimate signature can be severe. The most obvious consequence, of course, is the potential liability for resulting damages. Where an aggrieved party can adequately demonstrate its reliance upon an illegitimate notarization, courts have not hesitated to attribute all resulting damages and expenses to the notary.[34]

Notarial malfeasance has the additional, unique consequence of exposing the notary to liability to anyone who might come to rely upon the tainted document. As the title notary *public* might suggest, the very function of a notary is

to "purposely let third parties rely on a document."[35] The improper discharge of notarial duties, therefore, permits the notary "to be held liable to *anyone* who may be thereby injured."[36]

For those who face fraud liability, the consequences of notarial misconduct are even more severe. In some cases, the mutual misrepresentations of the notary and the party submitting the false signature — even though the notary was not necessarily aware of the forgery — can constitute concerted action sufficient to make the notary solidarily liable for all resulting damages.[37]

Perhaps more practically damning is the effect of a fraud finding upon an attorney-notary's insurance coverage. Because many malpractice insurance policies exclude coverage for claims arising out of fraudulent or deceptive acts, an attorney sued over a notarial act could conceivably have no source of indemnity. Indeed, this is precisely what happened in *McGuire*, where the Louisiana 1st Circuit determined that the professional liability insurer owed no coverage to the attorney-notary who notarized the signature of an absent party.[38] From here, it is not difficult to argue that notarial malfeasance justifies piercing the corporate veil of the attorney-notary's law firm[39] and even creates a non-dischargeable debt.[40]

As if the legal consequences of notarial malfeasance were not enough, such conduct is also ripe for professional discipline. In fact, the notary statute expressly contemplates that attorney-notaries will at all times remain subject to "the authority of the Louisiana Supreme Court to regulate the practice of law."[41] In turn, Rule 8.4 of the Louisiana Rules of Professional Conduct makes it professional misconduct for an attorney to "engage in conduct involving dishonest, fraud, deceit or misrepresentation."

By definition, mere negligence in the course of notarial work should not constitute a violation of the Rules of Professional Conduct. If the legal analysis applied in *Summers* and *McGuire* is any indication, however, the notarization of an absent party's signature is not merely negligence. Given the sole purpose of notarial attestation, such an "independent notarization" certainly seems to be misrepresentative, dishonest and deceptive. For precisely these reasons, the Louisiana Supreme Court has ordered a range of disciplinary actions in response to similar conduct.[42]

Conclusion

Like many articles, this one was inspired by real events and a very real lawsuit. Despite the shortage of litigation on the topic, the severity with which the law has punished careless notarial conduct is startling. To those attorneys who continue to serve as notaries, the Louisiana Supreme Court's 141-year-old statement in *Rochereau v. Jones* remains both remarkably relevant and the best summary of the responsibilities:

> High and important functions are entrusted to notaries; they are invested with grave and extensive duties . . . . Their responsibility is as high as their trust, and a notary who officially certifies as true what he knows to be false violates his duty, commits a crime, forfeits his bond, binds himself, and binds his sureties.[43]

FOOTNOTES

1. *See,* La. R.S. 35:191(C)(3)(c).
2. *See generally,* La. R.S. 35:191.
3. *See,* La. R.S. 35:191(A), (F)-(O).
4. Yes, this happened.
5. *See id*.
6. La. R.S. 35:2, 35:3.
7. La. R.S. 35:199 (48 hours in Orleans Parish). The same statutory provision establishes a $200 penalty and a cause of action in favor of all parties to the instrument.
8. La. Civ.C. art. 1833.
9. La. Civ.C. art. 1541.
10. La. Civ.C. art. 1577.
11. *See,* Zamjahn v. Zamjahn, 02-871 (La. App. 5 Cir. 1/28/03), 839 So.2d 309, 315.
12. *Id*.
13. *See,* La. R.S. 35:1 *et seq*.
14. *See,* La. R.S. 35:198(A).
15. La. R.S. 35:201.
16. Howcott v. Talen, 63 So. 376, 379 (La. 1913); Quealy v. Paine, Webber, Jackson & Curtis, Inc., 475 So.2d 756, 761 (La. 1985) (quoting Howcott).
17. 629 So.2d 1274 (La. App. 5 Cir. 1993), *writ denied*, 635 So.2d 1110 (La. 1994).
18. *Id*. at 1276.
19. *Id*.
20. *Id*. at 1277.
21. Howcott v. Talen, 63 So. 376, 379 (La. 1913); Quealy v. Paine, Webber, Jackson & Curtis, Inc., 464 So.2d 930, 938 (La. App. 4 Cir. 1985), *aff'd in relevant part, revd in part on other grounds*, 475 So.2d 756 (La. 1985).
22. Quealy, 464 So.2d at 938; Howcott, 63 So. 376 at 379.
23. Quealy, 464 So.2d at 938; Howcott, 63 So. 376 at 379.
24. Levy v. W. Cas. & Sur. Co., 43 So.2d 291, 294 (La. App. 2 Cir.1949).
25. 530 So.2d 115, 118 (La. App. 2 Cir. 1988).
26. *Id*. at 117.
27. *Id*. at 118.
28. 420 So.2d 197, 201 (La. App. 1 Cir. 1982).
29. *Id*. at 203.
30. *Id*. at 204.
31. 2010-0562, 2012 WL 602366 (La. App. 1 Cir. 1/30/12).
32. *Id*. at *11-12.
33. *Id*. at *12.
34. *See, e.g.*, Summers Bros. v. Brewer, 420 So.2d 197, 204 (La. App. 1 Cir. 1982).
35. *Id*. at 204.
36. Harz v. Gowland, 52 So. 986, 987 (La. 1910) (emphasis added); *see also,* Summers, 420 So.2d at 204 ("A notary is responsible to all persons . . . .").
37. McGuire, 2010-0562, 2012 WL 602366 at *12.
38. *Id*. at *13-14.
39. *See,* Riggins v. Dixie Shoring Co., 590 So.2d 1164, 1168 (La. 1991).
40. *See,* 11 U.S.C. § 523(a)(6).
41. *See,* La. R.S. 35:604.
42. *See, e.g.*, In re Hollis, 2013-2568 (La. 3/14/14), 135 So.3d 596, 599 (ordering attorney discipline based, in part, on "notarizing [an] affidavit outside of the presence of the affiant"); In re Porter, 2005-1736 (La. 3/10/06), 930 So.2d 875, 876-77; In re Landry, 2005-1871 (La. 7/6/06), 934 So.2d 694, 699.
43. Rochereau v. Jones, 29 La. Ann. 82, 86 (La. 1877).

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