NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0048

PHYLLIS M. NELSON

VERSUS

NEIL E. WISEMAN, COLDWELL BANKER TEC REALTOR AND CONTINENTAL CASUALTY COMPANY

Judgment Rendered: November 3, 2006

Appealed from the
Twenty-second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2005-10567

Honorable William J. Burris, Judge Presiding

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BEFORE: CARTER, C.J. WHIPPLE AND McDONALD, JJ.

McDonald, J. concurs.

WHIPPLE, J.

In this appeal, plaintiff challenges the trial court's judgment, which maintained an exception of res judicata and dismissed plaintiff's suit with prejudice. For the following reasons, we affirm in part, reverse in part and remand.

FACTS AND PROCEDURAL HISTORY

On February 3, 2005, plaintiff, Phyllis Nelson, filed suit for breach of contract, detrimental reliance and damages, naming as defendants: Neil Wiseman; Coldwell Banker TEC Realtor ("Coldwell Banker"), Wiseman's employer; and Continental Casualty Company, defendants' insurer. In her petition, plaintiff alleged that on September 29, 2003, she had entered into a purchase agreement to purchase a home in Mandeville, Louisiana, with the act of sale scheduled for November 3, 2003. Plaintiff further alleged that in regard to her attempts to purchase this home, defendant Wiseman was acting as a dual agent for both buyer and seller.

As alleged in the petition, all parties were aware that plaintiff planned to convert the home into a child care center, and prior to the purchase agreement being finalized, plaintiff began working to obtain the required zoning approval for a child care center at that location, with both Wiseman and the seller attending zoning and planning meetings for that purpose. However, as alleged by plaintiff, despite these attempts, the required zoning approval was not obtained until January of 2004, which she alleged occurred after the expiration of the September 29, 2003 purchase agreement.

According to the petition, once the zoning approval was obtained, plaintiff and the seller began to renegotiate another sales contract. The petition further averred that despite the alleged expiration of the purchase agreement, upon the zoning approval, plaintiff then began work on obtaining

proper state and federal licenses as well as bringing the property within compliance of parish, city, state and federal codes.

With regard to the negotiations between plaintiff and the seller, plaintiff alleged in her petition that they began discussions regarding the possibility of a lease/purchase agreement for the property, and plaintiff and Wisemen drafted a lease/purchase agreement. While plaintiff acknowledged in her petition that the seller never signed the lease/purchase agreement, she averred that Wiseman assured her that the lease/purchase agreement would be approved by the seller and that plaintiff would be required to present $12,000.00 at the April 26, 2004 proposed closing. Thus, plaintiff alleged that she continued to obtain proper licensure, codal approval and inspections under the belief that the closing would take place on April 26, 2004.

Plaintiff further alleged in her petition that she closed her dance instructing business in New Orleans to devote her time to preparing the Mandeville property for the eventual opening of her child care business. Additionally, she alleged that Wiseman was present with her frequently during the two weeks preceding the proposed closing date, preparing final touches to the child care center.

However, plaintiff averred that "later negotiations" just prior to the proposed closing date revealed that the lease/purchase was not agreeable to the seller. Plaintiff contended that she then attempted to obtain an investor to purchase the property, who would then lease it to plaintiff. However, she alleged that while the investor attempted to contact Wiseman, Wiseman made no contact with the investor.

According to the petition, Wiseman then advised plaintiff on the date of the proposed closing, April 26, 2004, that there was a predicated contract on the property with another purchaser. Plaintiff averred that she and her

investor composed another offer to counter the predicated contract, and the offer was sent by facsimile transmission to Wiseman. However, Wiseman never replied.

Plaintiff further averred that she had detrimentally relied upon the assertions and representations of Wiseman and Coldwell Banker that plaintiff would obtain the property at issue. She contended that defendants were liable to her for misrepresenting her status of buyer throughout the time of preparation of the property prior to the anticipated closing date and for Wiseman's alleged conflict of interest as agent for both plaintiff and the seller, whom plaintiff learned at some point was Wiseman's wife. Thus, plaintiff sought damages for loss of income potential, economic loss, mental and emotional pain and suffering, aggravation and inconvenience.

Thereafter, defendants filed a "Peremptory Exception" on the basis that plaintiff had no right of action against them because she had executed a release, relieving them of any liability to her. In further explanation in their memorandum in support of their exception alleging plaintiff had no right of action, defendants contended that on November 4, 2003, plaintiff signed a "Cancellation of Agreement to Purchase or Sell," through which she was refunded her $2,000.00 deposit in exchange for a release of any claims against defendants in connection with the September 29, 2003 purchase agreement, thereby compromising her claim. Defendants filed two exhibits in support of their peremptory exception, including the Cancellation of Agreement to Purchase and Sell.

Defendants later filed a supplemental memorandum in support of their peremptory exception, wherein they stated as follows: "The Peremptory Exception filed by the defendants is simply titled 'Peremptory Exception.' The original Memorandum in Support was titled 'Memorandum in Support

of Exception of No Right of Action.' However, the exception and memorandum also should appropriately be considered an Exception of Res Judicata." Defendants averred that despite its title, the original memorandum clearly discussed the peremptory exception of res judicata. Thus, defendants stated that, "in addition to the exception of No Cause of Action, the defendants respectfully request this Honorable Court also consider the Peremptory Exception of Res Judicata which has been properly raised by the defendants."[1]

In their supplemental memorandum, defendants again argued that pursuant to the Cancellation of Agreement to Purchase and Sell, the parties released each other from any and all obligations in connection with the September 29, 2003 purchase agreement. Thus, defendants argued, plaintiff has no **cause of action** against defendants resulting from the September 29, 2003 purchase agreement, and all causes of action plaintiff may have had arising out of the purchase agreement and all damages incurred prior to the November 4, 2003 release were barred by res judicata due to written compromise.

Additionally, defendants contended that plaintiff had no **cause of action** for anything allegedly occurring after the release, because there was never any written contract to purchase or lease/purchase the property after that date and because defendants continued to fulfill the duties owed to plaintiff under the dual agency requirements of LSA-R.S. 9:3897. Defendants attached three exhibits to their supplemental memorandum,

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[1]While defendants' "Peremptory Exception" specifically stated that plaintiff had "no right of action" on the basis of release or compromise, defendants in their supplemental memorandum began referring to and arguing an exception of no **cause** of action. In fact, no argument was made in the supplemental memorandum regarding an exception of no right of action.

including copies of the purchase agreement, listing agreement and dual agency agreement.

Following a hearing, the trial court issued written reasons for judgment, in which it found that defendants had adequately raised the defense of res judicata and that an exception of res judicata was thus before the court. The court then granted the exception of res judicata, dismissing plaintiff's petition on that basis alone. The court concluded that its ruling on the exception of res judicata rendered it unnecessary to address the remaining exception. Accordingly, the trial court rendered judgment granting defendants' exception of res judicata and dismissing plaintiff's petition with prejudice.

From this judgment, plaintiff appeals, contending that the trial court erred in: (1) recognizing an exception of res judicata; and (2) ruling the matter was to be dismissed on an exception of res judicata.

ASSIGNMENT OF ERROR NUMBER ONE

In her first assignment of error, plaintiff contends that defendants failed to properly raise an exception of res judicata in that they did not file an exception of res judicata and that the trial court erred in recognizing the exception on its own motion. Pursuant to LSA-C.C.P. art. 927, a court cannot supply the objection of res judicata, which must be specially pleaded.

However, in Perkins v. Scaffolding Rental and Erection Service, Inc., 568 So. 2d 549, 550 (La. 1990), the third-party defendant filed an exception of no cause of action "on the ground that previously it had been dismissed with prejudice from the suit." While the third-party defendant's exception in Perkins did not expressly state the words "res judicata," the Louisiana Supreme Court upheld the exception on that very basis, i.e., that the third-party plaintiff was precluded by res judicata from maintaining the cause of

action. Perkins, 568 So. 2d at 553. Similarly, in Monk v. Scott Truck & Tractor, 619 So. 2d 890, 892, (La. App. 3rd Cir., 1993), the Third Circuit Court of Appeal concluded that an exception of no cause or right of action and an answer, which both denied liability on the basis of a previous adjudication, adequately raised the defense of res judicata in the lower court.

In the instant case, as stated above, defendants filed a "Peremptory Exception," in which they stated that plaintiff had no right of action on the basis of a release or compromise, i.e., the Cancellation of Agreement to Purchase or Sell. A valid compromise is appropriately raised as a bar to litigation through the defense of res judicata. Five N Company, L.L.C. v. Stewart, 2002-0181 (La. App. 1st Cir. 7/2/03), 850 So. 2d 51, 60.

Accordingly, considering the pleadings filed and based on the Supreme Court's holding in Perkins, we find that defendants adequately raised the defense of res judicata in the exception filed. See Perkins, 568 So. 2d at 553; Monk, 619 So. 2d at 892.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In her second assignment of error, plaintiff contends that the trial court erred in dismissing her suit on the basis of res judicata. In her brief, plaintiff acknowledges that she executed the cancellation agreement. However, she contends that her petition clearly sets forth that she detrimentally relied upon actions and assertions by Wiseman, after the cancellation of the purchase agreement, that she would obtain the property through a purchase or lease/purchase and, accordingly, continued to pursue zoning permits and financing. Plaintiff contends that the exception of res judicata thus does not account for the entirety of her claim, which extends far beyond the date of the cancellation agreement. As such, she contends

that even if this court agrees that the cancellation agreement is binding upon her, it should only be binding as to any claims arising on or before the original closing date of November 3, 2003. Additionally, plaintiff contends that defendant Wiseman did not sign the cancellation agreement, and, accordingly, because he was not a party to the compromise, her claims against him are not barred by res judicata.

On the trial of the peremptory exception raising the objection of res judicata, the burden of proving the facts essential to sustaining the objection is on the party pleading the objection. Union Planters Bank v. Commercial Capital Holding Corporation, 2004-0871 (La. App. 1st Cir. 3/24/05), 907 So. 2d 129, 130. While the doctrine of res judicata is ordinarily premised on a final judgment on the merits, it also applies where there is a transaction or settlement of a disputed or compromised matter that has been entered into by the parties. Ortego v. State, Dept. of Transp. and Development, 96-1322 (La. 2/25/97), 689 So. 2d 1358, 1363. A transaction or compromise is a mutual agreement between two or more persons for the benefit of preventing or terminating a lawsuit in the manner in which they agree and in the balance of reciprocal concessions. LSA-C.C. art. 3071; Ortego, 96-1322, 689 So. 2d at 1363. Consequently, a party claiming res judicata based on a compromise agreement must have been a party to the compromise, and the authority of the thing adjudged extends only to the matters those parties intended to settle. Ortego, 96-1322, 689 So. 2d at 1363.

In the instant case, the cancellation agreement regarding the property at issue provided, in part, as follows:

> It is hereby agreed and understood that the Seller and the Purchaser do mutually cancel and nullify the "Agreement to Purchase or Sell" on the above referenced property, hereinafter called the Property.

> The undersigned parties do hereby authorize Coldwell Banker TEC as the Listing Broker to return the Purchaser's deposit, in full, amounting to $2000[00] in cash and/or a $ ___N/A__ demand note upon receipt of this instrument fully executed by all parties hereto.
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> Coldwell Banker TEC as the Listing Broker and Coldwell Banker TEC as the Selling Broker, hereby waive any and all commission due them under said "Agreement to Purchase or Sell" unless Seller and Purchaser negotiate a sale of Property between them at any price within a period of six months after the final date of this instrument. In the event a sale of the Property is negotiated between Seller and Purchaser within this six month period, Seller shall pay __3__% of the Sales Price to the Listing Broker and __3__% of the Sales Price to the Selling Broker.
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> **The undersigned parties**, including real estate Brokers, **hereby release each other from any and all obligations and liabilities in connection with said "Agreement to Purchase or Sell"**, except as qualified above. (Emphasis added).

The document was signed on November 4, 2003, by plaintiff, the seller and a representative of Coldwell Banker.

Clearly, through this agreement, plaintiff released defendant Coldwell Banker from any liability with regard to the September 29, 2003 purchase agreement. The matters the parties intended to settle by that agreement extended to "any and all obligations and liabilities in connection with" the September 29, 2003 purchase agreement, which included a closing date of November 3, 2003 for the sale of the property. See Ortego, 96-1322, 689 So. 2d at 1363.

However, as noted by plaintiff, the allegations in her petition focus largely on the actions of Wiseman, who was not a signatory to the cancellation agreement, and on his actions occurring **after** the cancellation agreement was signed by plaintiff on November 4, 2003, after which date Wiseman purportedly "assured" her, through words and actions, that the subsequently proposed lease/purchase agreement would be approved by the

seller.[2] Accordingly, while we find no error in the trial court's determination that plaintiff's claims against Coldwell Banker relating to the September 29, 2003 purchase agreement are barred by res judicata on the basis of compromise, we agree that the trial court erred in dismissing by res judicata her claims against Wiseman and his employer, Coldwell Banker, to the extent that such claims are based on Wiseman's alleged actions occurring **after** the November 4, 2003 signing of the compromise agreement.[3]

In their brief to this court, defendants state that after ruling on the exception of res judicata, the trial court declined to determine "whether any other exception filed was provident." Defendants then proceed to argue that with regard to plaintiff's claim of detrimental reliance on actions occurring after the November 4, 2003 compromise agreement, any reliance she had on the assertions by Wiseman was not reasonable, because there was no written contract between the parties after that date with regard to the property at issue. Accordingly, defendants urge this court to affirm the dismissal of plaintiff's suit in full.

While defendants do not specifically state that they are requesting that this court consider *de novo* an exception of no cause of action on the basis that any reliance by plaintiff on oral assertions by Wiseman with regard to the sale or lease of real property was not justified or reasonable, we note that this was the precise argument defendants made in their Supplemental

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[2]While Wiseman was allegedly an employee of Coldwell Banker, we note that the dual agency agreement he entered into with plaintiff lists his capacity simply as "designated agent," not as an agent or employee of Coldwell Banker. Moreover, the dual agency agreement makes no mention at all of Coldwell Banker. Once he entered into the dual agency relationship with plaintiff, Wiseman personally owed plaintiff certain statutorily prescribed duties as set forth in LSA-R.S. 9:3897.

[3]We further note that to the extent that Continental Casualty is the alleged insurer of both Wiseman and Coldwell Banker, we must likewise reverse the dismissal of plaintiff's claims against this defendant as well.

Memorandum in Support of Exception of No Right of Action wherein they asserted that plaintiff had no **cause** of action. As noted above and as noted by the trial court in its reasons for judgment, defendants' supplemental memorandum sets forth arguments as if defendants had filed an exception of no cause of action, rather than an exception of no right of action. The trial court avoided the "confusion of no right/cause of action" by dismissing plaintiff's suit on the basis of res judicata, which was in fact the underlying defense set forth in the exception of no right of action. Apparently, on appeal, while defendants do not plainly state that they seek this relief, they appear to be urging that this court rule that plaintiff has no **cause** of action for detrimental reliance because of plaintiff's unjustified or unreasonable reliance on Wiseman's assertions.

As stated above, defendants did not file an exception of no cause of action in the trial court below. Moreover, while this would not preclude them from raising the objection of no cause of action on appeal, see LSA-C.C.P. art 2163, we conclude that the exception is not properly before this court either. Pursuant to Uniform Rules—Courts of Appeal, Rules 2-7.2 and 2-7.3, a party urging an exception in the appellate court must do so by filing a pleading with this court. State in the Interest of D. H., 2004-2105 (La. App. 1st Cir. 2/11/05), 906 So. 2d 554, 558. Instead, the defendants herein have only raised the issue of no cause of action, based on the alleged unreasonableness of plaintiff's reliance on Wiseman's assertions, in a supplemental memorandum in support of the exception of no right of action below and in their appellate brief. Neither a memorandum nor a brief, including an appellate brief, is a pleading. LSA-C.C.P. art. 852; Williams v. State Department of Health and Hospitals, 95-0713 (La. 1/26/96), 671 So. 2d 899, 902; State in the Interest of D. H., 2004-2105, 906 So. 2d at 558.

Accordingly, we conclude that defendants' argument that plaintiff has no cause of action against them because her reliance on Wiseman's oral assertions was unreasonable has not been properly presented to this court. See State in the Interest of D. H., 2004-2105, 906 So. 2d at 558.

Moreover, while the peremptory exception of no cause of action may be noticed by the appellate court on its own motion, see LSA-C.C.P. art. 927(B), we decline to do so in this case. While a finding that the plaintiff's reliance on the defendant's representation was justifiable is a necessary element to prove a claim for detrimental reliance, Nicholas v. Allstate Insurance Company, 99-2522 (La. 8/31/00), 765 So. 2d 1017, 1031, a determination of whether plaintiff's reliance on the representation was justified or reasonable is a factual determination best addressed at trial, rather than through an exception of no cause of action. See Cenac v. Hart, 98-01679 (La. App. 3rd Cir. 4/7/99), 741 So. 2d 690, 695-696, and Academy Mortgage Company v. Barker, Boudreaux, Lamy & Foley, 96-0053 (La. App. 4th Cir. 4/24/96), 673 So. 2d 1209, 1211-1212.

Additionally, to the extent that defendants argue that plaintiff's reliance on Wiseman's oral assertion was unjustified or unreasonable **as a matter of law** due to the absence of any written purchase or lease/purchase agreement after the November 4, 2003 cancellation agreement, we note that Louisiana law does not require proof of a formal, valid and enforceable contract for a party to prevail on a claim for detrimental reliance on an onerous promise.[4] LSA-C.C. art. 1967; Suire v. Lafayette City-Parish Consolidated Government, 2004-1459 (La. 4/12/05), 907 So. 2d 37, 59; Dugas v. Guillory, 97-398 (La. App. 3rd Cir. 10/7/98), 719 So. 2d 719, 722-

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[4]No argument has been made that the alleged promises herein were gratuitous in nature.

723; cf. Morris v. Friedman, 94-2808 (La. 11/27/95), 663 So. 2d 19, 26, (wherein the Supreme Court, interpreting the law prior to the January 1, 1985 effective date of LSA-C.C. art. 1967, held that a claim of detrimental reliance would not lie when the law required the contract to be in writing). Moreover, and perhaps more importantly, we note that when Wiseman entered into a dual agency agreement with plaintiff, he assumed certain duties to plaintiff, including the duty to deal with plaintiff honestly. LSA-R.S. 9:3897(A)(1). Whether those duties were breached is also a question of fact not appropriately addressed through an exception of no cause of action.

Accordingly, while we take no position through this opinion as to the ultimate merit of plaintiff's claims, under the procedural posture of the case as presented to this court, we are constrained to conclude that the trial court erred in part in dismissing plaintiff's suit. To the extent that the trial court dismissed plaintiff's claims against Coldwell Banker arising out of the September 29, 2003 purchase agreement on the basis of res judicata, we affirm the judgment. However, to the extent that the judgment dismissed plaintiff's remaining claims, we must reverse.

CONCLUSION

For the above and foregoing reasons, the July 27, 2005 judgment of the trial court is affirmed to the extent that it dismissed plaintiff's claims against defendant, Coldwell Banker TEC Realtor, and its insurer, Continental Casualty Company, relating to the September 29, 2003 purchase agreement, on the basis of res judicata. However, to the extent that the judgment dismissed plaintiff's claims against Coldwell Banker TEC Realtor (as Wiseman's alleged employer) arising **after** the November 4, 2003 Cancellation of Agreement to Purchase or Sell and her claims against defendants, Neil E. Wiseman and Continental Casualty, that portion of the

judgment is reversed. This matter is remanded to the trial court for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed one-half to plaintiff and one-half to defendants.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.