

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 2278

SLIDELL APARTMENTS PARTNERS, L.P. AND
SLIDELL APARTMENTS PARTNERS II, L.P.

VS.

TAMMANY HOLDING CORPORATION

JUDGMENT RENDERED: NOV 14 2007

ON APPEAL FROM THE
TWENTY-SECOND JUDICIAL DISTRICT COURT
DOCKET NUMBER 2006-12058, DIVISION H
PARISH OF ST. TAMMANY, STATE OF LOUISIANA

HONORABLE DONALD M. FENDLASON, JUDGE

HARRY ROSENBERG
CHRISTOPHER K. RALSTON
NEW ORLEANS, LA

ATTORNEY FOR PLAINTIFFS/APPELLEES
SLIDELL APARTMENTS PARTNERS, L.P. AND
SLIDELL APARTMENTS PARTNERS II, L.P.

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AND
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ATTORNEYS FOR DEFENDANT/APPELLANT
TAMMANY HOLDING CORPORATION

BEFORE: GAIDRY, MCDONALD AND MCCLENDON, JJ.

Gaidry, J. concurs

McClendon, J. concurs.

MCDONALD, J.

This is an appeal of a judgment granting a preliminary injunction to plaintiffs, Slidell Apartments Partners, L.P. and Slidell Apartments Partners II, L.P., against defendants, Tammany Holding Corporation. For the following reasons, we affirm in part, vacate in part and remand.

FACTS AND PROCEDURAL BACKGROUND

In 1996, Tammany Holding Corporation, (THC), a land developer, purchased approximately 3,000 acres of vacant lowland in St. Tammany Parish adjoining Lake Pontchartrain. THC began dredging and filling the property for development. On March 2, 2001 a fifteen-page purchase agreement was signed wherein Gross Builders, Inc., represented by Jenard Gross, agreed to purchase from THC, represented by Robert L. Torres, 18 acres of land in St. Tammany Parish on Lake Pontchartrain for the sum of \$6,130,000.00. The agreement contained a provision addressing the quality of the development proposed to be built on the property, reciting, “An essential element of Seller’s inducement to enter into this Agreement is the evidence and reputation for quality development of property by entities involving Jenard Gross as represented by buyer.” It further provided that “[t]he Act of Sale shall expressly provide that the Seller through its Architectural Control Committee reserves the right to approve all building plans and specifications.” In June 2001, Jester Apartments Partners, L.P., represented by its manager, Jenard Gross,¹ purchased the 18 acres for the purpose of constructing an apartment complex.

An apartment complex, Villa du Lac Apartments, was constructed on

¹ Jester Apartments Partners, L.P. subsequently transferred the property to Slidell Apartments Partners, L.P. and Slidell Apartments Partners, L.P. II in two separate transactions occurring in November 2002 and March 2006. Gross was also the managing partner of the Slidell Apartments Partnerships and we will refer to appellee in this matter as Slidell Apartments.

the subject property. In or around March 2006, THC was contacted by persons who indicated that they were negotiating with the owners of Villa du Lac Apartments to purchase the apartments and convert them to separate condominium ownership. In April 2006, THC filed Instrument Number 1548478 into the public lands records of St. Tammany Parish, which provided:

Know All Men By These Presents that the property described on the attached Exhibit A being a portion of ground situated in Section 3 and 4, Township 10 South, Range 14 East, District 13, Ward 9, St. Tammany Parish, Louisiana being a portion of Parcel Z designated as 18.095 acre tract which was conveyed by Tammany Holding Corporation to Jester Apartment Partners, L.P. by Sale with Mortgage dated June 15, 2001 and recorded at Instrument Number 1256068 specifically provides at Section 20.3 "The Buyer/Mortgagor, its successors and assigns shall be bound by the terms and condition of an Architectural Approval Agreement entered into by Tammany Holding Company and Jester Apartment Partners, L.P. dated June 15, 2001."

The Architectural Approval Agreement paragraph 1.1 "Representations of Jester Apartment Partners, L.P." recites that the Jester Apartment Partners, L.P. "represents that the multi-family residential apartment complex it intends to construct on the Property shall generally be of a similar nature and type as that constructed in Galveston, Texas."

The representations of Jester Apartments Partners, L.P. the plans and specifications submitted as referenced in paragraph 1.0 are the basis for the approval granted in paragraph 2.0, all expressly approve a multi-family apartment complex.

The approval required is a private restriction in the Sale with Mortgage which is binding on the successors and assigns and cannot be inferred to mean the approval of any other development. The approval specifically does not include the development of condominiums.

In May 2006, Slidell Apartments filed a Verified Petition to be Maintained in Possession, naming as defendant THC and alleging, inter alia, that the filing of the above referenced instrument disturbed the petitioner's possession of their property, and that they were entitled to relief under articles 3659 and 3662 of the Code of Civil Procedure. The petition prayed that defendant be ordered to show cause why an injunction should not issue.

forever enjoining defendant from interfering with petitioners' possession and control of the Property; that there be judgment in favor of petitioners maintaining their possession and rights in the property free from disturbance by defendant; that defendant be ordered to assert any adverse claim of ownership or other right or interest in the property that defendant may have in a petitory action to be filed within 30 days from the trial court's ruling or be precluded thereafter from asserting the claim; that defendant be ordered to pay damages; and for all other relief to which they were entitled under the law.

At the same time as the filing of the possessory action, a petition for preliminary injunction was filed. The petition recited that on April 24, 2006, THC filed in the conveyance records of St. Tammany Parish Instrument Number 1548478, which instrument constituted a disturbance in law that interfered with Slidell Apartments' possession and enjoyment its of property. Slidell Apartments prayed that the court grant the petition for preliminary injunction and issue an order prohibiting THC Corporation from interfering with the property and enjoyment rights of Slidell Apartments.

A rule to show cause order was signed by the court setting a hearing date of May 31, 2006, in accordance with Louisiana Code of Civil Procedure article 3602,² and providing that the petition shall be heard upon verified pleadings and affidavits only, in accordance with Louisiana Code of Civil

² "A preliminary injunction shall not issue unless notice is given to the adverse party and an opportunity had for a hearing. An application for a preliminary injunction shall be assigned for hearing not less than two nor more than ten days after service of the notice."

Procedure article 3609.³

The hearing on the preliminary injunction was held on May 31, 2006, at which time Slidell Apartments offered into evidence the petition and attachments, which included an affidavit by Jenard Gross; an affidavit was offered by THC and admitted over objection, and oral arguments were made. At the conclusion, the trial court took the matter under advisement, allowing five days for counsel to submit memorandum. Written reasons for judgment were mailed to counsel on June 16, 2006, and requested that a judgment in accordance with the reasons be forwarded to the court. Judgment was signed June 30, 2006, granting a preliminary injunction to Slidell Apartments; ordering THC to remove and/or cancel Instrument No. 1548478 filed on April 24, 2006 from the St. Tammany Parish conveyance records; further enjoining THC, its agents, attorneys and representatives from disturbing or interfering with the possessory and/or enjoyment rights of Slidell Apartments or their assigns/successors in interest in the immovable property and its improvements made the subject of the instrument; and further ordering THC to assert within 10 days from the date of the judgment any and all claims of ownership or other right or interest in the subject immovable property in a petitory action or thereafter be precluded from asserting any declaration of rights as to the subject immovable property.

³ “The court may hear an application for a preliminary injunction or for the dissolution or modification of a temporary restraining order or a preliminary injunction upon the verified pleadings or supporting affidavits, or may take proof as in ordinary cases. If the application is to be heard upon affidavits, the court shall so order in writing, and a copy of the order shall be served upon the defendant at the time the notice of hearing is served.

At least twenty-four hours before the hearing, or such shorter time as the court may order, the applicant shall deliver copies of his supporting affidavits to the adverse party, who shall deliver to the applicant prior to the hearing copies of affidavits intended to be used by such adverse party. The court, in its discretion, and upon such conditions as it may prescribe, may permit additional affidavits to be filed at or after the hearing, and may further regulate the proceeding as justice may require.”

THC appeals the judgment alleging six assignments of error: (1) The trial court erred in signing the plaintiffs' submitted judgment on the petition for preliminary injunction ordering defendant to assert any and all claims of ownership or other right or interest in the subject property; (2) The trial court erred in findings of fact and law that parol evidence was inadmissible to contradict the clear and unambiguous language of the written contracts between the defendant and Jester Apartment Partners, L.P.; (3) The trial court erred in finding that THC relied only on the Architectural Approval Agreement and the Comprehensive Restrictions to establish the right of THC to approve the plan of development and restrict development to that approved plan; (4) The trial court erred in a finding of fact that the expired agreement does not in any way restrict the usage of the property or improvements but only addresses the architectural aspects (the physical appearance) of the construction; (5) the trial court erred in failing to consider the contractual obligations between THC and Slidell Apartments entities engaged in the same business enterprise; (6) the trial court erred in granting the preliminary injunction to remove the Instrument Number 1548478 filed against the property.

LAW AND ANALYSIS

THC assigns error to the trial court's order requiring that any and all claims in the subject property be asserted within ten days of the signing of the judgment, noting that the written reasons for judgment prepared by the trial court, and to which the judgment was supposed to conform, did not impose this requirement. We agree that it was legal error for the trial court to order THC to assert "within 10 days from the date of this Judgment any and all claims of ownership or other right or interest in the subject property

in a petitory action or ... be precluded thereafter from asserting any declarations of rights as to the subject immovable property.”⁴

Procedurally, the hearing was for a preliminary injunction pursuant to La. C.C.P. art. 3663,⁵ ancillary to the main action, which was a possessory action filed pursuant to La. C.C.P. art. 3659, which defines disturbances in fact and in law that give rise to a possessory action. The only relief prayed for in the preliminary injunction petition was that the court grant the petition for preliminary injunction and issue an order that *prohibits* THC from interfering with the property and enjoyment rights of Slidell Apartment Partners, L.P... and that orders THC *to remove from the conveyance records* of the Parish of St. Tammany, Instrument No. 1548478, dated April 21, 2006.

Slidell Apartments argues that the trial court was correct in ordering THC to assert its right in a petitory action because that is the result required by La. C.C.P. art. 3662, which provides in pertinent part:

A judgment rendered for the plaintiff in a possessory action shall:

(2) Order the defendant to assert his adverse claim of ownership of the immovable property or real; right therein in a petitory action to be filed within a delay to be fixed by the court not to exceed sixty days after the date the judgment becomes executory, or be precluded thereafter from asserting the ownership thereof, if the plaintiff has prayed for such relief ...

⁴ We note that the written reasons for judgment issued by the trial court do not mention any requirement that THC assert its ownership claims, and notes that a judgment in accordance with the reasons will be signed. However, the judgment does so order, and it is the judgment that is appealed.

⁵ Sequestration of immovable property or of a real right therein involved in a possessory or petitory action during the pendency thereof is available under the applicable provisions of Chapter I of Title I of Book VII.

Injunctive relief, under the applicable provisions of chapter 2, of Title I of Book VII, to protect or restore possession of immovable property or of a real right therein, is available to:

- (1) A plaintiff in a possessory action, during the pendency thereof, and
- (2) A person who is disturbed in the possession which he and his ancestors in title have had for more than a year of immovable property or of a real right therein of which he claims the ownership, the possession, or the enjoyment.

This judgment, however, was *not* rendered in a possessory action. It was rendered on a hearing for preliminary injunction ancillary to the possessory action.

A possessory action is an ordinary proceeding, and a judgment pursuant to such an action is rendered after a trial on the merits. The judgment subject to this appeal was rendered after a summary proceeding, a hearing for preliminary injunction, which was limited to evidence by affidavits, the petition, and exhibits attached to the petition. A preliminary injunction may be issued on merely a *prima facie* showing by the plaintiff that he is entitled to relief. *Mary Moe, L.L.C. v. Louisiana Bd. Of Ethics* 03-2220 (La 4/14/04), 875 So.2d 22, 29. The issuance of a preliminary injunction addresses itself to the sound discretion of the trial court and will not be disturbed on review unless a clear abuse of discretion has been shown. *State Machinery v. Iberville Council* 05-2240 (La. App. 1st Cir. 12/28/06), 952 So.2d 77, 81. The burden of proof upon the plaintiff at the hearing in this matter and the standard of review by this court of the judgment of the trial court differ from what is required in a possessory action. Further, while the trial court “may take proof as in ordinary cases at a preliminary injunction hearing,”⁶ in this case the evidence was limited to affidavits.

While the trial court’s written reasons for judgment did note that it found that the plaintiffs met the four requirements for a possessory action, THC is correct in asserting that the court was not procedurally postured to render judgment on the merits of the possessory action. Therefore, we find that it was error for the judgment to require that THC file a petitory action

⁶ Louisiana Code of Civil Procedure article 3609.

within 10 days of the date of the judgment to assert any and all rights in the subject property, and that portion of the judgment is vacated.

THC next assigns error to certain findings by the trial court. Specifically, that the court erred in finding that the written contracts between the parties were clear and unambiguous; in relying only on the Architectural Approval Agreement and the Comprehensive Restrictions to establish the right of THC to approve the plan of development and restrict development to that approved plan; on finding that the expired agreement does not in any way restrict the usage of the property or improvements but only addresses the architectural aspects of the construction; and in failing to consider the contractual obligations between THC and Slidell Apartments.

We have reviewed the entire record in this matter and particularly the trial court's reasons for judgment. The trial court found that the Architectural Approval Agreement between Jester Apartments Partner, L.P. and THC dated June 21, 2001 expired by its terms on December 31, 2001. It further found that the agreement did not restrict usage of the property or improvements, but only addressed the architectural aspects (the physical appearance) of the construction. Further, that the Comprehensive Architectural Restrictions did not provide the basis for a servitude or building restriction. A court of appeal may not set aside a trial court or a jury finding of fact in the absence of "manifest error" or unless it is "clearly wrong." *Stobart v State Dept. of Transportation and Development*, 92-1328 (La. 4/12/93), 617 So.2d 880, 882. Our review of the record does not support a finding that these factual findings of the trial court were manifestly

erroneous or clearly wrong. Based on these facts, the trial court found that the documents did not constitute a valid predial servitude or building restriction.

Given the nature of this proceeding, and mindful of the burden of proof at the preliminary injunction hearing and the standard of review by which this court considers the correctness of the trial court's judgment, we find that Slidell Apts. met its burden of establishing a *prima facie* showing that it would prevail at trial on the merits, and no abuse of discretion by the trial court in enjoining THC from interfering with the possession and enjoyment rights of Slidell Apts. in the subject property. Therefore, the portion of the judgment enjoining THC from interfering with the possessory or enjoyment rights of Slidell Apts. in the immovable property is affirmed.

Finally, THC asserts that the trial court erred in granting the preliminary injunction to remove Instrument No. 1548478. We agree. The preliminary injunction ordering the removal of the instrument from the conveyance records is a mandatory and not a prohibitory injunction. A mandatory injunction commands a party to take a specific action. *New Orleans v. Bd. Of Dir. Of State Museum* 98-1170 (La. 3/2/99), 739 So.2d 748, 756. The general rule is that an injunction will only issue in its prohibitory form, but when a defendant obstructs plaintiff in the enjoyment of a real right, the latter may be entitled to a prohibitory injunction restraining the disturbance and also to a mandatory injunction for the removal of the obstruction. *Concerned Citizens v. Parish of Tangipahoa* 04-0270 cw 04-0249 (La. App. 1st Cir. 3/24/06), 906 So.2d 660, 664. A mandatory injunction may not be issued on a merely *prima facie* showing that the party seeking the injunction can prove the necessary elements; instead, the party must show by a preponderance of the evidence at an

evidentiary hearing that he is entitled to the preliminary injunction. *New Orleans* 739 So.2d at 756.

There was not a full evidentiary hearing in this matter. The procedure invoked was insufficient to issue either the mandatory injunction ordering removal of the offending instrument or the order to assert a petitory action. The primary objective of procedural rules is to secure to parties the full measure of their substantive rights. *Fraternal Order of Police v. City of New Orleans*, 02-1801 (La. 11/8/02), 831 So.2d 897, 899. It bears remembering that rules of procedure exist for the sake of substantive law and to implement substantive rights, not as an end in and of itself. *Unwired Telecom Corp. v. Parish of Calcasieu*, 03-0732 (La. 1/19/05), 903 So.2d 392, 401.

For the foregoing reasons, the portion of the judgment ordering THC to remove or cancel from the conveyance records of St. Tammany Parish the Instrument Number 1548478 is vacated; the portion of the judgment enjoining THC from disturbing or interfering with the possessory or enjoyment rights of Slidell Apartments is affirmed; the portion of the judgment ordering THC to assert any and all claims of ownership or other right in the subject immovable property in a petitory action is vacated. Costs of this appeal are assessed to Slidell Apartments Partners, L.P. and Slidell Apartments Partners II, L.P.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.