

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1886

SAMUEL MARKOVICH

VERSUS

*J.M.H. BY SET HIGGINBOTHAM, J CONCURS*  
PRUDENTIAL GARDNER REALTORS, JOHN MIDDLETON, TED  
MOSES, MICHAEL ACCARDO, JR., LATTER & BLUM, INC. AND  
JOHN DOE

**DATE OF JUDGMENT:** JUL 1 2011

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT  
NUMBER 2006-10837, DIV. E, PARISH OF ST TAMMANY  
STATE OF LOUISIANA

HONORABLE WILLIAM J. BURRIS, JUDGE

\* \* \* \* \*

Edward P. Gothard  
Metairie, Louisiana

Counsel for Plaintiff-Appellee  
Samuel Markovich

William M. Magee  
Rhea P. Loney  
Covington, Louisiana

Counsel for Intervenor-Appellee  
T-Bo Contracting, LLC

Jack A. Ricci  
Gary J. Giepert  
New Orleans, Louisiana

Counsel for Defendants-Appellants  
John Middleton, GBS Properties, LLC  
d/b/a Prudential Gardner Realtors, and  
Continental Insurance Company

Rykert O. Toledano, Jr.  
Brian G. Meissner  
Covington, Louisiana

Counsel for Defendant/Appellee  
Michael Accardo, Jr.

\* \* \* \* \*

BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

**Disposition: VACATED IN PART AND AFFIRMED IN PART.**

KUHN, J.

Defendants-appellants, GBS Properties d/b/a Prudential Gardner Realtors (Prudential), Continental Casualty Company (Continental), and John Middleton, appeal the trial court's judgment awarding damages against them in favor of defendant-appellee, Michael Accardo, Jr. and plaintiff-appellee, Samuel Markovich, as a result of Middleton's negligence as the marketing agent for the sale of Accardo's immovable property. We vacate that portion of the judgment rendered against Middleton and affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Accardo owned three and one quarter acres of undeveloped, immovable property in the old Chinchuba subdivision of Mandeville that he listed with Prudential, for whom John Middleton was the marketing agent. On February 16, 2006, through his real estate agent, Holly Braselman, Markovich made an offer to Accardo for the property. On Friday, February 17, 2006, Middleton extended a counteroffer to Markovich, which stated he had until 5 p.m. on Tuesday, February 21, 2006, to accept. Later in the day on February 17, 2006, T-Bo Contracting, LLC (T-Bo) made an offer through Middleton for the same property. The following day, Saturday, February 18, 2006, Middleton gave a second counteroffer, this time to T-Bo, giving it until 6 p.m. on February 21, 2006, to accept. T-Bo accepted the counteroffer on Saturday, February 18, 2006, and secured the transaction with a \$5,000 deposit.

Markovich instituted this litigation after agents of Prudential returned his acceptance of the counteroffer and \$10,000 deposit, naming Accardo, Middleton, Prudential, and Continental as defendants. T-Bo, who intervened in the action

seeking specific performance and attorney's fees from Accardo, was subsequently added as a party-defendant in Markovich's lawsuit. Accardo answered the appeal and filed a reconventional demand, seeking damages against Prudential as a result of Middleton's actions.

Both Markovich and T-Bo moved for summary judgment, averring that each had the valid purchase agreement with Accardo. The trial court denied both motions. Thereafter, Accardo moved for summary judgment against T-Bo, suggesting the agreement he had with T-Bo was "null and void" pursuant to the non-fulfillment of a suspensive condition addressing his right to tree removal. T-Bo filed another motion for summary judgment, again seeking specific performance of the purchase agreement that he had entered into with Accardo.

In a judgment signed on June 27, 2008, the trial court denied Accardo's motion for summary judgment against T-Bo, but granted T-Bo specific performance against Accardo, declaring its counteroffer was the first accepted purchase agreement.<sup>1</sup>

On September 10, 2008, T-Bo notified Accardo it was not interested in purchasing the property based in part on an "evaluation of the value of the property being only worth half of what it was to be sold for initially." On April 17, 2009, Markovich offered to purchase the property for \$200,000, but Accardo declined that offer.

On March 17, 2010, a trial on the merits was conducted to address the respective claims of Markovich and Accardo to damages as well as T-Bo's claim of

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<sup>1</sup> Accardo filed a supervisory writ as to the trial court's rulings. This court declined to exercise supervisory jurisdiction, noting defendants had an adequate remedy on appeal. *See Markovich v. Prudential Gardner Realtors*, 2008-1653 (La. 1st Cir. 2/2/09) (unpublished writ action).

entitlement to attorney's fees from Accardo pursuant to the terms of the purchase agreement. On May 10, 2010, the trial court rendered judgment, concluding that Prudential and Continental were liable to Markovich for \$453,600.00 and to Accardo for \$280,000.00. Having also concluded that Accardo was liable to T-Bo for its attorney's fees, the trial court awarded additional damages of \$20,594.79 to Accardo from Prudential and Continental for the attorney's fees he was responsible to pay T-Bo. This appeal followed.<sup>2</sup>

Initially we note that Middleton was deceased by the time of trial. His estate was not substituted as a party defendant. The attorney for Prudential and Continental brings this appeal on behalf of all three defendants. Before trial the parties stipulated that any negligence, omissions, or legal liability of Middleton is covered under a liability policy of insurance issued by Continental. Because Middleton was deceased at the time judgment was rendered against him, the portion of the judgment that casts him with liability is an absolute nullity that cannot be cured by a party substitution. *See Page v. Page*, 98-1625, p. n.1 (La. App. 1st Cir. 9/24/99), 762 So.2d 18, 19 n.1. Thus, the portion of the judgment that was rendered against Middleton is a nullity and, accordingly, is vacated and set aside.

On appeal, Prudential and Continental challenge the trial court's imposition of liability as well as its awards of damages in favor of Markovich and Accardo, including the reimbursement of Accardo's attorney's fees in defending the suit

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<sup>2</sup> Neither T-Bo nor Accardo appealed the trial court's award of damages to T-Bo under the terms of the purchase agreement; thus, that portion of the judgment is now final. *See* La. C.C.P. arts. 2082, 2083A, 2087, and 2123.

brought against him by T-Bo.

### **CHALLENGE OF JUDGMENT IN FAVOR OF MARKOVICH**

Prudential and Continental raise several contentions relating to contractual liability and maintain they are not liable to Markovich for his damages.<sup>3</sup>

None of these assertions has merit because Middleton, as a real estate agent acting as a broker for Accardo, had a duty to take the necessary steps to bring the signed purchase agreement to the act of sale within the time period designated by the contract. *See Naquin v. Robert*, 559 So.2d 18, 21 (La. App. 4th Cir.), *writ denied*, 561 So.2d 118 (La. 1990). In this case, liability is premised under a breach of La. C.C. art. 2315. Thus, because we have found that Middleton's negligence supports the imposition of liability against Prudential and Continental, we pretermitt a discussion of any contractual liability.

The trial court concluded that Middleton's breach of his duty to bring about the sale of Accardo's property to Markovich in accordance with the terms of the purchase agreement was the basis for his damages. Both Middleton, in his deposition testimony, and Mason "Sandy" Sandusky, the managing broker for Prudential, testified that Middleton's actions in extending counteroffers to both Markovich and T-Bo at the same time was a mistake. And Braselman, who was accepted as an expert in real estate, testified that Middleton acted outside the proper requirements of a realtor marketing property for his client when he accepted both counteroffers at the same time. Thus, the trial court's finding that Middleton

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<sup>3</sup> Specifically, Prudential and Continental urge the purchase agreement signed by Markovich contained a suspensive condition that rendered the agreement null and void. Next they assert that because Braselman did not have a power of attorney when she initially made the offer for Accardo's property, Markovich's ratification could not have been to the detriment of T-Bo's rights under La. C.C. art. 1844. Finally, they claim that because Middleton was a mandatory who

breached his duty to bring the sale to fruition is supported by the record and, therefore, is not manifestly erroneous. *See Stobart v. State*, 617 So.2d 880, 882 (La.1993).

Prudential and Continental also challenge the imposition of liability in favor of Markovich for Middleton's actions asserting that he was not the proper party for whom judgment should have been rendered. They contend Marko Construction, Markovich's construction corporation, rather than Markovich in his individual capacity, was the correct party.

The evidence showed that Markovich entered into his relationship with Middleton in his individual capacity. The purchase agreement was signed by Markovich in his individual capacity. While there was testimony that had he been able to obtain the property, he would have created a limited liability corporation to develop it and would have then transferred the property to the corporation, it is clear that he never did. As such, the trial court correctly concluded that he was the party to whom Middleton owed the duty to bring about the sale and who was affected by the breach of the duty. *See* La. C.C.P. art. 681 (an action can be brought only by a person having a real and actual interest which he asserts). There is no error.

Prudential and Continental contend that the trial court's award of damages for lost profits is not supported by the record. In so contending, they do not make any assertions against the quantum of the award, suggesting instead that the entire award is not warranted.

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(Continued . . .)

exceeded his authority, under La. C.C. art. 3019, he was personally bound to the contract and limited to damages of \$10,000.00 under the terms of the purchase agreement.

One injured through the fault of another is entitled to full indemnification for the resulting damages. *Hughes v. Goodreau*, 2001-2107, p. 22 (La. App. 1st Cir. 12/31/02), 836 So.2d 649, 664, *writ denied*, 2003-0232 (La. 4/21/03), 841 So.2d 793.

A reasonable factual basis exists to support the trial court's conclusion that Markovich lost profits in the amount of \$453,600.00. The testimony of Markovich and real estate expert Braselman, as well as the appraisals of Christopher Jourdan, all demonstrated with reasonable certainty that the minimum profit Markovich stood to gain by developing the property had Middleton not breached his duty to bring the sale to fruition was the amount awarded by the trial court. Given the reasonable factual basis supported by the testimonial and documentary evidence, there is no manifest error. *See Pelts & Skins Export, Ltd. v. State ex rel. Dept. of Wildlife and Fisheries*, 97-2300, pp. 11-12 (La. App. 1st Cir. 4/1/99), 735 So.2d 116, 126, *writs denied*, 99-2036, 99-2042 (La. 10/29/99), 748 So.2d 1167, 1168. Accordingly, the trial court's award of damages to Markovich for lost profits in the amount of \$453,600.00 is affirmed.

#### **CHALLENGE OF AWARD TO ACCARDO**

Again relying on a contractual claim as a basis to escape liability, Prudential and Continental challenge the award in favor of Accardo.<sup>4</sup> But as we have already noted, the liability for damages for which Prudential and Continental are liable is not a result of the conventional obligations the parties entered into, but due to Middleton's negligent conduct.

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<sup>4</sup> Specifically, Prudential and Continental cite La. C.C. art. 2002 (which is found in the chapter setting forth the effects of conventional obligations) and maintain that Accardo failed to mitigate his damages and is, therefore, not entitled to any damages.

A real estate broker is a professional who holds himself out as trained and experienced to render a specialized service in real estate transactions. The broker stands in a fiduciary relationship to his client and is bound to exercise reasonable care, skill, and diligence in the performance of his duties. A realtor has a fiduciary duty to his client and a breach of that duty to the client is actionable under La. C.C. art. 2315. *Hughes*, 2001-2107 at pp. 13-14, 836 So.2d at 660. It was Middleton's breach of his fiduciary duty that gives rise to liability for the damages caused to Accardo.

Prudential and Continental make no assertions challenging the trial court's implicit findings that Middleton owed his client a fiduciary duty, that his actions of giving two counteroffers to two different prospective purchasers at the same time breached that duty, and that the breach caused Accardo's damages. They do, however, contend that the trial court erred in awarding \$280,000.00 to Accardo because there was no competent evidence to support such an award.

A reasonable factual basis exists for the trial court's award of \$280,000.00 in damages to Accardo. *See Hughes*, 2001-2107 at p. 14, 836 So.2d at 660. Markovich testified that he offered \$200,000.00 to Accardo for the undeveloped immovable property on April 17, 2009. And Jourdan's appraisal of the property, dated May 21, 2009, stating it was worth \$250,000.00 at that time was also in evidence. Thus, the trial court clearly was within its discretion to decide that on the date of trial, March 17, 2010, the property was worth \$200,000.00. And since it was undisputed that Accardo had two offers of \$480,000.00 for his property prior to Middleton's negligence, the award of \$280,000.00 is neither manifestly erroneous



nor an abuse of discretion. *See* La. C.C. art. 2324.1; *see also Hughes*, 2001-2107 at p. 22, 836 So.2d at 664.

Prudential and Continental complain that the trial court erred in awarding Accardo the amount of attorney's fees he incurred as a result of his realtor having given two purchase agreements to two different parties at the same time. But a realtor's liability includes the amount his client incurred in defending the underlying litigation. *Hughes*, 2001-2107 at p. 14, 836 So.2d at 660. The record contains an itemized bill submitted by T-Bo and relied on by the trial court in fashioning its award of attorney's fees against Accardo in favor of T-Bo. We find no error in the trial court's decision to award that same amount to Accardo. Accordingly, we affirm the trial court's award of \$280,000.00 plus an additional \$20,594.79 in favor of Accardo as the damages he sustained as a result of Middleton's negligent conduct.

#### **DECREE**

For these reasons, that portion of the judgment that casts John Middleton with liability is vacated. In all other respects, the judgment is affirmed. Appeal costs are assessed against GBS Properties d/b/a Prudential Gardner Realtors and Continental Casualty Company.

**VACATED IN PART AND AFFIRMED IN PART.**