NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2005 CA 2230

GEORGE JOSEPH ACKEL, JR.

VERSUS

DARLENE PARENT ACKEL

Judgment Rendered: **JUN 20 2007**

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 2001-13951

The Honorable Raymond S. Childress, Judge Presiding

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

GAIDRY, J.

This is an appeal of a judgment relating to a claim of partial ownership of immovable property, based upon a counterletter evidencing the plaintiff's one-half interest. Relying primarily upon the public records doctrine, the trial court sustained various exceptions by two defendants and granted summary judgment in favor of two other defendants, but denied the plaintiff's motion for partial summary judgment. The plaintiff appeals. For the following reasons, we find summary judgment inappropriate, affirm the judgment in part insofar as it denied the plaintiff's motion, reverse the judgment as to both the summary judgments granted and the exceptions sustained, and remand the case for further proceedings.

FACTS AND PROCEDURAL HISTORY

On September 18, 1986, prior to their marriage, the plaintiff-appellant, George J. Ackel, Jr., and the defendant-appellee, Darlene Parent Ackel, renounced the legal matrimonial regime and established a separate property regime by written agreement. The parties subsequently established their matrimonial domicile in Jefferson Parish.

On March 15, 1993, Ms. Ackel executed a "Cash Sale of Property" by authentic act, purchasing from Hibernia National Bank the immovable property at issue (the Military Road property) in St. Tammany Parish. The stated purchase price was $210,000.00, and the sale was expressly made "as is" with express waiver of warranties by the seller. On the same date, Ms. Ackel executed a counterletter by authentic act, acknowledging that she purchased the property with funds provided to her by Mr. Ackel; that the property was purchased "for her account and for the account of George J. Ackel, Jr."; that she in fact had only a 50% interest in the property; and that at Mr. Ackel's request she would "execute . . . an instrument transferring to

[him] fifty (50%) percent interest to the . . . property." The cash sale was duly recorded in the conveyance records on March 22, 1993; the counterletter was not.

Mr. Ackel filed a petition for divorce in Jefferson Parish on February 12, 2001. In those proceedings, Ms. Ackel was represented by her original counsel in this litigation, Don C. Gardner. The Ackels' divorce proceedings were quite acrimonious.[1]

Mr. Ackel instituted the present litigation by filing a Petition to Partition Co-Owned Property on August 27, 2001. Named as defendant was Ms. Ackel, his estranged wife. He alleged that they were co-owners of the Military Road property and that he was entitled to partition by licitation or by private sale. He further acknowledged that the property was not community property, based upon their separate property regime. Ms. Ackel answered the petition, denying its allegations and alleging her sole ownership of the property.

On October 23, 2001, a consent judgment was rendered in the Jefferson Parish divorce proceedings. The consent judgment was signed by the parties and their attorneys, and provided, among other conditions, that "the parties agree[d] that there will be joint mutual injunctions prohibiting them from alienating any of the parties [*sic*] properties pending a full

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[1] In a deposition given on July 7, 2003, the attorney who notarized the 1993 cash sale and prepared the counterletter described the parties' later negotiations on property settlement issues in the divorce proceedings as "one knock down, drag out, one of them blood fights you have in a divorce," and a "blood bath." The present action, in which former counsel for both parties have themselves been joined as party defendants as alleged conspirators, has been even more acrimonious and contentious, and the pleadings and memoranda in the record are replete with mutual recriminations and insinuations of misconduct. On January 29, 2004, the trial court signed a Consent Interim Order which set forth certain "rules of behavior" during discovery depositions, prohibiting "extraneous remarks made by counsel as to the character of the parties or attorneys involved[,]" the "use of profanity or vulgarity at any time[,]" "body, hand gestures or disrespect [*sic*] which display contempt or hostility[,]" and "threats to use the judicial process against other parties or attorneys."

resolution of the division of property herein." The judgment was not actually signed by the trial court until January 22, 2002.

On January 23, 2002, Mr. Ackel's attorney filed a Rule for Use and Occupancy of the Military Road property in the Jefferson Parish divorce proceeding, and mailed Mr. Gardner a copy of the rule and a motion for divorce pursuant to La. C.C. art. 102. The rule and motion were both fixed for hearing on February 26, 2002, a fact conveyed to Mr. Garner in the letter from Mr. Ackel's counsel.

On February 19, 2002, Ms. Ackel sold the Military Road property to 7536 Scottwood, Inc. (Scottwood), a domestic corporation, for the stated price of $500,000.00. In the Act of Cash Sale passed before Cynthia Petry, a notary public, Ms. Ackel stated that she was then living separate and apart from her husband and gave her residence street address as that of the Military Road property. The act also recited that the sale was made for the sum of $500,000.00, the full sum being paid "in lawful current funds of the United States of America," with Ms. Ackel acknowledging receipt of that payment.

On the same date as the sale, Scottwood executed a mortgage in favor of Ms. Ackel for the full purchase price, secured by a promissory note in that amount bearing six percent (6%) interest payable in 35 equal monthly installments of interest only, with one final payment of the principal on February 1, 2005. The mortgage also provided, among other terms, that "[t]he Borrower [Scottwood] shall not sell, convey or otherwise transfer or dispose of all or any portion of the Property [.]" Again on the same date, Ms. Ackel leased the same property from Scottwood for a term of three years (from March 1, 2002 through March 31, 2005), for the monthly rental

of $2,500.00. Additionally, Ms. Ackel as lessee agreed to pay "all taxes and insurance" on the property.[2]

On February 26, 2002, Mr. Ackel filed the counterletter executed by Ms. Ackel in the public conveyance records of St. Tammany Parish.

On March 19, 2002, Scottwood in turn sold the Military Road property to Schurr Investments, L.LC., for the sum of $560,000.00, subject to the first mortgage in favor of Ms. Ackel and subject to her recorded lease of the property.

On March 27, 2002, Ms. Ackel filed a peremptory exception raising the objections of no cause of action and no right of action. She alleged that she was previously the sole owner of the property, that the property was sold on February 19, 2002, and that at no time before or after the sale was Mr. Ackel a "legal owner" of the property.

On May 28, 2002, the trial court heard the exception and ruled in favor of Ms. Ackel, granting Mr. Ackel fifteen days within which to file an amended petition stating a right of action.[3]

On June 10, 2002, Mr. Ackel filed an amended petition, supplementing his original petition with allegations that Ms. Ackel executed the counterletter at issue on March 15, 1993, and that after the filing of his original petition, she sold the Military Road property in violation of the terms of the agreement expressed in the counterletter and for less than its value. He sought damages for Ms. Ackel's alleged breach of contract,

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[2] The latter condition is stated twice in the lease agreement. However, the mortgage executed the same date provided that "[t]he Borrower will pay and discharge promptly when due all taxes, assessments and governmental charges or levies imposed . . . upon the Property[,]" and further obligated Scottwood, as "Borrower," to "procure and maintain for the benefit of the Lender [Ms. Ackel] original paid-up insurance policies . . . containing a noncontributory standard mortgagee clause or its equivalent in favor of the Lender."

[3] The written judgment sustaining the exception was not actually signed until August 30, 2002. The judgment names both Don C. Gardner and Cynthia Petry present as Ms. Ackel's attorneys on the date of the hearing.

including half the actual value of the property, attorney fees, and court costs. Ms. Ackel answered the amended petition, denying most of Mr. Ackel's new allegations, but admitting the sale of the property. She further affirmatively alleged that the property was purchased for her separate interest and that Mr. Ackel never formally requested that she recognize his claimed interest.

On December 13, 2002, Mr. Ackel filed a second supplemental and amending petition, adding as additional defendants Don C. Gardner, Ms. Ackel's attorney; Scottwood; and Schurr. He alleged that the sale to Scottwood and the mortgage executed by Scottwood in favor of Ms. Ackel were simulations and the products of a conspiracy between Ms. Ackel and Mr. Gardner to fraudulently deprive him of his interest in the property. He further alleged that Scottwood's sale to Schurr was likewise a simulation.

Scottwood filed a dilatory exception, objecting to the second supplemental and amending petition on the grounds that its allegations relating to fraud were vague and factually insufficient. This exception was overruled by judgment signed on May 22, 2003.

On May 6, 2003, Mr. Ackel filed a third supplemental and amending petition, alleging that Mr. Gardner or someone under his control arranged for the preparation and recordation of the sale of the property to Scottwood, the mortgage, and the lease to Ms. Ackel, and that all three acts were simulations. He also alleged that as Ms. Ackel's attorney, with knowledge of both the counterletter and mutual injunctions issued in the divorce proceedings, Mr. Gardner fraudulently and maliciously entered into a conspiracy to deprive Mr. Ackel of his interest in the property. He further alleged that the monthly mortgage payments owed by Scottwood and the monthly lease payments owed by Ms. Ackel were in the same amount.

Ms. Ackel and Mr. Gardner jointly answered the second and third supplemental petitions, specifically denying any conspiracy or simulation. In the same pleading, they asserted a reconventional demand against Mr. Ackel and a third-party demand against William Magee (Mr. Ackel's second attorney in this action), seeking damages for making false and fraudulent allegations of simulation and fraud to dispute Ms. Ackel's sale of the property and to remove Mr. Gardner as Ms. Ackel's counsel, and for abuse of process, among other related claims.

On August 11, 2003, Mr. Ackel filed a fourth supplemental and amending petition, amending the prayer of his petition to request judgment for damages, attorney fees, and costs against all defendants *in solido* by reason of their alleged conspiracy to fraudulently and maliciously deprive him of his ownership interest.

On September 26, 2003, Scottwood filed a motion for summary judgment, seeking the dismissal of all claims asserted by Mr. Ackel against it.

On October 8, 2003, Mr. Ackel filed a motion for partial summary judgment, seeking summary judgment declaring the sales to Scottwood and Schurr, and the associated mortgages, to be simulations.

On October 28, 2004, Schurr filed a motion for summary judgment, seeking its dismissal as a defendant on the same factual and legal grounds asserted by Scottwood.

On January 3, 2005, Ms. Ackel separately filed peremptory exceptions of no right of action and no cause of action, asserting that Mr. Ackel had no right of action to bring a partition action, as he was not a "legal owner" of the property.

The trial court heard the various exceptions and motions for summary judgment on January 21, 2005. The court sustained the exceptions filed by Ms. Ackel and Mr. Gardner, granted the motions for summary judgment filed by Scottwood and Schurr, and denied Mr. Ackel's motion for partial summary judgment. It issued its written reasons for judgment on February 9, 2005, and its judgment incorporating all rulings on the exceptions and motions was signed on March 23, 2005. Mr. Ackel appeals.

ASSIGNMENTS OF ERROR

For convenience, we condense and paraphrase Mr. Ackel's various assignments of error as follows:[4]

(1) The trial court erred in finding that the sales to Scottwood and Schurr were not simulations, and that those parties were good faith purchasers for value, and in denying his motion for partial summary judgment;

(2) The trial court erred in failing to find the existence of genuine issue of material fact regarding the validity of the sale to Scottwood and the actual giving of a promissory note as consideration;

(3) The trial court erred in failing to find the existence of genuine issue of material fact as to fraud and conspiracy on the part of the defendants;

(4) The trial court committed legal error in concluding that Mr. Ackel had no legal interest in the Military Road property enforceable against Ms. Ackel because he did not sign the counterletter; and

[4] In most of his listed assignments of error, Mr. Ackel states that the trial court "failed to inquire as to, review any facts or make a factual finding" regarding the matters as to which he contends genuine issue of material fact existed. Although phrased awkwardly in his assignments of error, in light of the substantive arguments presented in this appeal, we interpret these contentions to be directed to error in the trial court's ultimate disposition of the exceptions and motions, rather than to any procedural irregularity in the hearing and the rendition of its judgment and reasons for judgment. *See* La. C.C.P. art. 2129.

(5) The trial court erred in sustaining the exceptions and granting the motions for summary judgment.

STANDARD OF REVIEW

Trial court rulings sustaining exceptions of no cause of action and no right of action are reviewed *de novo* on appeal because both involve questions of law. Likewise, summary judgments are reviewed *de novo*. Thus, we must review the propriety of the judgment using the same standards applicable to the trial court's determination of the exceptions and motions.

No Cause of Action

The objection that a petition fails to state a cause of action is properly raised by the peremptory exception. La. C.C.P. art. 927(A)(4). A trial court's judgment sustaining the peremptory exception of no cause of action is subject to *de novo* review by an appellate court, employing the same principles applicable to the trial court's determination of the exception. *Stroscher v. Stroscher*, 01-2769, p. 3 (La. App. 1st Cir. 2/14/03), 845 So.2d 518, 523.

The purpose of the peremptory exception of no cause of action is to determine the sufficiency in law of the petition, in terms of whether the law extends a remedy to anyone under the petition's factual allegations. *Id.* Generally, no evidence may be introduced to support or controvert the exception. La. C.C.P. art. 931. However, Louisiana jurisprudence recognizes an exception to this rule, whereby evidence admitted without objection may be considered by the court as enlarging the pleadings. *Stroscher*, 01-2769 at p. 3, 845 So.2d at 523. Here, the record reflects that evidence was received during the course of the joint hearing held on the various exceptions and motions, and that no objection was made to the trial

court's consideration of such evidence for purposes of determining the peremptory exception of no cause of action.

For purposes of determining the issues raised by a peremptory exception of no cause of action, the well-pleaded facts in the petition must be accepted as true, and the court must determine if the law affords the plaintiff a remedy under those facts. *Id.* Any doubts are resolved in favor of the sufficiency of the petition. *Id.* If two or more causes of action are based on separate and distinct operative facts, the court may sustain the exception in part, while preserving other causes of action sufficiently pleaded. *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So.2d 1234, 1242 (La. 1993).

No Right of Action

The function of an exception of no right of action is a determination of whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the petition. *Badeaux v. Southwest Computer Bureau, Inc.*, 05-0612, p. 6 (La. 3/17/06), 929 So.2d 1211, 1216-17. In other words, the focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the suit. *Badeaux*, 05-0612 at p. 6, 929 So.2d at 1216. The factual evidence admissible on the hearing of this exception is restricted as to whether this particular plaintiff does or does not fall within the general class having legal interest to sue upon the cause of action asserted. *Bielkiewicz v. Rudisill*, 201 So.2d 136, 142 (La. App. 3rd Cir. 1967). Stated somewhat differently, evidence may be received under the exception of no right of action for the purpose of showing that the plaintiff does not possess the right he claims or that the right does not exist. *Teachers' Ret. Sys. of La. v. La. State Employees' Ret. Sys.*, 456 So.2d 594, 598 (La. 1984). Thus, to prevail on the exception of no right of

action, the defendant must show that the plaintiff does not have an interest in the subject matter of the suit or legal capacity to proceed with the suit. *Talbot v. C & C Millworks, Inc.*, 97-1489, pp. 3-4 (La. App. 1st Cir. 6/29/98), 715 So.2d 153, 155. Where doubt exists regarding the appropriateness of an objection of no right of action, it is to be resolved in favor of the plaintiffs. *Teachers' Ret. Sys. of La.*, 456 So.2d at 597.

Summary Judgment

The summary judgment procedure is expressly favored in the law, and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. La. C.C.P. art. 966(A)(2). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

The mover has the burden of proof that he is entitled to summary judgment. *See* La. C.C.P. art. 966(C)(2). In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Hines v. Garrett*, 04-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. *Willis v. Medders*, 00-2507, p. 2 (La. 12/8/00), 775 So.2d 1049, 1050.

DISCUSSION

Louisiana Civil Code article 2025 defines a simulation as a contract which the parties mutually agree "does not express the true intent of the

parties." It has also been described as "a transfer of property which is not what it seems." *Moore v. Moore*, 427 So.2d 1320, 1323 (La. App. 2nd Cir. 1983). A counterletter is a separate written agreement expressing the true intent of the parties to a simulation. La. C.C. art. 2025. Counterletters can have no effects against third persons in good faith. La. C.C. art. 2028. A third person in good faith against whom a counterletter can have no effect is one who does not know of the existence of the counterletter. La. C.C. art. 2028, Revision Comments – 1984, (d). Nevertheless, if the counterletter is not recorded, a third person's actual knowledge of it may not deprive him of protection under the public records doctrine. *Id.*

Ms. Ackel and Mr. Gardner contend that the counterletter at issue was of no effect because it was simply a unilateral act by Ms. Ackel, and that without Mr. Ackel's signature, expressing his consent to the parties' agreement, no agreement came into existence between the spouses as to Mr. Ackel's claimed interest in the property, and Mr. Ackel thus had no right of action against them. In its written reasons for judgment, the trial court agreed with those contentions, and sustained the peremptory exceptions of Ms. Ackel and Mr. Gardner on the grounds that Mr. Ackel had "no legal interest to bring a partition action and thus [had] no right to bring this action." In doing so, the trial court committed legal error. We find the counterletter to be valid and enforceable between Mr. Ackel and Ms. Ackel, as we explain below.

An absolute simulation, where the parties intend that their simulated contract shall produce no effects between them, includes "the situation in which an apparent transferee confirms by counterletter that the subject property still belongs to the transferor." La. C.C. 2026, Revision Comments

– 1984, (b).[5] The "traditional institutions of simulation and counterletter" are "important to the civil law of Louisiana" and "have long been common in practice." La. C.C. 2025, Revision Comments – 1984, (b). Counterletters require no special form except that they must be in writing. *Roy v. ROBCO, Inc.*, 98-214, p. 4 (La. App. 5th Cir. 10/14/98), 721 So.2d 45, 46. Our jurisprudence has consistently enforced counterletters signed only by the apparent transferee, without any requirement that the apparent transferor or beneficiary of a counterletter sign it or take other affirmative action in order to assert the rights acknowledged in the counterletter. *See Thom v. Thom*, 166 La. 648, 117 So. 750 (La. 1928); *Peterson v. Moresi*, 191 La. 932, 186 So. 737 (La. 1939); *Dupuy v. Riley*, 557 So.2d 703, 708-09 (La. App. 4th Cir.), *writ denied*, 563 So.2d 878 (La. 1990); *Roy*, 98-214 at pp. 4-5, 721 So.2d at 47.[6]

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[5] "For example, the record owner of real property may acknowledge in a counterletter that another person actually owns the property; the counterletter may then be used when the property is to be reconveyed after a period." Black's Law Dictionary 376-77 (8th ed. 2004).

[6] Ms. Ackel cites *Decatur-St. Louis Combined Equity Properties, Inc. Venture v. Abercrombie*, 411 So.2d 677 (La. App. 4th Cir. 1982) in support of her contention that the party claiming the benefit of a counterletter must sign or otherwise "ratify" or "acknowledge" the counterletter to give it effect. The case simply does not stand for that proposition. Ms. Ackel contends that the court in *Decatur-St. Louis* "found that the defendant's [*sic*] ratified the counter letter by properly pleading the ratification in its [*sic*] petition." In the first place, we point out that defendants do not generally file petitions; they file answers or other responsive pleadings. It was the *plaintiffs* in *Decatur-St. Louis* who alleged that the defendants previously acknowledged and ratified the true ownership interest of the plaintiff partnership through various written documents. The *Decatur-St. Louis* defendants filed no petition, nor even an answer to the petition naming them as defendants; they filed a peremptory exception raising objections of no right of action and no cause of action, expressly denying the plaintiffs' claimed ownership and invoking the parol evidence rule. They did not "ratify" anything by virtue of a pleading. Secondly, the defendants were the record co-owners of the property, not alleged co-owners asserting ownership interests by virtue of a counterletter in their favor. The crucial issue was whether the "[d]ocuments executed by the *defendants* acknowledging ownership of the property in the partnership are admissible in evidence as *counterletters signed by the owners of record*." *Id.* at 680. (Emphasis supplied.) The Fourth Circuit held that because the parol evidence rule does not apply to counterletters, the trial court erred in excluding the documents from evidence, and that counterletters "require no special form except they must be *in writing*." *Id.* (Emphasis supplied.) The court did not hold that the alleged counterletters had to be executed by both the record owners and the non-record owner to be effective. Thus, the case holding actually supports Mr. Ackel's position on this legal issue.

Ms. Ackel alleged in her reconventional demand and her affidavit submitted in connection with the motions for summary judgment that the counterletter was never explained to her. It is well-settled that a party signing a contract is presumed to have consented to its contents and cannot avoid his obligations by contending that he did not read or fully understand it. A signature to a contract is not a mere ornament. *Rao v. Rao*, 05-0059, p. 17 (La. App. 1st Cir. 11/4/05), 927 So.2d 356, 367, *writ denied*, 05-2453 (La. 3/24/06), 925 So.2d 1232. Again, we find that the counterletter at issue is valid and enforceable as between Mr. and Ms. Ackel and supports Mr. Ackel's claim to a fifty percent interest in the Military Road property.

Circumstantial evidence may be used to defeat summary judgment, and summary judgment is rarely appropriate to determine subjective factual issues such as intent, motive, or knowledge. *Thomas v. North 40 Land Development, Inc.*, 04-0610, p. 21 (La. App. 4th Cir. 1/26/05), 894 So.2d 1160, 1173-74. Even under our current summary judgment procedure, if Mr. Ackel was able to demonstrate a factual dispute concerning the parties' actual intent relating to the sale to Scottwood, summary judgment would be inappropriate. *See Carrier v. Grey Wolf Drilling Co.*, 00-1335, p. 5 (La. 1/17/01), 776 So.2d 439, 442.

Fraud is defined in our civil code as "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." La. C.C. art. 1953. Fraud may also result from silence or inaction. *Id.* Any circumstances constituting fraud must be alleged "with particularity." La. C.C.P. art. 856. Our review of the factual allegations of Mr. Ackel's petition, as amended, reveals sufficient factual particularity as to the allegations of those facts purportedly constituting simulation and fraud. As

his petition, as supplemented and amended, adequately alleged a cause of action for simulation and fraud against the defendants, founded upon an alleged fraudulent conspiracy, the peremptory exception of no cause of action was improvidently sustained.

An absolute simulation is a contract intended to have no effects between the parties. La. C.C. art. 2026. In an absolute simulation, sometimes called a pure simulation or a non-transfer, the parties only pretend to transfer the property from one to the other, but in fact both the transferor and the transferee intend that the transferor retain ownership of the property. When this type of simulation is successfully attacked, the true intent of the parties is revealed; that is, that no transfer had in fact taken place. *Peacock v. Peacock*, 28,324, pp. 5-6 (La. App. 2nd Cir. 5/8/96), 674 So.2d 1030, 1033.

Two legal presumptions, one codal and one jurisprudential, apply in situations where a party seeks to prove a simulation. The codal presumption expressed in La. C.C. art. 2480 provides that when the thing sold remains in the corporeal possession of the seller, the sale is presumed to be a simulation, and, where the interest of heirs and *creditors* of the seller is concerned, the parties must show that their contract is not a simulation. The presumption is applicable only where the vendor retains corporeal possession. *Peacock*, 28,324 at p. 6, 674 So.2d at 1033. This is a strong legal presumption. *Travelers Ins. Co. v. McArthur*, 175 So.2d 669, 671 (La. App. 1st Cir. 1965).

The jurisprudential presumption of simulation applies where the evidence establishes the existence of facts and circumstances that create a highly reasonable doubt as to the reality of the putative sale. *Wilson v. Progressive State Bank & Trust Co.*, 446 So.2d 867, 869 (La. App. 2nd Cir.

1984). When either the codal or jurisprudential presumption exist, the burden of proof shifts to the other party to the sale who may rebut the presumption by establishing a good faith transaction, resulting in a true alienation of ownership for consideration. A transaction will not be set aside as a simulation if any consideration supports the transaction, because the reality of the transference is thus established. *Peacock,* 28,324 at p. 6, 674 So.2d at 1033-34.

Given the undisputed content of the counterletter, Mr. Ackel put forth a *prima facie* case that he was a creditor as to Ms. Ackel, the seller of the property. The undisputed evidence was that Ms. Ackel remained in full corporeal possession of the property. Thus, the codal presumption applied, and Ms. Ackel and Scottwood bore the burden of proving their transaction was not a simulation.

Whether or not a transaction is simulated is a matter to be decided in the light of the circumstances of each case. *Milano v. Milano*, 243 So.2d 876, 879 (La. App. 1st Cir. 1971). A simulation may be proved by indirect or circumstantial evidence since, by its inherent nature, a simulation often only admits of circumstantial proof. *Wilson*, 446 So.2d at 869.

A third person, not a party to an absolute simulation, may attack an absolute simulation made in fraud of his interest. *See* La. C.C. art. 2026, Revision Comments – 1984, (c). *See also Britton v. Williams*, 40,341, pp. 7-8 (La. App. 2nd Cir. 10/26/05), 914 So.2d 1151, 1155-56. With regard to the standard of proof of fraud, La. C.C. art. 1957 provides that fraud need only be proven by a preponderance of the evidence, and that such proof also "may be established by circumstantial evidence." Circumstantial evidence, including highly suspicious facts and circumstances surrounding a transaction, may be considered in determining whether a fraud has been

committed. *Williamson v. Haynes Best Western of Alexandria*, 95-1725, p. 85 (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 the case of *Griffing v. Atkins*, 1 So.2d 445 (La. App. 1st Cir. 1941), an employee of a jewelry store was found to have fraudulently taken advantage of the finder of a ring worth $1,250.00, purchasing it for $130.00 with the connivance of certain co-employees.

We observed:

> Courts have always acknowledged how difficult it is for one to prove fraud by positive and direct testimony, realizing full well that those who indulge in it generally prepare themselves in such a manner as to cover up and leave no traces of their practice behind them. In an early case, *Simon-Gregory Co. v. Newman,* 50 La.Ann. 338, 23 So. 329 [,] the Court stated that: "While fraud is never to be presumed, courts of justice 'recognize the cunning concealment in which it shrouds its devious practices and the difficulty of tracing it by direct proof.'"

Id. at 450.

We further observed in *Griffing* that the plaintiff admitted that he "purchased [the] ring 'sight unseen'" (as Scottwood purchased the property here), and that it did not seem reasonable that a knowledgeable jeweler would agree to purchase the ring and seek to borrow the purchase price under such circumstances. *Id.* at 448-49. The same skepticism would seem to be warranted in the present case, given Mr. Schudmak's admitted failure to even inspect the residence on the property at issue prior to his company's purchase of it for half a million dollars. That circumstance supports the conclusion that a genuine issue of material fact exists as to the claims of simulation and fraud.

Ms. Ackel testified that she wanted to sell the Military Road property because her estranged husband had not paid her any spousal support between

March and November of 2001, and because she "wanted to get on with [her] life," since "[she] knew that . . . every turn of the road [she] would have a debate with Mr. Ackel." After initially contacting a friend and intermediary, Mr. Forbes, regarding prospective purchasers, she did not have the property appraised to determine its fair market value, although she previously believed it was worth $900,000.00, nor did she list it with a realtor or otherwise offer it for sale to the general public.[7] She claimed, however, that there was no urgency on her part to sell the property, even though she also claimed to be in financial difficulty at that time.[8] She testified that she advised Mr. Schudmak, Scottwood's principal, that she wanted to sell the property "[b]ecause [she] wanted to get out of it," and claimed in her deposition that she in fact intended to vacate the property after selling it. She further claimed that she never advised Mr. Schudmak of the pending partition action at any time prior to the sale to Scottwood.

To characterize the financing and security arrangements of the two sales at issue as unusual is an understatement. In summary, Scottwood purported to purchase rural residential property for $500,000.00, without an appraisal and with only a cursory inspection of the overall property, making no actual payment or capital outlay whatsoever, obligating itself only to pay the principal three years from the date of sale, leaving the seller in possession of the property, with interest on its promissory note set off against the rent due under the lease. In exchange for that obligation, Ms. Ackel in turn sold property that she believed to be worth $900,000.00 (and

[7] In testimony given in open court in the Jefferson Parish proceedings, Ms. Ackel admitted that she "probably" chose not to list the property with a real estate agent in order to prevent Mr. Ackel from learning about her intent to sell the property.

[8] In her deposition, Ms. Ackel described herself as "pretty much" destitute at the time she sold the property.

actually worth $850,000.00)[9] for less than 60 percent of its true value, that amount not payable to her until three years later. She also supposedly obtained the right to reside in her former residence for three years without the actual monetary payment of any rent, but agreed to continue to pay the insurance for the property and the property taxes during that time, rights and obligations she obviously would have had as owner even if the property had not been sold. Yet she entered into that seemingly disadvantageous transaction with the advice and assistance of Mr. Gardner, her attorney, a longtime friend of Mr. Schudmak, Scottwood's sole principal and stockholder. Shortly thereafter, Scottwood sold the $850,000.00 property to Schurr for $560,000.00, again with no actual payments being made by the buyer, and without any inspection of the interior of the residence by Schurr.

The case of *Ingram v. Freeman*, 326 So.2d 565 (La. App. 3rd Cir.), *writs denied*, 329 So.2d 755, 757 (La. 1976), involved facts which parallel certain of those in the present matter. The plaintiff obtained a judgment against the defendant for personal injuries caused by a brutal beating, and later obtained a judgment annulling the defendant's transfer of property to his sister on the grounds of simulation. On the day that the act of sale from the defendant to his sister was executed (only two weeks after the battery), the parties entered into a lease whereby the defendant leased the property from his sister. The lease was prepared by the same attorney who drafted the sale. The court also noted that the evidence relating to the purported $15,000.00 consideration for the sale (the cancellation of a prior $5,000.00 debt the defendant owed to his sister and brother-in-law and $10,000.00 cash

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[9] On January 28, 2004, the trial court appointed James B. Mitchell, a licensed and certified real estate appraiser, to appraise the Military Road property. His appraisal report dated March 18, 2004 and addressed to the trial court reflects an estimated value of $850,000.00 as of March 15, 2004, and an estimated "retrospective" value of $850,000.00 as of February 15, 2002 (four days before the sale to Scottwood).

"in a paper bag") was "difficult to accept" and "patently suspicious." *Id.* at 568. The court further observed:

> Also questionable was [the defendant's] alleged motive for selling the property. *This defendant claimed that his only desire was to dispose of his land, take the money, and leave the area*, to perhaps work or settle in another part of the country. However, it was established at trial, that another individual had previously been negotiating for the same property but minus the farming equipment and household items and was offering a price of approximately $25,000.00 [$10,000.00 more than the $15,000.00 sale price]. *If [the defendant] was interested in selling the property and leaving, surely he would have sold it to the highest bidder. Defendant's credibility is further weakened by the fact that he entered into a year's lease of the property on the same day of the sale. This act certainly belies his intention to obtain his money and leave.*

Id. (Emphasis supplied.)

While not conclusive on the issue, the fact that the cash consideration recited in the act of sale to Scottwood was not in fact paid, even in part, is relevant in determining whether the true consideration or cause for the sale was adequate to overcome the presumption of simulation. *See McBride v. McBride*, 121 So.2d 353, 354 (La. App. 1st Cir. 1960). *See also Peacock*, 28,324 at p. 7, 674 So.2d at 1034. In the case of *Holahan v. Durand*, 220 So.2d 527 (La. App. 4th Cir. 1969), a bankruptcy trustee sued to annul a cash sale of immovable property from the bankruptcy petitioner to his daughter on the grounds of simulation. The sale price was $6,500.00 cash and the assumption of an outstanding mortgage for $1,300.00, and the purported seller retained possession of the property through a usufruct for life. There was no documentary evidence of actual payment, and it was established at trial that the mortgage had been cancelled a month prior to the sale. In classifying the transaction as a simulation, the court also considered relevant, as one of a number of "suspicious facts," the fact that the daughter's funds "did not pass through the hands of the notary who

confected the sale, nor . . . was the money transferred in the presence of the notary or of the witnesses thereto." *Id.* at 530.[10]

In *Travelers*, the plaintiffs were judgment creditors of the defendant debtor, and sought to have a sale of immovable property declared a simulation. The defendant debtor purportedly sold his residence to his brother-in-law three months before the judgment against him, but remained in possession of the residence over two years after the sale. The act of sale recited a consideration of $6,000.00 cash and the brother-in-law's assumption of an outstanding mortgage. The evidence showed that the cash consideration was never paid by the brother-in-law, but the defendant debtor claimed it actually represented his repayment of prior loans from his brother-in-law, thus amounting to a *dation en paiement*. It was also shown that the defendant debtor continued to pay the mortgage installments and the property taxes after the sale, although he characterized those payments as rent. Even though the evidence at trial was the same evidence presented on a previous unsuccessful motion for summary judgment filed by the plaintiffs, this court held that the legal presumption of simulation of La. C.C. art. 2480 applied, and that the defendant debtor "failed to sustain the burden of proof that the sale was made for a valid consideration." *Travelers*, 175 So.2d at 671. Accordingly, in that case, we set the sale aside as a simulation.

Prior jurisprudence has recognized as a hallmark of simulation the situation "where a party faces an impending civil liability, and purports to

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[10] Cynthia Petry, the notary before whom the sale from Ms. Ackel to Scottwood and the related mortgage were executed, testified by deposition on August 21, 2003 that she did not paraph a promissory note identified with the mortgage, and did not see any cash or promissory note exchanged during the closing of the sale. In a later affidavit submitted in connection with the motions for summary judgment, dated October 17, 2003, Ms. Petry averred that Scottwood executed a promissory note in connection with the execution of the mortgage, which she "Ne Varietured to identify with the act of mortgage." This discrepancy adds an additional element of factual dispute.

convey the only property that may be used to satisfy the monetary obligation inherent in the civil liability." *Wilson*, 446 So.2d at 871. It is immediately obvious from even a cursory review of the parties' financial statements in the divorce proceedings (also filed in the record here) that Ms. Ackel owned no other substantial assets from which she could satisfy any potential liability to Mr. Ackel under the terms of the counterletter. The timing and factual context of the sale to Scottwood and the relatively short period of time between that sale and Scottwood's sale to Schurr only serve to compound the reasonable doubt as to the reality of the sales shown by other circumstances.[11]

Scottwood and Schurr rely heavily, as did the trial court, on the public records doctrine as insulating those defendants from any cause of action asserted by Mr. Ackel.[12] A third party purchaser of immovable property can rely on the public records so long as he does not participate in fraud. *Owen v. Owen*, 336 So.2d 782, 788 (La. 1976). Thus, questions of fraud and bad faith are generally relevant to a determination of whether a third party purchaser is entitled to the protection afforded by the public records doctrine. *Simmesport State Bank v. Roy*, 614 So.2d 265, 268 (La. App. 3rd Cir.), *writ denied*, 616 So.2d 698 (La. 1993). To be entitled to the protection of the public records doctrine, a purchaser of immovable property must be an "innocent third party purchaser," and a "purchaser for value." *See Owen*,

[11] For example, the simulated sale in *Peacock* occurred during a "flurry of activity" following the receipt of a letter from the plaintiff to the defendant "seller," expressing the plaintiff's intent to exercise a right of redemption as to the property that the plaintiff had originally sold to that defendant. *Peacock*, 28,324 at p. 7, 674 So.2d at 1034. The rapid progression of transactions relating to the Military Road property similarly occurred shortly after Ms. Ackel's continued occupancy of the property was placed at issue by the filing of Mr. Ackel's Rule for Use and Occupancy in the divorce proceedings.

[12] The public records doctrine is embodied in a number of codal and statutory provisions. Among these are La. C.C. art. 1839, which provides, in part, that "[a]n instrument involving immovable property shall have effect against third persons only from the time it is filed for registry in the parish where the property is located." *See also* La. C.C. arts. 517, 2442, 3338 and La. R.S. 9:2721, *et seq.*

336 So.2d at 786-87; *American Legion Chappepeela Post #255 of Loranger La. v. Morel*, 577 So.2d 346, 348 (La. App. 1st Cir.), *writ denied*, 580 So.2d 924 (La. 1991). While Scottwood and Schurr may very well be good faith third-party purchasers for value, the factual circumstances detailed herein preclude summary judgment as to that status, given the present posture of these proceedings.

Based upon our review of the record as a whole, we conclude that Mr. Ackel has demonstrated genuine issue of material fact as to the reality of the consideration or cause for those sales, thereby causing the burden of proof of non-simulation to be retained by Scottwood and Schurr. The defendants' intent, motive, and knowledge form the crux of that factual issue.[13] The mere absence of any written counterletters between Ms. Ackel and Scottwood, Scottwood and Schurr, or any combination of those parties, does not serve to eliminate all contested factual issues as to the reality of their transactions and the expressed consideration therefor. Acceptance of the defendants' contentions regarding this subjective element would entail a credibility determination inappropriate for summary judgment. *See Monaghan v. Caserta*, 95-0718, p. 4 (La. App. 1st Cir. 12/15/95), 666 So.2d 397, 400. In our view, considering the evidence in the light most favorable to Mr. Ackel, as we are required to do, we conclude that the movers failed to meet their burden of proof for purposes of summary judgment.

We note that in its written reasons for judgment on the exceptions and motions at issue, the trial court stressed that Mr. Ackel "testified at various

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[13] The very fact that Scottwood and Schurr felt it necessary to comment, in their brief, on Mr. Ackel's purported "bad faith" in "hiding" his asserted interest in the Military Road property through the use of and subsequent delay in recording the counterletter is emblematic of the subjective issues of motive and intent that permeate all of the various transactions relating to the property.

times he intended for [Ms. Ackel] to have the property," and further observed:

> It is ironic that plaintiff . . . criticizes the subsequent sales of the property for want of a meeting of the minds as to object and price. His deposition testimony reflects great ambiguity in his own mind as to his intent regarding any interest he wished to exert [*sic*] in the property when it was purchased in 1993.

A trial court cannot make credibility determinations on a motion for summary judgment. *Williams v. Storms*, 01-2820, p. 10 (La. App. 1st Cir. 11/8/02), 835 So.2d 755, 763. There are simply too many genuine issues of subjective intent and motive raised by the unique and unconventional circumstances of the parties' various dealings and relationships for summary judgment to be appropriate here. Even if the circumstantial evidence put forth by Mr. Ackel might ultimately be considered insufficient proof of simulation or fraud at trial on the merits, it is sufficient to defeat summary judgment in this matter's present posture. While Mr. Ackel may indeed have considerable difficulty meeting his ultimate burden of proof of his claims at trial, summary judgment is not a substitute for trial on the merits under the facts before us at this time. Under those facts, Mr. Ackel is entitled to a full evidentiary hearing on the issue of simulation.[14] For the same reasons, however, the trial court was correct in denying Mr. Ackel's motion for partial summary judgment, and we affirm its judgment in part as to that ruling.

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[14] In *Milano*, we held that "whether the transactions were in fact simulations must be determined in the light of all attending circumstances which are not before us inasmuch as the issue of simulation was not fully tried below." 243 So.2d at 880. We therefore remanded the matter to the trial court for a "full hearing" on the issue. *Id.* In *Teachers' Ret. Sys. of La.*, 456 So.2d at 597, holding that all doubt as to an exception of no right of action should be resolved in favor of the plaintiff, the supreme court noted the lack of additional evidence "which would contribute to a better understanding of the intentions of the parties concerning their relationships." It concluded that "[u]ntil those legal relationships are determined and the status of each of the parties to this series of complex financial arrangements established *after presentation of all evidence*, it would be precipitous to dismiss any of the parties." *Id.* (Emphasis supplied.)

The determination of the exceptions and the motions for summary judgment were necessarily intertwined by reason of their legal issues, and the consolidated hearing on the exceptions and motions, employing different evidentiary standards, served to procedurally complicate those issues. If genuine issues of material fact remain as to whether the two sales were simulations, then those issues cannot be determined by summary judgment, and remain viable issue to be resolved at trial. If the two sales were in fact absolute simulations, then they are null and without effect, and the public records doctrine cannot serve to validate them. Under either scenario, given the allegations of his petition, Mr. Ackel may conceivably be considered a co-owner of the property as between him and Ms. Ackel, and thereby has arguably stated both a cause and right of action for partition of the allegedly co-owned property and at the very least an alternate cause and right of action for damages based upon breach of contract, simulation, conspiracy, and fraud. Any doubt as to his right of action to proceed must be resolved in his favor.[15] Thus, the trial court likewise erred in sustaining the exceptions.

The costs of this appeal are assessed in equal proportions to all parties.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

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[15] See n.14, *supra*.