

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2021 CA 0355

SUCCESSIONS OF JOYCE FAYE MILLET A/K/A JOYCE  
LEBLANC MILLET, WIFE OF/AND LEONCE JOSEPH MILLET, JR.

*Consolidated with*

2021 CA 0356

JILL MILLET

VERSUS

ECONOMY BRICK SALES, INC.

Judgment Rendered: DEC 22 2021

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On Appeal from the  
23rd Judicial District Court  
In and for the Parish of Ascension  
State of Louisiana  
Trial Court No. 18,543 c/w 126,239

Honorable Jason Verdigets, Judge Presiding

\* \* \* \* \*

Barbara Lane Irwin  
Timothy E. Pujol  
Gonzales, LA

Attorneys for Plaintiff-Appellant,  
Jill Millet

*amp  
JMM*

CHH

Courtney C. Miller  
Graham Williams  
Richard Bouligny Eason II  
Robin Bryan Cheatham  
New Orleans, LA

Attorneys for Defendants-Appellees,  
Dean Millet, Michelle Millet DePierri  
and Economy Brick Sales, Inc.

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BEFORE: WHIPPLE, C.J., PENZATO, AND HESTER, JJ.

**HESTER, J.**

In this succession proceeding and consolidated suit for breach of lease agreement, Jill Millet, one of decedent's daughters, appeals the trial court's grant of summary judgment, dismissing all of Jill's claims in both suits. For the following reasons, we reverse.

**FACTUAL AND PROCEDURAL HISTORY**

Leonce Millet, Jr. and his wife, Joyce Millet, were the owners of certain immovable property in Ascension Parish. The immovable property was subject to a recorded Lease Agreement between the Millets and Economy Brick Sales, Inc. ("Economy Brick"). Leonce was the original proprietor of Economy Brick; however, Dean J. Millet and Michelle Millet DiPierre, as the sole officers of Economy Brick, were the signatories to the Lease Agreement in 2004.

The Lease Agreement provided as follows:

1. Term:

The term of this lease shall be a maximum period of Fifty (50) Years commencing on the 1<sup>st</sup> day of January, 2004 and expiring on the 31<sup>st</sup> day of December 2054. Lessee agrees to pay to Lessor, without deduction, set off, prior notice or demand, net rental during the said term, payable on the first day of each month, in advance monthly installments of SEVEN THOUSAND AND NO/100 (\$7,000.00) DOLLARS to continue in effect as long as Lessor survives. The term of the lease shall be reduced to the remainder of twenty (20) years commencing upon the deaths of both Lessors in which event the monthly rental shall be paid as set forth in 2 (a) below.

2. Death of Lessor:

- (a) Upon the occurrence of the death of both Lessors, the monthly rental will be reduced to 1.30% of the monthly sales not to exceed a maximum monthly installment of \$4,000.00 payable in equal monthly installments to Rhonda Millet Matthews, Aleta Millet Morgan, Jill Millet and Paula Millet LeBlanc on the first day of each month.

Joyce died testate on February 27, 2013, and Leonce died testate on June 11, 2018. Subsequently, Dean and Michelle jointly filed a Petition to Open Successions, Probate Wills, and for Appointment of Independent Co-Executors, and an order was issued appointing Dean and Michelle as independent co-executors of the successions

(hereinafter sometimes referred to as the “succession proceeding”). In accordance with Joyce’s 2009 Last Will and Testament, all of her rights in the immovable property at issue were transferred to Leonce upon her death in February of 2013. See La. Civ. Code art. 935 (providing, in part, that particular successors acquire ownership of the things bequeathed to them immediately upon death of the decedent). In his August 2013 Last Will and Testament (hereinafter sometimes referred to as the “August 2013 Will”), Leonce bequeathed the immovable property to Dean and Michelle and acknowledged in the will that the immovable property was subject to the Lease Agreement. Leonce transferred, conveyed and assigned to Dean and Michelle “all of [his] rights and obligations in, to and under said Lease, including but not limited to the power to amend or terminate said Lease on behalf of the Lessor.” Additionally, the August 2013 Will stated, “It is my desire and I hereby instruct [Dean and Michelle] to consider termination of said Lease upon my death.”

Contending that lease payments were owed to her after the death of her father in accordance with Paragraph 2(a) of the Lease Agreement, Jill submitted a proof of claim to the co-executors, but the claim was rejected. In July of 2019, Jill filed a Petition for Judicial Enforcement of Claim against Dean and Michelle in the succession proceeding, seeking to enforce the terms of the Lease Agreement and to obtain lease payments owed to her. Shortly thereafter, Jill also filed a separate suit for breach of contract and damages against Economy Brick and Dean, which suit was ultimately consolidated with the succession proceeding. In August of 2019, Dean and Michelle recorded the Act of Cancellation of the Lease Agreement in the mortgage and conveyance records, which cancellation had an effective date of June 12, 2018 (the day after Leonce’s death).

On March 23, 2020, Dean and Michelle, in their capacity as co-executors in the succession proceeding, as well as Economy Brick and Dean filed a motion for summary judgment seeking to dismiss all of Jill’s claims against them in both the

succession proceeding and the contract suit, and the motion was ultimately set for hearing on August 4, 2020. According to defendants, Leonce intended to transfer the immovable property to Dean and Michelle and intended to cancel the Lease Agreement with Economy Brick upon his death. Defendants argued that the intent of the testator, Leonce, controls the interpretation of the August 2013 Will, citing to La. Civ. Code art. 1611.<sup>1</sup> Moreover, defendants argued, the rights of any third-party beneficiary, like Jill, under the Lease Agreement were revoked in accordance with La. Civ. Code art. 1979<sup>2</sup> when Leonce drafted his August 2013 Will, five years before Jill attempted to manifest her intention to avail herself of the benefit. In support of the motion for summary judgment, defendants submitted the following exhibits: (1) Lease Agreement; (2) August 2013 Will of Leonce; (3) Judgment of Partial Possession; (4) Act of Cancellation of Lease Agreement; (5) Affidavit of Dean; and (6) Affidavit of Michelle.

Jill timely opposed defendants' motion and objected to all the exhibits, specifically noting that exhibits 1, 2, and 4 did not comply with the provisions of La. Code Civ. P. art. 966(A)(4) (only permitting pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions) and exhibits 5 and 6 were not affidavits based on personal knowledge. Further, Jill argued that Leonce had no authority under the Lease Agreement to terminate and, consequently, could not transfer such authority to Dean and Michelle. Attached to the opposition was the Affidavit of Jill, which affidavit included the following exhibits: (1) Petition for Judicial Enforcement of Claim with exhibits; (2) Petition for Breach of Contract and Damages with exhibits; and (3) Discovery Responses of Jill.

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<sup>1</sup> Louisiana Civil Code art. 1611(A) provides, in pertinent part, that “[t]he intent of the testator controls the interpretation of his testament.”

<sup>2</sup> Louisiana Civil Code art. 1979 provides, in pertinent part, that a “stipulation may be revoked only by the stipulator and only before the third party has manifested his intention of availing himself of the benefit.”

In the reply memorandum, filed on July 31, 2020, defendants contended the objections to the summary judgment evidence were meritless but also acknowledged that contracts and other documents may be used in support of motions for summary judgment if properly authenticated by an affidavit or deposition to which they are attached. Defendants attached as exhibits to the reply the Affidavits of Dean, Michelle, and Robin Cheatham, which affidavits authenticated the Lease Agreement, the Act of Cancellation, and Leonce's August 2013 Will. Accordingly, defendants argued, the objections raised by Jill were unfounded. Thereafter, defendants filed a supplemental reply, attaching as an exhibit the deposition of Jill taken on July 28, 2020, noting that the transcript was not prepared at the time the initial reply memorandum was filed.

Citing to La. Code Civ. P. art. 966(B)(3), which prohibits the filing of additional documents with a reply memorandum, Jill filed motions to strike, seeking to enforce the provisions of 966(B)(3). Defendants responded to the motions to strike, positing that the reply memorandums "merely rebut[] the arguments of the plaintiff in her opposition memorandum." Defendants explained, "To support [their] rebuttal arguments ... as to the authenticity of the exhibits objected to by plaintiff, [defendants] used the affidavits of Dean Millet, Michelle Millet DePierri and Robin Cheatham to authenticate these exhibits."

The trial court heard arguments on the motions to strike on August 4, 2020, which had been the hearing date for the motion for summary judgment, and effected a compromise, stating as follows:

You know my initial reaction to all of this and my suggestion is that I agree, I believe that you deserve the right to reply to these replies. Obviously I would like to have as much admissible information in front of me regarding an MSJ, because we all know what that means, to make my decision. What I'm going to propose is that I give you that time to reply and then we're going to have to back up the bench trial. Neither side will be prejudice[d]. I have plenty of dates to give, because I'm not having jury trials. We'll go off the code. I think you have to do it, something like 65 days out of the trial regarding your MSJ.

Through a joint agreement among the trial court and the parties, the trial date was continued until October 6, 2020, and the hearing on the motion for summary judgment was reset for September 10, 2020. The trial court permitted Jill to submit a responsive brief fifteen days before the new hearing date, which she timely filed and submitted as exhibits excerpts from the depositions of Dean and Michelle.

At the rescheduled hearing on the motion for summary judgment, the trial court heard arguments from the parties and granted the motion. The judgment, signed on October 5, 2020, granted defendants' motion for summary judgment and dismissed all claims Jill asserted against defendants in both the succession proceeding and the suit for breach of contract. A timely motion for new trial was filed by Jill but was denied by the trial court. The instant appeal followed.

#### **LAW AND ANALYSIS**

The purpose of summary judgment is to pierce the pleadings and to assess the proof in order to determine whether there is a genuine need for trial. **Louisiana Workers' Compensation Corp. v. B, B & C Associates, LLC**, 2017-1342 (La. App. 1st Cir. 4/9/18), 249 So.3d 18, 22. The initial burden of proof is on the mover. La. Code Civ. P. art. 966(D)(1). After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents 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. Code Civ. P. art. 966(A)(3).

The mover can meet its burden by filing supporting documentary evidence, which is restricted to pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions with its motion for summary judgment. La. Code Civ. P. art. 966(A)(4). Other documents that are not included in the exclusive list of La. Code Civ. P. art. 966(A)(4), such as photographs, pictures, video images, or contracts, are not permitted unless they are properly authenticated by an affidavit or deposition to

which they are attached.” See La. Code Civ. P. art. 966, comments—2015, comment (c). The mover’s supporting documents must prove the essential facts necessary to carry the mover’s burden. Therefore, in deciding a motion for summary judgment, it must first be determined whether the supporting documents presented by the mover are sufficient to resolve all material fact issues. **Jenkins v. Hernandez**, 2019-0874 (La. App. 1st Cir. 6/3/20), 305 So.3d 365, 370-71, writ denied, 2020-00835 (La. 10/20/20), 303 So.3d 315.

Appellate courts review summary judgments *de novo*, using the same standards applicable to the trial court’s determination of the issues, and ask the same questions the trial court does in determining whether summary judgment is appropriate. **Cabana Partners, LLC v. Citizens Bank & Trust Co.**, 2018-0133 (La. App. 1st Cir. 12/21/18), 269 So.3d 986, 990. See also La. Code Civ. P. art. 966(A)(3).

On summary judgment, defendants sought to establish that Leonce’s intent, as expressed in his August 2013 Will, was to transfer the immovable property to Dean and Michelle and to cancel the Lease Agreement with Economy Brick upon his death, thereby eliminating any claim Jill, as a third-party beneficiary, had under the terms of the Lease Agreement. As movers, defendants bore the initial burden of proof on summary judgment but failed to submit proper summary judgment evidence sufficient to prove the essential facts necessary with their motion. See La. Code Civ. P. art. 966(A)(4). Defendants would also bear the ultimate burden of proof at trial that the Lease Agreement was cancelled and that the third-party beneficiary rights had effectively been revoked by the stipulator prior to Jill manifesting her intent to avail herself of the benefit.

In support of the motion for summary judgment, defendants submitted unauthenticated copies of the Lease Agreement, Leonce’s August 2013 Will, and the Act of Cancellation of Lease Agreement, which are not documents permitted to

be filed in support of a motion for summary judgment unless properly authenticated via an affidavit or deposition to which they are attached. *Id.*; see also La. Code Civ. P. art. 966, comments—2015, comment (c). Jill timely filed an opposition to the motion for summary judgment and properly objected to the unauthenticated summary judgment evidence in accordance with La. Code Civ. P. art. 966(B)(2) and (D)(2). To the extent that the trial court ultimately accepted these documents as exhibits, the trial court abused its discretion. See **Pottinger v. Price**, 2019-0183 (La. App. 1st Cir. 10/23/19); 289 So.3d 1047, 1053 (finding the abuse of discretion standard applicable to a trial court’s ruling on objections to documents filed in support of or in opposition to motions for summary judgment raised by a party in a timely filed opposition or reply memorandum in accordance with La. C.C.P. art. 966(D)(2)). Defendants could not carry their burden of proof without these documents.

While defendants also included the affidavits of Dean and Michelle in support of their motion for summary judgment, Jill timely and properly objected to the affidavits on the basis that they were not based on Dean and Michelle’s personal knowledge. La. Code Civ. P. art. 966(B)(2) and (D)(2); La. Code Civ. P. art. 967(A). When an objection to an affidavit in support of or in opposition to a motion for summary judgment is made in accordance with La. Code Civ. P. art. 966(D)(2), the only issue to be determined is whether that affidavit is in compliance with La. Code Civ. P. art. 967. **Mariakis v. North Oaks Health System**, 2018-0165 (La. App. 1st Cir. 9/21/18), 258 So.3d 88, 95.

Louisiana Code of Civil Procedure article 967(A) provides, in part, that affidavits in support of motions for summary judgment “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Personal knowledge encompasses only those facts that the affiant saw,

heard, or perceived with his own senses. **Schexnaildre v. State Farm Mutual Automobile Insurance Co.**, 2015-0272 (La. App. 1st Cir. 11/9/15), 184 So.3d 108, 116. Portions of affidavits not based on the personal knowledge of the affiant should not be considered by the trial court in deciding a motion for summary judgment. **Griffin v. Design/Build Associates, Inc.**, 2018-1720 (La. App. 1st Cir. 5/31/19), 278 So.3d 399, 404.

In nearly identical affidavits of Dean and Michelle attached to defendants' motion for summary judgment, affiants indicated that they were the co-executors of the successions of Joyce and Leonce and that they were the sole officers of Economy Brick. Beyond those statements, none of the attestations in the affidavits set forth any basis of personal knowledge of the facts alleged therein.<sup>3</sup> The Lease Agreement and provisions thereof are referenced in the affidavits, but the affidavits fail to state that Dean and Michelle were signatories to the Lease Agreement, which was stated in the affidavit improperly submitted with defendants' reply memorandum. Moreover, the affidavits reference provisions of Leonce's August 2013 Will, but similarly fail to establish the basis of personal knowledge regarding the document referenced. Despite referencing provisions of the Lease Agreement and Leonce's August 2013 Will, these documents are not attached to the affidavits. La. Code Civ. P. art. 967(A) (providing, in part, that sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith). Affiants further make statements regarding Leonce's intent set forth in and the effects of the August 2013 Will, which are improper legal conclusions or opinions outside the affiants' knowledge or expertise. See Mapp Construction, LLC v.

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<sup>3</sup> Both affidavits conclude that "[a]ffiant does further state that the facts contained in this Affidavit are based on [his/her] personal knowledge, information and belief." However, affidavits that are devoid of specific underlying facts to support a conclusion of ultimate "fact" are not legally sufficient to establish that there were no genuine issues of material fact and that movers were entitled to judgment as a matter of law. See Mapp Construction, LLC v. Southgate Penthouses, LLC, 2009-0850 (La. App. 1st Cir. 10/23/09), 29 So.3d 548, 564, writ denied, 2009-2743 (La. 2/26/10), 28 So.3d 275.

**Southgate Penthouses, LLC**, 2009-0850 (La. App. 1st Cir. 10/23/09), 29 So.3d 548, 563-64, writ denied, 2009-2743 (La. 2/26/10), 28 So.3d 275. These portions of the affidavits do not meet the requirements of La. Code Civ. P. art. 967 and will not be considered. **Griffin**, 278 So.3d at 404; see also **Mapp**, 29 So.3d at 564.

Despite the clear prohibition of La. Code Civ. P. art. 966(B)(3), defendants attached three affidavits authenticating the documents previously submitted with the initial motion to their reply memorandum. Defendants later filed a second reply memorandum in order to submit yet another exhibit – the deposition of Jill taken over four months after the motion for summary judgment was filed. Pursuant to La. Code Civ. P. art. 966(D)(2), the trial court may only consider those documents filed in support of or in opposition to the motion for summary judgment. See **Jones v. Baton Rouge General Medical Center-Bluebonnet**, 2020-1250 (La. App. 1st Cir. 6/4/21), \_\_\_ So.3d \_\_\_, \_\_\_, 2021 WL 2282631, \*3 (declining to consider documents attached to a reply memorandum in accordance with La. Code Civ. P. art. 966(B)(3)). In evaluating defendants’ motion for summary judgment, the trial court abused its discretion in considering the documents filed with defendants’ reply memorandums.<sup>4</sup>

Considering the remaining valid summary judgment evidence submitted by defendants (the Judgment of Possession in the succession proceeding), defendants did not carry their burden of proof as movers. Without Leonce’s August 2013 Will, there is no evidence establishing Leonce’s purported intent and no basis for determining what legal effects the will had on the Lease Agreement or on the rights of a third-party beneficiary. Therefore, under our *de novo* review, we find that the trial court erred in granting defendants’ motion for summary judgment and in

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<sup>4</sup> The trial court attempted to create a solution that allowed all documents submitted with the reply memorandums to be considered and provided a fair opportunity for Jill to respond. However, continuing the hearing on the motion for summary judgment and the trial date with the parties’ consent did not remedy the failure of defendants to carry their burden of proof as movers and could not permit additional documents to be filed with any reply memorandum. La. Code Civ. P. art. 966(B)(3) and (D).

dismissing Jill's petitions filed in the succession proceeding and the breach of contract action.

### **CONCLUSION**

For the foregoing reasons, we reverse the trial court's October 5, 2020 judgment, granting Dean Millet, Michelle Millet DePierri, and Economy Brick Sales, Inc.'s motion for summary judgment and dismissing Jill Millet's Petition for Judicial Enforcement of a Claim and Petition for Breach of Contract and Damages. This matter is remanded for further proceedings. All costs of the appeal from the October 5, 2020 judgment are to be borne by Dean Millet, Michelle Millet DePierri, and Economy Brick Sales, Inc.

**REVERSED AND REMANDED.**