Judgment rendered December 2, 2009.
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 44,631-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

JAMES A. YOUNG — Plaintiff-Appellee

versus

SHARON MILES TOLINTINO — Defendant-Appellant

* * * * *

Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Bossier, Louisiana
Trial Court No. 127040

Honorable Jeff Cox, Judge

* * * * *

THE HENDERSON LAW FIRM, LLC
By: Darius Q. Henderson — Counsel for Appellant

TUTT, STROUD & MCKAY, LLC
By: Charles G. Tutt — Counsel for Appellee

* * * * *

Before BROWN, GASKINS, CARAWAY, PEATROSS and MOORE, JJ.

BROWN, C.J., dissents with written reasons.

CARAWAY, J., dissents with written reasons.

GASKINS, J.

The defendant, Sharon Miles Tolintino, appeals from a trial court ruling denying her motion for summary judgment and granting summary judgment in favor of the plaintiff, James A. Young, ordering specific performance of an agreement to buy and sell property. For the following reasons, we affirm the granting of the summary judgment and remand to correct the judgment.

FACTS

On December 6, 2005, the parties entered into an agreement to buy and sell property. The defendant had a partial ownership interest in two pieces of property in south Bossier Parish. One tract was located in Sections 33 and 34, Township 17 North, Range 11 West. The other was located in Sections 3 and 4, Township 16 North, Range 11 West. The plaintiff agreed to purchase all the defendant's interest in these tracts for $400 per acre. There were mineral royalty payments of $1,500 per month on the tract in Sections 33 and 34. One-half of the mineral interest was to be transferred to Mr. Young for the price of $27,000. No mineral income was present on the other property; all mineral interests in that tract were to be conveyed to the plaintiff.

Mr. Young agreed to transfer to Ms. Tolintino not less than two acres fronting Chinanook Road in Section 3, Township 16 North, Range 11 West for $5,000 per acre and the minerals were reserved. He paid partial consideration of $1,000 to Ms. Tolintino to be applied to the purchase price. The closing was to be scheduled as soon as reasonably possible.

Ms. Tolintino claims that on January 20, 2006, she met with Mr. Young at his place of business and told him that she wanted to revoke the buy and sell agreement. She asserted that she tried to refund to Mr. Young the $1,000 he paid in consideration of the agreement, but he refused to accept the money or release her from the agreement.

On February 9, 2006, Mr. Young sent a letter to Ms. Tolintino, informing her that the survey of the property had been completed. He gave her the option to cancel the agreement by returning his money by 5:00 p.m. on February 17, 2006. Otherwise, the contract would remain in effect and they would proceed with the closing. Ms. Tolintino did not return the money paid by Mr. Young in accordance with the deadline. The buy and sell agreement was filed into the Bossier Parish records on February 22, 2006.

According to Ms. Tolintino, in May and August 2006, she again attempted to refund the $1,000 to Mr. Young and he refused to accept it, maintaining that he was also entitled to repayment for the cost of surveying the property subject to the agreement. Ms. Tolintino claims that on June 5, 2007, a certified letter was mailed to Mr. Young stating her wish to revoke the contract and enclosing a check for $1,120.60, the original $1,000 plus interest. She asserts that Mr. Young did not claim that letter, but he did receive another letter and refund check on July 6, 2007, that she sent to him. Mr. Young's attorney said that his client did not cash the check. Approximately three months later, on October 15, 2007, Mr. Young's

attorney said that his client did not want to rescind the agreement and that suit would be filed within 15 days.

On July 10, 2008, Mr. Young filed a petition for specific performance, alleging that the defendant failed to move forward with the agreement. On July 31, 2008, Ms. Tolintino answered, insisting that the agreement was dissolved and the obligation terminated when she gave the $1,000 back to Mr. Young, with interest. She also claimed that he did not set the closing within a reasonable time as required by the contract.

On October 9, 2008, Mr. Young filed a motion for summary judgment, claiming that Ms. Tolintino did not tender his money until after the deadline set in his letter. Because she waited too long to attempt to cancel the agreement, he argued that the agreement was still in effect. He claimed that there is no genuine issue of material fact and that he is entitled to specific performance of the agreement. In opposition to this motion, Ms. Tolintino responded that there was a genuine issue of material fact as to whether she revoked the buy and sell agreement before it was accepted.

On November 3, 2008, Ms. Tolintino filed a motion for summary judgment, contending that in January, May and August 2006, she tried to return Mr. Young's money, but he declined to release her from the agreement until she paid for the survey of the property which she refused to do. She maintained that the agreement between the parties was a revocable offer to sell the property and that she revoked her offer by attempting to refund Mr. Young's money.

A hearing on the motions was held in the trial court on January 12, 2009. Mr. Young argued that the contract to buy and sell in this case is a completed contract and not an offer to sell the property. He urged that cancellation of the agreement did not occur within the time limit he set in his letter. Ms. Tolintino claimed that she frequently traveled between Louisiana and California and there was no showing that she received Mr. Young's demand letter in a timely fashion.

The trial court found that the parties had a valid buy and sell agreement, not an offer to sell. Accordingly, the trial court ruled in favor of the plaintiff and rejected the claims of the defendant. A judgment granting Mr. Young's motion for summary judgment, ordering specific performance, and denying Ms. Tolintino's motion, was signed and filed January 12, 2009. Ms. Tolintino appealed.

SUMMARY JUDGMENT

Ms. Tolintino argues that the trial court erred in granting summary judgment in favor of Mr. Young and denying her motion for summary judgment. She maintains that the agreement between the parties was a revocable offer to sell and not a completed agreement to buy and sell. According to Ms. Tolintino, the time limit for closing was specified only "as soon as reasonably possible." She claims that the ambiguity of this phrase created a genuine issue of material fact, making the granting of summary judgment in favor of Mr. Young inappropriate.

Ms. Tolintino also asserts that the issue of whether she revoked her offer to sell the property is a genuine issue of material fact. She argues that

acceptance of the offer required closing on the sale. Because there was no acceptance, she maintains that there was no enforceable agreement. Ms. Tolintino urges that she revoked her offer to sell and the revocation was effective when the buyer received it prior to acceptance. She claims that the agreement was abrogated and any obligation between the parties was extinguished.

Legal Principles

Summary judgments are reviewed *de novo* on appeal using the same criteria that govern a district court's consideration of whether summary judgment is appropriate; whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. *Louisiana Safety Association of Timbermen-Self Insurers Fund v. Louisiana Insurance Guaranty Association,* 2009-0023 (La. 6/26/09), 17 So. 3d 350.

A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, 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).

In 1997, the legislature enacted La. C.C.P. art. 966(C)(2), which further clarified the burden of proof in summary judgment proceedings. This provision first places the burden of producing evidence for summary judgment on the mover (normally the defendant), who can ordinarily meet the burden by submitting affidavits or by pointing out the lack of factual support for an essential element of the opponent's case. At that point, the

party who bears the burden of persuasion at trial (usually the plaintiff) must come forth with evidence (affidavits or discovery responses) which demonstrates he or she will be able to meet the burden at trial. *Henderson v. Homer Memorial Hospital,* 40,585 (La. App. 2d Cir. 1/27/06), 920 So. 2d 988, *writ denied,* 2006-0491 (La. 5/5/06), 927 So. 2d 316.

Once the motion for summary judgment has been properly supported by the moving party, the failure of the nonmoving party to produce evidence of a material factual dispute mandates the granting of the motion. *Henderson v. Homer Memorial Hospital, supra.*

When a contract can be construed from the four corners of the instrument, interpretation of the contract presents a question of law that can be decided on summary judgment. *Sims v. Mulhearn Funeral Home, Inc.,* 2007-0054 (La. 5/22/07), 956 So. 2d 583.

A contract is formed by the consent of the parties through offer and acceptance. La. C.C. art. 1927. An offer not irrevocable under La. C.C. art. 1928 may be revoked before it is accepted. La. C.C. art. 1930. A revocation of a revocable offer is effective when received by the offeree prior to acceptance. La. C.C. art. 1937.

Discussion

Ms. Tolintino argues that she is entitled to summary judgment because the agreement between the parties was not a contract to buy and sell property under La. C.C. art. 2623, but a revocable offer to sell under La. C.C. art. 1937 that could be accepted only by closing on the sale. She claims that she revoked the offer before it was accepted by Mr. Young and

therefore, there is no contract between them and he is not entitled to specific performance.

We find that the trial court correctly found that the agreement between the parties was not a revocable offer to sell under La. C.C. art. 1937. The document is entitled, "Agreement to Purchase and Sell." It provides:

> Pursuant to our discussion, this letter is to summarize our agreement for the sale of lands in which you have partial ownerships in south Bossier Parish, Louisiana. The Tolintino property which is to be transferred are [sic] located in the following sections:
>
> Sections 33 and 34, Township 17 North, Range 11 West
> Sections 3 and 4, Township 16 North, Range 11 West
>
> It is our agreement that Young is to purchase all of the Tolintino interests in the above described lands on the basis of $400 per acre. Additionally, mineral royalty income is present in sections 33 and 34 averaging $1,500 per month to Seller. One-half of the mineral interest will be transferred to Young. The purchase price is $27,000 for one half of the minerals. No mineral income is present in sections 3 and 4; all interest in these sections will be conveyed.
>
> In return, James Young will transfer to Tolintino, not less than 2 acres fronting Chinanook road in Section 3, Township 16 North, Range 11 West. The site is immediately adjacent [to] the east side of Bracks Chapel Church and will front not less than 100 feet on the asphalt roadway. This property will be transferred on the basis for $5,000 per acre and minerals reserved.
>
> For consideration in this agreement, $1,000 is paid to Sharon Miles Tolintino as part consideration which will be applied to the purchase price at closing. Closing will be as soon as reasonably possible. It is acknowledged that James A. Young is a licensed Louisiana real estate broker and is acting for his own account.

The agreement at issue here is not a revocable offer to sell under La. C.C. art. 1937, but is a bilateral promise or contract to sell under La. C.C. art. 2623. That article provides:

> An agreement whereby one party promises to sell and the other promises to buy a thing at a later time, or upon the happening of a condition, or upon performance of some obligation by either party, is a bilateral promise of sale or contract to sell. Such an agreement gives either party the right to demand specific performance.
>
> A contract to sell must set forth the thing and the price, and meet the formal requirements of the sale it contemplates.

There is no argument that the agreement failed to meet the requirements set forth in La. C.C. art. 2623 for a valid contract to sell. As provided in La. C.C. art. 2623, a contract to sell must set forth the thing and the price and meet the formal requirements of the sale it contemplates. Because the sale contemplated here was one of immovable property, it was required to be in writing. The agreement in this matter specifically described the immovable property that Ms. Tolintino would convey to Mr. Young. The amount of money to be paid by Mr. Young was set forth. The agreement further requires Mr. Young to transfer property to Ms. Tolintino. In the agreement, that property is described as follows:

> In return, James Young will transfer to Tolintino, not less than 2 acres fronting Chinanook road in Section 3, Township 16 North, Range 11 West. The site is immediately adjacent [to] the east side of Bracks Chapel Church and will front not less than 100 feet on the asphalt roadway. This property will be transferred on the basis for $5,000 per acre and minerals reserved.

Regarding the exchange of property, the description contains a reference to the amount of land to be conveyed by Mr. Young to Ms. Tolintino. The

section, township, and range are included along with a description of the front boundary along Chinanook Road and the specification that the front boundary will include not less than 100 feet on the asphalt roadway. The description also provides that the property is on the east side of Bracks Chapel Church. The tract was described with reference to landmarks such as roads, benchmarks, or other monuments which can be located or a survey commenced at some established point. See *Martin v. Brister,* 37,011 (La. App. 2d Cir. 7/23/03), 850 So. 2d 1106, *writ denied,* 2003-2374 (La. 11/21/03), 860 So. 2d 550; *Copellar v. Yount,* 344 So. 2d 1114 (La. App. 3d Cir. 1977). This description is sufficient to fully set forth the thing to be conveyed or exchanged in the agreement to buy and sell.

The instrument at issue here is a completed contract to sell with an offer to transfer ownership of property in exchange for a specified amount of money and the transfer of property owned by Mr. Young. Ms. Tolintino's acceptance of the terms of the agreement was evidenced by her signature on the document. Therefore, Ms. Tolintino's actions in attempting to return Mr. Young's money to abrogate the agreement did not constitute the revocation of a revocable offer. The trial court correctly denied her motion for summary judgment.

Ms. Tolintino also claims that the trial court erred in granting summary judgment in favor of Mr. Young and in ordering specific performance of the contract to buy and sell because the agreement required that the "Closing will be as soon as reasonably possible." She maintains that this phrase created ambiguity in the agreement between the parties. We

do not find any genuine issue of material fact as to ambiguity in the agreement regarding the meaning of closing "as soon as reasonably possible" or as to whether Mr. Young sought to enforce his right to specific performance of the contract to buy and sell within a reasonable time.

As stated in *Joffrion v. Gumbel,* 123 La. 391, 48 So. 1007 (1909):

> The general rule is that he who seeks performance of a contract for the conveyance of land must show himself ready, desirous, prompt, and eager to perform the contract on his part. Therefore unreasonable delay in doing these acts which are to be done by him will justify and require a denial of relief. No rule respecting the length of delay which will be fatal to relief can be laid down, for each case must depend on its peculiar circumstances.
>
> . . . .
>
> It is equally well settled that one who seeks specific performance of such a contract must institute his suit within a reasonable time, and before any material change affecting the interest of the parties has taken place.

See also *Bellestri v. Clark,* 239 La. 713, 119 So. 2d 836 (1960); *Davis v. McCain,* 171 La. 1011, 132 So. 758 (1931); *Powell v. Codifer & Bonnabel, Inc.,* 167 La. 97, 118 So. 817 (1928); *Schluter v. Gentilly Terrace Co.,* 164 La. 663, 114 So. 586 (1927); *Pruyn v. Gay,* 159 La. 981, 106 So. 536 (1925)*; Cognevich v. Blazio,* 159 La. 1019, 106 So. 550 (1922); *Goudeau v. Daigle,* 37 F. Supp. 843 (E.D. La. 1941), *affirmed*, 124 F. 2d 656 (5th Cir. 1942), *cert. denied,* 316 U. S. 695, 62 S. Ct. 1290, 86 L. Ed. 1765 (1942); *Dewenter v. Mott,* 27 So. 2d 444 (La. App. 1st Cir. 1946); *Cresson v. Earhart,* 164 So. 152 (La. App. Orleans 1935).

Further, under La. C.C. art. 2623, there is no requirement that a time limit be stipulated within which to close the sale. See *Miller v. Miller,* 335

So. 2d 767 (La. App. 3d Cir. 1976). See also Official Revision Comments (b) to Article 2623 (1993).

The undisputed facts in this matter show that in December 2005, the parties entered into an agreement to buy and sell property. In January 2006, slightly more than one month later, Ms. Tolintino informed Mr. Young that she wished to rescind the agreement. In February 2006, Mr. Young outlined his conditions for abrogating the agreement and gave Ms. Tolintino a deadline for compliance. She failed to meet the deadline. However, in May and August 2006, Ms. Tolintino informed Mr. Young that she still did not want to go through with the sale and made efforts to refund the $1,000 he had paid in consideration of the agreement. In June and July 2007, Ms. Tolintino sent letters to Mr. Young stating that she wished to dissolve the agreement and enclosed a check for Mr. Young's money paid in consideration, with interest. While Mr. Young did not claim the letter in June 2007, he received Ms. Tolintino's letter and check in July 2007. Mr. Young did not negotiate the check. On October, 15, 2007, approximately three months later, Mr. Young's attorney said that his client did not want to rescind the agreement and that suit would be filed within 15 days.

The facts of this matter are not disputed and where there is any minor discrepancy, we have adopted Ms. Tolintino's version of the facts. Within the first nine months after the agreement to sell was signed, Ms. Tolintino tried multiple times to terminate the contract. After Ms. Tolintino failed to meet the time and money conditions set by Mr. Young to terminate the contract, Mr. Young remained steadfast in his position that the agreement

to buy and sell should be honored. It was Ms. Tolintino's reluctance to perform the agreement that resulted in the delay in its execution. Considering the communications between the parties and their attorneys, the period of two years and seven months between the signing of the agreement to buy and sell and the filing of suit for specific performance was a reasonable time period in which to execute on the contract.

Not only must the lawsuit be timely filed as explained in *Joffrion, supra,* but it also must be filed before any material change affecting the interest of the parties has taken place. Ms. Tolintino submitted no evidence to show any change in the interest of the parties or the valuation of the land. Any argument to the contrary is completely outside the record before us. We find that there is no genuine issue of material fact in this case. The record shows a valid contract to sell property. The trial court correctly granted summary judgment in favor of Mr. Young.

Reformation of Judgment

The Agreement to Purchase and Sell generally describes the properties to be sold or exchanged. The parties have not complained about these descriptions. As to the effect of the contract between the parties, there is no dispute as to the "thing" to be sold or exchanged.

La. C.C.P. articles 1919 and 2089 mandate that all judgments which affect title to immovable property shall describe with particularity the immovable property affected. The descriptions of the property in the agreement do not describe the property "with particularity," so that third parties can determine the boundaries of the properties. We, therefore,

remand this case to the trial court in order that the judgment be reformed to comport with La. C.C.P. articles 1919 and 2089.

CONCLUSION

For the reasons stated above, we affirm the trial court ruling denying summary judgment in favor of the defendant, Sharon Miles Tolintino, and granting summary judgment in favor of the plaintiff, James A. Young. We remand this case to the trial court for the reformation of the description of the immovable properties. Costs in this court are assessed to the defendant, Sharon Miles Tolintino.

AFFIRMED AND REMANDED WITH DIRECTIONS.

BROWN, CHIEF JUDGE, dissenting,

The issue presented in this case concerns the trial court's granting of plaintiff's motion for summary judgment, which ordered the specific performance of an exchange of property located in south Bossier Parish. The written buy/sell instrument is all that exists to support plaintiff's petition and summary judgment motion. The agreement required Ms. Tolintino to give all the property that she owned in sections 3, 4, 33, and 34 to Mr Young; in exchange, Mr. Young, a sophisticated land buyer and the drafter of the contract, would give to Ms. Tolintino ***not less*** than two acres and ***not less*** than 100 frontage feet somewhere east of Bracks Chapel Church in section 3.

With this inadequacy of the underlying written buy/sell instrument, the petition filed by Mr. Young for specific performance failed to describe with particularity the immovable property as well as any equalizing money to be exchanged. La C.C.P. articles 1919 and 2089 require judgments which affect title of immovable property to describe with particularity the immovable property affected. The petition does not legally describe any specific property either party will exchange, and in particular, what Mr. Young will give in exchange. The quantity and dimensions of the property to be conveyed by Mr. Young are open ended and not particularly described. As such, the petition does not adequately state a cause of action, and La. C.C.P. article 927B allows an appellate court on its on motion to dismiss for no cause of action.

When a petition fails to state a cause of action La. C.C.P. article 934 provides an opportunity to amend to add allegations which might complete the contract. However, in *City Bank & Trust of Shreveport v. Scott*, 575 So. 2d 872, 873 (La. App. 2d Cir. 1991), this court stated:

> This court has noted that there are cases in which parol or extrinsic evidence may be admitted to aid and identify immovable property described in a written contract to sell. Parol evidence has not been allowed, however, to wholly identify the immovable. Parol has been allowed only where the courts have found that there was "sufficient body" in the initial written description so as to leave the title to immovable property "resting substantially on writing and not essentially on parol." *Jackson v. Harris*, 18 La. App. 484, 136 So. 166, 169 (La. App. 2d Cir. 1931).

Then, expanding further, the court paraphrased the rule of an earlier supreme court case as follows:

> To aid and establish identity of a defective or ambiguous description of an immovable property in a written contract, parol evidence is admissible only where the written, but defective, description distinguishes the property from other properties so as to allow the conclusion that the mutual or common intent of the parties to the writing was to deal with the particular property and not another property of the same kind or quantity.
>
> There should be sufficient substance in the written description in question so as to leave the title to the immovable resting substantially on the writing and not on parol.

Id. at 873-74. The court then concluded with the affirmation of what was apparently a dismissal of the case for no cause of action, as follows:

> We hold the initial description in question here, vacant land, 21 acres, Gilliam, Louisiana, is too general and cannot serve as a base on which title to an immovable might be identified, "built up or eked out," by extrinsic and parol evidence.

Id. at 875.

The majority opinion states under "Reformation of Judgment" that "[a]s to the affect of the contract between the parties, there is no dispute as to the 'thing' to be sold or exchanged." The opinion then states that "[t]he descriptions of the property . . . do not describe the property 'with particularity' so that third parties can determine the boundaries of the properties." The majority opinion then remands the case to the trial court "in order that the judgment be reformed to comport with La. C.C.P. articles 1919 and 2089." This, however, is the problem. The trial court cannot reform the judgment to state the metes and bounds of the property and the amount of any equalizing money because the parties may never have reached an agreement as to exactly what acreage, frontage, or dimensions of the property were to be given by Mr. Young. The trial court cannot simply substitute what it believes would be fair.

Further, the agreement, which was written on the letterhead of Longleaf Investments, LLC, a company owned by Mr. Young, provided:

> Closing will be as soon as possible. It is acknowledged that James A. Young is a licensed Louisiana real estate broker and is acting for his own account.

Within a month (January 2006) of signing the agreement, Ms. Tolintino informed Mr. Young that she wanted to back out of the deal. In response, Mr. Young, an experienced realtor, gave Ms. Tolintino a deadline to refund the $1,000 and pay the surveying costs (no survey was ever filed in this record). On February 22, 2006, after the deadline had passed, Mr. Young recorded the contract in the Bossier Parish records.

That Ms. Tolintino wanted to back out of the deal should have caused Mr. Young to expeditiously file this action for specific performance. Instead Mr. Young waited until July 2008 to file this action, more than 2 ½ years after the agreement was executed and recorded. Furthermore, Mr. Young did not file until after the Haynesville Shale became big news and large bonuses were being paid in south Bossier Parish for mineral rights. Thus, the value of the properties may have changed significantly. Ms. Tolintino did object that the action for specific performance was not filed within a reasonable time frame.

In *Joffrion v. Gumbel,* 123 La. 391, 48 So. 1007, 1012 (1909), the Louisiana Supreme Court wrote:

> The general rule is that he who seeks performance of a contract for the conveyance of land must show himself ready, desirous, prompt, and eager to perform the contract on his part. Therefore unreasonable delay in doing these acts which are to be done by him will justify and require a denial of relief. No rule respecting the length of delay which will be fatal to relief can be laid down, for each case must depend on its peculiar circumstances.
>
> ***It is equally well settled that one who seeks specific performance of such a contract must institute his suit within a reasonable time, and before any material change affecting the interest of the parties has taken place.***
>
> These doctrines are applicable to the case before us. It exhibits an excessive and unreasonable delay not only in giving notice of satisfaction with the title and intent to require a conveyance, but also in the application for relief. In the time which has been permitted to elapse a material increase in the value of the subject-matter of the contract has taken place. ***It would be an unwarrantable exercise of discretionary power to allow one holding a mere [right] to purchase to lie by for so long a time and speculate upon the fluctuating values of urban lots, and, after a substantial increase in their value, to enforce a conveyance in his favor at the original price now inadequate.***

> Delay in such cases may doubtless be explained, and, in some circumstances, excused, but neither explanation nor excuse can be discovered in this case. (Citations omitted) (Emphasis added).

In *Dewenter v. Mott*, 27 So. 2d 444, 446-47 (La. App. 1st Cir. 1947), the court wrote:

> Counsel for defendant next contend that plaintiff's inaction from the day the sale was to be executed until he filed the present suit to enforce performance has given rise to a presumption that the contract had been rescinded. They cite authority to the effect that when both parties to a contract like this fail to take any affirmative action within a reasonable time to default the other there is an inference of rescission. The principle is one familiar to the common law but appears to have received the approval of the Supreme Court. *See Joffrion v. Gumbel*, 123 La. 391, 48 So. 1007, 1012. ***As we view it, the matter all relates to what is to be considered a 'reasonable time' within which a party must act under the circumstances, and in determining that question the court must necessarily be guided by what are the peculiar facts and circumstances in each case.*** (Emphasis added).

The majority opinion faults defendant for not showing the fluctuation in property values, but does not fault plaintiff for his delay in bringing this action. As the court in the *Dewenter* case held, "when both parties to a contract like this fail to take any affirmative action within a reasonable time to default the other there is an ***inference of rescission***." (Emphasis added). Plaintiff failed to explain his delay, and, as stated in *Joffrion,* "[d]elay in such cases may doubtless be explained, and, in some circumstances, excused, but neither explanation nor excuse can be discovered in this case." Accordingly, in addition to finding that the petition fails to state a cause of action, I find that there are clearly extant questions of material fact,

particularly respecting the extraordinary length of delay and the possibility of a substantial increase in the value of the property.[1]

[1]The sale has yet to be completed. The issue of lesion may eventually be raised. Mr. Young was transferring not less than two acres in section 3 for $5,000 an acre and reserving the minerals, while Ms. Tolintino was transferring what she owned including the minerals in section 3 for $400 an acre.

CARAWAY, J., dissenting.

I agree with Chief Judge Brown's conclusion concerning the failure of the plaintiff's claim to state a cause of action. Regarding the focus of the majority and the trial court on the parties' failure to timely execute their exchange, that issue is premature and may relate to the parties' failure to have properly reached agreement in writing concerning the measure and identification of the 2-acre(+) tract.

In the present case, the immovable which each party is to exchange to the other is only generally described. Thus, even assuming that parol and extrinsic evidence is present and admissible for the determination of the parties' meeting of the minds over these properties, their written contract alone cannot serve as a binding contract for the exchange of unidentified properties. Young's petition makes no separate allegation of the extrinsic evidence of the parties' dealings that might serve to give the metes and bounds descriptions of the immovables.

Finally, the procedural oddity of the majority's ruling cannot go unnoticed. The trial court's judgment made one simple decree which ordered "specific performance of the agreement to purchase and sell sued on herein." It purports to be a final judgment. Under La. C.C.P. art. 2504, once such judgment becomes final and exigible and a party fails to specifically perform as so ordered, "the court may direct the act to be done by the sheriff." The majority ruling now on the one hand purports to affirm this judgment; while on the other hand, in recognition of the impossibility of specific performance of the exchange of unidentified immovables, the

judgment remands the case for the pursuit of further evidence which might identify the properties and a meeting of the minds of the parties. This is not an affirmation of a judgment. It is *res judicata* of nothing. Instead, it is a reversal and a directive for continued evidentiary proceedings. The written contract, the trial court judgment, and the majority ruling all suffer from the same flaw. There have never been allegations, nor evidence in this case, of what immovable property the parties agreed to exchange. I would reverse and remand to require the plaintiff to amend and state a cause of action.