

Judgment rendered September 27, 2017.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 51,598-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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ALICE LANDRY BOYER

Plaintiff-Appellee

versus

CHERYL L. KOKKINIS, ET AL.

Defendants-Appellants

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Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Bossier, Louisiana
Trial Court No. 142,191

Honorable Allen Parker Self, Jr., Judge

* * * * *

LANGLEY, PARKS, HORTON
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* * * * *

Before WILLIAMS, DREW, and PITMAN, JJ.

DREW, J.

Cheryl L. Kokkinis and Shirley V. Landry (“defendants”) appeal from the trial court’s imposition of discovery sanctions and grant of the motion for partial summary judgment in favor of the plaintiff, Alice Landry Boyer. In relevant part, the judgment: (1) held the defendants are solidarily liable to the plaintiff for conversion of co-owned funds in the amount of \$183,062.50, and (2) dismissed the defendants’ reconventional demand with prejudice.

For the reasons stated hereinafter, we vacate the discovery sanctions except as to the imposition of attorney fees and costs, and affirm the grant of summary judgment.

FACTS

On July 3, 2013, Alice Boyer commenced this litigation by filing a petition for accounting, partition and for damages alleging that Cheryl Kokkinis converted funds – from an investment account jointly owned by Boyer and Kokkinis – by writing a check to herself from the account and depositing it in her own personal account. Boyer also alleged that Kokkinis did so at the direction of Shirley Landry. Landry and Kokkinis filed an answer and reconventional demand claiming that the plaintiff herself had also committed conversion via similar transactions.

After roughly two years of discovery, the court granted a motion to compel against defendants and ordered them to tender the requested materials within 30 days. Defendants only partially complied with the order compelling discovery. On February 10, 2016, Boyer filed a motion for discovery sanctions. The court found that the defendants willfully disregarded the discovery order, and imposed the following sanctions: (1) the defendants were barred from supporting any of their claims or defenses

with any asset records, accounting records, or bank statements; (2) it was deemed conclusively established that the Texas properties were purchased with funds jointly owned by Boyer and Kokkinis; (3) the defendants were cast with the costs of filing the motion for discovery sanctions and each defendant was cast with one-half of the total attorney fee award.

Thereafter, the plaintiff filed a motion for partial summary judgment, and the defendants filed no opposition. The court granted the motion for partial summary judgment, which, along with the discovery sanctions, is the subject of this appeal.

DISCUSSION

ASSIGNMENTS OF ERROR

The appellants make the following assignments of error: (1) the court erred in failing to find a genuine issue of material fact regarding whether the parties' pattern of behavior constituted a ratification of the personal use of account assets, such that plaintiff's claim of conversion could not be maintained; (2) the court erred in failing to find that genuine issues of material fact exist surrounding defendants' reconventional demand; (3) the court erred in failing to take judicial notice of the appellants' former attorney's legal neglect, and as a result of such failure, granting the plaintiff's motion for partial summary judgment; (4) the court abused its discretion in barring defendants from supporting or defending claims with any asset records, accounting records, or bank statements; (5) the court abused its discretion in deeming it conclusively established that the Texas properties were purchased with funds co-owned by plaintiff Boyer and defendant Kokkinis.

LAW AND ANALYSIS

“Conversion is an intentional tort and consists of an act in derogation of the plaintiff’s possessory rights.” *Aymond v. State, Dept. of Revenue & Taxation*, 95-1663 (La. App. 1 Cir. 4/4/96) 672 So. 2d 273, 275. The Louisiana Supreme Court has stated that:

[C]onversion is committed when any of the following occurs: 1) possession is acquired in an unauthorized manner; 2) the chattel is removed from one place to another with the intent to exercise control over it; 3) possession of the chattel is transferred without authority; 4) possession is withheld from the owner or possessor; 5) the chattel is altered or destroyed; 6) the chattel is used improperly; or 7) ownership is asserted over the chattel.

Dual Drilling Co. v. Mills Equip. Investments, Inc., 98-0343 (La. 12/1/98), 721 So. 2d 853, 857. “However, one who might otherwise be entitled to maintain an action for...conversion... may afford the alleged wrongdoer a complete defense to the action by waiving the right to treat the act as wrongful, or by ratification thereof.” *Aymond* at 276.

Motions for summary judgment are governed primarily by Louisiana Code of Civil Procedure articles 966 and 967. Article 966(A)(3) establishes the fundamental requirements for granting a motion for summary judgment:

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 movant is entitled to judgment as a matter of law. (Emphasis added.)

Article 966(D)(1) allocates the burden of proof in accordance with how it would be allocated if the matter went to trial:

The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover’s burden on the motion does not require him to negate all essential elements of the adverse party’s claim, action, or defense, but rather to point out to

the court in the absence of factual support or one or more elements essential to the adverse party's claim, action, or defense. The burden is upon the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.

Article 966 (D)(2) regulates the evidence to be considered in connection with a motion for summary judgment as follows:

*The court may consider **only** those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made. Any objection to a document shall be raised in a timely filed opposition or reply memorandum. The court shall consider all objections prior to rendering judgment. The court shall specifically state on the record or in writing which documents, if any, it held to be inadmissible or declined to consider. (Emphasis added).*

Appellate courts review rulings on motions for summary judgment *de novo*. *Schroeder v. Board of Sup'rs of La. State Univ.*, 591 So. 2d 342, 345 (La. 1991).

Existence or nonexistence of genuine issues of material fact

Article 966(D)(2), as emphasized above, renders meritless the appellants' assignments of error asserting the existence of genuine issues of material fact regarding both: (1) their affirmative defense to appellee's conversion claim; and (2) the appellants' reconventional demand.

Had this matter gone to trial, the appellants would have been assigned the burden of proof regarding the parties' pattern of conduct – which the appellants claim amounted to at least a genuine issue of material fact regarding the appellee's implicit assent to or ratification of their actions otherwise constituting conversion. That is because such constitutes an affirmative defense. *Hogan Exploration, Inc. v. Monroe Eng'g Assocs., Inc.*, 430 So. 2d 696 (La. App. 2 Cir. 1983). Accordingly, art. 966(D)(1) required

the appellants to “produce factual support sufficient to establish the existence of a genuine issue of material fact” regarding the appellee’s alleged assent or ratification. Furthermore, art. 966(D)(2) required them to do so by filing documentary evidence of the assent or ratification in opposition to the motion for summary judgment. The appellants filed no opposition whatsoever in response to the motion for summary judgment. Accordingly, there was no evidence of the alleged assent or ratification which the court could properly consider.

For the same reasons expressed in the preceding paragraph, the appellants’ assignment of error asserting the existence of a genuine issue of material fact regarding their reconventional demand lacks merit. The appellants argue in their brief that Boyer admitted to withdrawing funds from the account to be used for the purchase of Boyer’s daughter’s house. The court could not have properly considered this admission as evidence for purposes of the motion for summary judgment because it was not adduced in accordance with article 966 (D) (2).¹

Judicial notice of supposed legal neglect

The appellants assert that the trial judge erred in granting the motion for summary judgment despite the alleged legal neglect committed by their former attorney. The appellants claim that the trial judge should have taken judicial notice of this alleged legal neglect and, in that accord, postponed decision on the motion for summary judgment until this alleged legal neglect was remedied.

¹ A different result would obtain if appellants had filed an affidavit attached to an opposition memorandum containing a citation to allegation in the reconventional demand and the appellee’s admission thereof in her answer.

La. C.E. art. 201 governs taking of judicial notice of matters other than laws, ordinances, rules, decisions by government agencies and the like.

In relevant part, art. 201 provides:

A. Scope of Article. This Article governs only judicial notice of adjudicative facts. An “adjudicative fact” is a fact normally determined by the trier of fact.

B. Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the trial court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

C. When discretionary. A court may take judicial notice, whether requested or not.

D. When mandatory. A court shall take judicial notice upon request if supplied with the information necessary for the court to determine that there is no reasonable dispute as to the fact.

E. Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior opportunity to be heard, the request may be made after judicial notice has been taken.

The requirement for taking judicial notice pursuant to La. C.E. art. 201 is that the fact is not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. If that requirement is met, the trial judge has discretion to take judicial notice; however, if in addition to the satisfaction of that requirement, a party requests that judicial notice be taken, the taking of judicial notice becomes mandatory.

In this case, the appellants did not request judicial notice and *do not specify anything in the record constituting factual reasons or circumstances underlying their former counsel’s supposed legal neglect*, i.e., failure to tender discovery as ordered and failure to oppose the motion for summary

judgment. Therefore, based on the record, the possibility that the appellants themselves were at fault for these failures is equally likely. For these reasons, it would have been impossible for the trial judge to correctly deem the existence of former counsel's legal neglect to be "beyond reasonable dispute." The trial judge did not abuse his discretion in not staying the motion for summary judgment by reason of the supposed legal neglect.

Discovery sanctions

The appellants argue that the trial judge abused his discretion in imposing discovery sanctions on them as a result of their failure (or their attorney's failure) to comply with an order compelling discovery. The sanctions: (1) prohibited the appellants from using any asset records, accounting records or bank statements as evidence in prosecuting their claim or defending against Boyer's claim; and (2) deemed it conclusively established that the (allegedly) converted funds were used to purchase the Argyle, Texas, real estate.

La. C.C.P. art. 1471 provides that if a party fails to obey a discovery order, the trial court may, among other things, enter as sanction(s):

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

The trial court's imposition of discovery sanctions is subject to abuse of discretion review. *Jones v. LSU/EA Conway Med. Ctr.*, 45,410 (La. App. 2 Cir. 8/11/10), 46 So. 3d 205.

The court abused its discretion in imposing the sanction barring the appellants from using “any asset records, accounting records or bank statements” to support their “claims and defenses or oppose plaintiff’s claims and defense.” This sanction had the effect of substantially disabling the appellants from proving their own conversion claim and from proving their affirmative defense of waiver or ratification. It was the functional equivalent of dismissal of the appellants’ reconventional demand and default judgment against them on the main demand; accordingly, this sanction required the same justifications as dismissal and default judgment.

Dismissal and default judgment are “generally reserved for those cases in which the client, as well as the attorney is at fault.” *Horton v. McCary*, 635 So. 2d 199, 203 (La. 1994). Furthermore, a trial judge abuses his discretion by imposing either such sanction where the record does not “support ‘a finding that the failure was due to...willfulness, bad faith, or fault.’” *Id.*

In its order imposing sanctions, the court cited the following as proof of the defendants’ culpability in their nonsatisfaction of the discovery order: (1) plaintiff’s memorandum stated that defendants’ attorney is not at fault; (2) the court’s opinion that the defendants’ former “counsel of record is both competent and professional”; (3) former defense counsel’s promise to tender the discovery as soon as he received the documents from his clients. On that basis, the trial court concluded that it could “only infer that the defendants have not delivered their responses to their counsel.”

That conclusion is not adequately supported by the record. Perhaps their former counsel failed to fulfill his promise or perhaps there was a valid

reason that the defendants did not tender all of the discovery. The record does not sufficiently exclude these possibilities. Accordingly, the trial judge abused his discretion in imposing the functional equivalent of a default judgment against the defendants and dismissal with prejudice of their reconventional demand.

The court also deemed it conclusively established, pursuant to article 1471(A)(1), “that the additional Texas properties were purchased with funds jointly-owned by plaintiff, Alice Landry Boyer and Cheryl L. Kokkinis.” This also was an abuse of discretion. In effect, it served as absolute proof of the plaintiff’s prima facie conversion case. *Dual Drilling* at 857. Such is tantamount to entering a default judgment against the appellants. This sanction was improper for the same reasons that the other sanction was improper. Furthermore, this sanction constitutes obiter dictum in that it is not essential to a claim for conversion to show what was purchased with the converted funds. *Id.*

DECREE

For the reasons stated above, the discovery sanctions are vacated except as to the imposition of costs and attorney fees on the appellants, and the grant of summary judgment is affirmed. Appellate costs are to be paid one-third by Alice Landry Boyer and two-thirds by Cheryl L. Kokkinis and Shirley V. Landry, pursuant to La. C.C.P. art. 2164.

**DISCOVERY SANCTIONS VACATED IN PART; GRANT OF
SUMMARY JUDGMENT AFFIRMED.**