

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 1425

AARON & TURNER, L.L.C.

VERSUS

MELISSA MICHELLE PERRET

Judgment Rendered: MAY - 4 2009

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 544,355

The Honorable Curtis A. Calloway, Judge

Randall A. Shipp
Garth J. Ridge
Baton Rouge, LA

Counsel for
Defendant-Appellant
Melissa Michelle Perret

Connell L. Archey
Jennifer A. Hataway
Baton Rouge, LA

Counsel for
Plaintiff-Appellee
Aaron & Turner, L.L.C.

**BEFORE: WHIPPLE, KUHN, GUIDRY, PETTIGREW,
AND HUGHES, JJ.**

*J.E.K. m
8/27/09
Kuhn, J. Concurs
Pettigrew, J. Concurs with Reason
Guidry, J. Dissents on original reasons.*

HUGHES, J.

In this suit, the defendant, whose home was seized and sold under executory process, appeals a subsequent judgment of the trial court awarding the seizing creditor attorney fees. For the reasons that follow, we vacate the judgment appealed and remand to the trial court with instructions.

On February 28, 2001, Melissa Michelle Perret signed a note and mortgage in favor of ABN AMRO Mortgage Group, Inc. (ABN) to refinance an existing mortgage on her home. Aaron & Turner, L.L.C. (Aaron & Turner), the law firm that acted as the closing agent for the transaction, disbursed funds to and on behalf of Ms. Perret during the transaction, acting on the belief that ABN had funded the loan.

When it was discovered several years later that Aaron & Turner had never received the funds to finance the transaction from ABN, Aaron & Turner obtained the February 28, 2001 note by ostensible assignment from ABN and demanded payment from Ms. Perret for the total accumulated amount due on the note, plus late fees and interest. When Ms. Perret refused to remit the sum demanded, Aaron & Turner filed a petition on May 26, 2006 to enforce the mortgage and note by executory process.¹ Ms. Perret responded with a "Petition for Injunction and Declinatory Exception of Lis Pendens," contending she was entitled to: "a stay of the [e]xecutory [p]rocess suit, and of the pending sale, because the first filed suit is derived from the same transaction, and between the same parties," and "a dismissal of the [e]xecutory [p]rocess suit in its entirety." The trial court denied Ms. Perret's petition for injunctive relief and her declinatory exception by a

¹ Aaron & Turner initially filed a petition to enforce the mortgage and note in an ordinary proceeding under a separate docket number in another division and section of the trial court. This court's decision, on rehearing, of that separate proceeding is also handed down this date. **Aaron & Turner, L.L.C. v. Perret**, 2007-1701 (La. App. 1 Cir. __/__/09), ___ So.2d ___ (on rehearing).

judgment signed September 13, 2006; Ms. Perret devolutively appealed that judgment.

In the meantime, Aaron & Turner proceeded with the executory process and effected the seizure and sale of Ms. Perret's home to satisfy the debt owed as represented by the note. By the time Ms. Perret's appeal of the September 13, 2006 judgment came to be heard on appeal, Ms. Perret's home had been sold at a sheriff's sale. On review, the majority opinion of this court stated that "[a]ny pronouncement by this panel on the propriety of the executory proceedings and the trial court's denial of Ms. Perret's petition for injunction would be merely advisory and could not bring about the cancellation of the sheriff's sale as prayed for by Ms. Perret in her petition." Accordingly, Ms. Perret's appeal was dismissed. **Aaron & Turner, L.L.C. v. Perret**, 2006-2433, p. 5 (La. App. 1 Cir. 9/14/07), 971 So.2d 1049, 1051.

Subsequent to the sale of Ms. Perret's home and disbursement of a portion of the proceeds to satisfy the amount owed on the note, including interest and late fees, the sheriff deposited the remainder of the funds recovered from the sale into the registry of the court. Aaron & Turner then filed motions seeking: (1) a determination of a reasonable amount of attorney fees, which it contended were awarded in the order commanding the sheriff to seize and sell Ms. Perret's home; and (2) an order authorizing release of the amount so fixed from the funds held in the registry of the court. Following a hearing on the request, the trial court awarded \$14,356.52 as a reasonable amount of attorney fees to Aaron & Turner and ordered the registrar of the court to release that amount from the registry of the court by a judgment signed April 3, 2007. Ms. Perret devolutively appeals the April 3, 2007 judgment.

After a thorough review of the record presented on appeal in this case and in view of the decision we render this date in **Aaron & Turner, L.L.C. v. Perret**, 2007-1701 (La. App. 1 Cir. __/__/09), ___ So.2d ___ (on rehearing), we have determined that in accordance with the authority granted appellate courts by LSA-C.C.P. art. 2164 and in the interest of justice, the judgment assessing attorney fees rendered by the trial court on April 3, 2007 should be vacated. The propriety of the imposition of attorney fees pursuant to the contractual provisions of the promissory note and mortgage signed by Ms. Perret is dependant upon the validity of those contracts, an issue which has yet to be fully litigated in the companion lawsuit. Further, we conclude that the instant action should be consolidated pursuant to LSA-C.C.P. art. 1561² with the companion lawsuit, 19th Judicial District Court Number 540,761 (referenced hereinabove), in the interests of judicial efficiency.

CONCLUSION

For the reasons provided herein, we vacate the judgment of the trial court awarding Aaron & Turner, L.L.C. attorney fees in this matter. We further remand the matter to the trial court for consolidation of this action with **Aaron & Turner, L.L.C. v. Perret**, 19th Judicial District Court Number 540,761, and order that the issue of attorney fees be held in abeyance until a decision is rendered on the validity of the promissory note and mortgage in **Aaron & Turner, L.L.C. v. Perret**, 19th Judicial District

² The comments to LSA-C.C.P. art. 1561 point out that cases involving common issues of fact and law are appropriate for consolidation; judges are empowered under this article to order consolidation on their own motion.

Court Number 540,761. All costs of this appeal are assessed to appellee,
Aaron & Turner, L.L.C.³

**JUDGMENT VACATED; CONSOLIDATION ORDERED;
REMANDED WITH INSTRUCTIONS.**

³ On July 30, 2007, this court issued a rule to show cause for the parties to respond by briefs regarding: (1) whether the trial court had jurisdiction over the subject matter of the April 3, 2007 judgment; and (2) whether the appeal of the April 3, 2007 judgment should be dismissed. Based on our resolution of this appeal, we recall the rule so issued. Based on the disposition of this matter, we further find it unnecessary to address the issues briefed by Ms. Perret.

AARON & TURNER, L.L.C.

NUMBER 2007 CA 1425

VERSUS

COURT OF APPEAL

MELISSA MICHELLE PERRET


FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: WHIPPLE, KUHN, GUIDRY, PETTIGREW, AND HUGHES, JJ.

PETTIGREW, J., CONCURS WITH THE RESULTS AND ASSIGNS REASONS.

PETTIGREW, J., concurring.

 I concur with the results reached by the majority. I am of the opinion that the procedural quagmire this case finds itself in is due to some prior jurisprudence that misinterpreted La. Code Civ. P. art. 2644. It is my humble opinion that once a creditor files an ordinary proceeding on a promissory note and mortgage, he cannot then dismiss that suit and file a separate suit for executory process on the same promissory note and mortgage.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 1425

AARON & TURNER, L.L.C.

VERSUS

MELISSA MICHELLE PERRET

GUIDRY, J., dissents in part and assigns reasons.

 **GUIDRY, J., dissenting in part.**

As noted in my dissent in Aaron & Turner, L.L.C. v. Perret, 2007-1701 (La. App. 1st Cir. __/__/09), ___ So. 2d ____, I disagree with the majority's questioning of the validity of the mortgage and note executed by Ms. Perret. As Ms. Perret was unable to prove the invalidity of those contracts in the executory proceedings nor in the separately filed ordinary proceeding, the majority's action of reversing, remanding, and consolidating this matter with Ms. Perret's reconventional claims pending in the ordinary proceeding is inappropriate. I would further note that I find no actionable error in the trial court's judgment rendered herein¹ and would affirm. For these reasons, I respectfully dissent from the majority opinion in this matter.

¹ In her final assignment of error, Ms. Perret asserted that the trial court's decree that "the Registrar of the Court immediately release" the sum awarded as attorney fees from the registry of the court violated La. C.C.P. arts. 1974 (time delay for filing a motion for new trial) and 2123 (time delay for seeking a suspensive appeal). Ms. Perret is correct that the trial court erred in ordering the immediate release of the funds as La. C.C.P. art. 2252 states "[a] judgment creditor may proceed with the execution of a judgment *only after the delay for a suspensive appeal therefrom has elapsed.*" (Emphasis added). However, as Ms. Perret did not suspensively appeal the judgment, any objection she had to this error in the judgment is waived as a consequence thereof. See Central Bank v. Frost, 552 So. 2d 508, 511 (La. App. 2d Cir. 1989), writ denied, 556 So. 2d 59 (La. 1990), certiorari denied, 498 U.S. 827, 111 S.Ct. 83, 112 L.Ed.2d 55 (1990).