NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 CA 2389

BAVARIAN CHALET, LLC
and HARRY J. KERLEC

VERSUS

JAMES RAMIREZ, III and RYAN REED

Judgment Rendered: May 2, 2008.

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 2006-13482

Honorable Reginald T. Badeaux, III, Judge Presiding

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BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

CARTER, C. J

This is an appeal by Harry Kerlec and the Bavarian Chalet, LLC, from a judgment of the trial court sustaining a peremptory exception raising the objection of no cause of action, and dismissing their suit with prejudice.

FACTS AND PROCEDURAL HISTORY

This suit stems from an "Agreement For Purchase and Sale of Business" entered into by Helga and Harry Kerlec as sellers and Ryan Reed and James Ramirez, III as buyers. The Kerlecs agreed to sell to Reed and Ramirez their business as well as specified movables for a total price of $50,000.00. The contract provided for an initial payment of $10,000.00, with the balance to be paid in monthly installments. Pursuant to the terms of the agreement, Reed and Ramirez paid the Kerlecs an initial payment of $10,000.00 on August 16, 2005, and, according to the Kerlecs, took delivery of the movables. Days later, on August 29, 2005, Hurricane Katrina struck and destroyed the movables. Thereafter, Reed and Ramirez made none of the monthly payments set forth in the contract.

Harry Kerlec and the Bavarian Chalet, L.L.C. (plaintiffs),[1] instituted suit against Reed and Ramirez, seeking the unpaid balance of $40,000.00, together with interest, costs and attorney's fees. Reed and Ramirez urged a peremptory exception raising the objection of no cause of action, contending that under the agreement, the Kerlecs retained ownership of the property, therefore the agreement was a financed lease that terminated when the property was destroyed. Plaintiffs maintained that the agreement was a sale, which transferred ownership of the property to Reed and Ramirez, and further that the risk of loss of the property transferred to Reed and Ramirez

[1] Helga Kerlec died before suit was filed.

on August 16, 2005, when they took delivery of the property. The trial court determined that, under the terms of the contract, ownership reverted to plaintiffs when Reed and Ramirez defaulted under the contract. Thus, the trial court determined it did not need to reach the issue of whether the agreement is a sale or lease, because, regardless of the characterization, plaintiffs failed to state a cause of action. Plaintiffs now appeal.

DISCUSSION

The exception of no case of action tests whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition. **Badeaux v. Southwest Computer Bureau, Inc.**, 05-0612 (La. 3/17/06), 929 So.2d 1211, 1217. The exception is triable on the face of the petition and any annexed documents, with each well-pleaded fact therein accepted as true. See **Badeaux**, 929 So.2d at 1217; **Kuebler v. Martin**, 578 So.2d 113, 114 (La. 1991). In reviewing a trial court's ruling sustaining an exception raising the objection of no cause of action, the appellate court subjects the case to *de novo* review, employing the same principles applicable to the trial court's determination of the exception. **Stroscher v. Stroscher**, 01-2769 (La. App. 1 Cir. 2/14/03), 845 So.2d 518, 523.

The agreement between the parties contains language to the effect that the Kerlecs retained ownership of the property until the total purchase price was paid. Reed and Ramirez assert that because of that language, the Kerlecs bore the risk of the property being lost and therefore, they owe nothing to the plaintiffs. However, as a general rule, Louisiana does not recognize common law conditional sales contracts for movables in which the seller remains the owner of the property until the full price is paid. **Hewitt v. Safeway Ins. Co. of La.**, 01-0115 (La. App. 3 Cir. 6/6/01), 787 So.2d

1182, 1186. The exception to this general rule is a financed lease under the Louisiana Lease of Movables Act. See LSA-R.S. 9:3302.

After de novo review, we find that the agreement between the parties does not meet the requirements for either a lease under LSA-C.C. 2668 or a financed lease under LSA-R.S. 9:3306(12). The agreement between the parties is a contract of sale. LSA-C.C. art. 2456 provides that "[o]wnership is transferred between the parties as soon as there is agreement on the thing and the price is fixed, even though the thing sold is not yet delivered nor the price paid." The agreement established a fixed price for the specified property. Although the price was not paid in full at the time of the agreement, the agreement did constitute a contract of sale and transferred ownership of the specified property from the Kerlecs to Reed and Ramirez. Further, the risk of loss of the thing sold owing to a fortuitous event, such as Hurricane Katrina, was transferred to Reed and Ramirez at the time of delivery. Accepting the allegations of the petition as true for purposes of the exception, Reed and Ramirez took delivery of the property and assumed the risk of loss due to a fortuitous event on August 16, 2005.

After the property was destroyed, Reed and Ramirez failed to make monthly payments and were in default under the contract. The contract provides:

> In case of default by the buyers on their payment agreement . . . shall give the sellers automatically ***the option*** of taking duly ownership of their goods sold to the sellers. (Emphasis added)
> ...
>
> These sold goods in cause of default by the buyers shall immediately become the sole property of the sellers, Helga and Harry Kerlec. The buyers, Ryan Reed and Jim Ramirez have waived all rights of goods purchased with the owner financing and acknowledge to total loss of such goods o [sic] the original

> owners and sellers without any financial recovery of previously paid moneys with the owner finance agreement.

Provisions in a contact must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. LSA-C.C. art. 2050. Accordingly, the contract's default provisions must be interpreted to provide for reversion of ownership as an option only, without foreclosing on the Kerlecs' alternative right to seek payment of the purchase price.

Moreover, because the property specified in the agreement was destroyed by Hurricane Katrina *before* Reed and Ramirez were in default, when Reed and Ramirez did default on their monthly payments, it was impossible for ownership of the property to revert back to the Kerlecs as provided in the agreement. An obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible. An obligor is, however, liable for his failure to perform when he has assumed the risk of such a fortuitous event. LSA-C.C. art. 1873. Thus, while Reed and Ramirez may not be liable for their inability to return the items listed in the agreement to the plaintiffs, they are still liable for the purchase price under the agreement.

Based on our de novo review and considering as true the facts of the petition, we find that plaintiffs' petition states a cause of action. Accordingly, the judgment of the trial court is reversed and this matter is remanded for further proceedings.

Finally, Reed and Ramirez answered this appeal complaining that the trial court erred in failing to grant them the relief requested through their reconventional demand. This court lacks jurisdiction to consider the

reconventional demand. The reconventional demand was not heard by the trial court, and no judgment was rendered in that regard. Therefore, the reconventional demand remains pending before the trial court. Accordingly, the answer to appeal is dismissed for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the judgment appealed from is reversed, and this matter is remanded to the trial court for further proceedings. The answer to the appeal filed by Reed and Ramirez is dismissed for lack of jurisdiction. Costs of this appeal are assessed to Ryan Reed and James Ramirez, III.

REVERSED AND REMANDED; ANSWER TO APPEAL DISMISSED.