NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0959

WILLIAM J. HAMLIN AND AVERY LEA GRIFFIN

VERSUS

MERLE MULKEY AND XYZ INSURANCE COMPANY

Judgment Rendered: March 28, 2007

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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. 2005-14363, Section "F"

Honorable Martin E. Coady, Judge Presiding

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William J. Hamlin Albita Springs, LA	Counsel for Plaintiff/Appellee Pro Se
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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Pettigrew J. Concurs and assigns Reasons

HUGHES, J.

This is an appeal from an action on the sale of immovable property in which injunctive relief was granted. For the reasons that follow, we dismiss the appeal.

FACTS AND PROCEDURAL HISTORY

Between August 26, 2005 and August 27, 2005, William J. Hamlin and Avery Griffin entered into a purchase agreement with Merle Mulkey for the sale of immovable property located in Abita Springs, Louisiana.[1] It is alleged that on or about August 29, 2005, Hurricane Katrina caused damage to the property.

On September 9, 2005, the plaintiffs/purchasers inspected the premises and signed a property inspection form agreeing to accept the property in its present condition if the seller would assign rights to homeowner's policy proceeds for the repair of the hurricane damage. The seller failed to sign the property inspection form to signify agreement to assignment of insurance rights.

On September 16, 2005, the plaintiffs/purchasers signed an "Amendment to Agreement to Purchase" form extending the seller's time to respond to the property inspection report until September 19, 2005, and including the following proposed term: "Seller's assignment of insurance rights shall relieve her of all responsibility to negotiate with insurance company[;] occupancy & possession shall be at act of sale, but seller may continue to store her furniture & possessions at property, at no cost, through 10/31/05[.]" The seller also failed to sign this amendment.

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[1] Copies of the purchase agreement, counter offer, property disclosure addendum, property inspection response, and amendment to purchase agreement appear in the record attached to the plaintiffs' petition. A copy of the act of sale appears in the record attached to Merle Mulkey's motion for new trial. Mr. Hamlin further attached a copy of the defendants' insurance policy to his memorandum in opposition to the motion for new trial. Original, verified copies of these documents were not made a part of the record on appeal.

Nevertheless, on October 11, 2005, the parties entered into an act of sale, conveying title of the subject property from Shelton W. Mulkey Jr. and Merle Massel Mulkey to William J. Hamlin.[2] The stated purchase price in the act of sale was $416,952.00, and it was declared therein that: "Seller makes no warranties, either expressed or implied, as to the condition of the property. Purchaser accepts the property in its 'AS IS' condition and Seller's responsibility for the condition of the property is relieved at closing."

On the date of the closing, October 11, 2005, plaintiffs William J. Hamlin and Avery Lea Griffin filed a "Petition for Specific Performance, Injunctive Relief and Damages." In their petition, plaintiffs asserted that Merle Mulkey refused to assign her rights to insurance proceeds at the act of sale of the property at issue, despite her alleged agreement to do so. Plaintiffs further alleged that they should be considered "loss payees" under any business policy of insurance issued to Ms. Mulkey on the premises (asserting that she used the premises as a business property), and seeking to join the unidentified insurer as a defendant, denominated as XYZ Insurance Company ("XYZ").[3] Plaintiffs asserted that Ms. Mulkey refused to provide the name of her insurance company and alleged that Ms. Mulkey intended to keep the insurance proceeds without applying them to the needed repairs of the insured premises. Plaintiffs further alleged that they would suffer irreparable injury if they were not allowed to participate in the settlement

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[2] Avery Griffin, though a party to the pre-sale documents, did *not* join in the act of sale. And Shelton W. Mulkey Jr., though *not* a party to the pre-sale documents, did join in the act of sale.

[3] Avery Lea Griffin was dismissed as a party plaintiff in an amended and supplemental petition filed by Mr. Hamlin on November 4, 2005. In this first amended and supplemental petition, Mr. Hamlin also added as a party defendant Shelton Mulkey, and substituted as a party defendant James Wolf Insurance Company ("Wolf") for XYZ. However, Wolf was later dismissed and a second amended and supplemental petition was filed substituting Certain Underwriters at Lloyd's London for Wolf, as a party defendant. The record on appeal does not reflect that any insurer filed an answer.

negotiations with the insurer, and they sought an injunction against Ms. Mulkey and her insurer, prohibiting settlement until the rights alleged in the suit could be determined. Plaintiffs also sought in the alternative, a judgment in the amount of any insurance proceeds Ms. Mulkey might be paid, on a theory of unjust enrichment.

An ex parte temporary restraining order was issued ordering Merle Mulkey not to "proceed with entering into a settlement with her insurance company for any damages caused to the Abita property by Hurricane Katrina."

Following a November 3, 2005 hearing on preliminary injunctive relief, the trial court ruled in plaintiffs' favor, despite Ms. Mulkey's failure to appear, noting she had been served. The "Judgment on Motion for Preliminary Injunction" was signed by the court on November 8, 2005, and "[b]ased on the evidence presented in open court,"[4] decreed that a preliminary injunction issue "in the form and substance of the temporary restraining order issued by the Court in this matter on October 11, 2005." The injunction was ordered to continue until the issues in the matter were resolved or until further order of the court.

On November 7, 2005, Merle Mulkey filed a motion for new trial to dissolve the injunction, which included a request for damages, attorney's fees, and costs under LSA-C.C.P. art. 3608 et seq. Ms. Mulkey asserted that the parties were bound by the terms of the act of sale, executed October 11, 2005, and that in the act of sale Mr. Hamlin agreed to accept the property "as is" and without any assignment of Ms. Mulkey's rights under her insurance policy. Ms. Mulkey further alleged that Mr. Hamlin was in bad faith in

[4] The transcript of the November 3, 2005 hearing appears in the record. The only "evidence" submitted during the hearing was the testimony of Mr. Hamlin, who testified essentially to the facts as alleged in his petition. No documents or other exhibits were introduced into evidence.

filing the instant lawsuit while possessed with the knowledge that she had never agreed to transfer to him the rights she had under her insurance policy. A sworn affidavit was filed into the record, attested to by both Shelton Mulkey and Merle Mulkey, stating that at no time did they either verbally or in writing agree to assign insurance policy proceeds owed to them on the property.

On February 6, 2006, the trial court signed a judgment denying the motions for new trial and for dissolution of the injunction.[5] Merle and Shelton Mulkey have appealed this judgment,[6] and assert the following assignments of error: (1) the trial court erred in granting a temporary restraining order and preliminary injunction when the plaintiff neither alleged nor proved that he was threatened with irreparable harm; (2) the trial court erred in granting a temporary restraining order and preliminary injunction without requiring the plaintiff to post bond; (3) the trial court erred in granting a preliminary injunction when, at the November 3, 2005 hearing, the plaintiff failed to introduce evidence to support entry of a preliminary injunction; (4) the trial court erred in granting a preliminary injunction because the plaintiff did not demonstrate a probability of success on the merits; and (5) the trial court erred in failing to award damages and attorney fees for plaintiff's actions in improvidently obtaining the temporary restraining order and preliminary injunction.

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[5] In a minute entry, the trial court indicated that the issues raised in defendants' motions were submitted to the court on the memoranda. The trial court issued written reasons for his judgment denying defendants' motions, relying on the definition of "insurable interest" as set forth in LSA-R.S. 22:614, stating that no Louisiana jurisprudence existed on the issue, and citing the case of **Deck v. Chautauqua County Patrons' Fire Relief Association**, 343 N.Y.S.2d 855 (N.Y. 1973). However, we note that the Louisiana Supreme Court has considered a similar issue in **Daum v. Lehde**, 239 La. 607, 119 So.2d 481 (La. 1960), and ruled therein that the buyer of the immovable property at issue had no right to seek insurance proceeds payable to the seller under his own policy of insurance. Thus, it would seem that resolution of the issue is not entirely dependant on whether a buyer has an insurable interest, but rather, whether his interest has in fact been insured.

[6] Shelton Mulkey joined Merle Mulkey in answering plaintiff's amending and supplemental petitions, and in the appeal filed herein.

APPELLATE PROCEEDINGS AND JURISDICTION

On June 28, 2006, Mr. Hamlin filed a motion in this court to supplement the appellate record with pleadings previously filed in the lower court, entitled "Motion of Plaintiff William J. Hamlin to Dissolve and Vacate Judgment of Preliminary Injunction Dated November 8, 2005" (filed in the lower court on May 4, 2006), and "Second Amended and Supplemental Petition for Specific Performance, Injunctive Relief and Damages" (filed in the lower court on December 23, 2005).

On September 5, 2006, the motion was denied in part by this court, as to the second amended and supplemental petition, which was already a part of the appellate record; the remainder of Mr. Hamlin's motion was deferred until consideration of this matter on the merits of the appeal. After further consideration we have found the motion to dissolve and vacate the preliminary injunction relevant to this appeal, and have granted the remainder of Mr. Hamlin's motion to supplement the record; the appellate record has now been supplemented with this pleading.

In the "Motion of Plaintiff William J. Hamlin to Dissolve and Vacate Judgment of Preliminary Injunction Dated November 8, 2005," plaintiff asked that the judgment granting the preliminary injunction in his favor be dissolved and vacated on the grounds that "the insurer is now in the lawsuit as a party defendant and therefore it is unnecessary for the injunction to be maintained." The motion was granted by the trial court on May 8, 2006, and the November 8, 2005 judgment was dissolved and vacated. We believe this action by the trial court removed the basis for the instant appeal.

An appellate court has a duty to examine subject matter jurisdiction sua sponte, even when the issue is not raised by the litigants. **Republic Fire and Casualty Insurance Company v. State of Louisiana Division of**

Administration, 2005-2001, p. 11 n.5 (La. App. 1 Cir. 12/28/06), ___ So.2d ___, ___ n.5; **Jackson National Life Insurance Company v. Kennedy-Fagan**, 2003-0054, p. 4 (La. App. 1 Cir. 2/6/04), 873 So.2d 44, 47, writ denied, 2004-0600 (La. 4/23/04), 870 So.2d 307; **McGehee v. City/Parish of East Baton Rouge**, 2000-1058, p. 3 (La. App. 1 Cir. 9/12/01), 809 So.2d 258, 260.

Appeals from injunctive relief are governed by LSA-C.C.P. art 3612, which provides as follow:

> A. There shall be no appeal from an order relating to a temporary restraining order.
>
> B. ***An appeal may be taken as a matter of right from an order or judgment relating to a preliminary or final injunction***, but such an order or judgment shall not be suspended during the pendency of an appeal unless the court in its discretion so orders.
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> C. An appeal from an order or judgment relating to a preliminary injunction must be taken, and any bond required must be furnished, within fifteen days from the date of the order or judgment. The court in its discretion may stay further proceedings until the appeal has been decided.
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> D. ***Except as provided in this Article, the procedure for an appeal from an order or judgment relating to a preliminary or final injunction shall be as provided in Book III***. [Emphasis added.]

Under the last paragraph of this article, except where specific portions differ from the general procedure for appeals, the general rules are applicable. LSA-C.C.P. art. 3612, Comment (c). The historical comments to LSA-C.C.P. art. 3612 indicate that a source provision for this article was former LSA-R.S. 13:4070 which provided, in pertinent part:

> **§ 4070. Appeals.** No appeal shall be allowed from any order granting, continuing, refusing or dissolving a restraining order, but ***where upon a hearing, a preliminary writ of injunction shall have been granted, continued, refused or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall have been refused by such order or decree, a devolutive, but not a suspensive appeal, may be taken*** as a matter of right from such interlocutory order or decree. ... [Emphasis added.]

In the instant case, although a preliminary injunction was granted, that injunction has now been dissolved and vacated. Therefore, defendants'/appellants' first four assignments of error, asking this court to overturn the injunction, are now moot. The only remaining assignment of error complains of the trial court's failure to award damages and attorney fees for the allegedly improvident obtaining of the temporary restraining order and preliminary injunction. However, because the trial court did not find merit in defendants'/appellants' motion to vacate the preliminary injunction, the trial court did not reach the issue of damages. See **Spiers v. Roye**, 2004-2189, pp. 5-6 (La. App. 1 Cir. 5/19/06), 927 So.2d 1158, 1169-70, on rehearing.

Although in **Spiers v. Roye**, the underlying action involved an attachment and sequestration, whether the issue of damages related to the attachment and sequestration could be considered on appeal, when the motion to dissolve the attachment and sequestration had been denied, was addressed by this court as follows:

> When a motion to dissolve a writ of attachment or sequestration under LSA-C.C.P. art. 3506 is coupled with a request for damages, there are three possible outcomes:
>
> A. Motion to dissolve denied.
> B. Motion to dissolve granted, damages denied.
> C. Motion to dissolve granted, damages awarded.
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> In situations B and C, the trial court has considered the merits of awarding damages after finding that dissolution of the writ is warranted. Damages "may" be awarded, in the discretion of the court, depending on the facts and circumstances of each case. In situation A, the issue of damages is not reached. There is no consideration of whether damages should be awarded, and if so, how much, because absent a dissolution, there can be no damages.
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> A judgment "denying damages," whether after a contradictory motion or after the trial of an incidental demand by ordinary process, can only be rendered when dissolution has been granted. A judgment "denying damages" after dissolution has been denied is improper because it reaches beyond the issue

> decided; the issue of damages, whether to grant or deny, and the amount if granted, becomes moot. In other words, the granting of the motion to dissolve is a condition precedent to a determination of the issue of damages.

Id. (footnote omitted). We believe this rationale is equally applicable in the instant case.

In this case, since the judgment dissolving and vacating the injunction was rendered after this appeal was taken, and did not indicate that the issue of damages was considered in connection with that judgment, we cannot presume the court ruled on the issue of damages, and hence there is nothing for this court to review.

Further, the failure of a trial court to address a claim for damages in conjunction with a motion to dissolve a preliminary injunction is not an issue that is independently appealable under LSA-C.C.P. art 3612; it is a non-appealable interlocutory judgment under LSA-C.C.P. art. 2083.

Accordingly, this appeal should be dismissed ex proprio motu.

CONCLUSION

For the reasons assigned herein, this appeal is hereby dismissed. Each party is to bear his own costs.

APPEAL DISMISSED.

WILLIAM J. HAMLIN AND AVERY LEA GRIFFIN

MERLE MULKEY AND XYZ INSURANCE COMPANY

NUMBER 2006 CA 0959

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

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

PETTIGREW, J., concurring.

I agree with the majority that due to the trial court's order dated May 8, 2006, dismissing and vacating the preliminary injunction previously issued by the trial court on November 8, 2005, the issue of dissolution of the preliminary injunction issued by the trial court is now moot.

However, I disagree with the majority that appellants' first four assignments of error are moot. Not only did appellants ask for a dissolution of the preliminary injunction on November 8, 2005, but they also asked us to determine whether the temporary restraining order and preliminary injunction were improvidently issued due to the fact that the plaintiffs in this case did not prove that they were threatened with or received irreparable harm to justify the issuance of a temporary restraining order and preliminary injunction, that there was error on the part of the trial court in issuing a temporary restraining order and preliminary injunction without requiring the plaintiffs to post bond, whether the plaintiffs produced sufficient evidence to support the entry of a preliminary default, and whether the plaintiffs demonstrated the probability of success on the merits to justify the issuance of a preliminary injunction. Underlying all four of these assignments is the issue of whether the plaintiffs even proved that appellants agreed to assign their property damage claims against their own insurer.

This court has not addressed any of these issues. Due to the trial court's May 8, 2006 order dissolving the preliminary injunction, this court is left with two options in my opinion: (1) address all of the issues in this case or (2) dismiss the appeal, reserving to the appellants their rights to further litigate all of the issues raised in this appeal in further proceedings at the lower court and in this court on subsequent appeals.

Although I would prefer to address the issues now, I will concur in the results reached by the majority, because dismissing the appeal reserves to the appellants the right to litigate these issues at the trial court level and again on a subsequent appeal – if one is taken.