

243 So.3d 693

NOLA BOURBON, LLC

v.

**Jorge RODRIGUEZ–FRANCO and
Lillian Benitez**

NO. 2017–CA–1002

**Court of Appeal of Louisiana, Fourth
Circuit.**

APRIL 18, 2018

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DEFENDANTS/APPELLANTS

(Court composed of Chief Judge James F.
McKay, III, Judge Daniel L. Dysart, Judge
Dennis R. Bagneris, Sr., Pro Tempore)

Judge Daniel L. Dysart

Jorge Rodriguez–Franco and Lillian Benitez
appeal the issuance of a permanent injunction
against them and in favor of Nola Bourbon,
LLC. For the reasons that follow, we reverse
and remand this matter for further
proceedings.

BACKGROUND:

Nola Bourbon, LLC, (hereinafter "Nola
Bourbon" or "plaintiff") is the owner of the
property located at 933 Bourbon Street in
New Orleans, having purchased the property
on September 27, 2011. Jorge Rodriguez–
Franco and Lillian Benitez (hereinafter
referred to collectively as "Benitez" or
"defendants") are the owners of 927–931

Bourbon Street, and have been since 1995. A
dispute over the alley that runs between the
two properties is the basis for this lawsuit.

In August of 2015, Nola Bourbon filed a
Petition for Preliminary Injunction,
Permanent Injunction and Ex Parte Motion
for Temporary Restraining Order. In the
petition, Nola Bourbon alleged that Benitez
ordered it to remove air conditioning units
that were on defendants' property,

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allegedly with defendants' permission. Upon
learning that defendants no longer wanted
the air conditioning units on their property,
plaintiff entered into a verbal and written
agreement with defendants to refrain from
taking any action for a ten-day period.
However, prior to the termination of the ten-
day period, defendants closed in with bricks
plaintiff's previously existing gate opening in
the wall between the properties. Nola
Bourbon alleged that the closure of the wall
caused damage to its property. Specifically,
plaintiff alleged that because its property
could no longer drain into a pre-existing
French drain between the properties, water
would accumulate on plaintiff's property,
flooding a downstairs unit; plaintiff could no
longer access its air conditioning units for
maintenance; and, repairs and/or
maintenance could no longer be done to that
side of plaintiff's property.

In their ex parte motion for a temporary
restraining order, plaintiff requested that
defendants be enjoined from dismantling or
moving the air conditioning units, and from
denying plaintiff access to defendants' side of
the alley wall. The trial court granted only the
portion of the restraining order addressing
the air conditioning units. The defendants
answered the petition, raising allegations of
harm to their property, and arguing that
plaintiff had no rights to the use of the alley.

Prior to a hearing being held on the petition for injunctive relief, defendants filed exceptions of no cause of action, improper use of summary proceeding and prematurity, all of which were denied by the trial court.

On October 15, 2015 and July 12, 2016, the trial court held hearings on plaintiff's petition for injunctive relief. A judgment was rendered on September 13, 2017, along with written reasons for judgment. The trial court ordered defendants to remove the brick wall that was constructed between the two properties to block plaintiff's gate. The trial court's ruling also permanently enjoined defendants and any successors in title from denying access to plaintiff and any successors in title to the defendants' side of the alley; from blocking or obstructing the French drain in the common alleyway; from removing the currently existing air conditioning units on defendants' property or from preventing maintenance of said units.

Defendants now appeal.

DISCUSSION:

In their first assignment of error, defendants argue that the trial court erred in granting a permanent injunction, as a hearing on the permanent injunction was never scheduled; rather, only a hearing on the preliminary injunction was noticed.

The judgment from which this appeal is taken is clearly granting a permanent injunction. Specifically, the court ordered the prompt removal of the brick wall in the former passageway between the properties. The judgment further found the existence of a continuous predial servitude of drainage,¹ an apparent predial servitude of access for maintenance acquired by acquisitive prescription, a right of access and a servitude for maintenance and repairs to plaintiff's property, and a servitude in favor of plaintiff for the placement of air conditioning units in the common alley on defendants' property.

Plaintiff argues that the parties met in chambers, at which time the trial judge stated that the matter would be tried once.

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Further, plaintiff alleges that the judge instructed that the original rule to show cause would be extended to a new date, based on a waiver of service by all counsel and an agreement to hold simultaneously a hearing on both the preliminary and permanent injunctions.

Our review of the record indicates that defendants were never notified of or stipulated to the hearing of this matter being on the merits of a permanent injunction. Rather, during the first day of hearing, counsel for plaintiff argued that an affidavit should be allowed into evidence over defendants' objection to hearsay, as affidavits are allowed at hearings on preliminary injunctions. The trial court allowed the affidavit into evidence, stating that "this is a summary hearing, it's an injunction hearing, and it could have been done solely by affidavit." As this Court is a court of record, we cannot rely on plaintiff's statements concerning matters that allegedly took place off the record. *Succ. of Feingerts*, 17-0265, p. 11 (La.App. 4 Cir. 12/21/17), 234 So.3d 1081, 1089, quoting *Denoux v. Vessel Mgmt. Servs., Inc.*, 07-2143, p. 6 (La. 5/21/08), 983 So.2d 84, 88.

Based on the above, it is clear that this case was tried on a petition for a preliminary injunction. See *Elysian Fields Church of Christ v. Dillon*, 08-0989, p. 8 (La.App. 4 Cir. 3/18/09), 7 So.3d 1227, 1232, citing *Springlake Homeowners Ass'n, Inc. v. Pecot*, 321 So.2d 789, 790 (La.App. 4th Cir. 1975). "[T]he jurisprudence is clear that a preliminary hearing cannot be converted to a permanent injunction hearing absent a stipulation of the parties to the contrary." *Louisiana Serv. and Contracting Co., Inc. v.*

St. Bernard Parish Gov't. , 08-0174, p. 5 (La.App. 4 Cir. 11/26/08), 1 So.3d 557, 560.

Accordingly, we find that the defendants are entitled to a full trial on the merits of the permanent injunction. A permanent injunction may be rendered only "after a trial on the merits in which the burden of proof is a preponderance of the evidence rather than a prima facie showing." *Elysian Fields Church of Christ*, 08-0989, p. 8, 7 So.3d 1227, 1232, citing *Bollinger Machine Shop and Shipyard, Inc. v. United States Marine, Inc.* , 595 So.2d 756, 758 (La.App. 4th Cir. 1992). The judgment is hereby reversed and this matter remanded for further proceedings.²

REVERSED AND REMANDED

Notes:

¹ The petition for injunction makes a reference to the fact that water cannot drain from plaintiff's property into a French drain in the "common" alleyway. However, plaintiff's did not seek the recognition of a servitude of drainage.

² Based on our ruling, we decline to discuss the remainder of defendants' assignments of error.
