NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1592

R. L. DRYWALL, INC.

VERSUS

B & C ELECTRIC, INC., MICHAEL BABIN AND STEPHEN A. BABIN

Judgment Rendered: MAY 02 2014

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 569,160

The Honorable William A. Morvant, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WHIPPLE, C.J.

This matter is before us on appeal by defendants, B & C Electric, Inc., Michael Babin, and Stephen A. Babin, from a judgment of the trial court in favor of plaintiff, R.L. Drywall, Inc. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

R.L. Drywall, Inc., owned by Richard Lacoste, was hired by B & C Electric, Inc., owned by Michael Babin and Stephen Babin, to perform drywall services in a warehouse building, which included two suites of offices. Lacoste created a bid for the services and materials, which he also used as an invoice. The parties dispute whether Babin was provided with a copy of the bid before any work began. The original total amount shown on the bid/invoice was $11,012.00. However, the project was subsequently expanded to include an additional ceiling and an additional room. Thus, after applying a credit in the amount of $706.00 for unused sheets of 5/8 inch drywall and adding $2,031.00 for additional sheets of 1/2 inch drywall, the total bid/invoice was $12,337.00. After the work was completed, Lacoste supplied Michael Babin, who was in charge of the project, with the bid/invoice showing the total amount due. Babin disputed owing the charges shown on the bid/invoice and sent Lacoste a check in the amount of $5,000.00 as a good-faith down payment until they "could sit down and figure

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[1] A show cause order was previously issued by this court as to the timeliness of the defendants' motion for new trial and motion for appeal. The defendants responded to the show cause order, and on January 16, 2014, another panel of this court issued an order provisionally maintaining the appeal, yet reserving the final determination as to whether the appeal should be maintained to the panel to which the appeal was assigned.

According to the record, the judgment maintaining the defendants' exception of no cause of action and dismissing plaintiff's claims was signed on October 26, 2011, with notice of same issued on October 27, 2011. An untimely motion for new trial was subsequently filed on November 8, 2011. In their response to the show cause order, however, the defendants attached proof of fax filing of their motion for new trial dated November 7, 2011, which would make the filing of their motion for new trial timely. See LSA-R.S. 13:850. The trial court denied the motion for new trial on January 30, 2012; however, the judgment denying the motion for new trial was not signed until August 14, 2012. Notice of this judgment was mailed on August 16, 2012. Thus, the motion for appeal was timely filed on September 17, 2012.

this out." According to Babin, he could not make "any sense of [the] bill" and could not tell what he was being charged for. Lacoste did not cash the check for $5,000.00, but instead, gave it to his attorney.

When the bill was not paid in full, on February 19, 2008, Lacoste filed a statement of lien and privilege on immovable property owned by the Babins located at 6325 Airline Highway, Baton Rouge, Louisiana, where B & C Electric's warehouse was located.[2] Counsel for R.L. Drywall then sent Michael and Stephen Babin correspondence via certified mail dated March 7, 2008, which included a lien notice along with a copy of the lien, and a demand for payment of the full amount allegedly due of $12,337.00, with legal interest, from the date of the filing of the lien.

When the total amount of the invoice remained unpaid, on July 24, 2008, R.L. Drywall filed a "Petition to Enforce Lien," claiming a privilege against the property for the contractual amount due and seeking a money judgment for that amount plus damages, legal interest from the date of judicial demand, costs, and reasonable attorney's fees. The matter was heard by the trial court on July 25, 2011, after which the trial court rendered judgment in favor of R.L. Drywall in the amount of $12,337.00, with legal interest, and attorney's fees in the amount of $3,300.00. A judgment conforming to the court's ruling and recognizing R.L. Drywall's privilege on the immovable property was signed by the trial court on October 26, 2011.

The defendants then filed the instant appeal, contending that the trial court erred in: (1) finding that plaintiff carried its burden of proving the amount due by a preponderance of the evidence; (2) awarding attorney's fees for an "open account," where the contract between the parties clearly contemplated a single

[2]The Louisiana Private Works Act is set forth in Louisiana Revised Statute 9:4801, *et seq.*

construction job rather than any on-going relationship; and (3) awarding attorney's fees, where the amount due was unclear and the creditor refused to provide a reasonable explanation.

DISCUSSION

Motion to Supplement

The defendants filed a motion for leave to supplement their brief on appeal with a one-page "explanatory exhibit," which they concede is not evidence and is not contained in the record, "to assist the Court in its review of the factual arguments in this business dispute." Plaintiff filed an opposition to the motion, contending that this document was never before produced or introduced at trial; that it is uncertain as to where the information in the document originated; and that the information contained in the document represents new evidence not brought at trial or at the motion for new trial.

As an appellate court, we have no jurisdiction to review evidence that is not in the record on appeal, and we cannot receive new evidence. Niemann v. Crosby Development Company, L.L.C., 2011-1337 (La. App. 1st Cir. 5/3/12), 92 So. 3d 1039, 1044. An appellate court must render any judgment which is just, legal, and proper upon the **record on appeal**. LSA-C.C.P. art. 2164. Thus, an appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. Tranum v. Hebert, 581 So. 2d 1023, 1026 (La. App. 1st Cir.), writ denied, 584 So. 2d 1169 (La. 1991). In particular, appellate briefs are not part of the record, and an appellate court has no authority to consider on appeal facts referred to in argument of counsel, in such briefs, or in exhibits containing matters that are not in the pleadings or evidence, and as such, are outside the record. Niemann v. Crosby Development Company, L.L.C., 92 So. 3d at 1045.

Although the defendants contend that the exhibit is provided "solely to assist the Court in its review of the factual arguments," because this court's review is limited to the record before us on appeal herein, defendants' motion to supplement their brief on appeal with an "explanatory exhibit," which was not introduced before the trial court and contains facts outside of the record, is denied.

Assignment of Error Number One

Although the Louisiana Private Works Act must be strictly construed as being in derogation of general contract law, courts should not overlook the clear legislative intent, which is to protect contractors, laborers, materialmen, and subcontractors engaged in construction and repair projects. Burdette v. Drushell, 2001-2494 (La. App. 1st Cir. 12/20/02), 837 So. 2d 54, 68, writ denied, 2003-0682 (La. 5/16/03), 843 So. 2d 1132. However, because Louisiana's lien statutes are *stricti juris*, the plaintiff must prove its claim for liens by a "substantial preponderance" of the evidence. Parish Concrete, Inc. v. Fritz Culver, Inc., 399 So. 2d 694, 696 (La. App. 1st Cir. 1981).

The appellate court's review of factual findings is governed by the manifest error-clearly wrong standard. The two-part test for the appellate review of a factual finding is: 1) whether there is a reasonable factual basis in the record for the finding of the trial court; and 2) whether the record further establishes that the finding is not manifestly erroneous. Mart v. Hill, 505 So. 2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trial court's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a trial court's factual finding only if, after reviewing the record in its entirety, it determines the trial court's finding was clearly wrong. See Stobart v. State, through Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993).

Where factual findings are based on determinations regarding the credibility of witnesses, the trier of fact's findings demand great deference and are virtually never manifestly erroneous or clearly wrong. Tunnard v. Simply Southern Homes, L.L.C., 2007-0945 (La. App. 1st Cir. 3/26/08), 985 So. 2d 166, 169. Moreover, determinations regarding the credibility of witnesses under the manifest error-clearly wrong standard demand great deference to the trier of fact's findings as only the trier of fact can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. State v. Bell, 2010-0583 (La. App. 1st Cir. 10/29/10), 48 So. 3d 1253, 1255, writ denied, 2010-2629 (La. 1/28/11), 56 So. 3d 962. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989).

In their first assignment of error, the defendants contend that the trial court erred in finding that plaintiff carried its burden of proving the amount due by a preponderance of the evidence.

At the hearing on the petition to enforce the lien,[3] Lacoste testified that the bid/invoice prepared for this job was quoted by the square footage of the project and that he charged the defendants a 92 cent "flat rate" per square foot to furnish the drywall products, hang the drywall, and finish the product for both the 1/2 inch sheetrock and the 5/8 inch sheetrock. He explained that he measured the job

[3]Before the hearing commenced, the parties stipulated to the introduction of their exhibits. Plaintiff introduced: the bid/invoice (P-1); a copy of the act of cash sale of the immovable property (P-2); a copy of the lien (P-3); a notice of lien/demand letter (P-4); and an affidavit by plaintiff's counsel attached to his fee ledger (P-5). The defendants introduced: photographs of the some of the finished drywall product (D-1); photographs of a sign posted by plaintiff (D-2); and an estimate for a sheetrock job from AMB Distributors. (D-3)

to determine the square footage and multiplied that by 4.2. The costs itemized in the bid/invoice were $1,920.00 to hang 80 4x12 5/8 sheets of sheetrock, $1,632.00 to hang 170 4x12 1/2 sheets of sheetrock, $4,200.00 to finish the sheetrock, $2,640.00 for "Sheetrock," $300.00 for "Frame Beam," and $320.00 for "Fire Caulk." The total of the initial bid/invoice was $11,012.00. Lacoste testified that Babin had the bid "in his hand" before the work began. Lacoste testified that the bid/invoice was revised when Babin added extra work to the job, which expanded the project to include a ceiling and an extra room. Lacoste testified that he and Babin "agreed to a [square] footage on it" before they added the extra work. Lacoste explained that of the original 80 sheets of 5/8 inch material, 16 sheets were left over; thus, in revising the bid/invoice, he subtracted $706.00 for 768 square feet of unused 5/8 inch material and added $2,031.00 for the 46 extra 1/2 inch material sheets used to add the ceiling and room. The revised bid/invoice total was $12,337.00. Lacoste stated that the work was completed in a workmanlike fashion and that he was never called to do a punch list or fix any defects.

Michael Babin testified that he was in charge of the building project for B & C Electric and that he hired Lacoste to perform the drywall work. Babin identified the bid/invoice, but stated that he did not have the bid/invoice before the work began and that the bid/invoice was only sent to him "at the end of the job." He testified that the bid he received from Lacoste was verbal and that Lacoste told him that he would charge less than 70 cents per square foot. Babin further testified that Lacoste never gave him a price on the sheetrock, but told him that "he could beat anybody's price." Babin conceded that he never really knew what he was paying for the sheetrock. Babin testified that the "biggest problem" he had with the invoice, is that he could not "make any sense" of the bill or get the square footage to add up. Babin further stated that there was excessive waste on the job

due to Lacoste's failure to order the proper size sheetrock and that the job was not completed to his satisfaction. Babin identified photographs showing the difference in the finished sheetrock for the interior office walls as opposed to the warehouse firewalls that were hung with a piece of tape over the joints. Babin complained that despite the difference in the amount of labor involved for the finished as opposed to unfinished walls, he was charged the same flat rate. Babin testified that he tendered Lacoste a good faith payment of $5,000.00 and attempted to get Lacoste to break down the bill and sit down and go over it with him, but Lacoste refused. Babin acknowledged that he did not provide a punch list to R.L. Drywall regarding defects.

After hearing the testimony, the trial court rendered oral reasons for judgment, noting that the testimony presented by Lacoste and Babin "obviously conflicts," as follows:

> Well, the testimony I've heard thus far obviously conflicts between Lacoste and Mr. Babin. [...] Mr. Babin indicated they had an oral contract, a verbal agreement to do the drywall on this particular job. Mr. Lacoste has submitted an invoice which initially indicated the number of sheets of 5/8 to be hung, the number of sheets of 1/2-inch to be hung, the price to finish, the price for the Sheetrock, and assorted costs, the frame, beam, and then fire caulk. There was a credit given for 16 sheets of 5/8 for a credit of $706.56, and additionally there were 46 extra sheets of 1/2-inch which added $2,031.36, bringing the total for the job with those changes to $12,337.00. I have heard from both Mr. Lacoste and Mr. Bethune[4] as to the work that was done. And, actually, Mr. Babin on cross indicated that they never provided plaintiff with a punch list, which would indicate that there were no problems other than the finish with the firewall, but the three photos that I've looked at, and I don't know if it's because of the quality of photos provided to the Court, but I don't see any glaring flaws, any beveling, or any problems with the Sheetrock work.

With regard to the bid/invoice, the trial court noted that while it may not be "the most artfully drawn document, it's not hard to tell from a simple cursory [re]view exactly what was done and what was provided and what the cost of each

[4]Rodney Bethune is an employee of R.L. Drywall who worked on the B & C Electric project and testified as to the procedures used and the quality of the work performed by R.L. Drywall on that particular job.

of these were." The trial court found that plaintiff met his burden of proof, noting that "other than Mr. Babin's opinion, I've heard no testimony, no contradicting evidence from anybody else that this amount of money for this job is not ordinary and customary, that this is somehow overcharged based on the square footage or overcharged based on the number of sheets that were hung."

On review, considering the conflicting testimony presented herein, we find no error in the trial court's determination, which is amply supported by the record, that plaintiff met his burden of proving, by a preponderance of the evidence, the amount due on the lien. Although Babin contends that he did not understand the invoice, and that there was excessive waste on the job, the defendants failed to present any testimony challenging plaintiff's calculations or otherwise challenging the methodology used in preparing the bid/invoice herein; nor did the defendants present any photographs, expert testimony, or other evidence to establish their claim that there was excessive wasted sheetrock on this job.

Accordingly, we find no merit to this assignment of error.

Assignments of Error Two and Three

In these assignments of error, the defendants contend that the trial court erred in awarding plaintiff attorney's fees pursuant to LSA-R.S. 9:2781 for an "open account" where the contract between the parties clearly contemplated a single construction job rather than any on-going relationship, and where the amount due was unclear and the creditor refused to provide a reasonable explanation.

As a general rule, attorney's fees are not due and owing a successful litigant unless specifically provided for by contract or by statute. Frank L. Beier Radio, Inc. v. Black Gold Marine, Inc., 449 So. 2d 1014, 1015 (La. 1984). Our courts have construed such statutes strictly because the award of attorney's fees is exceptional and penal in nature. Bridges v. Lyondell Chemical Company, 2005-

1535 (La. App. 1st Cir. 6/9/06), 938 So. 2d 786, 789, writ denied, 2006-2196 (La. 11/17/06), 942 So. 2d 541.

At the time the defendants engaged the services of plaintiff, Louisiana Revised Statute 9:2781(A) provided, in part:[5]

> When any person fails to pay an open account within thirty days after the claimant sends written demand therefor correctly setting forth the amount owed, that person shall be liable to the claimant for reasonable attorneys fees for the prosecution and collection of such claim when judgment on the claim is rendered in favor of the claimant.

Moreover, Louisiana Revised Statute 9:2781(D) provided, in part:

> "[O]pen account" includes any account for which a part or all of the balance is past due, whether or not the account reflects one or more transactions and whether or not at the time of contracting the parties expected future transactions. "Open account" shall include debts incurred for professional services, including but not limited to legal and medical services.

In its petition, plaintiff specifically pled for attorney's fees pursuant to LSA-R.S. 9:2781, the suit on open account statute, stating, "Defendants received a statement of account and failed for over 30 days to pay same, and are, therefore, liable to plaintiff for reasonable attorney's fees." In its oral reasons, the trial court awarded attorney's fees herein "based upon the nonpayment after 30 days" in accordance with the statute.

On appeal, defendants contend the trial court erred in awarding attorney's fees herein in that construction contracts have not "historically been considered" to be open accounts. We note, however, that the cases relied on by the defendants in support of their contention that this is not a suit on an open account are all pre-Frey cases and are factually distinguishable from the case herein.

In Frey Plumbing Company, Inc. v. Foster, 2007-1091 (La. 2/26/08), 996 So. 2d 969 (per curiam), a homeowner hired a plumbing company to fix an

[5]Sections (E) and (F) of Louisiana Revised Statute 9:2781 were subsequently amended by La. Acts 2010, No. 695, §1.

underground pipe at her residence. The plumbing company issued an invoice to the homeowner after the work was performed. The bill remained unpaid for over six months. During that time, the plumbing company sent written demands for payment to the homeowner to no avail. The plumbing company filed suit to recover payment and also sought an award of attorney's fees under the open account statute. The homeowner filed a motion for partial summary judgment, arguing that the claim did not constitute a claim on open account where the services were for a first and only transaction between the parties, there was no line of credit, only one invoice was submitted for a single-time payment, and no additional jobs were anticipated. Frey Plumbing Company, Inc. v. Foster, 996 So. 2d at 970. The trial court granted the partial motion for summary judgment, finding the claim did not constitute a claim on an open account. The court of appeal denied the plumbing company's writ application, finding no error in the trial court's judgment. On review, the Supreme Court determined that the trial court erred in finding that a contract for open account could not exist between the parties merely because there was only a single transaction between them and no future transactions were contemplated. The Court noted that any account which fits the definition of an open account, including but not limited to an account for professional services, fits within the ambit of the statute, reasoning that: "La. R.S. 9:2781(D) must be applied as written. Under a plain reading of the statute, there is no requirement that there must be one or more transactions between the parties, nor is there any requirement that the parties must anticipate future transactions. To the extent the prior case law has imposed any requirements which are inconsistent with the clear language of La. R.S. 9:2781(D), those cases are overruled." Frey Plumbing Company, Inc. v. Foster, 996 So. 2d at 972.

Under Frey, which directs us to apply the language of LSA-R.S. 9:2781(D) as written (i.e., that an "open account" includes any account for which a part or all

of the balance is past due, whether or not the account reflects one or more transactions and whether or not at the time of contracting the parties expected future transactions), we find the account herein fits the definition of an open account as pled by plaintiff in his petition. The clear language of the statute states that an open account "includes any account," and nowhere in the statute are construction accounts or contracts specifically excluded.

Moreover, we note that in Burdette, this Court was asked to review an award of attorney's fees rendered on a petition to enforce a lien under the Private Works Act. Therein, the defendant argued on appeal that an award for attorney's fees was not provided for by contract nor authorized by statute. This Court agreed, noting that there was no evidence that the oral contract at issue provided for such recovery by either party and that the plaintiff had not cited any statutory authority for recovery of attorney's fees by a contractor seeking payment for labor and materials and recognition of a lien. Burdette v. Drushell, 837 So. 2d at 70. In doing so, however, we noted that plaintiff did not invoke the provisions of LSA-R.S. 9:4822(K) (providing for claims against the owner and the contractor in accordance with LSA-R.S. 9:4802); nor did plaintiff's petition suggest that his claim was one on open account under LSA-R.S. 9:2781. Burdette v. Drushell, 837 So. 2d at 70, n.17. As such, this Court reversed the award of attorney's fees where plaintiff failed to allege a basis for the award. Burdette v. Drushell, 837 So. 2d at 70.

In the instant matter, we recognize that plaintiff has not asserted a claim for attorney's fees under the provisions of the Louisiana Private Works Act. Instead, plaintiff's claims for attorney's fees are asserted pursuant to LSA-R.S. 9:2781. This Court has previously awarded attorney's fees in suits to recognize liens under the Private Works Act where such fees were not provided for under the Private Works Act, but where another statutory basis exists for such an award.

See Bernard Lumber Company, Inc. v. Lake Forest Construction Company, Inc., 572 So. 2d 178, 183 (La. App. 1st Cir. 1990) (in a suit under the Private Works Act, where attorney's fees were not provided for under the applicable provisions of the Private Works Act, attorney's fees were nonetheless awarded on the basis that the credit application granted plaintiff the right to recover attorney's fees). In the instant case, unlike in Burdette, plaintiff **has** alleged another basis for the award of attorney's fees, i.e., under the open account statute, and attorney's fees were awarded pursuant to the statute.

Nonetheless, the defendants additionally argue that even if attorney's fees could be awarded under the open account law herein, given the ambiguous nature of the bid/invoice, the award should be set aside as plaintiff failed to "correctly" set forth in the written demand the amount owed as required by LSA-R.S. 9:2781. We find no merit to this argument. Although the defendants dispute that the amount set forth as owed by plaintiffs in the written demand is "correct," as set forth in our discussion above, we find no error in the trial court's underlying findings and conclusion that plaintiff met his burden of proof as to the amount due. Thus, we find no merit to this argument.

Accordingly, we find no error in the trial court's award of attorney's fees herein under the open account statute. See LSA-R.S. 9:2781. In their brief on appeal, the defendants request that they be given a $5,000.00 credit for the check they tendered to plaintiff, but that was never cashed. Although plaintiff testified that he gave the check to his attorney, the record does not establish that the check is still in plaintiff's attorney's possession or that it is still valid. Thus, there is no basis for this court to award a credit of $5,000.00 and the defendants' request is denied.

CONCLUSION

For the above and foregoing reasons, the October 26, 2011 judgment of the trial court is affirmed. Costs of this appeal are assessed to the defendants/appellants, B & C Electric, Inc., Michael Babin, and Stephen A. Babin.

MOTION TO SUPPLEMENT DENIED; JUDGMENT AFFIRMED.