

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2021 CA 0335

PINNACLE BUILDERS, INC.

VERSUS

JOHN AND KATHY GILBERT



Judgment Rendered: DEC 22 2021

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On Appeal from the
21st Judicial District Court
Parish of Livingston, State of Louisiana
No. 157328

The Honorable Charlotte H. Foster, Judge Presiding

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* * * * *

BEFORE: LANIER, WOLFE, AND BURRIS,¹ JJ.

¹ The Honorable William J. Burris, retired, is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

WOLFE, J.

John and Cathy Gilbert² appeal the trial court's judgment that ordered them to pay Pinnacle Builders, Inc., amounts due under a construction contract as well as attorney fees and costs, and denied their reconventional demand. Pinnacle answered the appeal, requesting additional attorney fees and costs. We amend the trial court's judgment and, as amended, affirm.

FACTS

In November 2016, the Gilberts entered a construction contract with Pinnacle for the repair and renovation of their home, located in Walker, Louisiana, which had been damaged by historic flooding in August of that year. The contract price was \$138,700.00, based on the Gilberts' insurance company approving the repair of damages up to four feet from the home's slab. The contract specified that work would begin 30 days after execution of the contract and would be completed within 180 days thereafter.

The Gilberts paid a 10% deposit, and Pinnacle began work on time. By December 2016, Pinnacle estimated the project was 52% completed and sent the Gilberts an invoice for 40% of the contract price, opting to bill for less than the work actually completed. Following an inspection by the Gilberts' mortgage company, the Gilberts paid the invoice without question. Thereafter, Pinnacle encountered shortages of labor and materials, which affected all construction in the geographic region. Pinnacle continued working on the project as it was able, which required the completion of tasks out of the usual order. In June 2017, with the project incomplete, the Gilberts informed Pinnacle they were terminating the contract, specifically indicating they were dissatisfied with the stain applied to the cabinets.

² Although her first name is spelled "Kathy" in the suit caption, the record reflects that Mrs. Gilbert spells her first name "Cathy"; therefore, we use the spelling "Cathy" herein.

Pinnacle sent the Gilberts a final invoice dated July 11, 2017, for \$47,491.52, which was due on receipt. The amount represented work Pinnacle had done since the previous invoice, including installation of a new front door, trim work, cabinetry, garage doors, windows, and granite countertops, electrical trim work, as well as some painting. Mrs. Gilbert responded, asking for a cost breakdown of each item. Pinnacle explained it could not provide a breakdown because the contract was “a ‘hard money’ job,” with payments based upon percentage of work completed. Pinnacle further explained that although the project was 78-82% completed, the Gilberts were billed for only 74% of the contract price, less amounts already paid. Without providing any explanation, the Gilberts made no payments toward the invoice.

Then, in September 2017, the Gilberts’ attorney sent Pinnacle a demand letter that outlined alleged deficiencies in Pinnacle’s work on the project, including improper staining of cabinets, substandard painting, uneven floors, incomplete sheetrock, failure to install trim and molding, improperly cut granite, as well as other unidentified deficiencies and issues. The letter stated the Gilberts had been forced to terminate the contract and retain a new contractor to complete the project at a cost of over \$83,000.00. The Gilberts requested repayment of \$4,726.42 and informed Pinnacle that they would make no payment toward the final invoice.

In October 2017, Pinnacle instituted this suit. Pinnacle contended the Gilberts terminated the contract after approximately 80% of the work on the project was completed, without notice or explanation, and without providing Pinnacle the opportunity to cure any alleged defects. Pinnacle alleged the only complaint voiced by the Gilberts prior to termination related to the application of cabinet stain. Pinnacle averred that although the contract did not require a particular application method and the stain was applied according to industry standards, it had adjusted the amount billed in its final invoice to accommodate the Gilberts’ dissatisfaction with

the cabinet stain. Pinnacle averred the Gilberts terminated the contract for their own convenience and without cause, obligating them to pay Pinnacle the amount of the final invoice, judicial interest, attorney fees, and costs.³

The Gilberts answered the petition, generally denying Pinnacle's allegations and contesting Pinnacle's allegation that they terminated the contract without cause. The Gilberts alleged they notified Pinnacle of issues with defective workmanship throughout the project and that Pinnacle failed to remedy many of the issues. They contended they were forced to terminate the contract and hire another contractor to correct Pinnacle's alleged defective work and finish the project. The Gilberts also asserted a reconventional demand, seeking recovery of the amounts they spent to correct Pinnacle's substandard work, judicial interest, attorney fees, and costs, as well as the dismissal of Pinnacle's claims.

The matter proceeded to a bench trial on October 13, 2020, with the parties disputing whether the Gilberts terminated the contract for cause or convenience. After hearing the testimony and reviewing the evidence presented, the trial court determined the Gilberts did not prove by a preponderance of the evidence that Pinnacle's work on the home was defective. The trial court further found that the delays in completion of the work were beyond Pinnacle's control; therefore, under the terms of the contract, Pinnacle was not liable for damages resulting therefrom. The trial court concluded that the Gilberts had the right to terminate the contract for convenience, but were obligated to pay Pinnacle for expenses and labor already incurred. The trial court signed a judgment on December 8, 2020, ordering the

³ In its petition, Pinnacle also alleged it was entitled to the profit it would have earned on the remainder of the work had the contract not been terminated since the Gilberts terminated the contract for convenience rather than for cause. However, at trial, Pinnacle indicated it was not seeking to recover any profits and sought only the amount of the final invoice (which did not include profits), interest, attorney fees, and costs. In briefing the issues to the trial court, the Gilberts disputed Pinnacle's representation that the final invoice did not include profits. On appeal, the Gilberts challenge the amount of the final invoice; however, the issue of profits is not raised on appeal and is not considered herein.

Gilberts to pay Pinnacle \$47,491.52, and legal interest from July 11, 2017. The judgment further ordered the Gilberts to pay attorney fees and costs in the amount of \$30,553.46. The Gilberts' reconventional demand was dismissed.

The Gilberts now appeal. Pinnacle has answered the appeal, seeking an increase in the amount of attorney fees and costs incurred in defending this appeal.

DISCUSSION

The Gilberts contend the trial court erred in finding they terminated the contract for convenience, without cause. They argue that the evidence proves Pinnacle breached the contract by failing to finish the project on time, providing defective work, and working on an excessive number of homes at the same time.

A written contract has the effect of law between the parties, and the parties must perform their obligations under the contract in good faith. See La. Civ. Code art. 1983; **Construction Affiliates, Inc. v. Pullen**, 2009-1418 (La. App. 1st Cir. 7/9/10), 2010 WL 2712695, *2 (unpublished), writ denied, 2010-1850 (La. 10/29/10), 48 So.3d 1091. An agreement by which one party undertakes to construct a building for a specified price and furnishes either his work alone or his labor and materials is a construction contract or contract to build. The price is compensation for the work performed and materials used in construction. See La. Civ. Code arts. 2756 and 2757; **Construction Affiliates, Inc.**, 2010 WL 2712695 at *2. The owner has the right to terminate a construction contract at his convenience, without cause, even after work has begun on the project; however, the owner is required to pay the contractor for expenses and labor already incurred along with any damages the case may require. See La. Civ. Code art. 2765; **Construction Affiliates, Inc.**, 2010 WL 2712695 at *3.

Every construction contract implicitly obligates the contractor to perform the work in a good, workmanlike manner, free from defects in either materials or workmanship, with the work suitable for its intended purpose. See La. Code Civ.

arts. 1994 and 2769; **Matherne v. Barnum**, 2011-0827 (La. App. 1st Cir. 3/19/12), 94 So.3d 782, 789, writ denied, 2012-0865 (La. 6/1/12), 90 So.3d 442. If the contractor fails to do the work he agreed to perform, or does not execute it in the manner and at the time he agreed to do it, he will be liable for damages that may ensue from his breach of the contract. See La. Civ. Code art. 2769. To recover damages, the owner must prove by a preponderance of the evidence: 1) that defects exist; 2) that faulty materials or workmanship caused the defects; and 3) the cost of repairing the defects. **Matherne**, 94 So.3d at 789.

The trial court's factual conclusions with respect to a claim for unworkmanlike performance are governed by the manifest error standard of review. See **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989); **Matherne**, 94 So.3d at 789; **Williams v. Silva**, 2016-0182 (La. App. 4th Cir. 12/21/16), 207 So.3d 661, 665. If the trial court's findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse those findings even if convinced it would have weighed the evidence differently had it been the trier of fact. **Rosell**, 549 So.2d at 844. To reverse the trial court's determination of fact, an appellate court must review the record in its entirety and find that a reasonable factual basis does not exist for the finding, and further determine that the record clearly establishes that the fact finder was clearly wrong or manifestly erroneous. **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993).

Where there is conflict in testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review. **Stobart**, 617 So.2d at 882. Further, when presented with two permissible views of the evidence, the trial court's choice between them cannot be manifestly erroneous or clearly wrong. **Stobart**, 617 So.2d at 883. Where the trial court's conclusions are based on determinations regarding the credibility of witnesses, the manifest error standard demands great deference because 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. **Rosell**, 549 So.2d at 844.

Michael Roblin, Pinnacle's owner and president, testified that he runs Pinnacle's day-to-day operations. After the August 2016 flood, Pinnacle repaired 37 homes. Mr. Roblin described the Gilbert project as "a full reno" that encompassed insulation, sheetrock, trim work, cabinetry, painting, as well as some kitchen remodeling and upgrades. He explained that some of the work was to the area above the four-foot-line authorized by the insurance company. The first invoice was based on completion of the final demolition, framing, and insulation installation; hanging, floating, and texturing sheetrock; and the "rough-in" of plumbing, electrical, and air conditioning. On the advice of his bankers, Mr. Roblin followed a new construction spreadsheet and his own experience to calculate that the work was 52% completed.

Mr. Roblin explained that the magnitude of the flood and damage to suppliers in the area created shortages and delays that were unforeseeable at the time the contract was signed. For example, he described all renovation and repair work on flooded homes in the area coming to a standstill while contractors waited on cabinetry. Mr. Roblin testified that other than voicing the general frustration shared by everyone in the area trying to get back into their homes, the Gilberts did not complain about the delays during the project and did not cite the delays as a basis when they terminated the contract.

Mr. Roblin testified that approximately six months after work began, Mr. Gilbert telephoned him to say they were terminating the contract. Mr. Roblin went to the worksite and met with Mr. Gilbert, who complained that some cabinets were not stained properly. Mr. Gilbert thought the cabinets should have been "ragged," an older method that involved applying the stain with a rag. Mr. Roblin told Mr. Gilbert that the outsides of the cabinets were ragged, but the insides were sprayed,

which was the industry standard. Mr. Roblin also assured Mr. Gilbert that overspray on the walls would be taken care of during the final painting. The Gilberts nonetheless terminated the contract.

At trial, Mr. Roblin was asked about the demand letter he received from the Gilberts' attorney. Mr. Roblin testified that some of the work identified as deficient simply had not yet been completed when Pinnacle was terminated. For example, the letter referenced "uneven floors," but Pinnacle had not worked on the floors because the painting was not completed. Mr. Roblin was unsure what some of the items in the letter referenced, but guessed those were imperfections that would have been taken care of in finalizing the project. He explained that the area experienced an appliance shortage, so a small hole for the cooktop was cut into the granite that could be enlarged if necessary after the cooktop was delivered. Further, sheetrock repairs and painting were unfinished when Pinnacle was terminated.

Mr. Roblin specifically disputed the letter's representation that the Gilberts made requests that the issues be resolved to no avail. He testified that he periodically reported to the Gilberts, primarily Mrs. Gilbert, on the progress of the project and no dissatisfaction with Pinnacle's workmanship was expressed. Mr. Roblin testified that the Gilberts only brought the painting and staining issues to his attention during the meeting when they terminated the contract. Mr. Roblin stated that prior to that meeting, Mr. Gilbert only asked him about installing the new insulation against the older insulation that remained. Pinnacle then repacked the insulation to appease Mr. Gilbert, and the issue was not raised again.

Brian Stockwell, who worked as a supervisor for Pinnacle on the Gilberts' project, testified that over the course of the project, the Gilberts expressed frustration with the lack of progress on their home, but seemed satisfied with his explanation of the material shortages. When asked if the Gilberts complained about workmanship, he testified they complained about "some painting and stuff like that," explaining

the complaints were things that would have been resolved in completing the painting. When specifically asked about the cabinet stain, Mr. Stockwell stated the stain was applied in accordance with the industry standard and that Mrs. Gilbert was “kind of unhappy with the mess.” He did not recall a complaint about the color and reiterated that the work was not complete when the Gilberts terminated Pinnacle. Mr. Stockwell testified that although incomplete, Pinnacle’s work was performed to good workmanlike standards.

Mrs. Gilbert testified that she and her husband terminated the contract because of poor work quality after giving Pinnacle “lots of chances” to remedy the defects. She described issues with insulation, the wood used for windowsills, the quality of painting, the way doors were hung, and improper staining of the cabinets. She testified that holes in the walls above the four-foot line were painted over without being filled. Additionally, some paint appeared to be runny. Mrs. Gilbert stated that she selected the stain color for the cabinets and approved it after a subcontractor showed her how it looked when applied with a rag; however, she was unhappy that some cabinets appeared darker, which led her to assume the stain had been sprayed on rather than applied as she had been shown. Mr. Gilbert testified that he agreed with Mrs. Gilbert’s complaints and confirmed that they terminated the contract because of poor workmanship.

Mrs. Gilbert testified that there were numerous delays in Pinnacle’s work on the project and times when it seemed laborers were present but not working. She confirmed that she knew of problems getting cabinets and stated that she gave Pinnacle the name and number of an alternative supplier but Pinnacle never called. Mrs. Gilbert explained that at the final meeting with Mr. Roblin, they explained that they were unhappy with the work quality and that it “had nothing to do with any delays.” However, she added that in May, before the final meeting took place, her husband told Mr. Roblin they would give him six weeks to complete the project.

She also stated that she did not believe some of the reasons given for the delays, since she saw Pinnacle doing work on other homes. She testified that in her opinion, Pinnacle was in breach of contract in May when it failed to complete the project.

Mrs. Gilbert testified that they did not pay Pinnacle's final invoice because they did not believe Pinnacle performed quality work and because they "had to redo everything." She stated they were forced to hire a new contractor to complete the project. The Gilberts submitted invoices from Maginnis Construction, as well as proof that they paid Maginnis approximately \$79,000.00 for work on their home. Mrs. Gilbert conceded that Maginnis finished the job for less than the amount they would have paid to Pinnacle under the contract at issue. Mrs. Gilbert also conceded that Maginnis did not replace the cabinets that Pinnacle stained, but likely sanded them so the color appeared lighter. Upon further questioning, Mrs. Gilbert equivocated on whether they owed Pinnacle any amounts for work billed under the final invoice.

The trial court found that Pinnacle did not breach the contract by failing to complete the project within 180 days as stated in the contract. Rather, the trial court found that the delay was beyond Pinnacle's control and excused by Paragraph 5 of the contract, which provided:

Delays: Contractor shall not be liable for any loss or damage resulting from delay caused by occurrences beyond the control of Contractor, labor difficulties, labor or material shortages, governmental regulation, the elements, or other acts of God.

The trial court explained:

The Great Flood of 2016 was catastrophic. Damage caused by the flood was far reaching [a]ffecting not only homeowners but also businesses. Building supplies were scarce and subcontractors were hard to obtain. As Mike Roblin, President of Pinnacle Builders, Inc., testified at trial, the shortages of building materials and availability of subcontractors resulted in unforeseen delays in the construction of the Gilbert home. His testimony was unrefuted. Based upon the unique circumstances brought about by the flood, the Court finds that Pinnacle did not violate the contract as it pertains to the construction time of the Gilberts' home.

The record supports the trial court's factual determination that the delay in completing the project was the result of factors beyond Pinnacle's control. Both Mr. Roblin and Mr. Stockwell testified about material and labor shortages that stalled construction throughout the area. The Gilberts argue that that testimony is refuted by a March 30, 2017 invoice from the company that built the cabinets, which states the invoiced amount was for "Custom Cabinets installed." The Gilberts argue this proves the cabinets were installed on that date and disproves Pinnacle's explanation. However, Mr. Roblin testified at trial that the cabinets were not installed on the date of the invoice, but payments were made prior to installation to prioritize his clients. The trial court's decision to credit the testimony of Mr. Roblin and Mr. Stockwell over that of Mrs. Gilbert cannot be considered manifestly erroneous. See Rosell, 549 So.2d at 844. Thus, we find no error in the trial court's determination that the delays fell under the purview of Paragraph 5 of the contract. Furthermore, Mrs. Gilbert explained at trial that the delay was not a primary reason for terminating the contract.

The trial court additionally found that the Gilberts failed to prove that Pinnacle breached the contract by performing defective work. The record also supports this finding. Although the Gilberts testified they were dissatisfied, they produced no evidence to support their subjective belief the work was defective. For example, the Gilberts submitted proof they paid Maginnis to perform work to complete the project; however, they submitted no proof, other than Mrs. Gilbert's testimony, that Maginnis's work was required to remediate Pinnacle's defective work. Both Mr. Roblin and Mr. Stockwell testified that Pinnacle's work was good, workmanlike, and in accordance with industry standards. The trial court did manifestly not err in crediting the testimony of Mr. Roblin and Mr. Stockwell over that of Mrs. Gilbert and determining the Gilberts failed to prove that Pinnacle's work was defective. See Matherne, 94 So.3d at 789; Williams, 207 So.3d at 666.

The Gilberts also contend that Pinnacle breached the contract by undertaking the repair of too many homes. They point to the contract, which stated that time was of the essence, as well as Mr. Roblin's letter providing them an estimate for the project that stated Pinnacle would only be taking "a small amount" of flood-repair clients to insure quality work could be performed quickly. However, the record does not establish that Pinnacle breached any provision of the contract in this regard. Notably, the statement that Pinnacle would take only a small amount of clients is not contained in the contract itself. Even if that was a contractual obligation, there is no proof that the number of homes Pinnacle repaired, which was 37 according to Mr. Roblin and approximately 50 according to Mr. Stockwell, exceeded "a small amount" or was beyond Pinnacle's capabilities. This argument is without merit.

For all of these reasons, we find no manifest error in the trial court's determination that the Gilberts terminated the contract for convenience, without cause. Accordingly, the Gilberts are liable for the expenses and labor Pinnacle had incurred at the time of termination. See La. Civ. Code art. 2765.

The Gilberts argue, however, that are not obligated to pay Pinnacle because they were unsatisfied with the work performed, citing the provision of the contract that states:

2. Price: The contract price for the work to be performed by Contractor including labor and materials shall be \$138,700.00, payable upon completion of all work and approval of said work by Homeowner and any inspector or other appropriate regulatory agency.

This argument does not appear to have been raised before the trial court. As a general rule, an appellate court will not consider issues that were not raised in the pleadings, were not addressed by the trial court, or are raised for the first time on appeal. **KJMonte Investments, LLC v. Acadian Properties Austin, LLC**, 2020-0204 (La. App. 1st Cir. 12/30/20), 319 So.3d 354, 361. Furthermore, the referenced provision does not address payment when the contract is terminated without cause

before work is complete. Where, as here, the owner terminates the contract after work has begun without cause, Louisiana law requires payment for the expenses and labor the contractor has incurred. See La. Civ. Code art. 2765. This argument is without merit.

The Gilberts next contend Pinnacle failed to prove the amount of its damages, arguing that “Pinnacle was obligated to provide materials and labor that would add up to \$138,700.00” to recover the contract price. They argue the final invoice identifies \$20,809.80 as the amount owed for subcontractor expenses and since Pinnacle failed to provide evidence of the hours its employees worked on the project, that amount should be deducted.

At trial, Mr. Roblin testified the contract was a “hard-money” as opposed to a “cost-plus” contract. Mr. Roblin explained that this meant the job was for a set price, billed based on the percentage of work completed as opposed to invoices. He explained that given the unique situation created by the flood, repair work was billed based on reference to a standard new construction spreadsheet and his own experience after working in the construction industry since he was a teenager. The initial invoice was based on the percentage of work completed and was paid without question. The final invoice did not reflect the percentage of work completed at the time of termination; however, Mr. Roblin testified he calculated the amount in the same way and that it represented completion of approximately 74% of the project.

Mr. Roblin’s testimony that the work on the project was 74% completed at the time of termination was unrefuted. Thus, the record supports the trial court’s determination that the Gilberts owed Pinnacle the amount of the final invoice for payment of 74% of the contract price following termination. Moreover, Mr. Roblin described the work performed between the time the first invoice was billed and the time of termination, and Mrs. Gilbert conceded that the work was performed.

In challenging the trial court's award, the Gilberts also contend the total amount should be reduced by \$13,870.00, the amount of their initial deposit, because that amount related to demolition work and Pinnacle failed to provide any verification that the work was performed. It is undisputed that the Gilberts paid the deposit, which Mr. Roblin described as a standard requirement of all clients. According to Mr. Roblin, that amount was then credited to the balance the Gilberts owed under the contract. As previously stated, Mr. Roblin's testimony that the project was 74% completed supports the trial court's determination that the amount of the final invoice was owed. This argument lacks merit.⁴

The contract provides that if litigation is necessary to ensure performance, the unsuccessful party agrees to pay reasonable attorney fees and court costs in connection therewith. The trial court ordered the Gilberts to pay attorney fees and costs in the amount of \$30,553.46. The Gilberts challenge that award, contending Pinnacle is not entitled to attorney fees because it was in breach of contract. Having found no error in the trial court's determination that the Gilberts did not prove that Pinnacle breached the contract, this argument lacks merit.⁵

Pinnacle filed an answer, seeking additional attorney fees for defending this appeal. When a party is awarded attorney fees by the trial court and then is forced to and successfully defends an appeal, it is appropriate for the appellate court to reasonably increase the amount of the awarded attorney fees to keep the appellate judgment consistent with the underlying judgment. See Lewnau v. Board of Supervisors of Southern State University, 2019-0943 (La. App. 1st Cir. 1/9/20), 295 So.3d 419, 427; Aswell v. Division of Administration, State, 2015-1851 (La.

⁴ We further question whether this issue was properly raised by the pleadings. Pinnacle filed this suit seeking recovery of the final invoice amount, and the Gilbert's reconventional demand sought recovery of all amounts spent to correct Pinnacle's alleged defective work. The Gilberts did not seek recovery of the initial deposit on the basis that it was not owed.

⁵ The Gilberts do not otherwise challenge the amount awarded for attorney fees and costs.

App. 1st Cir. 6/3/16), 196 So.3d 90, 96, writ denied, 2016-1263 (La. 11/7/16), 209 So.3d 102. The award is made at the appellate court's discretion upon consideration of such factors as the skill exercised by the attorney and the amount of time and work reflected in the appeal.⁶ See A.B.S. Services, Inc. v. James Construction Group, L.L.C., 2020-0841 (La. App. 1st Cir. 7/22/21), 2021 WL 3087879, *10 (unpublished); Lewnau, 295 So.3d at 427. After thorough consideration, we find a \$3,000.00 increase in the amount of attorney fees is reasonable; therefore, we amend the trial court to increase the amount of attorney fees by that amount.

CONCLUSION

For the reasons set forth herein, the motion to supplement the appellate record is denied, and the judgment of the trial court is amended to increase the amount of attorney fees and costs to \$33,553.46. As amended, the judgment is affirmed. Costs of this appeal are assessed to John and Kathy Gilbert.

MOTION TO SUPPLEMENT DENIED; JUDGMENT AMENDED AND, AS AMENDED, AFFIRMED.

⁶ Pinnacle filed a motion to supplement the appellate record with an affidavit of its attorney, as well as an itemized invoice for work done in defending this appeal. However, both the affidavit and invoice were created after the order of appeal was granted. An appellate court cannot review evidence that is not in the record on appeal and lacks jurisdiction to receive new evidence. Burniac v. Costner, 2018-1709 (La. App. 1st Cir. 5/31/19), 277 So.3d 1204, 1208 n.6. Thus, the motion to supplement the record is denied.