RANDY COOKMEYER AND LAURIE COOKMEYER	*	**NO. 2002-CA-0909**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
MASONRY PRODUCTS SALES, INC.	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 99-55369, SECTION "C"
Honorable Sonja M. Spears, Judge
* * * * * *

JUDGE

JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Miriam G. Waltzer and Judge Michael E. Kirby)

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REVERSED IN PART AND AFFIRMED IN PART

The plaintiffs, Randy and Laurie Cookmeyer, filed suit seeking damages for defective brickwork to their home. Plaintiffs named as defendant, Masonry Products Sales, Inc., the company from which they purchased the bricks. Defendant filed a petition in reconvention seeking monies allegedly owed on open account by the plaintiffs. After a bench trial on the merits, the trial court rendered judgment dismissing plaintiffs' claims against the defendant and granting judgment in favor of the defendant on the reconventional demand.

In their first assignment of error, the plaintiffs contend that the defendant failed to produce sufficient evidence to prove that monies were owed on the open account. In a suit on open account, a plaintiff's *prima facie* proof must include both the business record of the account and an affidavit or testimony verifying the correctness thereof. Gulf States Asphalt Co., Inc. v. Baton Rouge Services, Inc., 572 So.2d 148 (La. App. 1 Cir.1990); Roll-Lite Overhead Doors, a Div. of Architectural Specialities Co., Inc. v. Clover Contractors, 527 So.2d 500 (La.App. 5 Cir.1988). The

naked declaration of an employee that the balance of some unproduced account is correct does not constitute the *prima facie* proof required for a judgment in a suit on open account. Roll-Lite Overhead Doors, supra at 503, citing American Dist. Tel. Co. v. Rault, 378 So.2d 194, at 195 (La. App. 4 Cir.1979); Designer's Gallery v. Hagen, 611 So.2d 737 (La. App. 4 Cir. 1992).

The mere declaration that a balance is owed without either a specific reference to the documentation supporting the goods and/or services furnished or a specific description in the affidavit itself of the goods and services furnished to a defendant is insufficient proof to support a judgment. Without identifying testimony, either orally or by affidavit, the invoices, standing alone, are insufficient. Designer's Gallery v. Hagen, supra.

Once a prima facie case has been established, the burden shifts to the debtor to prove the inaccuracy of the account or to prove that the debtor is entitled to certain credits. Heritage Worldwide, Inc. v. Jimmy Swaggart Ministries, 95-0484 (La.App. 1 Cir. 11/16/95) 665 So.2d 523; National Gypsum Co. v. Ace Wholesale, Inc., 96-215 (La.App. 5 Cir. 11/26/96) 685 So.2d 306.

In the case at bar, the defendant did not produce any testimony verifying the correctness of the monies due. While defendant produced

testimony that an estimate was provided to the plaintiffs and that the bricks were delivered, there was no testimony as to the amount of money owed to the defendant. The defendant did not produce any invoices for the bricks allegedly purchased by the plaintiffs. Ronald Foster, the president of Masonry Products Sales, Inc., testified at trial, but he did not authenticate any invoices or testified as to the amount allegedly owed by the plaintiffs. As the defendant did not meet its burden of proof, the trial court erred when it granted judgment in favor of the defendant on the reconventional demand.

In their second assignment of error, the plaintiffs contend the trial court erred when it failed to issue written reasons for judgment. With respect to plaintiffs' request for findings of fact and reasons for judgment, C.C.P. art. 1917 provides that when requested to do so by a party the court shall give in writing its findings of fact and reasons for judgment if the request is made not later than ten days after the signing of the judgment. The article is mandatory; the trial judge is obliged to comply with a timely request.

Where the trial judge fails to comply with a timely request for written findings of fact and reasons for judgment under Code of Civil Procedure Article 1917, the proper remedy for the aggrieved party is to apply for supervisory writs or move for remand of the case for the purpose of

requiring the trial judge an opportunity to comply with the request. Brocato v. Brocato, 369 So.2d 1083 (La.App. 1 Cir. 1979). In this case plaintiffs have neither applied for supervisory writs nor requested a remand of the case. Seymour v. Seymour, 423 So.2d 770 (La.App. 4 Cir. 1982). Thus, there is no relief available to the plaintiffs from the trial court's failure to provide written reasons for judgment.

In their third assignment of error, the plaintiffs contend that the trial court's judgment is deficient as it fails to cast a party in judgment. The judgment states:

> IT IS FURTHER ORDERED that there be judgment in favor of defendant and plaintiff in reconvention, Masonry Products Sales, Inc., in the full sum of $12,979.64 plus legal interest and court costs from the date of judicial demand.

The plaintiffs argue the judgment is void and unenforceable because it did not cast them, or any other party in judgment.

A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. La. C.C.P. art. 1841. Pursuant to La. C.C.P. art. 1918, a final judgment shall be identified as such by appropriate language. Official Revision Comment (a) for La. C.C.P. art. 1918 provides in pertinent part: "In Louisiana the form and wording of judgments is not sacramental. .... Nonetheless, Louisiana

courts require that a judgment be precise, definite and certain." Russo v. Fidelity & Deposit Co., 129 La. 554, 56 So. 506 (La. 1911).

In Borg-Warner Acceptance Corp. Through Borg-Warner Leasing v. Whitlow Truck Center, Inc., 508 So.2d 857 (La. App. 5 Cir.1987), the plaintiff sued defendants Whitlow Truck Center, Inc. and Otis J. Whitlow and obtained a money judgment in its favor, but the judgment was defective because it did not name the defendant against whom it was rendered. The trial court, without the benefit of a motion for new trial, amended its judgment to state expressly that Otis J. Whitlow was the party cast in judgment. The plaintiff appealed. Citing La. C.C.P. arts. 1951 and 1971, the Louisiana Fifth Circuit Court of Appeal concluded that the trial court had no authority to amend the substance of the final judgment without granting a new trial and that the only method for amending the substance of the final judgment was by appeal. The appellate court specifically stated: "As the plaintiff further points out, the original judgment .... is legally incorrect and unenforceable because it did not name the defendant cast. The failure to name any defendant against whom the judgment was rendered in a case with multiple defendants makes the judgment fatally defective, because one cannot discern from its face against whom the judgment may be enforced.

Borg-Warner, 508 So.2d at 859.

In Scott v. State, 525 So.2d 689 (La.App. 1 Cir.1988), which involved a medical malpractice suit against multiple defendants, the trial court gave written reasons for judgment and rendered a judgment in favor of the plaintiffs awarding them damages, but the judgment failed to cast any defendant in judgment. Also, neither the judgment nor the reasons for judgment expressed the degree of fault of each defendant as a percentage. The defendants suspensively appealed. Relying on the decision in Borg-Warner Acceptance Corporation, the First Circuit Court of Appeal concluded the judgment did not determine the rights of the parties because it did not cast any defendant in judgment and did not express the degree of fault of each defendant as a percentage as required by La. C.C.P. arts. 1917 and 1812(C).

Unlike the two above cited cases which involved multiple defendants, Reaux v. City of New Orleans, 2001-1585 (La. App. 4 Cir. 3/20/02), 815 So.2d 191, involved only one defendant, the City. Because the reasons for judgment adequately set forth the trial court's findings of liability, the percentages of fault attributable to each party, and the amount of damages in this case, the appellate court found that the trial court's failure to specifically cast the City in judgment in its signed judgment did not render the judgment

fatally defective under the circumstances. Also, this Court noted that the City appealed, assigning as error the trial court's determination of fault, thus acknowledging that the trial court intended to cast it in judgment. In the interest of judicial economy, this Court amended the trial court's judgment to cast the City in judgment.

In the present case, it is apparent that the trial court intended to cast both plaintiffs in judgment. The plaintiffs argue that Reaux is not applicable because there are two plaintiffs/defendants in reconvention. However, the plaintiffs are husband and wife, and the obligation sued upon was a community debt. Each is responsible for the debt. The judgment was adequately clear.

In their fourth assignment of error, the plaintiffs contend that the trial court erred when it dismissed their claims against the defendant. The plaintiffs contend that they produced sufficient evidence to prove that the defendant’s actions were the cause of the defective brickwork.

In Arceneaux v. Domingue, 365 So.2d 1330 (La. 1978), the Louisiana Supreme Court held that the court of appeal should not upset the factual findings of a trial court absent manifest error or unless clearly wrong. A proper review, therefore, cannot be "completed by reading so much of the

record as will reveal a reasonable factual basis for the finding in the trial court; there must be a further determination that the record established that the finding is not clearly wrong." Id. at 1333. See also Youn v. Maritime Overseas Corp., 623 So.2d 1257 (La. 1993); Stobart v. State through Dept. of Transp. And Development, 617 So.2d 880 (La.1993); Ambrose v. New Orleans Police Dept. Ambulance Service, 93-3099 (La. 7/5/94), 639 So.2d 216.

At trial, Chad Curtis, an outside sales representative for the defendant, testified that he met with the plaintiffs and provided an estimate on the number of bricks necessary to brick the plaintiffs' new home that was being constructed. Initially, it was estimated that 25,300 bricks would be needed to complete the job. The estimate was later increased to 28,000. Curtis stated that Randy Cookmeyer told him to deliver only two truckloads at first (24,000 bricks) and hold the last four thousand bricks until they were needed on the job. According to Curtis, Cookmeyer did not want to accept delivery for any bricks that he might have to return. In such cases, there is an additional restocking fee. Curtis stated that he went to the job site on January 30, 1999, and spoke with Ernest Rogers, the bricklayer. Rogers asked if all the bricks had been delivered. Curtis told him that they were holding the last four thousand bricks and to let him know when they were

down to four thousand bricks on the jobsite. Rogers told Curtis that there were still ten thousand bricks on the job site. Curtis returned to the job site on March 14,1999 and there were still plenty of bricks on the jobsite. However, when Curtis went to the job site on March 21, 1999, there were only fourteen hundred bricks left. Curtis called defendant's office to deliver the four thousand additional bricks on hold. He was informed by the office staff that they were out of "Colonial Virginian" bricks, the type of brick the Cookmeyers had chosen which had been delivered in the first order. Curtis told Randy Cookmeyer that the defendant did not have "Colonial Virginian" bricks in stock and they would have to order more. He told Cookmeyer that the bricklayer needed to stop working and wait until the rest of the bricks arrived. Curtis indicated that it was necessary to blend the remaining fourteen hundred bricks with the four thousand bricks that would have to be ordered.

Randy Cookmeyer testified that he met with Curtis to discuss purchasing bricks for the construction of his new house, and that he and his wife chose "Colonial Virginian." Cookmeyer discussed the issue of production runs with Curtis as he wanted to make sure that all the bricks purchased came from the same production run. Curtis estimated that he would need 28,400 bricks to complete the job. Cookmeyer and Curtis

decided to have two full truckloads delivered (24,000 bricks); and then towards the end of the job, Curtis would come out and determine exactly the number of bricks needed to finish the job. Cookmeyer stated that he was willing to take possession of all the bricks if necessary, but that Curtis told him that the defendant would hold four thousand bricks at their warehouse until the additional bricks were needed. As such, he relied upon Curtis' representation and did not think that the bricks would be sold to another person. Cookmeyer further testified that Curtis met weekly with Rogers, who would tell Curtis what was needed on the jobsite, e.g., mortar and sand. On March 21, 1999, Curtis came out to the jobsite. He looked at the amount of bricks left and determined that the job needed forty-six hundred bricks to be completed. Curtis called the defendant's office to have the additional bricks delivered. After Curtis got off the telephone, Curtis was very upset and told Cookmeyer that his bricks had been sold. Curtis stated that the bricking had to stop immediately and could not resume until the rest of the bricks were delivered. Curtis apologized and said that it would take a couple of weeks to have the bricks delivered. According to the plaintiff, Curtis told him that there would be no problem with the coloration if the remaining bricks and new bricks were mixed. Cookmeyer said the difference in the color between the remaining bricks and the new bricks could not been seen

while the job was being completed. However, once the job was done, the difference in color was obvious. Cookmeyer called Curtis immediately upon noticing the problem. Curtis told Cookmeyer that it was a mortar problem, and suggested cleaning the bricks and mortar with a product called "SureKlean." Cookmeyer used the product on the wall but it did not help. Cookmeyer then met with Foster, the defendant's owner. Foster came to the house and looked at the job. Foster told Cookmeyer that he would have to live with the problem and offered no solutions.

Victor Bedikan, a licensed architect who testified for the plaintiffs, inspected the plaintiffs' home and noted that there was still a noticeable difference in the bricks. He stated that there was no difference in the color of the mortar. Bedikan determined that it would cost $11,076.00 to replace the right side wall and $4,563.00 to replace the front wall.

Reginald Miller, a masonry consultant, testified on behalf of the defendant. He also inspected the plaintiffs' home. He stated that the mortar, not the bricks, was the cause of the variant color because the different colored mortar caused the bricks to look slightly different. He also noted that the bricks were not blended as they should have been and said that if the bricks had been properly blended, the appearance of the wall would have been much improved, noting that directions which come with the bricks

require that bricks from different pallets be mixed together. Miller noted that the difference in the brick color could have resulted from the fact that the bricks came from different production runs.

Aaron Clark was one of two bricklayers from whom plaintiffs received an estimate to perform the bricklaying portion of the construction. However, plaintiffs hired Rogers to perform the bricklaying instead of Clark. Clark testified that he determined 30,000 bricks were needed to complete the job. Clark stated that he was present during a conversation between Curtis and Randy Cookmeyer. Curtis told the plaintiff that the brick varies in color and color range and that it would be to his advantage to have all the bricks on the job to insure a uniform color range.

Rogers testified that Curtis told him to let him know when there were about three thousand to four thousand bricks left so he could deliver the remaining bricks. Cookmeyer was not present when he and Curtis had the conversation. Rogers did not call Curtis because Curtis was on the site on a regular basis. Rogers stated he had approximately twelve hundred bricks left when the additional four thousand bricks were delivered and that the bricks got wet despite the fact that they covered the bricks with plastic. He and his crew worked on the job even when it rained, and the rain washed out some of the joints. Rogers stated that the lighter area of brick was caused

when the rain hit it and ran down the wall because once the mortar got wet, it changed color. Rogers stated that he told his workers to mix the twelve hundred bricks with the new delivery of four thousand bricks, but could not say if his workers actually mixed the bricks.

Todd Willis, a sales manager for Kentwood Brick, the manufacturer of "Colonial Virginian" bricks, testified that the bricks were hand manufactured and produced in lots of fifty thousand to seventy thousand bricks a day. Willis stated that there is a fairly wide variance of color within a five hundred brick cube. The instructions sent with the bricks suggest using multiple cubes to obtain a pattern. Willis further testified that the chance of twenty-four thousand bricks from an individual day's run going to the same job was remote because the bricks produced in one day may go to five or six different distributors.

Don Whalen, a cement sales representative for Blue Circle Cement, the product used on plaintiffs' house, testified that there are three conditions which could have caused the mortar to discolor: it may have rained immediately after the bricks were laid, or the mortar was tooled too early, or the mortar was lying on wet bricks. Whalen noticed, after inspecting the house, that there was also a problem with the blending of the bricks, but stated that staining the bricks and mortar could help resolve the

discoloration.

Foster testified that ninety-five percent of bricks purchased by the defendant company are delivered from the manufacturer to the company's yard. The company stocks bricks in quantity and then delivers the bricks from the yard to the worksite. Foster went to plaintiffs' house and inspected the discolored area after learning of the complaint. He recommended staining as a possible solution to the plaintiffs. Cookmeyer told Foster that the wall discoloration was his responsibility, and Foster responded that he would not take responsibility for faulty labor.

The plaintiffs argued at the trial level and on appeal that the defendant's actions in selling the bricks on hold for them caused them to use a different production run of bricks which resulted in having bricks of a variant color used in the construction of their home. However, the plaintiffs did not produce any expert testimony to support their argument. The plaintiffs' expert witness, Victor Bedikan, testified only to the cost of replacing the present bricks. He did not testify that the different color of bricks resulted from using a different production run.

On the other hand, defendants produced several experts who testified that the variant color was caused by the failure to blend the bricks properly; by allowing the wall, bricks and mortar to get wet; and by not allowing

sufficient drying time before bricking the wall. The defendants produced overwhelming testimony that if there was any negligence, it was on the part of the plaintiffs' bricklayer, not the defendant, the brick retailer.

We find that the trial court did not err in dismissing the plaintiffs' claims against the defendant.

For the foregoing reasons, the judgment of the trial court granting judgment in favor of defendant/plaintiff in reconvention on the reconventional demand is reversed, and the judgment dismissing plaintiff's claim is affirmed.

REVERSED IN PART AND AFFIRMED IN PART