

NOT DESIGNATED FOR PUBLICATION

MILDRED BUTLER * **NO. 2010-CA-1012**
VERSUS *
JOHN VICTORSON AND * **COURT OF APPEAL**
CARLOS CARCEMO * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2007-15529, DIVISION "E-7"
Honorable Madeleine Landrieu, Judge

* * * * *

Judge Max N. Tobias, Jr.

* * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr.,
Judge Paul A. Bonin)

Derek T. Russ
P. O. Box 58346
New Orleans, LA 70158

COUNSEL FOR PLAINTIFF/APPELLANT

Thomas E. Schwab
BARKLEY & THOMPSON, L.C.
1515 Poydras Street
Suite 2350
New Orleans, LA 70112

COUNSEL FOR DEFENDANT/APPELLEE, JOHN VICTORSON

AMENDED; AFFIRMED AS AMENDED.

In this appeal, the plaintiff, Mildred Butler, seeks reversal of the trial court's judgment granting summary judgment in favor of the defendant, Charles John Victorson. For the following reasons, we amend the judgment as amended affirm the judgment.

On 6 December 2007, Ms. Butler filed suit alleging that she hired Carlos Carcemo and C. John Victorson (collectively, the defendants) to perform repairs to her home. In her petition, she alleged that (1) Mr. Carcemo had introduced her to Mr. Victorson; (2) Mr. Victorson was an experienced contractor (although in an attachment to her petition she alleged that he was not a licensed contractor; (3) she and Mr. Victorson discussed details on work to be performed while Mr. Carcemo measured her home; (4) Mr. Victorson returned with a construction/ renovation proposal; (5) she entered into a construction/ home renovation contract with both defendants pursuant to the proposal presented to her; (6) work began on 7 June 2007 and stopped on 12 July 2007; (7) she raised concerns to the defendants to no avail; and (8) her concerns included areas that were incomplete and areas where the work was substandard. Ms. Butler asserted that the failure to address the areas of concern prompted the filing of the lawsuit.

Mr. Carcemo did not answer the petition, and a default was entered against him on 9 March 2009. The record on appeal does not reflect whether the default has been confirmed.

Mr. Victorson filed an answer and a reconventional demand. He denied that the work was performed in a substandard manner and alleged that he advanced funds for labor and materials for the repairs performed on Ms. Butler's home. He further alleged that amicable demand for payment was made upon Ms. Butler but to no avail.

Mr. Victorson filed a motion for summary judgment on 2 November 2009. In support of his motion for summary judgment, he attached an affidavit averring that (a) he agreed to advance funds for material and labor in connection with the repairs to be performed on Ms. Butler's house with the understanding that she would reimburse him when the work was completed; (b) Ms. Butler complimented the workers and had no complaints; (c) Mr. Carcemo became ill; and (d) he offered to find someone to complete the job, but Ms. Butler declined his offer. Mr. Victorson further asserted that he spent \$9,051.57 for materials and labor for the work performed on Ms. Butler's home.

Mr. Victorson also attached the affidavit of Ross Becker, a licensed architect, who rendered an expert opinion concerning the repairs. Mr. Becker stated that he reviewed the contract and the work performed and opined that the work was performed properly in accordance with the agreement. He also opined that the labor and material reimbursement sought by Mr. Victorson was reasonable and justified.

An affidavit of Mr. Victorson's counsel was also attached to the motion for summary judgment in which he stated that he sent a demand letter to Ms. Butler by certified mail; a copy of the letter was attached to the affidavit of counsel.

Thereafter, Ms. Butler filed a motion to dismiss Mr. Victorson from the lawsuit. On 27 January 2010, an order was signed dismissing Ms. Butler's claims against Mr. Victorson. On that same date, Ms. Butler filed an exception of no right of action. The memorandum in support of the exception of no right of action incorporated an opposition to the motion for summary judgment. Ms. Butler alleged that Mr. Victorson was not a party to the contract between herself and Mr. Carcemo and thus (1) had no standing to bring suit and (2) that his claim did not create an open account.

On 9 February 2010, the trial court entered judgment overruling the exception of no right of action and granting the summary judgment motion in favor of Mr. Victorson. Mr. Victorson was awarded \$9,051.57, judicial interest from date of judicial demand, costs, expert witness fees of \$525.00, and attorney's fees of \$3,460.00. Ms. Butler timely filed a motion for new trial which was denied on 23 April 2010; however, Mr. Victorson was awarded an additional \$500.00 in attorney's fees. This appeal followed.

Appellate courts review the granting of summary judgment *de novo* under the same criteria governing the trial court's consideration of whether summary judgment is appropriate. *Martinez v. American Steelway Industries, L.L.C.*, 09-0339, p.3 (La. App. 4 Cir. 9/2/09), 20 So.3d 526, 528, citing *Reynolds v. Select Props., Ltd.*, 93-1480 (La. 4/11/94), 634 So.2d 1180, 1183. A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that no genuine

issue of material fact exists and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B. If the court finds that a genuine issue of material fact exists, then summary judgment must be rejected. *Martinez*, 09-0339, p. 3, 20 So.3d at 528, *citing Oakley v. Thebault*, 96-0937, p. 3 (La. App. 4 Cir. 11/13/96), 684 So.2d 488, 490. The burden of proof does not shift to the party opposing summary judgment until the moving party presents a *prima facie* case that no genuine issues of material fact exists. *Id.* At that point, if the party opposing the motion “fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.” La. C.C.P. art. 966 C(2). Summary judgment should then be granted. *Martinez*, 09-0339, p. 4, 20 So.3d at 528, *citing Lomax v. Ernest Morial Convention Center*, 07-0092, pp. 2-3 (La. App. 4 Cir. 7/11/07), 963 So.2d 463, 465.

Similarly, an appellate court reviews a judgment to ascertain whether the trial court committed an error of law that might in whole or in part interdict the judgment. *In re Succession of Spurl*, 04-1373, pp. 4-5 (La. App. 4 Cir.4/6/05), 900 So.2d 1054, 1058, *citing Evans v. Lungrin*, 97-0541, 97-0577, p. 7 (La.2/6/98), 708 So.2d 731, 735 and *McLean v. Hunter*, 495 So.2d 1298, 1303-04 (La.1986). We apply the *de novo* standard of review in addressing errors of law. *Id.*

Although Ms. Butler’s brief does not conform to Rule 2-12.4 of the Louisiana Uniform Rules-Courts of Appeal -- she failed to (a) specify or assign alleged errors committed by the trial court, (b) give accurate citations to the pages in the record or the authorities cited in the brief, and (c) attach a copy of the judgment at issue -- we address whether or not summary judgment was appropriate and whether or not the trial court committed an error of law. La. C.C.P. arts. 2129

and 2164. Ms. Butler argued Mr. Victorson gave conflicting statements regarding the existence of a contract and hence, summary judgment was inappropriate as genuine issues of material fact existed.

In his reconventional demand, Mr. Victorson alleged that he merely advanced and/or expended funds for labor and materials in connection with the repairs to Ms. Butler's home. He does not allege that he is a contractor.

In support of his motion for summary judgment, he filed his affidavit asserting that "he agreed to advance funds for material and payroll on the project, with the understanding that Ms. Butler would reimburse me when the work was finished." To his affidavit is attached a "Bill for labor and materials" totaling a net of \$9,051.57 that itemizes the amounts that he advanced and reflects a "Prepayment by homeowner" of \$350.00. (He does not allege that he is a contractor on Ms. Butler's renovations.)

Mr. Victorson argued an open account as contemplated by La. R.S. 9:2781 was created by what he did. La. R.S. 9:2781 D defines an "open account" as "any account for which all a part or all 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."¹ Thus, Mr. Victorson asserted that no genuine issue of material fact existed and he was entitled to summary judgment as a matter of law.

Conversely, Ms. Butler submitted an affidavit wherein she stated that she entered into a contract with Mr. Carcemo only and did not enter into any contractual obligation with Mr. Victorson. In support of her argument, Ms. Butler

testified that she received copies of correspondence written by Mr. Victorson where he acknowledged that the contract was solely between Mr. Carcemo and Ms. Butler. However, none of those documents were attached to the memorandum in support of the exception of no right of action and/or incorporated opposition to the motion for summary judgment. The documents were attached to the motion for new trial and to Ms. Butler's brief submitted to this court.

“Evidence not properly and officially offered and introduced cannot be considered, even if it is physically placed in the record. Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal.” *City of New Orleans v. Young*, 08-0653, 08-0654, pp. 2-3 (La. App. 4 Cir. 11/12/08), 999 So.2d 49, 50, citing *Denoux v. Vessel Management Services, Inc.*, 07-2143, p. 6 (La. 5/21/08), 983 So.2d 84, 88. No evidence exists in the record that the documents that she attached to her motion for new trial and/or brief were properly and officially offered and introduced at the time the motion for summary judgment was originally heard and decided, although they were apparently available to Ms. Butler before the hearing. Thus, the documents cannot be considered by this court for the trial court was not required to consider the late filed documents.

Further, the argument set forth in the memorandum in support of exception of no right of action and incorporated opposition to the motion for summary judgment is contrary to that argued by Ms. Butler for over two years. In her original petition, Ms. Butler alleged that a contract was entered into with Mr.

¹ In contrast, *Black's Law Dictionary* defines an open account as “[a]n account that is left open for ongoing debit and credit entries by two parties and that has a fluctuating balance until either

Victorson and Mr. Carcemo. The petition contains a verified affidavit wherein she swore that the allegations in her petition were true and correct to the best of her knowledge. Over two years later, she filed a motion to dismiss Mr. Victorson from the litigation and an exception of no right of action in response to his reconventional demand. Ms. Butler alleged that she entered into a contract solely with Mr. Carcemo. This court has consistently stated:

An inconsistent affidavit offered only after the motion for summary judgment was filed is not sufficient to create a genuine issue of material fact where no justification for the inconsistency is offered. *George v. Dover Elevator Company*, 2002-0821, p.4 (La. App. 4 Cir. 9/25/02), 828 So.2d 1194, 1197 (other citations omitted). This is to prevent the too easy thwarting of summary judgment procedure by the mere filing of affidavits contradicting the inconvenient statements found in previous deposition testimony when the mover has no opportunity to cross-examine the witness concerning the inconsistencies and the trial court is prevented from weighing evidence by the rules of summary judgment.

Bourgeois v. Curry, 05-0211, pp. 12-13 (La. App. 4 Cir. 12/14/05), 921 So.2d 1001, 1009-1010. Ms. Butler offered no justification for the contradiction between the allegations of the verified petition and those set forth in her affidavit. We decline to consider the inconsistent affidavit offered solely to defeat the properly supported motion for summary judgment.

In a Joint Pre-Trial Outlined signed by both Ms. Butler's and Mr. Victorson's counsel, Ms. Butler represents that neither Mr. Carcemo nor Mr. Victorson were licensed contractors; Mr. Victorson's counsel represents that Mr. Victorson "operates a small neighborhood tavern" and is "not a contractor and has never represented himself as one." We find such statements sufficient to establish that Mr. Victorson was not a contractor.

party finds it convenient to settle and close, at which time there is a single liability."

In the context of this case and the pleadings of the parties, we find that the sums advanced by Mr. Victorson on behalf of Ms. Butler to be within the ambit of Chapter 2 of Book III of Title V of the Louisiana Civil Code or Chapter 2 of Book III of Title XV of the Louisiana Civil Code, but no open account pursuant to La. R.S. 9:2781 was created. That is, La. R.S. 9:2781 contemplates that the creditor (in the case before us, Mr. Victorson) is in a business with a profit motive and his claim is for an account for services or goods rendered by him.² *House of Raeford Farms of Louisiana, L.L.C. v. Osei-Tutu*, p. 2 (La. App. 1 Cir. 11/1/06), 942 So.2d 601, 604. Nor do we see that a line of credit such as exists in an open account was created between Mr. Victorson and Ms. Butler. *See, e.g., Blanchard v. Cors & Bassett*, 09-2236, unpub. (La. App. 1 Cir. 9/8/10), 2010 WL 3496263. Our review of the pleadings discloses nothing to indicate that Mr. Victorson was in a business. He merely alleges that he advanced money on Ms. Butler's behalf and that he wants to be reimbursed for same. Such does not bar his recovery of the principal amount claimed plus costs and judicial interest, but it does bar his right to recover attorney's fees under La. R.S. 9:2781.

Ms. Butler failed to produce factual support sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial. No genuine issue of material fact exists that Ms. Butler owes Mr. Victorson money for sums advanced by him on her behalf. As no genuine issue of material fact is presented, Mr. Victorson is entitled to judgment as a matter of law for the principal amount

² Construction contracts have not historically been treated as open accounts. *Hill v. Leach*, 98-1817, p. 3 (La. App. 3 Cir. 4/21/99), 734 So.2d 116, 118. *See also, Frey Plumbing Co., Inc. v. Foster*, 07-1091 (La. 2/26/08), 996 So.2d 969; *Newman v. George*, 07-0620 (La. App. 4 Cir. 9/26/07), 968 So.2d 220.

claimed and summary judgment was appropriate for that amount, plus judicial interest and costs.

Accordingly, we amend the trial court's judgment by deleting therefrom the sum of \$3,960.00 awarded as attorney's fees per the judgments, and, as amended, affirm the judgment of the trial court granting summary judgment.

AMENDED; AFFIRMED AS AMENDED.