

DIVISION I

CA06-1169

May 30, 2007

GLENN MECHANICAL, INC.  
APPELLANT

v.

LUCY GIBNEY  
APPELLEE

AN APPEAL FROM THE UNION  
COUNTY CIRCUIT COURT  
[CV2003-528-4]

HONORABLE CAROL CRAFTON ANTHONY,  
JUDGE

AFFIRMED

Appellant Glenn Mechanical challenges the trial court's dismissal of its breach-of-contract claim against appellee Lucy Gibney because the claim was barred by the three-year statute of limitations. We affirm.

In 1998, Gibney hired Glenn to perform plumbing, heating, and air services for the new home she was constructing. She later hired Glenn to perform excavation and cement work for the same property. The parties' agreements were never reduced to writing.

On October 28, 1999, Glenn completed its work on the project for Gibney. The total bill for Glenn's work was \$88,598.66 and Gibney began paying Glenn in monthly installments. She eventually reduced the amount owed on her account to \$38,753.87.

On December 5, 2003, after Gibney failed to make several payments on her account, Glenn filed suit against Gibney for breach of an oral contract. Soon thereafter, Glenn amended

the complaint and attached the affidavit of its president, Ricky McDiarmid. The affidavit stated that the last payment was made on the account on September 4, 2002, leaving an outstanding balance of \$38,753.87. In her answer, Gibney affirmatively pled that the statute of limitations had run on Glenn's claim.

At the November 4, 2005, bench trial, conflicting testimony was given regarding the date on which Glenn received the last payment on the account. Jason McDiarmid, Glenn's vice-president, testified that he performed an accounting of Gibney's account. On direct examination, he testified that the last payment made by Gibney was on August 1, 2001. On cross-examination, however, while reviewing the account invoices, he testified that the last payment on the account was received on October 4, 2000.

The trial court's order was entered on May 31, 2006. It found that the last payment was made to Glenn on October 4, 2000, and therefore, Glenn's breach of contract claim was time barred because the three-year statute of limitations on the oral contract had run on October 4, 2003. Glenn moved for reconsideration and the trial court failed to rule on the motion within thirty days. The motion was, therefore, deemed denied. Glenn now appeals.

Our standard of review on appeals from bench trials is whether the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Pablo v. Crowder*, 95 Ark. App. 268, \_\_\_ S.W.3d \_\_\_ (2006). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the firm conviction that a mistake has been committed. *Hot Spring County Solid Waste Auth. v. Hot*

*Spring County*, 96 Ark. App. 230, \_\_\_ S.W.3d \_\_\_ (2006). Disputed facts and determinations of the credibility of witnesses are within the province of the fact finder. *Newton v. Tidd*, 94 Ark. App. 368, 196 S.W.3d 488 (2006).

Glenn argues that the trial court erred when it ruled that its claim was barred by the running of the three-year statute of limitations. In Glenn's original complaint and in the amended complaint, Glenn described its agreement with Gibney as an oral contract. Actions founded upon an oral contract must be commenced within three years after the cause of action accrues. Ark. Code Ann. § 16-56-105(1) (Repl. 2005). The running of the statute of limitations is largely a question of fact. *Northwest Ark. Recovery, Inc. v. Davis*, 89 Ark. App. 62, 200 S.W.3d 481 (2004).

A cause of action for breach of contract accrues the moment the right to commence an action comes into existence, and occurs when one party has, by words or conduct, indicated to the other that the agreement is being repudiated or breached. *Helms v. Univ. of MO-KS City*, 65 Ark. App. 155, 986 S.W.2d 419 (1999). In ordinary contract actions, the statute of limitations begins to run upon the occurrence of the last element essential to the cause of action. *Id.* However, the law is well settled that a voluntary partial payment tolls the running of the statute of limitations, and forms a new period from which the statute must be computed. *Id.*

Three different dates were given as the date of the final payment, October 4, 2000; August 1, 2001; and September 4, 2002. Glenn argues that the testimony clearly established September 4, 2002, as the date of the last payment. It ignores the fact that Jason McDiarmid

offered testimony contradicting its present assertion. During direct examination, he testified that August 1, 2001, was the date of the last payment; however, while consulting the invoices, he later testified that the last payment was received on October 4, 2000. When the testimony is conflicting a fact question arises that is to be determined by the trial court. *Ward v. Williams*, 80 Ark. App. 69, 91 S.W.3d 102 (2002). We do not reverse on a factual issue as long as there is evidence to support the trial court's finding and the finding is not clearly against the preponderance of the evidence. *Id.*

The question of when the final payment was made is a question of fact. The trial court resolved that October 4, 2000, was the date of the last payment. Because issues of disputed fact were within the province of the trial court, we are unable to say that the trial court's decision was clearly erroneous. Accordingly, we affirm the trial court's finding that Glenn's cause of action was barred by the running of the three-year statute of limitations.

Affirmed.

BAKER, J., agrees.

GLOVER, J., concurs.