

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1674

MOUNT CALVARY BAPTIST CHURCH

VERSUS

WILLIAMS CONSTRUCTION COMPANY OF PORT ALLEN,
LOUISIANA

PMC by JZ

RHP by JZ

Judgment Rendered: AUG - 1 2007

Appealed from the
Twentieth Judicial District Court
In and for the Parish of East Feliciana
State of Louisiana
Suit Number 36079

Honorable William G. Carmichael, Presiding

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Mount Calvary Baptist Church

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Williams Construction Co. of
Port Allen, Louisiana

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Guidry, J. dissents in part and assigns reasons

McCLENDON, J.

In this suit on a construction contract, appellant, Williams Construction Company of Port Allen, Louisiana (Williams Construction), appeals the trial court's judgment in favor of appellee, Mount Calvary Baptist Church of Norwood (Mount Calvary). For the reasons that follow, we affirm as amended.

FACTS AND PROCEDURAL HISTORY

On March 1, 2001, Mount Calvary and Williams Construction entered into a construction contract, whereby Williams Construction agreed to construct a new church building for Mount Calvary in Norwood, Louisiana for \$577,175.00. According to the contract, substantial completion was to be achieved no later than 240 days from March 1, 2001, and liquidated damages were set at \$100.00 per day. On May 17, 2004, Mount Calvary filed suit against Williams Construction, asserting that it was entitled to liquidated damages in the amount of \$16,300.00 for Williams Construction's failure to complete construction within the time provided and damages for Williams Construction's defective workmanship in installing the roof, alarm system, electrical system, air conditioning system, and plumbing system. Williams Construction answered the petition and asserted several affirmative defenses.

A bench trial was scheduled for November 30, 2005. On the morning of trial, Williams Construction attempted to file a supplemental and amending answer, wherein it asserted the additional affirmative defenses of arbitration and waiver of claims. The trial court denied Williams Construction's request for leave to file the pleading; however, it allowed Williams Construction to introduce an addendum to the contract into evidence, AIA Document A201-1997, over Mount Calvary's objection. Because the addendum was not provided to Mount Calvary during discovery and admittedly had only been discovered by Williams Construction the day before trial, the trial court held the record open for two weeks

to allow Mount Calvary an opportunity to respond to this evidence. Thereafter, on December 9, 2005, Mount Calvary filed a motion to strike Williams Construction's defense of waiver of claims. At a hearing on January 23, 2006, the trial court denied Mount Calvary's motion to strike but ruled that neither party was bound by the addendum. Thereafter, the trial court signed a judgment on February 2, 2006, in favor of Mount Calvary and against Williams Construction in the amount of \$48,200.00, which represented damages for delay, replacement of the defective roof, and repair of the defective alarm system.

Williams Construction now appeals from this judgment, asserting that the trial court erred: (1) in ruling that the addendum to the construction contract was not binding on the parties; (2) in finding that all of the delays in the completion of the construction contract were due to the fault of Williams Construction; (3) in finding that Williams Construction was liable to Mount Calvary for replacement of the entire roof, when the roof could have been repaired for a considerably lesser amount, and Mount Calvary did nothing to mitigate its damages; (4) in finding Williams Construction liable for damages for defects complained of by Mount Calvary more than one year after substantial completion, when the contract provides for no remedy after one year; and (5) in holding Williams Construction liable for damages because of a faulty alarm system, when Mount Calvary made the choice not to replace the faulty system but to follow the recommendation of its technician to remove the digital voice recorder.

DISCUSSION

Williams Construction first contends that the trial court erred in failing to find that AIA Document A201-1997 was binding on the parties. As stated above, Williams Construction introduced this addendum, which contained the general terms and conditions of the construction contract, into evidence at trial. The

addendum is referenced numerous times in the construction contract, particularly on the first page, and is specifically listed under Article 8 as a contract document.

As a general rule of contract law, separate documents may be incorporated into a contract by attachment or reference thereto. **L & A Contracting Co., Inc. v. Ram Industrial Coatings, Inc.**, 99-0354, p. 19 (La.App. 1 Cir. 6/23/00), 762 So.2d 1223, 1234, writ denied, 00-2232 (La. 11/13/00), 775 So.2d 438. Further, Louisiana law presumes that parties are aware of the contents of writings to which they have affixed their signatures, and the parties will be held to the consequences of their signatures. **Aguillard v. Auction Management Corp.**, 04-2804, 04-2857, pp. 22-23 (La. 6/29/05), 908 So.2d 1, 17; **Tweedel v. Brasseaux**, 433 So.2d 133, 137-38 (La. 1983). Therefore, because the construction contract at issue, which was signed by both parties, clearly incorporates AIA Document A201-1997 by reference, its provisions are binding on the parties despite the fact that neither party was aware of the addendum's terms prior to its introduction into evidence at trial.¹

Williams Construction further asserts that it did not have to plead the affirmative defense of noncompliance or nonperformance of the contract. By definition, an affirmative defense raises a new matter or issue that will defeat the plaintiff's claim on the merits, even assuming that the claim is valid and that the allegations in the petition are true. **Buck's Run Enterprises, Inc. v. Mapp Construction, Inc.**, 99-3054, p. 4 (La.App. 1 Cir. 2/16/01), 808 So.2d 428, 431. The purpose of pleading a special defense is to give fair notice of the nature of the defense so that the plaintiff is not surprised. **Webster v. Rushing**, 316 So. 2d 111, 114 (La. 1975). Accordingly, if the defendant fails to plead an affirmative defense, no proof can be offered at trial in support of the defense. See **Hogan v. State Farm Automobile Insurance Co.**, 607 So.2d 747, 751 (La.App. 1 Cir. 1992).

¹ We note that neither party has raised the defense of vice of consent as to the construction contract based on the inclusion of this document. See LSA-C.C.P. art. 1005.

However, Williams Construction contends that it was not required to affirmatively plead the defense of noncompliance because Mount Calvary was required to show, as part of its case in chief, that it complied with the contractual prerequisites for asserting a claim against Williams Construction. It is well settled that a party suing upon a contract must allege and prove every fact necessary to bring him within the terms of the contract relied upon. **Odom v. Security Industrial Insurance Co.**, 94-0433, p. 3 (La.App. 1 Cir. 12/22/94), 649 So. 2d 37, 39. It is also settled that nonperformance by the plaintiff of an obligation under a contract sued upon is not a special defense which must be specially pleaded in the defendant's answer, but is a matter which may be raised by the defendant under a general denial. **Baker v. Union Tank Car Company**, 140 So.2d 397, 403 (La.App. 1 Cir. 1962). Therefore, we find that Williams Construction's failure to assert any affirmative defense related to Mount Calvary's noncompliance with the contract terms does not preclude consideration of this issue.

In the instant case, Williams Construction generally denied the allegations in Mount Calvary's petition, and asserted several affirmative defenses, one of which asserted that Williams Construction fulfilled the terms of the contract. Having already determined that AIA Document A201-1997 is binding on the parties, we find that the trial court erred in failing to determine whether Mount Calvary complied with the contract's terms and conditions in bringing its claims against Williams Construction.²

The general conditions of the contract contained in AIA Document A201-1997 specify the contractor's warranty of its work and provide a procedure for the

² Williams Construction does not assign as error on appeal the issue of arbitration and mediation, apparently recognizing that those arguments have been waived, having failed to raise them through a dilatory exception raising the objection of prematurity or by way of an affirmative defense. See LSA-C.C.P. arts. 926(A)(1), 928(A) and 1005.

resolution of claims and disputes. Subparagraph 3.5.1, entitled “Warranty,” states:

The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor’s warranty excludes remedy for damages or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

A claim is defined in Subparagraph 4.3.1 of Article 4 as:

[A] demand by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term ‘claim’ also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the claim.

According to Subparagraph 4.3.2, a claim must be initiated in writing to the architect and the other party within twenty-one days after occurrence of the event giving rise to such claim or within twenty-one days after the claimant first recognizes the condition giving rise to the claim, whichever is later. Subparagraph 4.4.1 also provides that claims shall be referred initially to the architect for decision, whose decision shall be required as a condition precedent to litigation of claims between the owner and contractor arising prior to the date final payment is due.

In the instant case, Mount Calvary has asserted that the installation of the roof and alarm system were defective.³ With regard to the roof, Reverend George Veal testified at trial that Mount Calvary notified Williams Construction, orally

³ In its petition, Mount Calvary asserted additional defects; however, the trial court only found the roof and alarm system to be defective, and Mount Calvary did not file an answer to the appeal contesting the trial court’s determination.

and in writing, of the problems with the leaking roof. The first written notice was dated June 6, 2002. However, in a letter dated August 17, 2003, Mount Calvary stated that the roof was still leaking and requested Williams Construction to correct the problem. Additional correspondence from Franklin Lassiter, the architect in charge of this project, and from counsel for Mount Calvary indicated that the roof leakage was a continuing problem that needed to be addressed. On March 17, 2004, Mr. Lassiter issued his recommendations to Mount Calvary and to Williams Construction for correcting the problems with the roofing system.

Williams Construction contends that Mount Calvary did not establish a right to relief under the contract because the specific leak referenced in the June 6, 2002 letter had been corrected and because the claim in the August 17, 2003 letter was outside of the one-year period following substantial completion. Subparagraph 12.2.2.1 states, in part:

In addition to the Contractor's obligations under Paragraph 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition.

Subparagraph 12.2.5 further states that “[n]othing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents.” According to these provisions, the one-year period for correction of work is in addition to those relating to the contractor's warranty under Subparagraph 3.5.1, which is a separate obligation. Because Mount Calvary asserts that the installation of the roof was defective, its claims clearly come within the warranty provision of Subparagraph 3.5.1 and therefore, are not subject to the one-year limitation of

Subparagraph 12.2.2.1. As such, based on the testimony and documentary evidence admitted at trial, we find that Mount Calvary instituted its claim in conformity with the contract terms.⁴

Further, we find that Mount Calvary presented evidence establishing that the roof leaked almost continuously from the date of substantial completion through the date of trial. Mr. Lassiter and Mount Calvary's expert, Carl Blackwell, testified that they visually inspected the roof on March 2, 2004, and observed the damaged roof panels, as evidenced by pictures admitted at trial. According to their testimony, the roof had not been installed or repaired correctly. Frank Williams testified that he made some repairs to the roof subsequent to March 2, 2004, but that he did not replace any of the damaged panels and admitted he had not satisfactorily repaired the roof because there were still complaints of leaks.

The appropriate measure of damages in such cases is generally what it would take to place the owner in the position he deserved to be in when the building was completed. See Degeneres v. Burgess, 486 So.2d 769, 775 (La.App. 1 Cir. 1986). If a defective roof can be repaired, the recovery is generally the cost of the repairs. See Degeneres, 486 So.2d at 775. However, when the replacement of the roof is necessary to cure the defects, then the cost of replacement is a proper element of damages. **Guy T. Williams Realty, Inc. v. Shamrock Construction Co.**, 564 So.2d 689, 694 (La.App. 5 Cir.), writ denied, 569 So.2d 982 (La. 1990); **New Zion Baptist Church v. Mecco, Inc.**, 478 So.2d 1364, 1366 (La.App. 4 Cir. 1985); **Hebert v. McDaniel**, 479 So.2d 1029, 1035 (La.App. 3 Cir. 1985).

In the instant case, Mr. Blackwell testified that the roof could be repaired, but that the repairs would only be a temporary fix, lasting at most eight to ten years, and would give Mount Calvary only a one-year repair warranty as opposed to the twenty to twenty-five year warranty from the manufacturer that it otherwise

⁴ Again, we do not address the issues of mediation and arbitration, as those arguments have not been assigned as error.

would have on a new, properly installed roof. Finding no manifest error in the trial court's factual determination that repair of the roof would not render it like new and that the replacement of the roof was necessary to cure the defects, we affirm the award of \$31,100.00 for the replacement of the roof.

With regard to the alarm system, Mount Calvary presented no evidence that it sent Williams Construction a written notice as to the defective alarm system as required by Subparagraph 4.3.1. Further, the evidence at trial established that Mount Calvary removed a part of the alarm system, namely, the digital voice recorder, at the instruction of a technician, and the warranty under Subparagraph 3.5.1 clearly excludes modifications not executed by the contractor. Accordingly, Mount Calvary failed to establish a claim under the construction contract for damages for the faulty alarm system, and we amend the judgment to delete \$800.00 for the repair of the alarm system.

Finally, Mount Calvary seeks damages for Williams Construction's delay in completing the construction contract. According to the construction contract, the date of commencement for the contract was March 1, 2001, and substantial completion of the entire work was to be achieved no later than 240 days from the date of commencement. In the instant case, substantial completion of the work was not achieved until April 8, 2002. Reverend Veal testified that there was some rain during the project and that problems arose with a change in subcontractors, proof of Williams Construction's workers' compensation insurance, installation of a firewall, connection of electricity by DEMCO, and brick selection. However, Reverend Veal stated that none of these delays were attributable to Mount Calvary. Particularly, with regard to the brick selection, Reverend Veal stated that Mount Calvary had selected the brick prior to construction, but Williams Construction delivered a different brick to the building site, and after consideration, Mount Calvary decided to use the brick that had been delivered.

Williams Construction introduced evidence attempting to show that the delays were not the fault of Williams Construction, but rather were the fault of Mount Calvary or others. However, Mr. Williams' testimony on this issue was contradictory and inconsistent. He could not definitively establish when the construction began, nor could he accurately account for the length of delay attributable to different causes. Additionally, his testimony differed from Reverend Veal's testimony in several respects, particularly with regard to the brick selection, re-location of a sewer plant, color choice, and location of a firewall. Therefore, we find no manifest error in the trial court's findings of fact and conclusion that Mount Calvary is entitled to the \$100.00/day stipulated amount pursuant to the contract for each day beyond the 240-day completion period, or \$16,300.00.

CONCLUSION

For the foregoing reasons, we amend the trial court's judgment to reflect an award of damages in the amount of \$47,400.00, representing the cost of the replacement of the roof and damages for the delay in the completion of the construction contract. In all other respects, we affirm the judgment of the trial court. All costs of this appeal are to be borne by the appellant, Williams Construction.

AFFIRMED AS AMENDED.

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GUIDRY, J., dissents in part and assigns reasons.

GUIDRY, J. dissenting in part.

I respectfully disagree with the majority's decision insofar as it affirms the trial court's award for the replacement cost of the roof. In the instant case, Mount Calvary's expert, Mr. Blackwell, testified that the roof could be repaired for a cost of \$5,700.00, but that the repairs are a temporary fix, only lasting at the most eight to ten years, very labor intensive, and would only give Mount Calvary a one year repair warranty as opposed to the twenty to twenty-five year warranty from the manufacturer that it otherwise would have on a new, properly installed roof. However, Mr. Blackwell reiterated several times that the damage to the roof could be repaired. Accordingly, because replacement of the roof is not necessary to cure the defects, the proper measure of damages in this case is the cost to repair, and not to replace the roof. See Degeneres v. Burgess, 486 So. 2d 769, 775 (La. App. 1st Cir. 1986); see also Guy T. Williams Realty Inc. v. Shamrock Construction Co., 564 So. 2d 689, 694 (La. App. 5th Cir.), writ denied, 569 So. 2d 982 (La. 1990) (wherein the testimony presented established that the alleged defects could *only* be repaired by replacement of the roof).