NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 CA 2162

LUNDIN ROOFING COMPANY, L.L.C.

VS.

BURLINGTON COAT FACTORY OF KENNER, INC. AND BURLINGTON COAT FACTORY DIRECT CORPORATION

Judgment rendered JUN 0 3 2010

* * * * * *

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 542,528
Honorable R. Michael Caldwell, Judge

* * * * * *

STEVEN A. JACOBSON
JAMES A. BURTON
DOUGLASS F. WYNNE
NEW ORLEANS, LA

ATTORNEYS FOR
DEFENDANTS-APPELLANTS
BURLINGTON COAT FACTORY
OF KENNER, INC. AND
BURLINGTON COAT FACTORY
DIRECT CORPORATION

DAVID J. SHELBY, II
JON N. LOUPE
BATON ROUGE, LA

ATTORNEYS FOR
PLAINTIFF-APPELLEE
LUNDIN ROOFING COMPANY,
LLC

* * * * * *

BEFORE: CARTER, C.J., GUIDRY, AND PETTIGREW, JJ.

PETTIGREW, J.

Defendants-appellants, Burlington Coat Factory of Kenner, Inc. ("Burlington-Kenner") and Burlington Coat Factory Direct Corporation ("Burlington-New Jersey") (collectively, "defendants") appeal from the trial court's judgment in favor of plaintiff-appellee, Lundin Roofing Company, L.L.C. ("Lundin"), awarding damages to Lundin as a result of a breach of contract by defendants. For the reasons that follow, we affirm.

The record before this court reveals on June 3, 2005, Lundin transmitted via fax a proposal to Mr. Jerry Lupia of Burlington-New Jersey, outlining the scope of the work required, to install a new roofing system on a building occupied by Burlington-Kenner for the specified sum of $351,800.00.[1] Thereafter, Mr. Lupia returned the previously-transmitted proposal with the installation price circled, and marked, "OK" followed by his signature and the date, June 6, 2005.[2] Mr. Lupia further transmitted to Lundin a signed purchase order, also dated June 6, 2005, which reflected himself as the "Buyer" and specified "Furnish labor, materials, equipment and supervision to install a new roofing system" for the quoted price of $351,800.00.[3] Said purchase order further directed that said materials be shipped to Burlington Coat Factory #258 in Kenner, Louisiana, and that same be billed to Burlington Coat Factory Corporate Office in Burlington, New Jersey.

In furtherance of this proposal, Lundin began purchasing the necessary materials and made other preparations required to perform its work on the Burlington project. In early July 2005, Terry Woodard, a job superintendent with Lundin, traveled to the job site to review the project in anticipation of commencing work on July 18, 2005. After climbing onto the rooftop, Mr. Woodard was advised by a crew apparently working for the building's owner that the owner did not want Lundin performing any work on the roof. Mr. Woodard thereafter related these events to Jerry Lupia of Burlington-New Jersey, and was advised not to return to the job site until the matter had been resolved. In the days

---

[1] Plaintiff's Exhibit 1.
[2] Plaintiff's Exhibit 2-A.
[3] Plaintiff's Exhibit 2-B.

that followed, Mr. Woodard had a series of conversations with Mr. Lupia regarding Mr. Lupia's attempts to resolve issues with the building's owner.

Hurricane Katrina made landfall on August 29, 2005, causing extensive damage to property in southeast Louisiana and additional damage to the building occupied by Burlington-Kenner. Lundin was never allowed to perform the work it set forth in its proposal.

Lundin filed suit against the defendants in the 19th Judicial District Court on April 18, 2006, seeking to recover damages as a result of defendants' breach of contract. The matter proceeded to a bench trial on July 17, 2009. At the close of the evidence, the trial court concluded that there existed an enforceable contract entered into by Burlington-New Jersey and not merely Burlington-Kenner. The trial court found Lundin's proposal to Mr. Lupia of Burlington-New Jersey that outlined the scope of the work to be performed at Burlington-Kenner together with the price constituted an offer. The trial court further found the subsequent return of the proposal approved, dated and signed by Mr. Lupia together with a purchase order issued to Lundin for the work at the price quoted by Lundin, with instructions to bill Burlington-New Jersey, constituted defendants' acceptance of Lundin's offer. Relying on the proposal and the acceptance, the court concluded the contract had an implied term for performance that began on July 18, 2005, which was thereafter breached by defendants before the building sustained additional damage as a result of Hurricane Katrina. The trial court concluded defendants were liable for damages for the breach of their contract with Lundin in the amount of $89,975.93, with legal interest thereon from July 18, 2005, until paid, together with legal interest on the costs of materials from July 18, 2005, until paid, and for all costs. The trial court signed a judgment in accordance with these findings on July 28, 2009. It is from this judgment that defendants have appealed.

On appeal, defendants challenge the trial court's finding that there existed a legally enforceable contract between defendants and Lundin, the commencement date of said contract, and the trial court's finding that defendants were in default as of said date.

Defendants further challenge the trial court's award of legal interest on all amounts spent by Lundin in purchasing materials for the job.

Louisiana Civil Code article 1927 provides,

> **Art. 1927. Consent**
>
> A contract is formed by the consent of the parties established through offer and acceptance.
>
> Unless the law prescribes a formality for the intended contract, offer and acceptance may be made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent.
>
> Unless otherwise specified in the offer, there need not be conformity between the manner in which the offer is made and the manner in which the acceptance is made.

In their brief to this court, defendants argue that their seeming consent as evidenced by Mr. Lupia's return of Lundin's proposal approved, dated, and bearing his signature together with a purchase order issued to Lundin for the work at the price quoted with instructions to bill Burlington-New Jersey, was vitiated through error. Louisiana Civil Code article 1948 provides consent to a contract may be vitiated by error, fraud, or duress; however La. Civ. Code art. 1949 states "[e]rror vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party." Specifically, defendants claim there was no agreement between the parties as to the date for commencing the work set forth in the contract, and the absence of this "central and essential" element served to vitiate consent to the contract.

We disagree. In its oral reasons for judgment, the trial court, upon finding a contract existed, opined,

> So as I indicated, that offer and acceptance constituted a contract. The question that has arisen in this case is, what was the term for the contract.
>
> Plaintiff's Exhibits One and Two do not specifically set a term, though the proposal, which was accepted, says that if it is accepted immediately, Lundin can start approximately July 18 of that year, which was 2005.
>
> Civil Code article 1777 says that a term may be either express or implied, and if there is no term, then the contract work is due immediately. It would certainly appear, from the proposal and the acceptance, that the implied term for beginning this work was approximately June [sic] 18, 2005.
>
> Civil Code article 1778 also provides that a term for performance is either certain or uncertain. If it is uncertain, it must be performed within a reasonable time. So again, the question becomes, what was the term for Burlington to allow the work to begin.

> [Plaintiff's Exhibit One] certainly suggests, or the wording of Article 1777 implies that the work was to begin approximately July 18. As I indicated earlier, that article also says that, if there is no definite time, that it must be within a reasonable time.
>
> Now the purchase order that was attached to Plaintiff's Exhibit Two was issued on June 6. Lundin had said it would start around July 18. . .
>
> I think that was certainly a reasonable time for beginning performance of the contract. And certainly when problems with the dispute between the owner and Burlington arose, thirty days after that, to resolve those problems, would have been a reasonable time. That would have given Burlington through the middle of August to try to resolve those problems.
>
> Those problems were not resolved before Hurricane Katrina hit in the last weekend of August of 2005, but I believe that Burlington certainly had a reasonable time to resolve those problems and to authorize the work well before Katrina.

In its oral reasons, the trial court further addressed defendants' argument, which is urged again in connection with this appeal, that the effects of Hurricane Katrina rendered performance of the contract impossible and relieved Burlington of its obligations. The trial court relied on **Payne v. Hurwitz**, 07-0081 (La. App. 1 Cir. 1/16/08), 978 So.2d 1000[4], and noted that,

> [W]hen the hurricane made performance more difficult, but not impossible, the contract was still valid, and the parties were still obligated by the contract.
>
> The *uncontradicted* testimony at trial was that Lundin stood ready and willing to perform the same scope of work for the same price after Katrina, as it was before. So there is no indication at all that Katrina relieved Burlington of its obligations under the contract.

Based upon these findings, the trial court determined defendants had breached their contract and that Lundin was "obviously entitled to damages."

The final issue raised by defendants is whether the trial court erred in awarding interest on the total amount of the judgment from July 18, 2005, until paid. The trial court, after hearing testimony and reviewing the evidence, awarded Lundin, as damages,

---

[4] In our opinion in **Payne**, this court stated,

> To relieve an obligor of liability, a fortuitous event must make the performance truly impossible. La. C.C. art. 1873, Revision Comments – 1984, (d). The non-performance of a contract is not excused by a fortuitous event where it may be carried into effect, although not in the manner contemplated by the obligor at the time the contract was entered into. **Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.**, 161 La. 1077, 1078-79, 109 So. 844 (La. 1926).

Payne, 07-0081 at p. 8, 978 So.2d at 1005.

the legal interest on the $137,002.46 in materials that Lundin purchased for use on the project, from July 18, 2005, until paid. In its reasons for judgment, the trial court stated,

> As I indicated, [Lundin] [in addition to its labor costs of $8,750.00] also purchased all of the materials on this job, which totaled $137,002.46. [Lundin] paid for those materials and carried the burden of having paid for those materials.
>
> [Lundin] did use those materials on later jobs, but used them or charged them at the same cost, so they made no profit on those. So they eventually recovered all of the costs for purchasing the materials, but they lost the use of the money for that entire time.
>
> [Lundin] also had the cost of storage and moving materials and so forth. So I believe that they are entitled to legal interest on the amount of those material costs of $137,002.46 from the date of the breach of contract until paid.

In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the trier of fact. La. Civ. Code art. 2324.1. The standard for appellate review of general damages is set forth in **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994), wherein the Louisiana Supreme Court stated that "the discretion vested in the trier of fact is 'great,' and even vast, so that an appellate court should rarely disturb an award of general damages." The appellate court's initial inquiry is whether the award for the particular injuries and their effects under the particular circumstances on the particular injured person is a clear abuse of the "much discretion" of the trier of fact. **Youn**, 623 So.2d at 1260. The role of the appellate court in reviewing general damage awards is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. **Millican v. Ponds**, 99-1052, p. 6 (La. App. 1 Cir. 6/23/00), 762 So.2d 1188, 1192.

Based upon our review of the evidence before us, we find no abuse of discretion by the trial court with respect to the damages awarded.

For the above and foregoing reasons, we affirm the judgment of the trial court and assess all costs associated with this appeal against defendants-appellants, Burlington Coat Factory of Kenner, Inc. and Burlington Coat Factory Direct Corporation. We issue this memorandum opinion in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.1B.

AFFIRMED.